UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

PUBLIC INTEREST LEGAL FOUNDATION, Plaintiff, v. JOCELYN BENSON, in her official capacity as Michigan Secretary of State, Defendant.	CIVIL ACTION No. 1:21-cv-00929

PROPOSED INTERVENOR-DEFENDANTS' REPLY
IN SUPPORT OF MOTION TO INTERVENE

TABLE OF CONTENTS

I. INTRODUCTION

Proposed Intervenors satisfy all four elements to intervene as of right, and neither Plaintiff Public Interest Legal Foundation ("PILF") nor Defendant Benson (the "Secretary") provide any compelling reason to conclude otherwise. This case is in its infancy and courts routinely grant intervention at this stage (and even later). PILF's reliance on occurrences outside and preceding this litigation is irrelevant. The parties make no meaningful attempt to dispute Proposed Intervenors' unique and personalized interests in this litigation—outright ignoring some and failing to address the bevy of cited authorities showing that courts regularly conclude that interests like Proposed Intervenors' warrant intervention. As for PILF's contention that attempts to purge purportedly deceased voters do not implicate the living—including Proposed Intervenors' members and constituents—it ignores reality: in practice, purges routinely erroneously identify living voters for removal from the rolls. Proposed Intervenors have a direct and associational interest in this action to protect against that very harm.

What the parties' oppositions *do* underscore is that they do not adequately represent Proposed Intervenors' interests. As PILF's and the Secretary's filings make clear, they are actively *adverse* to those interests. PILF initiated this action to remove approximately 25,000 voters from Michigan's qualified voter file, while the Secretary speculates that Proposed Intervenors' members or constituents might not

be included in that group. The parties' positions could not be more at odds with Proposed Intervenors' protectable interest in this case.

Intervention as of right is warranted. For the same reasons, and because intervention would promote judicial economy, permissive intervention is also appropriate.

II. ARGUMENT

Intervention is appropriate here, and the parties present no plausible grounds to conclude otherwise. *First*, a simple review of the docket discredits PILF's suggestion that this case is "well underway" and confirms that the case is in its earliest stages. *Second*, Proposed Intervenors advance precisely the types of interests that courts have deemed sufficient to warrant intervention. *Third*, these interests will be impaired by the "overzealous" purge of the voter rolls based on unreliable data analysis that PILF seeks to impose, which—as courts have also recognized—could also result in the removal of eligible voters. *Fourth*, neither PILF nor the Secretary disputes that Proposed Intervenors are the only parties that have the singular mission of easing barriers to registration and voting; thus, absent intervention, their interests are not adequately represented, notwithstanding the Secretary's defense.

Finally, courts have allowed intervention in cases with similar facts because it serves judicial economy to adjudicate the interests of all stakeholders and avoid duplicative litigation. Accordingly, the motion should be granted.[1]

A. Proposed Intervenors satisfy all requirements to intervene as of right.

1. Proposed Intervenors' motion is timely.

PILF and the Secretary argue at various points that Proposed Intervenors' request to participate in this case is both "premature" *and* too late, offering reasons untethered to Rule 24's timeliness inquiry. *Compare*, *e.g.*, PILF's Resp. in Opp. to Mot. to Intervene, ECF No. 28 ("Pl.'s Br.") at 2 (claiming motion is "at best[] premature"), *with id*. at 11 (asserting that "the motion was not timely"). But neither party seriously disputes that "this suit is in its infancy." Proposed Intervenor-Defs.' Br. in Support of Mot. to Intervene, ECF No. 18 ("Proposed Intervenors' Br.") at 8. At the time Proposed Intervenors moved to intervene, virtually nothing had occurred

