IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KRIS W. KOBACH, Kansas Secretary of State;

KEN BENNETT, Arizona Secretary of State;

THE STATE OF KANSAS;

THE STATE OF ARIZONA;

Plaintiffs,

v.

THE UNITED STATES ELECTION ASSISTANCE COMMISSION;

ALICE MILLER, in her capacity as the Acting Executive Director & Chief Operating Officer of The United States Election Assistance Commission

Defendants,

and

LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, LEAGUE OF WOMEN VOTERS OF ARIZONA, and LEAGUE OF WOMEN VOTERS OF KANSAS

Proposed Defendant-Intervenors.

Case No. 13-cv-4095-EFM-DJW

MEMORANDUM IN SUPPORT OF MOTION
TO INTERVENE AS DEFENDANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

The League of Women Voters of the United States, the League of Women Voters of Arizona, and the League of Women Voters of Kansas (collectively, the "League" or "Applicants"), by and through their undersigned counsel, respectfully submit this memorandum in support of their motion to intervene as defendants in this lawsuit. The Applicants seek 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). Applicants also request expedited consideration of this motion to allow Applicants the opportunity, if the motion is granted, to participate in the briefing and hearing on Plaintiffs' motion for a preliminary injunction on December 13, 2013, which Plaintiffs have moved the Court to convert into a trial on the merits and/or a motion for summary judgment.

As shown below, the League meets the standards for intervention as of right as well as for permissive intervention. The League is a nonprofit, community-based group, is one of the longest-standing organizations to conduct voter registration drives in both Arizona and Kansas, and has a vested interest in ensuring that citizens in these states can continue to vote. The League is directly and adversely impacted by the documentary proof-of-citizenship voter registration requirements enacted by Arizona and Kansas. Indeed, the Arizona League was a plaintiff in *Inter Tribal Council* in order to protect its interests in enhancing access to voting, and the League of the United States participated as amicus curiae. The League also has been actively engaged with the U.S. Election Assistance Commission ("EAC") as an advocate for voters' rights, the functioning of which is now at issue.

The Arizona and Kansas requirements substantially interfere with the League's mission to encourage voting and other forms of civic participation, especially among minorities and other

traditionally disenfranchised communities. The League's prospective members may find it difficult or impossible to vote because of these requirements.

Allowing Arizona and Kansas to implement these additional requirements for registering to vote using the Federal Form would strain the League's limited financial resources as a result of the substantial costs of attempting to educate its members and others about these new requirements and assist them in registering to vote.

I. BACKGROUND

A. Origins of the Federal Form

This lawsuit arises out of Arizona's and Kansas's continuing campaign to amend the uniform national mail-in voter registration form ("Federal Form") prescribed by the National Voter Registration Act of 1993 ("NVRA") and implemented by the EAC to require applicants for voter registration in those states to provide documentary proof of citizenship with their applications.

Congress enacted the NVRA in 1993 in part to address what it perceived as improper barriers to voter registration embedded in state law. As the statute itself acknowledges, "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities." 42 U.S.C. § 1973gg(a)(3). In its long history of promoting voter registration efforts, the League has experienced many of these unfair registration laws and procedures firsthand. Thus, the League's mission mirrors the NVRA's stated goals of "increas[ing] the number of eligible citizens who register to vote in elections for Federal office" and implementing procedures at all levels of government to "enhance[] the participation of eligible citizens as voters in elections for Federal office." *Id.* § 1973gg(b)(1), (2) .

One of the primary ways in which the NVRA was intended to combat problematic state laws and facilitate voter registration was through its mail registration provisions for voters. The centerpiece of these new provisions was the creation of a standardized mail voter registration form that could be utilized by the citizens of any state to register for federal elections. *Id.* § 1973gg-4. By creating a standardized registration form that "[e]ach State shall accept and use," *id.* § 1973gg-4(a)(1), Congress sought to ensure that states could not disenfranchise voters by setting discriminatory or burdensome registration requirements. *See Ass'n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 835 (6th Cir. 1997) ("In an attempt to reinforce the right of qualified citizens to vote by reducing the restrictive nature of voter registration requirements, Congress passed the [NVRA].").

