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THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LEAGUE OF WOMEN VOTERS OF UTAH, MORMON WOMEN FOR ETHICAL GOVERNMENT, STEPHANIE CONDIE, MALCOM REID, VICTORIA REID, WENDY MARTIN, ELEANOR SUNDWALL, JACK MARKMAN, and DALE COX,

Plaintiffs,

UTAH DEMOCRATIC PARTY, FRANK BRANNAN, HILARY LAMBERT, and CAROLINE SMITH,

Proposed Intervenor-Plaintiffs,

v.

UTAH STATE LEGISLATURE; UTAH LEGISLATIVE REDISTRICTING COMMITTEE; and SENATOR SCOTT SANTALL, REPRESENTATIVE BRAD WILSON, SENATOR J. STUART ADAMS, and LIEUTENANT GOVERNOR DEIRDRE HENDERSON, in their official capacities,

Defendants.

REPLY IN SUPPORT OF MOTION TO INTERVENE AS PLAINTIFFS

Civil Action No.: 220901712

Judge: Hon. Dianna M. Gibson

TIER III

Pursuant to Utah R. Civ. P. 7(e), Proposed Intervenor-Plaintiffs the Utah Democratic Party, Frank Brannan, Hilary Lambert, and Caroline Smith ("Proposed Intervenors") hereby submit their Reply Memorandum in Support of their Motion to Intervene ("Mot.").

NEW MATTERS RAISED IN THE MEMORANDUM OPPOSING THE MOTION

Defendants raise the following new matters in their Memorandum Opposing the Motion (Opp.):

First, Defendants claim—without support—that Proposed Intervenors will delay these proceedings, in part because Defendants claim that Proposed Intervenors indicated they will seek additional discovery that will delay the resolution of pure questions of law. In fact, Proposed Intervenors said no such thing—Proposed Intervenors, unlike Defendants, seek to expeditiously obtain a fair and lawful congressional map in time for the 2026 election and their participation will not delay these proceedings. Defendants' manufactured basis to claim to the contrary should be rejected out of hand.

Second, Defendants assert that because some of the existing Plaintiffs are registered Democrats, Proposed Intervenors' interests are already adequately represented. That fact has no bearing on whether Plaintiffs will adequately represent the interests of Proposed Intervenors. Plaintiffs *also* include registered Republicans and non-partisan organizations who are jointly represented and do not share the Democratic Party's narrow interest in protecting its candidates' electoral prospects and protecting *all* Democratic voters from the unlawful dilution of their voting power.

Third, Defendants contend that Plaintiffs and Proposed Intervenors share the same "ultimate objective" of striking down the existing congressional map. But the mere fact that a proposed intervenor seeks the same ultimate result in litigation does not show that its interests are adequately represented. Besides, the "ultimate objective" of this litigation is a *new*

congressional map, and Proposed Intervenors' interests may well diverge from Plaintiffs' on the final remedy.

Finally, Defendants contend that permissive intervention should be denied because allowing the Utah Democratic Party to intervene will cause this case to "devolve into political lawfare." Opp. at 1. They studiously ignore that they are each Republican elected officials who are alleged to have used the power of their office, in consultation with the Utah Republican Party, to unlawfully override the will of the voters and dilute the voting power of Democratic voters. The Court therefore should, in the alternative, grant permissive intervention. Indeed, Defendants do not dispute that Proposed Intervenors could, in fact, bring their own case raising similar challenges to S.B. 200 and Utah's current congressional map. Any such suit would almost certainly be consolidated with this one. The doctrine of intervention is meant to make this process more efficient and facilitate the Court hearing each of the parties with a particularized interest in the litigation at once, to better enable it to decide both the merits and facilitate any relief. Denying intervention, as Defendants urge, is more likely to unduly delay this process.

In short, the Opposition offers no valid reason why the Proposed Intervenors are not entitled to intervention as of right or why they should not, at the very least, be granted permissive intervention.

ARGUMENT

I. Proposed Intervenors are entitled to intervention as of right under Rule 24(a).

A. Proposed Intervenors' motion is timely.

In opposing Proposed Intervenors' motion as untimely, Defendants misstate the applicable legal standard. Timeliness is not simply a matter of how much time has passed since the commencement of the litigation—it must be "determined under the facts and circumstances of each particular case[.]" *Supernova Media, Inc. v. Pia Anderson Dorius Reynard & Moss, LLC*,

2013 UT 7, ¶ 23, 297 P.3d 599. And a motion to intervene is generally timely if it is filed any time "before entry of judgment or dismissal." *Id.* ¶¶ 23–24.

