

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**LEAGUE OF WOMEN VOTERS OF THE
UNITED STATES, LEAGUE OF WOMEN
VOTERS OF ALABAMA, LEAGUE OF
WOMEN VOTERS OF GEORGIA, LEAGUE
OF WOMEN VOTERS OF KANSAS, GEORGIA
STATE CONFERENCE OF THE NAACP,
GEORGIA COALITION FOR THE PEOPLE’S
AGENDA, MARVIN BROWN, JOANN BROWN,
and PROJECT VOTE,**

Plaintiffs,

v.

**BRIAN D. NEWBY, in his capacity as the Acting
Executive Director & Chief Operating Officer of The
United States Election Assistance Commission; and
THE UNITED STATES ELECTION
ASSISTANCE COMMISSION,**

Defendants,

Civ. No. 1:16-cv-00236

**MOTION OF THE PUBLIC INTEREST LEGAL FOUNDATION
TO INTERVENE AS DEFENDANT AND MEMORANDUM OF LAW IN SUPPORT**

The Public Interest Legal Foundation (the “Foundation”), by and through undersigned counsel, respectfully moves this Court for leave to intervene as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure, or in the alternative, permissively under Rule 24(b)(1). Pursuant to Federal Rule of Civil Procedure 24 and Local Civil Rule 7(j), the Foundation’s Proposed Answer is attached to this motion.

The Foundation contacted counsel for the parties to seek their consent on this motion to intervene. Counsel for Defendants responded that Defendants take no position on Proposed Intervenor’s motion. Counsel for Plaintiff League of Women Voters responded that Plaintiff

League of Women Voters does not consent to the motion. The other Plaintiffs have not yet responded.

In support of this motion, the Foundation states the following:

Introduction

The Foundation requests that the Court grant it leave to intervene as a Defendant as of right pursuant to Federal Rule of Civil Procedure 24(a)(2). The Foundation has a direct and tangible interest in this litigation that will be necessarily impaired if Plaintiffs prevail and that interest is not adequately represented by any Defendant. The Foundation's charitable mission includes working to protect the integrity of citizens' votes from dilution or abridgment, ensuring that voter qualification laws and election administration procedures are followed, and providing assistance to states that seek to enforce their constitutional mandate to regulate their own elections. The Foundation has sought to advance the interests of maintaining state control over elections as it relates to ensuring that only citizens are participating in elections in related litigation. These interests will be directly and adversely impacted by this case, which seeks to remove voter qualification procedures aimed at protecting the integrity of the election process. The Department of Justice, while serving as counsel for Defendant Election Assistance Commission (EAC), in prior litigation involving similar issues, and in independent executive branch actions, has demonstrated a hostility to the legal positions taken by the Defendants.

In the alternative, the Foundation requests the Court grant permissive leave to intervene pursuant to Federal Rule of Civil Procedure 24(b)(1)(B), on the grounds that it has claims and defenses that share common questions of law and fact with the main action here. As a nonprofit organization with special interest in the administration of election laws, the Foundation should be permitted to intervene just as several of the current Plaintiffs were granted permissive

intervention as defendants in similar prior litigation. *See Kobach v. United States Election Assistance Comm'n*, 2013 U.S. Dist. LEXIS 173872 (D. Kan. Dec. 12, 2013) (order granting motions to intervene filed by, among others, the League of Women Voters of the United States, the League of Women Voters of Kansas, and Project Vote). In *Kobach*, the current Plaintiffs sought, and were granted, permissive intervention as defendants for reasons substantially the same as those now raised by the Foundation.

If intervention is granted, the Foundation will participate in this case on the schedule that will be established for the existing parties; will avoid unnecessary delays or duplication of efforts in areas satisfactorily addressed and represented by the existing Defendants, to the extent possible; and will coordinate all future proceedings with the existing Defendants, to the extent possible.