The Federal Form was also meant to benefit national organizations that registered voters in multiple jurisdictions, such as the League, which would no longer have to contend with varying and confusing state registration laws. *See id.* § 1973gg-4(b) (mandating that state officials make the standardized mail registration form available to "governmental and private entities, with particular emphasis on making them available for organized voter registration programs"). Underlying these efforts to "streamline the registration process" was the understanding that states could not unilaterally change the Federal Form. Rather, the development and implementation of the Federal Form was—and remains—a task delegated exclusively to a federal agency: the EAC.[1]

Following the NVRA's enactment, the FEC commenced official notice-and-comment rulemaking proceedings to develop the Federal Form in accordance with the statute's goals and

[1] When the NVRA was originally passed, the agency responsible for implementing the NVRA was the Federal Election Commission. The Help America Vote Act of 2002 ("HAVA") later created the Election Assistance Commission and transferred to the EAC the responsibility of prescribing regulations necessary for a mail voter registration form for elections for Federal office. *See* 42 U.S.C. §§ 15321, 15329, 1973gg-7(a).

mandates. *See* Nat'l Voter Registration Act of 1993, 59 Fed. Reg. 11,211 (Mar. 10, 1994); Nat'l Voter Registration Act, 58 Fed. Reg. 51,132 (Sept. 30, 1993). The Federal Form was adopted without any requirement for documentary proof of citizenship. 42 U.S.C. § 9428.4; Nat'l Voter Registration Act of 1993, 59 Fed. Reg. 32,311 (June 23, 1994).

B. The Supreme Court's *Inter Tribal Council* Decision

Earlier this year, the Supreme Court held that Arizona's requirement that voter registrants provide documentary proof of citizenship was preempted by the NVRA with respect to applicants using the Federal Form. *Ariz. v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013). The Supreme Court agreed that the NVRA requires all states to "accept and use" the "Federal Form," which, as developed and approved by the EAC, does not require documentary proof of citizenship. As the Court explained, "[n]o matter what procedural hurdles a State's own form imposes, the Federal Form guarantees that a simple means of registering to vote in federal elections will be available." The Court further found that the NVRA's "accept and use" requirement is a constitutional exercise of Congress' power under the Elections Clause, and preempts state regulations governing the "Times, Places and Manner" of holding federal elections. *Id.* at 2253. Accordingly, the only route for Arizona—or Kansas—to add a documentary proof of citizenship requirement to Federal Form applicants would have been to challenge the EAC's denial of the request at that time or to again request that the EAC alter the Federal Form and to "challenge the EAC's rejection of that request in a suit under the Administrative Procedure Act." *Id.* at 2259.

Arizona, and more recently, Kansas, have repeatedly requested that the EAC alter the Federal Form to require documentary proof of citizenship and the EAC has at least twice rejected those requests, and more recently, the EAC staff deferred consideration of their renewed request. Beginning in 2005, Arizona requested that the EAC modify the instructions on the Federal Form

to accommodate the state's newly enacted documentary proof-of-citizenship requirement. Complaint at ¶ 67, *Ariz. and Kan. v. U.S. Election Assistance Comm'n,* No. 13-4095 (D. Kan. Aug. 21, 2013). On March 6, 2006, the EAC denied Arizona's request. In a letter sent by Executive Director Thomas Wilkey, the EAC explained that the modification requested would violate the NVRA. *Id.*, ex. 10. The EAC further explained that Arizona was obligated to "accept and use" the Federal Form and hence it could not apply its requirement to Federal Form applicants. *Id.* On March 13, 2006, Arizona Secretary of State Jan Brewer wrote to the EAC indicating that, despite the agency's decision, she planned to continue to instruct state election officials to apply a proof-of-citizenship requirement to the Federal Form, and requesting that the EAC reconsider its decision. *Id.*, ex. 11. In July 2006, the EAC again considered the question and voted on whether to modify the Federal Form pursuant to Arizona's request. The measure failed by a 2-2 vote, having not received approval of three members of the EAC as required by law for the EAC to take any action. *Id.*, ex. 13; 42 U.S.C. § 15328.

Although, as the Supreme Court noted, Arizona could have challenged the EAC's rejection of its request under the Administrative Procedure Act at the time, it failed to do so. *See Inter Tribal Council*, 133 S. Ct. at 2259. Instead, it continued to require proof of citizenship from Federal Form applicants, prompting the lawsuits that resulted in the *Inter Tribal Council* decision. Nor did Arizona or Kansas request that the EAC amend the Federal Form to permit documentary proof of citizenship during subsequent EAC rulemakings.