For instance, in *Burr v. Koosharem Irrigation Company*, the Court of Appeals held that the district court abused its discretion when it denied a motion to intervene as untimely "after nearly two years of conscious inaction." 2017 UT App 123, ¶ 12, 402 P.3d 124. The Court observed that the motion to intervene was filed "(1) before 'the final settlement of all issues by the parties,' (2) 'before entry of judgment or dismissal,' and (3) before a trial date was set." *Id.* ¶ 13 (quoting *Supernova Media*, 2013 UT 7, ¶ 24). And though nearly two years had passed since the case was initiated, the intervenor "simply had no need to seek intervention earlier than he did," and "apparently kept himself abreast of the status of the litigation so that he might attempt to intervene if the circumstances materially changed." *Id.* ¶ 14.

So, too, here. This is, effectively, a different case than it was two years ago. The Utah Supreme Court has clearly held, for the first time, that "the people's right to alter or reform the government through an initiative is constitutionally protected from government infringement," and articulated a framework for evaluating such claims. *League of Women Voters of Utah v. Utah State Legislature*, 2024 UT 21, ¶ 227 ("*LWVUT*"). As Defendants acknowledged in their recent motion for an extension of time to respond to Plaintiffs' summary judgment motion, "these remanded proceedings involve novel legal claims and a novel legal framework that has not before been analyzed or applied by the parties or this Court." Doc. No. 302 ¶ 11. Moreover, in light of the Supreme Court's decision in *LWVUT*, it is exceedingly likely that Plaintiffs (and Proposed Intervenors) will succeed in showing that Proposition 4 was unlawfully repealed, and that Utah's congressional maps were therefore unlawfully enacted. That finding will kick off yet another new phase of this case focused on the adoption of a new map to remedy that violation.

None of the cases cited by Defendants involved similar circumstances—and none stands for the proposition that the mere passage time since the case was initiated forecloses intervention. In *Republic Insurance Group v. Doman*, the intervenor moved to intervene only *after* "every fact necessary for a ruling on the motion for summary judgment had been deemed admitted and a ruling had been requested on the motion." 774 P.2d 1130, 1131 (Utah 1989). In *Matter of John Edward Phillips Family Living Trust*, the intervenor moved only "after the parties had entered into [a] settlement agreement," despite having been aware of the agreement for months before it was signed. 2022 UT App. 12, ¶ 37, 505 P.3d 1127. And in *Weston v. Darko Segota, Bergaz, L.C.*, the intervenor moved to intervene only after the parties had reached a potential settlement and a trial date was set. 1999 UT App 152, 1999 WL 33244810, at *1. Here, Proposed Intervenors filed their motion to intervene before any summary judgment motion had been filed—much less submitted; there has been no settlement agreement in the case; and no trial date has been set.

Defendants' contention that Proposed Intervenors will "decelerate proceedings" (Opp. at 1) makes little sense. Proposed Intervenors seek to intervene here as *Plaintiffs*, and their interest is in obtaining a fair and lawful congressional map in time for the 2026 election. *See* Mot. at 12 ("Proposed Intervenors are prepared to contribute to the complete development of the factual and legal issues before this Court to permit a timely resolution of these issues on the Court's schedule and without undue duplication."). Where *Defendants* are the current beneficiaries of the status quo (i.e., the congressional map adopted in violation of the Utah Constitution), they can offer no basis why it would be in *Proposed Intervenors*' interest to slow down or delay proceedings. And to the extent "the introduction of additional parties inevitably delays proceedings," *Athens Lumber Co., Inc. v. FEC*, 690 F.2d 1364, 1367 (11th Cir. 1982), that

cannot be a basis for denying intervention as of right (on timeliness grounds or any other basis), otherwise intervention would always be denied regardless of when the motion to intervene is filed. As discussed above, courts regularly conclude that motions to intervene are timely so long as they are filed before judgment is entered. Defendants cite no case finding that intervention at this stage of the proceedings would "prejudice" the existing parties. *Cf. Jenner v. Real Estate Servs.*, 659 P.2d 1072, 1074 (Utah 1983) ("*Postjudgment intervention* is looked upon with disfavor by reason of the tendency thereof to prejudice the rights of existing parties and the undue interference it has upon the orderly processes of the court." (emphasis added)).

