

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND**

COMMON CAUSE RHODE ISLAND, LEAGUE OF
WOMEN VOTERS OF RHODE ISLAND, MIRANDA
OAKLEY, BARBARA MONAHAN, and MARY
BAKER,

Plaintiffs,

- against -

NELLIE M. GORBEA, in her official capacity as Secretary
of State of Rhode Island; DIANE C. MEDEROS, LOUIS
A. DESIMONE JR., JENNIFER L. JOHNSON,
RICHARD H. PIERCE, ISADORE S. RAMOS, DAVID
H. SHOLES, and WILLIAM E. WEST, in their official
capacity as members of the Rhode Island Board of
Elections,

Defendants.

Case No. 1:20-cv-00318-MSM-
LDA

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION TO INTERVENE

Plaintiffs respectfully submit this memorandum in opposition to the Republican National Committee and the Rhode Island Republican Party's ("Movants") Motion to Intervene in this matter. Movants may not intervene as a matter of right, as they do not articulate an interest in this matter that will not be adequately represented and protected by Defendants. Movants also seek to permissively intervene in the case, citing the benefits of bringing together all interested parties for resolution of the relevant issues. However, Movants' intervention will likely lead to costly delays that impact the ability of Defendants to prepare for the State's pending September 8, 2020 primary and November 3, 2020 general elections, and increase the chances that Plaintiffs' right to vote will not be adequately protected. For these reasons, the Court should deny Movants' Motion to Intervene.

ARGUMENT

Rule 24 of the Federal Rules of Civil Procedure governs when an interested party may intervene as a matter of right, or with leave of the Court (permissive intervention). Movants cannot satisfy either standard, as they have no interest in this matter that is not adequately protected by Defendants, and their participation will likely prejudice Plaintiffs by delaying resolution of this matter, which will undermine Defendants' ability to implement the terms of the parties' proposed Consent Order and increases the chance that Plaintiffs' constitutional right to vote will be infringed.

I. The Court should deny Movants' motion to intervene as a matter of right because Movants' interests are not adverse to, and adequately represented by, the Defendants.

To succeed on a motion to intervene as of right, Movants must establish (i) the timeliness of their motion to intervene, (ii) the existence of an interest relating to the property or transaction that forms the basis of the pending action, (iii) a realistic threat that the disposition of the action will impede their ability to protect that interest, and (iv) the lack of adequate representation of its position by any existing party. *R&G Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 584 F.3d 1, 7 (1st Cir. 2009) (affirming district court's decision denying motion to intervene as untimely).

1. Movants assert only generalized interests shared by the public at large and interests not directly implicated by this case.

To demonstrate they have an interest in the action sufficient to intervene, Movants must establish a "significantly protectable interest[.]" *Public Serv. Co. v. Patch*, 136 F.3d 197, 205 (1st Cir. 1998) (quoting *Donaldson v. United States*, 400 U.S. 517, 531 (1971)). Movants must also establish that disposition of this action may "impair or impede the applicant's ability to protect a cognizable interest." *Id.* at 206. Here, Movants have not established specific interests likely to be affected by the disposition of the case. Movants argue that an injunction against the

witness or notary requirement¹ would “undercut democratically enacted laws that protect voters and candidates and change the structure of the competitive environment.” Doc. 11, Mem. In Support of Mot. to Intervene at 8-9. This is not a particularized interest. It is a concern affecting all voters. Intervention on this basis would allow any voting citizen of Rhode Island to intervene in any election-related case.

Movants also argue that changes at this stage of the election process could confuse voters, citing *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). Contrary to the Movants’ suggestion, voters would in fact be more confused if the witness or notary requirement were not suspended. In April 2020, Rhode Island’s Governor issued an executive order suspending the witness or notary requirement for Rhode Island’s June 2, 2020 presidential preference primary. R.I. Executive Order 20-27 at 2 (Apr. 17, 2020). In that election, 83% of voters exercised their right to vote via mail-in ballot.² Comparatively, in the May 2016 presidential preference primary, less than 4% of votes were cast by mail.³ Of the 83% of voters who voted by mail, many if not most were likely doing so for the first time. This indicates that many thousands of Rhode Island voters are accustomed to voting by mail without satisfying the witness or notary requirement. These voters are far more likely to be confused if the State does *not* suspend the witness or notary requirement for the September 8, 2020 primary and November 3, 2020 general elections.

Purcell does not command judicial abstention in late-breaking election cases, nor does timing alone provide reason enough to dismiss Plaintiffs’ claims. Rather, it instructs courts to proceed cautiously in considering significant judicial intervention on the eve of an election.

¹ Rhode Island requires mail voters to have their mail-in ballot envelopes signed by either two lay witnesses or one notary, with very limited exceptions for voters confined to a hospital or nursing home, living abroad, or out of state for military service. R.I. Gen. Laws §§ 17-20-2.1(d), 17-20-2.2(d).