C. Arizona and Kansas Renew Their Requests to EAC

Following the U.S. Supreme Court decision in *Inter Tribal Council*, Arizona once again renewed its request that the EAC modify the Federal Form, and Kansas renewed a similar request it had first made in 2012. Complaint, exs. 3, 5, 14. Defendant Alice Miller, the acting executive director of the EAC, responded to both requests by stating that the requests "raise[d]

issues of policy concern that would impact other states," and therefore could not be permitted without the approval of the Commission which would not be possible while the Commission lacked a quorum. *Id.*, exs. 6, 17.

Kansas and Arizona filed the instant suit on August 21, 2013. Plaintiffs ask the Court to set aside the EAC's actions as unlawful, declare that the EAC may not defer consideration of the requests until it has a quorum, and issue a writ of mandamus compelling the EAC immediately to modify the Federal Form so that each state may require registrants using the form to provide documentary proof of citizenship. Plaintiffs also ask the Court to declare that the NVRA exceeds Congress' power to regulate the "Times, Places and Manner" of federal elections to the extent that it permits the EAC to refuse to modify the Federal Form to allow states to require documentary proof of citizenship for registration. *Id.* at 29-31.

On October 23, 2013, more than two months after filing the Complaint, Plaintiffs filed a motion for a preliminary injunction, seeking an order that the EAC modify the instructions on the Federal Form or otherwise permit Kansas and Arizona to require documentary proof of citizenship from registrants using the Federal Form. After the Court ordered a hearing date of December 13 for the preliminary injunction, Plaintiffs moved to convert their motion for a preliminary injunction to a motion for summary judgment and to advance the trial on the merits to December 13. Defendants have not yet filed an answer or a response to Plaintiffs' motion for a preliminary injunction.

D. Applicants for Intervention

1. League of Women Voters of the United States

The League of Women Voters of the United States is a nonpartisan, community-based organization that promotes political responsibility by encouraging Americans to participate actively and knowledgeably in government and the electoral process. Founded in 1920 as an

outgrowth of the struggle to win voting rights for women, the League now has more than 150,000 members and supporters, and is organized in more than 850 communities and in every State.

For more than 90 years, the League has worked to protect every U.S. citizen's right to vote. As part of its mission, the League—with its state and local chapters—operates one of the longest-running and largest nonpartisan voter registration efforts in the nation. It also aims to educate people about their voting rights and what they need to do in order to vote. If the EAC is compelled to modify the Federal Form to incorporate Arizona and Kansas' proof-of-citizenship requirements, the League would be forced to expend substantial resources to educate the public about the new requirements and potentially to assist eligible voters secure proper proof-of-citizenship documents in order to exercise their right to vote. The high costs of educating voters about these new requirements would have a significant detrimental impact on all of the League's other activities.

Moreover, the League concentrates its voter registration drives at locations that reach large numbers of unregistered voters, such as high schools, community colleges, sporting events, and naturalization ceremonies. Many otherwise eligible voters would not have the required documents while at these locations or during these times, and may not otherwise register to vote. The states' modification thus would impose new, concrete financial and other costs on both the League and its volunteer members in carrying out the League's mission of promoting full civic participation in elections. These additional costs likely would drain the League's limited resources. In addition, individual prospective members of the League who do not currently possess qualifying proof-of-citizenship documents could be faced with the costs and burdens of securing such documents or being denied their right to register to vote in federal elections.

The national League, in association with its state and local chapters, operates a voter information website, VOTE.411, that provides voting procedure and candidate information, and offers an opportunity to use the Federal From. In the 2012 election cycle, VOTE.411 had over 2 million unique visitors. Requiring documentary proof of citizenship would undermine the effectiveness of this multi-jurisdictional mail voter registration program.

The League has been a leader in the effort to remove the unnecessary barriers that too many Americans face in registering to vote and casting a ballot. To that end, the League has historically endorsed the adoption of simple, uniform voter registration forms that can be submitted through the mail without additional documentary requirements. The League strongly supported the enactment and enforcement of the NVRA, a statute aimed at increasing the number of eligible citizens who register to vote by providing for uniform, non-discriminatory voter registration procedures. The League testified before Congress in favor of the bill and the provisions relating to the Federal Form. The League also worked to ensure that the regulations adopted first in 1994 by the FEC and later by the EAC would be consistent with the terms of the NVRA, which does not provide for a documentary proof-of-citizenship requirement. The League also strongly supported the creation of the EAC in the Help America Vote Act of 2002 ("HAVA") and has consistently advocated with the agency for strong procedures and decisions that protect the right to vote.