Moreover, Defendants' contention that Proposed Intervenors will delay the resolution of pure questions of law by seeking additional "discovery," Opp. at 5 (quoting Mot. at 7, 12), is a willful misreading of the Motion. Proposed Intervenors said no such thing. In their Motion to Intervene, Proposed Intervenors merely noted that "[p]rior to the stay, discovery had only just begun," Mot. at 7, and that their motion "comes before any meaningful discovery has taken place," *id.* at 12. That fact just underscores the early stage that this case is in. Of course, as full parties to the action, Proposed Intervenors would retain the same discovery rights as Defendants and Plaintiffs. But the suggestion that Proposed Intervenors will delay adjudication of dispositive motions in this case because they seek to "insert [themselves] into these remaining proceedings so that proposed intervenors can obtain discovery from their self-described political opponents," Opp. at 5, is simply untrue. Defendants' straw man arguments only underscore the weakness of their position.[1]

Finally, Defendants' concerns about "delay" ring particularly hollow in light of their recent request for over a month's extension of their time to respond to Plaintiffs' motion for

[1] In their reply in support of their motion for an extension, Defendants continue to falsely accuse Proposed Intervenors of seeking "discovery and not a decision." Doc. No. 321 at 1.

summary judgment. Doc. No. 302 In that motion, Defendants aver that they cannot proceed on the default briefing schedule established by the Utah Rules in part because their counsel "have other court deadlines." *Id.* ¶ 8. Defendants cannot credibly charge Proposed Intervenors with attempting to "decelerate" this case when they have sought and successfully obtained a five-week extension of the ordinary two-week period to respond to a summary judgment motion. And notably, the existing Plaintiffs, who *do* have a demonstrated interest in pushing this litigation forward expeditiously, have not opposed the Motion to Intervene.

B. Proposed Intervenors' interests may be impaired by the disposition of this action.

Defendants do not dispute that Proposed Intervenors have significant protectible interests in the subject of this litigation. Specifically, they do not dispute that Proposed Intervenors have significant, protectible interests in (1) remediating direct injury to the electoral prospects of Democratic candidates and (2) protecting their own votes and those of the Utah Democratic Party's members from unlawful dilution. *See* Mot. at 8-9. They nonetheless contend that it is speculative that those interests will be practically impaired by this litigation. But Proposed Intervenors need not show that their interests will be *certainly* impaired; it is enough that the interest "*may be* impacted by the judgment." *Supernova Media*, 2013 UT 7, ¶ 32 (emphasis added).

In any event, Defendants' contention makes little sense. The principal allegation of this lawsuit is that the Republican-dominated legislature unlawfully repealed Proposition 4 to pave the way for enacting a partisan gerrymander that diluted the votes of Democratic voters and injured the Democratic Party's electoral prospects. And, the end result of this litigation, should Plaintiffs and Proposed Intervenors succeed, will be declaratory and injunctive relief that will determine the configuration of congressional districts for at least the next three general elections.

Plainly, the outcome of these proceedings threatens to impair Proposed Intervenors' undisputed interests.

C. Proposed Intervenors' interests are not adequately represented in this action.

Proposed Intervenors' interests are not adequately represented by the non-partisan Plaintiffs. "Adequacy of representation generally turns on whether there is an identity or divergence of interest between the potential intervenor and an original party and on whether that interest is diligently represented." *Supernova Media*, 2013 UT 7, ¶ 48. Because Proposed Intervenors' interests in this action are not "identical" to those of the existing non-partisan Plaintiffs, there is no "presumption" of adequate representation. *Beacham v. Fritzi Realty Corp.*, 2006 UT App. 35, ¶ 9, 131 P.3d 271. Thus, the burden of showing inadequate representation "is a minimal one," *id.* ¶ 8, and "[t]he possibility that the interests of the applicant and the parties *may* diverge need not be great" to satisfy it. *Utahns for Better Transp. v. United States Dept. of Transp.*, 295 F.3d 1111, 1117 (10th Cir. 2002) (emphasis added) (quotation omitted).

Defendants contend that the "interests of the Democratic Party and putative individual Democrat[ic] intervenors are identical to those of the existing Democrat[ic] Plaintiffs." Opp. at 7. But the existing Plaintiffs include Democrats *and* Republicans *and* non-partisan organizations who are all jointly represented—there is no reason to believe the partisan affiliations of the five Democratic plaintiffs will control the litigation position of the plaintiff group as a whole. Nor can Defendants pick and choose among characteristics of the existing Plaintiffs to argue adequacy of representation where all of the existing Plaintiffs are litigating under the same banner and are decidedly *not* litigating from the view of the political interests of the Democratic Party. The non-partisan plaintiff organizations avowedly do not represent those interests, *see* Am. Compl. ¶¶ 13-14, 21-22, and the Republican voter-plaintiffs plainly do not share the Utah Democratic Party's interest in protecting the electoral prospects of Democratic candidates. These individuals and

groups have joined together in this litigation because they share common cause in opposing the Legislature's unlawful repeal of Proposition 4. But just because some among them are Democrats does not mean that Plaintiffs as a whole share "identical" interests with the Democratic Party. Illustrating the point, Defendants *themselves* underscore that Plaintiffs' asserted interests in this litigation are different from the Proposed Intervenors'. *See* Opp. at 5, 8, 9 (distinguishing between the Proposed Intervenors' interests and the nonpartisan Plaintiffs' individual rights).