I. The Court Should Grant Intervention as of Right.

Upon filing of a timely motion, Federal Rule of Procedure 24(a)(2) requires this Court to “permit anyone to intervene” who demonstrates that he has “an interest relating to . . . the subject of the action” that would be impaired “as a practical matter” because of the action, unless the interest is adequately represented by existing parties to the litigation. *Karsner v. Lothian*, 532 F.3d 876, 881 n.4 (D.C. Cir. 2008). It is well settled that Rule 24(a) should be construed liberally in favor of permitting intervention. *See Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972).

There are “four requirements for intervention as of right under Rule 24(a)(2): (1) timeliness; (2) a cognizable interest; (3) impairment of that interest; and (4) lack of adequate representation by existing parties.” *Smoke v. Norton*, 252 F.3d 468, 470 (D.C. Cir. 2001)

(internal citations omitted). The Foundation's Motion satisfies each, particularly the lack of adequate representation by existing parties, which may be acute.

A. The Foundation's Motion Is Timely.

First, Rule 24 requires that a motion to intervene be timely. *See United States v. British Am. Tobacco Austl. Servs.*, 437 F.3d 1235, 1238 (D.C. Cir. 2006).

There has been very little time since the Foundation became aware of this case, and therefore of its interest in it. The complaint was filed on February 12, 2016. While the Foundation was preparing to file a motion to intervene, Plaintiffs filed a motion for temporary restraining order on February 17, 2016, which was served on February 18, 2016. The Foundation submits that the time could hardly have been shorter. Though the docket reveals that a hearing on the temporary restraining order motion will be held on Monday, February 22, 2016, no other scheduling order has been set, no discovery has been undertaken, no dispositive orders have been entered, no trial date has been set, and Defendants have not filed an answer. The Foundation is filing this motion as soon as possible following the filing of the motion for a temporary restraining order. A motion to intervene filed just over a week after the case was initiated and within a few days of a request for injunctive relief is timely.

B. The Foundation's Strong Interests in Defending Voter Integrity Protections for Citizens Will Be Impaired if Plaintiffs Prevail.

Second and third, Rule 24 requires that a movant "claim an interest relating to the property or transaction that is the subject of the action, and [be] so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest." Fed. R. Civ. P. 24(a)(2). The Foundation has an interest in ensuring that aliens do not participate in American elections and that the Constitutional balance vesting state control over elections is preserved.

This case is the exact *inverse* of a case from the federal district of Kansas that concluded last year. *Kobach v. U.S. Election Assistance Comm'n*, 13-CV-4095 (D. Kan.) In that case, the then-acting Executive Director of the EAC had rejected the requests by Arizona, Georgia, and Kansas to include their proof of citizenship requirements in the state-specific instructions accompanying the federal form. Arizona Secretary of State Ken Bennett and Kansas Secretary of State Kris Kobach then filed suit. The district court found that the EAC had a nondiscretionary duty to grant the requests, but the Tenth Circuit reversed that finding. *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 289 (June 29, 2015). As stated previously, Plaintiffs, the League of Women Voters and Project Vote sought—and were permitted—to intervene as defendants in that case alongside the EAC. Their successful attempts to intervene relied on substantially the same proffered interests of the Foundation here.

The Foundation is a non-partisan, nonprofit, charity legal foundation that has as its mission the advancement and protection of the integrity of American elections and preserving the constitutional balance giving states control over their own elections. The Foundation helps citizens defend the integrity of their votes by educating them on efforts to erode their right to vote, taking action to ensure that voter registration and election processes are followed and enforced, and by helping states enforce their constitutionally protected voting laws. The Plaintiffs' lawsuit threatens the integrity of citizens' votes by seeking to eliminate safeguards that ensure aliens do not participate in American elections. Therefore, the Foundation has a vested interest in protecting against the dilution of citizen votes and preservation of the constitutional balance between the states and the federal government regarding the control of the electoral process.

The Foundation can provide an understanding of the national and constitutional implications of this challenge which Defendants cannot bring, for reasons discussed in greater detail below.

C. Defendants' Counsel Will Not Adequately Protect the Foundation's Interest in Advancing Protections for the Integrity of Elections.