The League has long advocated to ensure that the Federal Form remains simple and does not require additional documentation. The League has submitted multiple comments to the EAC to that effect, and commented on the NVRA rulemakings as well. The League also actively lobbied against the documentary proof-of-citizenship requirements that Arizona and Kansas enacted. Based on the League's extensive experience, it believes this requirement would prevent

many eligible Kansas and Arizona citizens from voting—especially voters from low-income communities and/or minorities on whom the League focuses its voter engagement efforts. The Federal Form has played a substantial role in the League's voter registration drives and serves as one of the organization's primary tools for bolstering democratic participation. Eliminating that option would make it significantly harder for citizens to vote, especially for those in these underrepresented communities. For instance, a 2006 survey sponsored by the Brennan Center for Justice reveals that as many as 13 million American citizens do not have ready access to citizenship documents, and as many as 21 million citizens do not have government-issued photo identification. *Citizens without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification*, Brennan Center for Justice, 2-3 (November 2006), http://www.brennancenter.org/analysis/citizens-without-proof.

2. Arizona and Kansas Leagues

The League of Women Voters of Arizona is a separately incorporated entity affiliated with the League of Women Voters of the United States. Like the national League, the Arizona League is a nonpartisan volunteer-based political organization that, for 93 years, has encouraged informed and active participation of citizens in government and worked to influence public policy through education and advocacy. To advance this mission, the Arizona League leads voter registration drives, distributes information about the electoral process, promotes electoral laws and practices that encourage voter participation, and partners with local organizations to host events on voting rights and other public policy issues, among other activities. The organization is active throughout Arizona, with five local affiliates and more than 460 members. The citizens it seeks to register and educate, including prospective League members, cannot produce documentary proof of citizenship or would have great difficulty doing so.

The Arizona League was a plaintiff in the *Inter Tribal Council* litigation, the result of which Plaintiffs are seeking to reverse through this litigation. The Arizona League was harmed during the period when the state of Arizona implemented a documentary proof-of-citizenship requirement for Federal Form applicants—Proposition 200—and would be harmed again if Plaintiffs prevail. When Proposition 200 was previously implemented, the Arizona League was forced to drastically reduce its voter registration activities because of the administrative burden imposed by the law. Also, while the Arizona League continued to distribute voter registration forms, it was no longer able to confirm voter registrations, as it had done previously. The communities that the Arizona League serves were also adversely impacted. In *Gonzalez v. Arizona*, Case No. 2:06-cv-01268-PHX-ROS, slip op. (D. Az. Aug. 20, 2008),[2] the case that eventually led to the Supreme Court's decision in *Inter Tribal Council*, the district court found that after Arizona enacted the documentation requirement in 2004, over 30,000 people were initially unable to register to vote because of the requirement. *Id.* at 13. The court also found that a disproportionate number of those applicants were Latino. *Id*. Moreover, while approximately 11,000 of those applicants subsequently were able to register to vote, about 20% of the remaining 20,000 unsuccessful applicants were Latino. *Id.* at 14.

Like the Arizona League, the League of Women Voters of Kansas is a separately incorporated entity affiliated with the League of Women Voters of the United States. The Kansas League is also a nonpartisan political organization that encourages informed and active participation in government. Like the Arizona League, the Kansas League promotes this mission through voter service and civic education by registering voters, educating the public on voting rights and other public policy issues, and hosting events. It also promotes its mission through

[2] Since this decision is not readily available electronically, Applicants have attached it as Exhibit 1 per Local Rule 7.6(c).

action to advocate for public policies that comport with its mission and the public interest. The Kansas League publicly opposed the Kansas statute that mandates registering voters to furnish documentary proof of their citizenship with their applications. The Kansas League is active throughout the state, with nine local affiliates and more than 750 members. The registration activities of local affiliates have been limited, hindered, or stopped entirely because the citizens that the League seeks to register and educate cannot produce documentary proof of citizenship or would have great difficulty doing so. Moreover, prospective League members who do not currently possess qualifying proof-of-citizenship documents could face difficulty registering to vote. In addition, partly in response to the new documentary proof-of-citizenship requirement, the Kansas League is initiating a campaign, "Protect the Vote," to educate voters about Kansas voting requirements. League members have thus far contributed more than $6,000 toward this effort.