It is also not enough that Proposed Intervenors seek to intervene on the same side as some of the existing parties to the case. "Needless to say, a prospective intervenor must intervene on one side of the 'v.' or the other and will have the same general goal as the party on that side. If that's all it takes to defeat intervention, then intervention as of right will almost always fail." *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 748 (7th Cir. 2020). As the Tenth Circuit has explained,

> [T]he government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a particular member of the public merely because both entities occupy the same posture in litigation. In litigating on behalf of the general public, the government is obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of the would-be intervenor.

Utah Assn. of Cntys. v. Clinton, 255 F.3d 1246, 1255-56 (10th Cir. 2011). A similar proposition holds true here: because the existing Plaintiffs represent a broad coalition of non-partisan organizations and Republican and Democratic voters, they cannot adequately represent the "individual parochial interest" of the Proposed Intervenors. *Id.* at 1256.

Moreover, Proposed Intervenors do not, in fact, have the "same ultimate objective" as the existing Plaintiffs. Opp. at 7. Defendants "operate at too high a level of generality," *Driftless*, 969 F.3d at 748, when they assert that Plaintiffs and Proposed Intervenors both seek to

"challenge S.B. 200." Opp. at 7. The ultimate outcome of this litigation will be not just the invalidation of S.B. 200—and thus the restoration of Proposition 4—but the adoption of a new congressional map. Because the potential configurations and permutations of that map are nearly infinite, it is not mere "possibility," Opp. at 8, that Plaintiffs and Proposed Intervenors will put forward different proposals colored by their differing "parochial" interests.

II. Alternatively, the Court should permit intervention under Rule 24(b).

In the alternative, Proposed Intervenors should be granted permissive intervention. Defendants do not dispute that Proposed Intervenors have "a claim or defense that shares with the main action a common question of law or fact." Utah R. Civ. P. 24(b)(1)(B). They argue only that Proposed Intervenors' entrance into the case will cause delay and prejudice. Opp. at 9. But, as discussed above, those concerns are unfounded.

Defendants' pearl clutching about "political lawfare," Opp. at 1, also does not supply a basis for denying permissive intervention. The central premise of this litigation is that Defendants—all Republican elected officials—unlawfully used the power of their offices to disregard the will of the voters and entrench the Republican Party in power. As highlighted in the Supreme Court's decision, Plaintiffs allege that "the Legislature decided to adopt its own partisan gerrymandered maps and prescreened them with Republican party leaders long before the Commission even reached the deadline for completing its work." *LWVUT*, 2021 UT 21, ¶ 41 (quoting LWV Complaint). Furthermore, this case arises against the backdrop of a history of the Republican-dominated Legislature "conduct[ing] its mapmaking behind closed doors to devise a map that would increase Republican advantage in the State's now-four districts." *Id.* ¶ 22 (quoting LWV Complaint). Excluding the Democratic Party from these proceedings would do nothing to make this case any less "political."

Finally, Defendants do not dispute that, at the very least, Proposed Intervenors would have standing to bring their own case raising similar challenges to S.B. 200 and Utah's current congressional map. *See Conder v. Hunt*, 2000 UT App. 105, ¶ 12, 1 P.3d 558 ("[T]he doctrine of claim preclusion does not bar later actions when a party has been denied intervention, even when the motion to intervene raises issues identical to those asserted in the later lawsuit."). Since any such suit would likely be consolidated with this one, *see* Utah R. Civ. P. 42(a), granting permissive intervention in this case will promote the interests of efficiency and finality by allowing all claims sharing "a common question of law or fact" to be adjudicated together.

CONCLUSION

Based on the foregoing, and for the reasons stated in the Motion, the Proposed Intervenors should be granted intervention as of right under Rule 24(a)(2). Alternatively, the Court should permit Proposed Intervenors to intervene under Rule 24(b).

Dated: September 6, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of September, 2024, I caused to be filed a true and correct copy of the foregoing **REPLY IN SUPPORT OF MOTION TO INTERVENE AS PLAINTIFFS** with the Court's GreenFiling system, which sent notice of such filing to the following:

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