Absent the opportunity to intervene, the Foundation's interests will not be adequately protected. By law, the Defendants may be represented by the Department of Justice (DOJ). But the components of the DOJ previously involved in these issues have demonstrated profound hostility and aggressive opposition to the proof-of-citizenship requirement approved by EAC as well as to other similar reasonable voting qualifications. There are indications that this conflicting hostility is ongoing.

In the brief filed by Kansas Secretary of State Kobach ("Kansas SOS") also seeking intervention, the Kansas SOS argues:

First, in the previous case concerning Kansas's 2013 requested language, *Kobach v. Election Assistance Commission*, 772 F.3d 1183 (10th Cir. 2014), the United States Department of Justice drafted the response to Kansas's 2013 request and presented that response to the States as if it were coming from the EAC itself. In effect, the Department of Justice commandeered the vacant ship that was the EAC and used that vessel to fight against the interests of the State of Kansas.

(Doc. 20 at 16-17.) If accurate, this would present a profound conflict that undermines the adequacy of representation. In other words, if accurate, the EAC was not the author of the policy now being challenged, but rather the lawyers potentially charged with the defense in this case were the authors. The usurpation of the prerogative of the independent and bipartisan EAC by executive branch attorneys, and the need to subsequently defend a reversal of that decision by the EAC, would weigh heavily in favor of satisfying the inadequacy of representation prong.

Furthermore, Supreme Court precedent dictates that the burden to prove inadequacy of representation already “should be treated as minimal.” *Trbovich*, 404 U.S. at 538 n.10. This “requirement of the Rule is satisfied if the applicant shows that representation of his interest ‘may be’ inadequate.” *Id.* This, the Foundation should be allowed to intervene as of right if the Defendant may not diligently pursue the same objective as the Foundation.

During the past two years, the DOJ zealously defended the position that proof-of-citizenship requirements are “unnecessary and inconsistent with the purposes of the [National Voter Registration Act].” *Kobach v. U.S. Election Assistance Commission*, No. 5:13-cv-04095, Doc. 152 at 1. If it is accurate that the defense in the *Kobach* case, which only concluded in June of last year, was adopted, not by the independent and bipartisan EAC, but by DOJ attorneys, some of whom may serve as counsel in this case, then inadequacy of representation is certainly satisfied in favor of the Foundation.

Further undermining the adequacy of DOJ’s representation is its recent opposition to similar voting qualifications. In just the past three years, DOJ has moved to block three states from implementing duly enacted voter identification laws,¹ even going so far as to claim that such laws were enacted with “the purpose of denying or abridging the right of African Americans to vote on account of their race or color.” *United States v. The State of North Carolina*, No. 13-cv-861, Doc. 1 at 25 (filed Sept. 30, 2013).

Based on DOJ’s actions and representations in the immediately preceding inverse litigation, the Foundation anticipates that the DOJ will not only provide inadequate

¹ Civil Rights Division, U.S. Department of Justice, Letter Thomas E. Perez to Keith Ingram, March 12, 2012, available at http://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/1_120312.pdf (Texas); Civil Rights Division, U.S. Department of Justice, Letter Thomas E. Perez to C. Havird Jones, Jr., Dec. 23, 2011 (South Carolina); *United States v. The State of North Carolina*, No. 13-cv-861 (filed Sept. 30, 2013).

representation, but will provide essentially no defense to the Foundation's interests. Intervention by the Foundation is therefore necessary.

II. In the Alternative, the Court Should Grant Permissive Intervention.

If the Court nonetheless determines that the Foundation is not entitled to intervene as of right, it should grant permissive intervention. Fed. R. Civ. P. 24(b). Rule 24(b) authorizes the Court to grant permissive intervention to anyone who "has a claim or defense that shares with the main action a common question of law or fact." Rule 24(b) does not impose any additional requirements, but is simply a matter within the sound discretion of the district court. *See EEOC v. National Children's Ctr.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). In deciding whether to grant permissible intervention, the factors the Court should consider are (1) whether the application is timely; (2) whether the movant's defense and the underlying action share a common question of law or fact; and (3) whether the intervention will unduly delay or prejudice adjudication of the rights of the original parties. *Id.*

A. Timeliness

In considering the timeliness of the intervention, the Court should consider the totality of the circumstances, *NAACP v. New York*, 413 U.S. 345, 366 (1973), including the length of time since the movant knew of its interest in the case; prejudice to the existing parties caused by any delay in intervening (but not delay caused by the intervention itself); prejudice to the proposed intervenor, and the existence of any unusual circumstances, *United Nuclear Corp. v. Cannon*, 696 F.2d 141, 143 (1st Cir. 1982).