The state Leagues have run voter registration drives since their founding, focusing on communities with a history of lower participation in elections and people who are less likely to have proof of citizenship, such as minorities, women, students, younger voters, the poor, and the elderly. *See Citizens without Proof* at 2-3. The documentary proof-of-citizenship requirements would thus injure the League's constituents and targeted communities. As shown above, the requirements will also make it significantly harder for the Arizona and Kansas Leagues to continue to register voters. They would not be able to afford the cost of buying and maintaining the equipment necessary to register hundreds of voters at events throughout the state with the documentary proof-of-citizenship requirements. Even if they could, there would be no way for them to bring photocopy machines and other such equipment to all the community events at which they register voters.

In addition to voter registration drives, the state Leagues engage in a number of nonpartisan activities geared to facilitate voting and other forms of civic participation, including in their efforts low-income neighborhoods, young people, rural areas, and minorities. To bring members of these historically underrepresented communities into the political process, the state Leagues widely distribute information about how and where to vote, assist with a voter protection hotline on Election Day, and frequently deploy their representatives to speak publicly about the importance of voting and other forms of participation in our democracy. In addition, the state Leagues partner with numerous community organizations—such as high schools and universities, local businesses, faith-based groups, and civil rights advocates—to promote and protect voting rights. On occasion, the state Leagues are asked by local leaders to monitor polling booths on Election Day, and League volunteers often serve as poll workers.

Since the documentary proof-of-citizenship requirements were enacted by Arizona and Kansas, the Arizona and Kansas Leagues have encountered and received numerous inquiries from concerned citizens who lack the newly mandated proof-of-citizenship documents, do not have documentation with their current name, do not understand how they can acquire these documents, or are frustrated by the expensive and complicated procedures involved in obtaining such documents required under Arizona and Kansas law. Because the proof of citizenship requirement chills and in some cases prevents voting, it is directly at odds with the state Leagues' primary mission of increasing and facilitating civic participation in the democratic process.

II. ARGUMENT

A. Applicants Should Be Granted Intervention as of Right

The Tenth Circuit "generally follows a liberal view in allowing intervention [as of right] under Rule 24(a) [of the Federal Rules of Civil Procedure]." *Elliot Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091, 1103 (10th Cir. 2005). Under Rule 24(a)(2):

> On timely motion, the court must permit anyone to intervene who. . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

The Tenth Circuit has interpreted Rule 24(a)(2) to have four requirements, allowing applicants to intervene as of right if: (1) the application is timely; (2) the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) the applicant's interest may as a practical matter be impaired or impeded; and (4) the applicant's interest is not adequately represented by existing parties. *Coal. of Ariz./N.M. Cntys. for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 840 (10th Cir. 1996). As demonstrated below, the Applicants amply satisfy all four factors required to intervene under Rule 24(a)(2).

1. Applicants' Motion is Timely

The League's motion to intervene in the instant action is plainly timely. Plaintiffs filed their complaint on August 21, 2013. Complaint, *Ariz. and Kan. v. U.S. Election Assistance Comm'n.*, No. 13-4095 (D. Kan. Aug. 21, 2013). They filed their motion for a preliminary injunction on October 23, 2013 and their motion to convert the earlier motion to one for summary judgment on November 7, 2013. Given the accelerated process that Plaintiffs are now seeking, the League filed its motion to intervene as soon as it could. Moreover, Defendants have not yet filed an Answer or a response to Plaintiffs' substantive motions, no discovery has been

undertaken, and no dispositive orders have been entered. Granting intervention would not, therefore, cause any delay in the trial of the case, nor would it prejudice the rights of any existing party. *See Sanguine, Ltd., v. U.S. Dep't of Interior*, 736 F.2d 1416, 1418 (10th Cir. 1984) (courts must assess timeliness of a motion to intervene "in light of all of the circumstances, including the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances.") (citation omitted). Intervention at this early stage of the litigation will not unduly delay or prejudice the adjudication of any rights of the original parties. *See id.*