[1] PILF also complains that intervention will create excess work, yet in the same breath it urges the court to conduct discovery and a mini trial on Proposed Intervenors' asserted interests, which other courts have already accepted in granting intervention for APRI and Rise. *See* Order Granting Mot. to Intervene, *Daunt v. Benson*, No. 1:20-CV-00522-RJJ-RSK, ECF No. 30 (W.D. Mich. Sept. 28, 2020). Of course, courts are not required to permit discovery or conduct evidentiary hearings in deciding whether to allow intervention—as demonstrated by countless cases in which courts granted such motions without subjecting the parties to parallel litigation proceedings. *See*, *e.g.*, *Usery v. Brandel*, 87 F.R.D. 670, 675 (W.D. Mich. 1980) (rejecting suggestion that a hearing was necessary before granting intervention).

in this case beyond the filing of PILF's complaint and the Secretary's motion to dismiss, which was not fully briefed. The Court had neither (and still has not) set a scheduling conference nor ruled on any dispositive motion, and—as PILF's opposition now establishes—at the time, the parties had not even conducted their initial Rule 26(f) conference.

PILF suggests that conversations and "interactions" occurring outside of this litigation render Proposed Intervenors' motion untimely, but such external events are irrelevant. What matters are the events that have transpired *in litigation*. *See Stupak-Thrall v. Glickman*, 226 F.3d 467, 473 (6th Cir. 2000) (considering "timing of certain events *during litigation*" and examining the "procedural history" of the case, beginning with the filing of the complaint) (emphasis added). Even if Proposed Intervenors had been aware of their interest in this case at the very moment it was filed, the motion would still be timely as very little has occurred in the case since then. Courts routinely allow intervention in cases when the intervenor seeks to participate far later than Proposed Intervenors moved here. *See, e.g.*, *Macomb Interceptor Drain Drainage Dist. v. Kilpatrick*, No. 11-13101, 2012 WL 1598154, at *3 (E.D. Mich. May 7, 2012) (finding six-month delay in filing motion timely because "[m]ere delay in filing a motion to intervene . . . is insufficient to establish the untimeliness of the motion"); *455 Cos., LLC v. Landmark Am. Ins. Co.*, No. 16-CV-10034, 2016 WL 5388909, at *2 (E.D. Mich. Sept. 27, 2016) ("[G]iven that the

motion was filed just over three months after removal, there was no undue delay that has prejudiced the original parties. The motion to intervene was timely."); *Attitude Wellness LLC v. Vill. of Pinckney*, No. 21-CV-12021, 2021 WL 5370484, at *2 (E.D. Mich. Nov. 18, 2021) ("[C]ase law in the Eastern District supports finding a two month delay timely."); *Zeeb Holdings, LLC v. Johnson*, 338 F.R.D. 373, 377 (N.D. Ohio 2021) (finding motion timely where movant waited six months after becoming aware of the action); *Blount-Hill v. Ohio*, 244 F.R.D. 399, 402 (S.D. Ohio 2005) (finding motion timely where "nearly five months" had passed since complaint filed). Proposed Intervenors filed their motion at the earliest stage of this case, before any discovery or scheduling conference had occurred. Their motion is timely.

2. Proposed Intervenors have significant, personalized interests in this case.

Proposed Intervenors have substantial protectable interests in this litigation, including: (1) protecting their members and constituents from voter purges while advancing their own voter registration efforts; and (2) preventing the diversion of their resources that will result if PILF's overzealous and error-prone voter purge demands are implemented. Both are more than sufficient for intervention under the Sixth Circuit's "rather expansive notion of . . . interest," *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997), which must be "construe[d] liberally," *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987).