² 2020 Presidential Preference Primary Statewide Summary, State of Rhode Island Board of Elections (updated July 2, 2020), https://www.ri.gov/election/results/2020/presidential_preference_primary/#.

³ 2016 Presidential Primary Statewide Summary, State of Rhode Island Board of Elections (updated May 4, 2016), https://www.ri.gov/election/results/2016/presidential_preference_primary/#.

Here, Defendants have expressed to the Court that a timely resolution of this matter will allow the State to print the necessary ballot envelopes and educate voters in advance of the elections Defendants will administer later this year. In addition, Rhode Island voters have indicated a clear preference for voting by mail in light of the risks associated with COVID-19. They are expecting a reasonable and safe method by which to exercise their fundamental right to vote. Suspending the witness or notary requirement will uphold voters' expectations, and allow these voters to cast their ballots safely.

2. Movants interests are adequately represented by Defendants.

Defendants are members of representative government bodies, and are therefore presumed to adequately represent the interests of Rhode Island citizens. *Public Serv. Co. v. Patch*, 136 F.3d at 207. Movants bear the burden of "a strong affirmative showing" that the government is not fairly representing the applicants' interests. *Id.* (internal quotations omitted). Movants argue that because the Defendants, as government entities, are tasked with protecting the public interest, they cannot effectively represent Movants' specific interests. The Court in *Public Serv. Co.* soundly rejected exactly this argument. *Id.* (rejecting argument that "[appellants'] status as the principal protector of the general public interest precludes its effective representation of their particularized interests."). Defendants are charged with administering and overseeing Rhode Island's elections so that all eligible electors may have the opportunity to vote. Movants have therefore failed to articulate a valid interest over and apart from Defendants that entitles them to intervene here.

Where the party seeking to intervene has the same ultimate goal as a party already in the suit, courts have applied a presumption of adequate representation. *Moosehead Sanitary Dist. V. S.G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979). To overcome that presumption, the

petitioner ordinarily must demonstrate adversity of interest, collusion, or nonfeasance. Here Movants have not alleged, much less proved, any nonfeasance or collusion, such that Movants' interests are inadequately represented. Movants' disagreement with the tactics employed by Defendants to protect the integrity of Rhode Island's elections is not enough to rebut the presumption of adequacy. *Saldano v. Roach*, 363 F.3d 545, 555 (5th Cir. 2004) ("Simply because the 'intervenor' would have made a different litigation decision does not mean the Attorney General is inadequately representing the State's interest."); *see also Students for Fair Admissions, Inc. v. President & Fellows of Harvard College (Harvard Corp.)*, 807 F.3d 472, 477 (1st Cir. 2015). ("[W]e simply hold that when a party cites a fear of settlement as a reason to intervene, it is not an abuse of discretion to find that reason insufficient if the intervention will not reduce the likelihood of settlement, much less of intervention might increase the likelihood.")

II. The Court should deny permissive intervention because intervention will likely delay a speedy resolution of this matter and prejudice the ability of Defendants to administer Rhode Island's elections scheduled for this year.

Federal Rule of Civil Procedure 24(b) permits intervention in the court's discretion upon timely application when an applicant's claim or defense and the main action have common questions of law or fact. In exercising its discretion, the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. *Id.* The Court has broad discretion to permit or deny intervention. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College (Harvard Corp.)*, 308 F.R.D. 39 (D. Mass. 2015) (aff'd by *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College (Harvard Corp.)*, 807 F.3d 472 (1st Cir. 2015)).

In *Students for Fair Admissions*, the Court found that intervention would add undue delay, cost, and complexity to the proceedings and denied petitioners' motion to intervene. 308 F.R.D. at 52. Allowing Movants to intervene in this case would have the same effect. Plaintiffs

and Defendants have reached an agreement on the terms of a Consent Order to ensure Rhode Island voters can vote safely in the State's pending September 8, 2020 primary and November 3, 2020 general elections. Movants' intervention may unnecessarily delay the entry of this Consent Order and prevent a timely resolution of this issue in time for Defendant Secretary GORBEA to print mail voter ballots and for all Defendants to inform the public of how they may exercise their right to vote. Given Movants' lack of a sufficient articulated interest unprotected by the parties to this proceeding, the Court should exercise its discretion to deny Movants' Motion to Intervene in accordance with Federal Rule of Civil Procedure 24(b). To the extent Movants' have a right to be heard, this Court's fairness hearing will provide them with an adequate opportunity to be heard without causing undue delay or added complication to the case.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that the Court should deny the Republican National Committee and the Rhode Island Republican Party's Motion to Intervene in this matter.

Dated: July 28, 2020

Respectfully submitted,

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CERTIFICATION

I certify that on July 28, 2020, I served a copy of the within documents via the Court's CMECF system, which sent copies of this document to Counsel of Record.

/s/ Lynette Labinger
Lynette Labinger, Esq.