2. Applicants Have a Substantial Interest in the Underlying Litigation

The Tenth Circuit has noted that "the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Utah Ass'n of Cntys v. Clinton*, 255 F.3d 1246, 1249, 1251-52 (10th Cir. 2001) (internal quotations and citation omitted). While the Tenth Circuit has historically required that a prospective intervenor's interest be "direct, substantial, and legally protectable," *In re Kaiser Steel Corp.*, 998 F.2d 783, 790-91 (10th Cir. 1993) (internal quotations and citation omitted) (also known as the DSL test), the continued vitality of the DSL test has been cast in doubt by *San Juan County, Utah v. United States*, 503 F.3d 1163 (10th Cir. 2007). In *San Juan*, the Tenth Circuit's *en banc* plurality opinion stated that the DSL test was "problematic" and "missed the point," *id.* at 1192-93, ultimately concluding that "[w]e cannot produce a rigid formula that will produce the 'correct' answer in every case." *Id.* at 1199.

While subsequent cases have not yet definitively clarified the Tenth Circuit standard, *see, e.g., WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1198 (10th Cir. 2010), *aff'd*, 703 F.3d 1178 (10th Cir. 2013) (not explicitly using the DSL test but noting that the would-be intervenor had a "legally protectable" interest), the Tenth Circuit has made clear that the interest

prong is a "highly fact-specific" inquiry, *Coalition*, 100 F.3d at 841, "requir[ing] courts to exercise judgment based on the specific circumstances of the case." *San Juan*, 503 F.3d at 1199. As the court noted in *San Juan*, "the factors mentioned in the Rule are intended to capture the circumstances in which the practical effect on the prospective intervenor justifies its participation in the litigation. Those factors are not rigid, technical requirements." *Id.* at 1195.

The League unquestionably has a strong interest in this litigation, sufficient to meet the requirements of Rule 24(a) regardless of the formulation used. Its core mission is to encourage and enable people in traditionally disenfranchised communities to vote. That mission would be severely compromised if Plaintiffs were to prevail. The requirements on voting registration that Arizona and Kansas have enacted would substantially undermine the League's efforts to empower people in traditionally underrepresented communities to vote, since these restrictions would have a disproportionate impact on such communities. For instance, as noted above, the League concentrates its voter registration efforts at community events where people may not have documentary proof and might not otherwise register to vote.

Moreover, having established one of the longest-running and largest nonpartisan voter registration efforts in the country, the League has a substantial interest in registering voters and otherwise promoting voter registration, since conducting voter registration drives is one of the key components of the League's activities. The League also has an interest in educating voters about the rules of elections so that they may fully participate, and in preserving its own voter registration and education resources, which would be compromised if it were forced to expend a significant amount of its resources on informing people about the documentary proof-of-citizenship requirements. The Arizona League in particular has a considerable interest in maintaining its victory from the *Inter Tribal Council* case. Nor can there be there any question

that the League's efforts to build citizen participation in the democratic process are legally protectable First Amendment activities.

In addition, the League has a special interest in the NVRA and the EAC. As noted above, the League was a vocal proponent of the NVRA, including testifying in favor of it before Congress. In addition, the League strongly advocated for the EAC's creation as part of HAVA. Then, once the EAC was formed, the League was actively engaged in advocating for voters' rights before the EAC, including opposing the requests made by Arizona and Kansas to modify the Federal Form to include their documentary proof-of-citizenship requirements. The League has also advised the EAC to adopt rules and regulations that would enable more uniform procedures for such requests. The League thus has a strong interest in a robust EAC that acts in the best interests of voters.

The Tenth Circuit's decision in *Coalition* strongly supports granting Applicants' motion to intervene here. In *Coalition*, a county coalition was challenging the government's decision to protect the Mexican Spotted Owl under the Endangered Species Act. The prospective intervenor, Dr. Silver, had photographed and studied the species in the wild and had petitioned the government to add it to the endangered species list. The Tenth Circuit held that "Dr. Silver's involvement with the Owl in the wild and his persistent record of advocacy for its protection" sufficed to meet the interest requirement of Rule 24(a). *Coalition*, 100 F.3d at 841. Here, the League has worked tirelessly to remove barriers from voting and advocate on behalf of communities who would suffer the most from such restrictions. The gains that the League has worked for are now being threatened by the documentary proof-of-citizenship requirements that Arizona and Kansas seek to force into the Federal Form. The League was a vocal supporter of the NVRA legislation because then-existing restrictions posed substantial barriers to voting

registration in minority and low-income communities, as well as for all Americans. The restrictions Arizona and Kansas now seek to impose would not only undercut the League's progress, but likely would cause the voting conditions in these states to regress in a manner harmful to the voting public, including these already underprivileged communities.