PILF contends that these interests are "no different from the general public's

interest in ensuring that election laws are followed," Pl.'s Br. 5; ironically, this argument more accurately describes PILF's generalized desire to enforce the National Voter Registration Act ("NVRA") than any of the Proposed Intervenors' particularized interests in protecting *their own* members and constituents from voter purges. These interests are not only specific to Proposed Intervenors but are also routinely recognized as sufficient to support intervention as of right. *See, e.g.*, *Youngblood v. Dalzell*, 925 F.2d 954, 957 n.1 (6th Cir. 1991) (noting union was permitted to intervene to protect interests of its members); *Issa v. Newsom*, No. 220CV01044MCECKD, 2020 WL 3074351, at *3 (E.D. Cal. June 10, 2020) (concluding proposed intervenors had a protectable interest in "asserting the rights of their members to vote safely without risking their health"). Furthermore, unlike the "general public," Proposed Intervenors engage in substantial voter outreach efforts. *See* Proposed Intervenors' Br. 3–5. Their independent interest in avoiding the diversion of their resources that would result should PILF's requested relief be granted is also routinely found sufficient to support intervention. *See, e.g.*, *Newsom*, 2020 WL 3074351, at *3 (concluding proposed intervenors had protectable interest in not "diverting their limited resources to educate their members on election procedures").

PILF's argument that Proposed Intervenors have no substantial interest in this litigation because "[n]o one . . . is seeking to remove eligible registrants from the

registration list," also misses the point. Pl.'s Br. 5. No one contests that the NVRA provides for the removal of deceased voters; the dispute concerns the procedures that PILF argues the Secretary must follow to comply—including removing approximately 25,000 registered voters that PILF identified as deceased based on questionable data analysis. "[O]verzealous measures" that go "beyond the reasonable list maintenance program required by the [NVRA]," *Public Interest Legal Foundation v. Winfrey*, 463 F. Supp. 3d 795, 798 (E.D. Mich. 2020), and that rely on unreliable data analysis will necessarily "remove eligible voters," *Bellitto v. Snipes*, 935 F.3d 1192, 1198 (11th Cir. 2019).

PILF's argument also conflates two separate elements of the intervention analysis and misapplies the standards for both: PILF does not actually dispute that protecting the right to vote or preventing purges of eligible voters from the voter rolls is a substantial interest; rather, PILF attempts to demonstrate that such interests are not *impaired* by its lawsuit. Impairment, however, is governed by a different standard. As discussed below, Proposed Intervenors need only show that impairment is *possible*, which they have done. *Purnell v. Cty. of Akron*, 925 F.2d 941, 948 (6th Cir. 1991).

The Secretary's arguments are similarly misplaced. She concedes that "the proposed intervenors may have an interest in this litigation," Def.'s Resp. in Opp. to Mot. to Intervene, ECF No. 27 ("Def.'s Br.") at 7, while insisting that Proposed

Intervenors' interests are not "substantial" because the requested purge of over 25,000 voters is *de minimis* and "it is certainly possible that none of the" voters to be purged are members or constituents of Proposed Intervenors. Def.'s Br. 5–6. But the Secretary does not contest that the requested relief creates a risk of disenfranchisement, and it is well settled that Proposed Intervenors' interests in protecting the right to vote are in fact substantial. *See Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 244 (6th Cir. 2011); *League of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421, 435 (5th Cir. 2011) (protecting one's right to vote sufficient to satisfy "interest" requirement of intervention of right).

3. The interests of Proposed Intervenors and their members and constituents may be impaired absent intervention.

Proposed Intervenors have shown that impairment of their interests is *possible*, which is all they must do to satisfy the third element. *Purnell*, 925 F.2d at 948. Proposed Intervenors serve community members who research has shown are most likely to be disenfranchised by voter roll purges—both because they are *more* likely to be removed and because they are *less* likely to overcome the hurdles of re-registering.[2] These members include young voters, retired individuals, and voters of

[2] *See, e.g.*, Gregory A. Huber et al., *The racial burden of voter list maintenance errors: Evidence from Wisconsin's supplemental movers poll books*, 7 SCIENCE ADVANCES 1 (Feb. 17, 2021) (finding minority registrants were "more than twice as likely as white registrants" to be flagged for removal under voter purge program and concluding that "the burden of incorrect removal falls more heavily on minority

color. Proposed Intervenors' Br. 3–4, 11–12. Because these groups are among Proposed Intervenors' members and constituents, Proposed Intervenors have more than adequately shown a possible impairment of their interests. *Cf. Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1342 (11th Cir. 2014) (finding organizational plaintiffs met Article III standing requirements because they represented "a large number of people" who faced "realistic danger" of being purged from voter rolls).