As is stated above, the Foundation is filing this motion as soon as possible following the filing of the motion for a temporary restraining order. The Foundation submits that any additional issues it intends to raise and litigate will cause no delay in this litigation.

B. Common Question of Law or Fact

The movant is not required to assert a separate or additional claim or defense in order to show commonality. Instead, permissive intervention is appropriate where the proposed intervenor's defense raises the same legal questions as the defense of the named defendants. *Kobach v. U.S. Election Assistance Commission*, No. 13-CV-4095-EFM-DJW, 2013 WL 6511874, at *5 (D. Kan. Dec. 12, 2013). In *Florida v. United States*, this Court ruled that organizations with "a special interest in the administration of elections laws" should be allowed to intervene permissively in an action wherein Florida sought preclearance of changes to its election laws, including voter registration protections. 820 F. Supp. 2d 85, 86-87 (D.D.C. 2011). Indeed, the *Florida v. United States* case was relied upon and cited by the District Court of Kansas when it granted the current Plaintiffs' motions to intervene as defendants in *Kobach v. U.S. Election Assistance Commission*, No. 13-CV-4095-EFM-DJW, 2013 WL 6511874, at *5 (D. Kan. Dec. 12, 2013).

Because the Foundation is similarly situated in almost all respects to the groups that sought and were granted intervention in the *Kobach* case, it is appropriate for the Foundation to be granted such leave here. The Foundation's charitable mission and activities involve protecting the integrity of every citizen's vote and that properly enacted procedures regulating the voter registration process are respected and enforced. The Foundation's proposed answer demonstrates that it denies the legal assertions made by the Plaintiffs in their complaint. The Foundation possesses a unique knowledge, perspective, and expertise regarding the issues in this action, which has been recognized by the courts that have accepted its appearance as *amicus curiae* in other cases. Finally, the Foundation's mission and activities fundamentally deal with a special interest in the administration of voting rights. *See Florida*, 820 F. Supp. 2d at 86-87.

C. Undue Delay or Prejudice

Finally, the Court must determine whether the intervention will unduly delay or prejudice adjudication of the rights of the original parties. Given the early stage of this litigation, when no scheduling order has been entered and no discovery has taken place, this intervention should not unduly delay this action or prejudice the Plaintiffs' rights, any more than their intervention in the inverse case delayed or prejudiced that litigation. Furthermore, the experience and expertise of the Foundation will assist the Court, rather than hamper it.

As additional proof that there will be no prejudice to the parties by allowing the Foundation to intervene, in the earlier *Kobach* litigation, the Defendant not only consented to the intervention of the current Plaintiffs, it supported the intervention by submitted a filing that provided a list of precedential cases in which similar groups had been allowed to intervene as defendants. Defendants' Response to Motions to Intervene by Inter Tribal Counsel et al. and Project Vote, *Kobach v. U.S. Election Assistance Commission*, No. 13-cv-4095, (D. Kan. Nov. 20, 2013).

Conclusion

For the foregoing reasons, the Court should grant the Foundation's Motion to Intervene as of right or, in the alternative, permissively.

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2016, I caused the foregoing to be filed with the United States District Court for the District of Columbia via the Court's CM/ECF system, which will serve all registered users.

Dated: February 20, 2016

/s/ Kaylan L. Phillips
Kaylan L. Phillips (D.C. 1110583)
kphillips@publicinterestlegal.org
*Counsel for Proposed Intervenor-
Defendant*