The League's efforts to promote civic participation and dismantle barriers to voting go above and beyond the interest the court in *Coalition* found sufficient to support intervention, compelling the same result here. As the U.S. Supreme Court has said, "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively . . . rank among our most precious freedoms." *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) (quoting *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968)).

3. The Disposition of This Action Could Impair Applicants' Interests.

In addition to demonstrating an interest in the underlying litigation, the Applicants must show that they are "so situated that the disposition of the action may as a practical matter impair or impede [their] ability to protect [their] interest." Fed. R. Civ. P. 24(a)(2). In light of the fact that the Rule refers to impairment "as a practical matter," the Tenth Circuit has made clear that "the court is not limited to consequences of a strictly legal nature." *Natural Res. Def. Council v. U.S. Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1345 (10th Cir. 1978). In particular, the Tenth Circuit has recognized that even if "a decision in the plaintiff's favor would return the issue to the administrative decision-making process," the interest of a prospective intervenor may still be impaired. *WildEarth*, 604 F.3d at 1199. "To satisfy th[e] [impairment] element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is *possible* if intervention is denied. This burden is minimal." *Utah Ass'n*, 255 F.3d at 1253 (emphasis added) (internal quotation and citations omitted).

If the Federal Form were modified to require documentary proof of citizenship as Plaintiffs seek, the League would face new and substantial barriers in carrying out its core mission of promoting voting among racial minorities, young voters, the poor, and other traditionally disenfranchised individuals. The League is a nonprofit, community-based organization with limited resources and would face significant costs in all aspects of its advocacy and outreach, from updating its educational materials to training volunteers regarding the new laws to dealing with the influx of queries from the public about the new registration requirements. The League's local affiliates have already been forced to shut down or substantially scale back on voter registration drives, or else expend far more resources to engage in them. In addition, the Leagues have had to expend substantial resources in educating voters about the complicated and confusing new requirements, and will need to continue to do so.

Furthermore, based on the League's long experience in this area, the League reasonably believes that those who already face significant barriers to voting may well be deterred from voting altogether, undermining years of work done by the League to promote civic participation. For instance, many women do not have documentary proof-of-citizenship reflecting their current name, due to marriage or other circumstances. Survey results from the Brennan Center suggest that only 48% of voting-age women have ready access to birth certificates with their current legal name and only 66% have access to *any* proof of citizenship with their current legal name. *Citizens without Proof* at 2-3. The survey also revealed that minorities, the elderly, and people with comparatively low incomes are disproportionately affected by documentary proof-of-citizenship requirements. *Id.* Moreover, in *Gonzalez v. Arizona*, *supra*, the district court found that since Arizona enacted Proposition 200—the law creating the voting restrictions at issue—people using a driver's license to register to vote faced additional hurdles if their license issued

before October 1, 1996 or if they were recently naturalized citizens, due to their license classification in Arizona's Motor Vehicle Department database. *Gonzalez*, slip op. at 11-12. These encumbrances, both in terms of money and effort, would be too much for many of the League's members and others in the communities it serves.

In addition, the Leagues will see their missions frustrated not only because some of their constituents will not be registered, but also because this case could undermine the statute they worked so hard to enact—the NVRA—as well as severely debilitating the EAC, the agency they have long supported and with which they have advocated for improvements. Moreover, as noted above, the Arizona League has a special interest in this case as one of the plaintiffs from the *Inter Tribal Council* case, because the outcome here could effectively extinguish its victory. In short, the League's substantial interest in this action, both in terms of preserving the progress it has made in the past and clearing the way for the gains it strives to make in the future, would be severely impaired if intervention were denied.