Even if none of Proposed Intervenors' members or constituents are ultimately purged, Proposed Intervenors will at a minimum be forced to divert their limited resources to ascertain that fact and to protect against future purge attempts that may be required because of the prospective injunctive relief that PILF seeks in this lawsuit. *See* Compl., ECF No. 1 at 19–20 (PILF seeking order that the Secretary "immediately and thoroughly investigate the deceased registrants identified by the Foundation," "cross-reference the names of new registrants against the [Social Security Death Index]," and alter its maintenance program to "cure the violations" PILF claims to have identified).

---

registrants"); Lydia Hardy, *Voter Suppression Post-Shelby: Impacts and Issues of Voter Purge and Voter ID Laws*, 71 MERCER L. REV. 857, 866 (2020) ("[V]oter purges have often had the effect of clearing eligible voters from state registration lists and in a manner that tends to discriminate by race and nationality."); Jeffrey A. Bloomberg, *Protecting the Right Not to Vote from Voter Purge Statutes*, 64 FORDHAM L. REV. 1021 n.40 (1995) (noting that "minorities and uneducated individuals often have difficulty registering to vote").

PILF suggests there can be no impairment here because it "seeks no relief concerning living or eligible registrants." Pl.'s Br. 8. But—even assuming good faith—the impact of PILF's requested relief on Michigan voters is not measured by the organization's purported good intentions. As the Eleventh Circuit has recognized, "easing barriers to registration and voting" and "the maintenance of accurate voter rolls" are necessarily in tension: "[a] maximum effort at purging voter lists could minimize the number of ineligible voters [on the list], but those same efforts might also remove eligible voters." *Bellitto*, 935 F.3d at 1198. PILF cites no pertinent law to the contrary except one unpublished, out-of-circuit district court order that was vacated as moot while on appeal: *Judicial Watch v. Logan*, No. 2:17-cv-08948, ECF No. 76 (C.D. Cal. July 12, 2018), *vacated as moot by Judicial Watch v. California Common Cause*, No. 18-56105 (9th Cir. Mar. 20, 2019).[3] That case is not binding on this Court, nor is it persuasive.

Logan considered the impairment-of-interest prong in a single short paragraph, reasoning that the movants could not be "substantially affected by the outcome of this case as it pertains only to *ineligible* voters" and that the movants only "speculate that eligible voters risk wrongful removal." *Id*. at *3. But this is contrary to the persuasive reasoning in *Daunt* that "at least part of the intervenors'

[3] Attached as Exhibit 1 to PILF's Response in Opposition to Motion to Dismiss, ECF No. 28-1.

interest is in preventing the case from ever getting that far" because intervention now would "limit the risk of chilling or escalating the costs of voter registration drives the intervenors see as part of their mission." No. 20-cv-00522, at *2. Furthermore, *Logan*'s analysis fails to account for the fact that mass voter purges invariably disenfranchise eligible voters, and PILF itself has a record of erroneously identifying eligible registrants for removal.[4]

Logan also misconstrues the purpose of intervention in concluding that the movants could simply "bring a separate, private cause of action to vindicate . . . voters' rights" if necessary. *Logan*, No. 2:17-cv-08948 at *3. Courts allow parties to intervene because of the "[s]trong interest in judicial economy" and the "desire to avoid multiplicity of litigation." *Buck v. Gordon*, 959 F.3d 219, 225 (6th Cir. 2020). Judicial economy is not served by successive lawsuits over similar issues—the intervention process is designed to prevent just that. And Proposed Intervenors are not required to wait until voters are removed from the rolls, or even prevented from voting entirely, in order to protect their rights. It is no answer to suggest that Proposed Intervenors and their members can seek redress *after* harm has befallen

[4] *See, e.g.*, Lise Olsen, *Texas' Voter Purge Made Repeated Errors*, HOUSTON CHRONICLE (Nov. 2, 2012), http://www.chron.com/news/politics/article/Texas-voter-purge-made-repeated-errors-4001767.php; Ed Pilkington, *Thousands at risk from rightwing push to purge eligible voters from US rolls*, THE GUARDIAN (Sept. 23, 2018), https://www.theguardian.com/us-news/2018/sep/23/voters-purges-elections-rolls-americans-pilf.

them. *Cf. Obama for Am. V. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("A restriction on the fundamental right to vote . . . constitutes irreparable injury."). Were that so, it is unclear when intervention would ever be appropriate.

4. The presumption of adequate representation does not apply, and even if it did, Proposed Intervenors' interests are not represented by either party.

The parties contend that Proposed Intervenors and the Secretary seek the same ultimate objective—dismissal of this case—but that fact is not dispositive. As courts have recognized, although Proposed Intervenors and the Secretary "may seek the same outcome," they may each present their "own unique arguments" against PILF's interpretation of the NVRA and relief sought. *Wilkins v. Daniels*, No. 2:12-CV-1010, 2012 WL 6015884, at *4 (S.D. Ohio Dec. 3, 2012); *see also Paher v. Cegavske*, No. 3:20-CV-00243-MMD-WGC, 2020 WL 2042365, at *3 (D. Nev. Apr. 28, 2020) (granting intervention of right where proposed intervenors "may present arguments about the need to safeguard [the] right to vote that are distinct from [state defendants'] arguments"); *Newsom*, 2020 WL 3074351, at *3 (concluding that proposed intervenors' interest in ensuring members' ability to vote and in allocating limited resources to that effort are distinct from the state's interest in "properly administer[ing] election laws"). The parties fail to acknowledge, much less contest, these authorities.

They also ignore the fact that Proposed Intervenors' "interests need not be wholly 'adverse' before there is a basis for concluding that existing representation of a 'different' interest may be inadequate." *Jansen*, 904 F.2d at 343 (emphasis added) (quoting *Nuesse v. Camp*, 385 F.2d 694, 703 (D.C. Cir. 1967)). But in any event, both PILF and the Secretary have signaled that they are in fact adverse to Proposed Intervenors' interests. On one hand, PILF actively seeks to purge Michigan's voter rolls based on questionable data analysis, *see* Compl. 19, while Proposed Intervenors seek to ease barriers to registration and voting. Meanwhile, the Secretary in her opposition brief has signaled her position that a purge of 25,000 out of 8 million voters renders Proposed Intervenors' interests in this case "insubstantial." Def.'s Br. 5. The disenfranchisement of any of Proposed Intervenors' members or constituents, however, is profoundly significant both to Proposed Intervenors and the impacted individuals. That the Secretary must strike a balance in administering the NVRA's twin goals of expanding access to voter registration and maintaining accurate voter rolls reveals the degree to which her interests may and do diverge from those of Proposed Intervenors. Thus, the Court should grant intervention as of right.

B. Alternatively, permissive intervention is warranted.

Proposed Intervenors have also demonstrated that they are entitled to permissive intervention. Their opening brief highlighted a ruling from another

Michigan federal court that involved a nearly identical factual scenario, in which the court granted permissive intervention in a lawsuit filed by PILF. *See* Proposed Intervenors' Br. 16–18 (citing *Winfrey*, 463 F. Supp. 3d at 802). The Secretary "acknowledges that the facts in [*Winfrey*] are closely aligned to those presented here." Def.'s Br. 10. This Court should follow *Winfrey*'s persuasive reasoning.