4. The Existing Parties Do Not Adequately Represent the Interests of the Applicants.

Finally, while the Applicants bear the burden of showing that the government will not adequately represent their interests, this burden is "minimal," requiring the Applicants to show only the representation "may be" inadequate. *Natural Res. Def. Council*, 578 F.2d at 1345. "The possibility that the interests of the applicant and the parties may diverge need not be great in order to satisfy this minimal burden." *WildEarth*, 604 F.3d at 1200 (internal quotations and citation omitted). In cases where the government is the defendant, the Tenth Circuit has "repeatedly recognized" that an applicant has shown inadequate representation where the government would be placed in the position of defending both the public interest and the private interest of the applicant. *Id.*

In this case, while there may be some overlap between the interest of the government and that of the League, it is likely that each will also have its own distinct areas of interest. For instance, the EAC's approach may need to take into consideration its own administrative processes, a concern that the League would not share as a private entity. The EAC may also be placed in the position of defending other decisions and acts about which the League may disagree. *See San Juan*, 503 F.3d at 1203-04 (noting that the government's representation may be inadequate where the government "has multiple interests to pursue"); *see also Sierra Club v. Glickman*, 82 F.3d 106, 110 (5th Cir. 1996) (concluding that interests of government and proposed intervenor "will not necessarily coincide, even though, at this point, they share common ground" and intervenor has "more flexibility" in advocating its position).

The Tenth Circuit has also recognized that the government's representation may be inadequate "when the applicant for intervention has expertise the government may not have." *Utah Ass'n*, 255 F.3d at 1255. The League has extensive experience with discerning and assessing on the impact of onerous voter registration requirements as a result of its efforts for nearly 90 years to promote voting across the country, including among traditionally disenfranchised communities. Moreover, because the League operates as a grassroots organization and has a strong representation in Arizona and Kansas, it has a local perspective that the government does not on the real-world effects of such restrictions on the voting rights of citizens in these states. *See Cnty. Council of Sumter Cnty., S.C. v. United States*, 555 F. Supp. 694, 696-97 & n.2 (D.D.C. 1983) (permitting intervention in light of African-American intervenors' local perspective and noting possibility of inadequate representation by the United States); *see also Natural Res. Def. Council v. Costle*, 561 F.2d 904, 912-13 (D.C. Cir. 1977) (intervention as of right granted to the environmental group Natural Resources Defense Council

(NRDC); NRDC's "more narrow and focussed [*sic*]" interest would "serve as a vigorous and helpful supplement to EPA's defense" and, "on the basis of their experience and expertise in their relevant fields, appellants can reasonably be expected to contribute to the informed resolutions of . . . questions when, and if, they arise."). With such important policy matters at stake in this case, the League's expertise would be invaluable.

B. In the Alternative, the Court Should Grant Permissive Intervention Under Rule 24(b)(1) .

In addition to meeting the standards for intervention as of right, the Applicants meet the requirements of permissive intervention pursuant to Fed. R. Civ. P. 24(b)(1), which permits intervention "upon timely application" when an applicant "has a claim or defense that shares with the main action a common question of law or fact." Courts in the Tenth Circuit have interpreted this provision to allow intervention where: (1) the motion is timely, (2) the applicant has a claim or defense that shares with the main action a common question of law or fact, and (3) intervention will not unduly delay or prejudice the adjudication of the original parties' rights. *Hershey v. ExxonMobil Oil Corp.*, 278 F.R.D. 617, 619 (D. Kan. 2011).

As discussed above, the League's application is timely, as Defendants have not yet filed an Answer, nor has the Court issued a case management order or any dispositive orders. For the same reasons, the League's intervention will not unduly delay or prejudice the adjudication of the original parties' rights. Finally, the questions of law and fact presented in this suit address the core issues that the League seeks to litigate.[3] Furthermore, the League's unique perspective and expertise would advance the proper development of the factual issues in the litigation. *See Miller v. Silbermann*, 832 F. Supp. 663, 674 (S.D.N.Y. 1993) (finding permissive intervention

[3] Applicants do not propose to add a counterclaim or to expand the questions presented by the Complaint, and will confer with Defendants to seek to avoid redundant filings.

appropriate where the applicants, because of their "knowledge and concern," would "greatly contribute to the Court's understanding" of the case). Thus, if the Court finds that the Applicants may not intervene as of right, the Applicants respectfully request that the Court allow them to intervene under Rule 24(b).

III. CONCLUSION

For the above and foregoing reasons, Applicants respectfully request that the Court grant Applicants' motion to intervene in this action as defendants.

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