PILF's attempts to distinguish *Winfrey* are not credible. It urges the Court to disregard the Michigan federal court case and rely instead on *Logan*—an unpublished and vacated California district court decision, which, as discussed above, is fundamentally flawed—because, according to PILF, this lawsuit is concerned with the removal of only dead voters. This distinction is illusory; it is common knowledge that "overzealous" or error-prone list maintenance efforts necessarily "increase the risk" of eligible voters "being removed by mistake." *Winfrey*, 463 F. Supp. 3d at 798; *see also Bellitto*, 935 F.3d at 1198. It is for that very reason that the NVRA prohibits systematic programs to remove ineligible voters within 90 days of a federal election. 52 U.S.C. 20507(c)(2)(A); *see also Arcia*, 772 F.3d at 1346 (explaining the purpose of 90-day rule is to reduce risk of "disenfranchising eligible voters"); *Mont. Democratic Party v. Eaton*, 581 F. Supp. 2d 1077, 1081 (D. Mont. 2008) ("[U]sing change-of-address information to purge voter rolls less than 90 days before an election creates an unacceptable risk that eligible voters will be denied the right to vote."). PILF's suggestion that its attempted

purge impacts only dead voters is wishful thinking at best and certainly provides no basis to distinguish *Winfrey*.

PILF also objects that Proposed Intervenors would "more than double the number of parties and attorneys in this matter," but there are only two parties to this action. If Proposed Intervenors' motion is granted, there will be a total of five parties, three of which will be represented by the same counsel and will submit joint filings "as if they were a single party"—just as they have done in moving to intervene. *City of Chi. V. Fed. Emergency Mgmt. Agency*, 660 F.3d 980, 986 (7th Cir. 2011) (reversing denial of permissive intervention and rejecting argument that intervention by six airlines would make litigation unwieldly where the airlines filed a single motion to intervene and would effectively litigate as a single party). As discussed above, *see* Part II.A.1, *supra*, and as conceded by the Secretary, this litigation is "in its early stages" prior to any discovery or decision on the merits. Proposed Intervenors' participation could hardly prolong or complicate the case given the paucity of parties and limited claims.

Finally, weighing against both parties' objections is the "[s]trong interest in judicial economy and desire to avoid multiplicity of litigation wherever and whenever possible . . . ." *Buck*, 959 F.3d at 225. Here, denial of a motion to intervene would require Proposed Intervenors to seek injunctive relief through separate litigation if PILF prevails or, as *Logan* erroneously suggested, to wait until their

members or constituents are in fact disenfranchised and then "bring a separate, private cause of action to vindicate these voters' rights." *Logan*, No. 2:17-cv-08948, at *3. By contrast, there is no risk of "undue delay or prejudice to the existing parties that would exceed the benefits of having [all] sides of this [statutory] dispute litigated in a single action . . . ." *Buck*, 959 F.3d at 225.

III. CONCLUSION

For the foregoing reasons, Proposed Intervenors request that this Court grant their motion to intervene.

Respectfully submitted, this 15th day of February, 2022.

/s/ *Uzoma Nkwonta*
Uzoma N. Nkwonta
Joshua L. Harris
Noah B. Baron
Joel J. Ramirez
ELIAS LAW GROUP LLP
10 G Street NE
Suite 600
Washington, DC 20002
Telephone: (202) 968-4654
Facsimile: (202) 968-4498
unkwonta@elias.law
jharris@elias.law
nbaron@elias.law
jramirez@elias.law

Sarah S. Prescott
Salvatore Prescott & Porter, PLLC
105 E. Main Street
Northville, Michigan 48167
sprescott@spplawyers.com
Telephone: (248) 679-8711

Facsimile: (248) 773-7280
sprescott@spplawyers.com

Counsel for Proposed Intervenors

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.3(b)(ii), counsel for Proposed Intervenors certify that this brief contains 3,699 words, as indicated by Microsoft Word 2021, inclusive of any headings, footnotes, citations and quotations, and exclusive of the caption, cover sheets, table of contents, table of authorities, signature block, any certificate, and any accompanying documents.

/s/ Uzoma N. Nkwonta
Uzoma N. Nkwonta