STATE OF MICHIGAN
IN THE SUPREME COURT

ANGELIC JOHNSON, et al,

Petitioners,

v.

JOCELYN BENSON, in her official capacity as the Michigan Secretary of State, et al.

Defendants,

DNC Services Corporation/Democratic National Committee and Michigan Democratic Party,

Proposed Intervenors.

MSC No. 162286

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BRIEF IN SUPPORT OF PROPOSED INTERVENORS' MOTION TO INTERVENE

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INTRODUCTION

Proposed Intervenor-Defendants DNC Services Corporation/Democratic National Committee ("DNC") and Michigan Democratic Party ("MDP," and together, "Proposed Intervenors") move to intervene as defendants in this lawsuit. Through this action, Petitioners seek to undo Michigan's lawful certification of the result of the 2020 general election, based on nothing more than rank speculation, baseless and irrelevant factual assertions, and fundamentally flawed legal claims. Proposed Intervenors represent a diverse group of Democrats, including elected officials, candidates, members, and voters. Petitioners' requested relief—wholesale disenfranchisement of more than 5 million Michiganders—threatens to deprive Proposed Intervenors' individual members of the right to have their votes counted, undermine the electoral prospects of their candidates, and divert their limited organizational resources. Proposed Intervenors' immediate intervention to protect those interests is warranted.

Attached as Exhibit 1 is Proposed Intervenors' proposed Answer. If their Motion to Intervene is granted, Proposed Intervenors also intend to submit a brief in opposition to Petitioners' substantive brief.

BACKGROUND

A. The Election

Culminating on November 3, 2020, Michiganders voted in one of the most scrutinized elections in recent history, one that yielded record turnout amid an ongoing pandemic. Before November 3, the Michigan courts were called upon to resolve disputes regarding the election, including one that is central to Petitioners' challenge here—whether Secretary Benson's decision to send absentee ballot applications to Michigan voters in the face of the deadly COVID-19 pandemic violated Michigan law. On September 16, 2020, the Michigan Court of Appeals determined that Secretary Benson had the authority to take this action under the Constitution and

laws of the State of Michigan. See *Davis v Secretary of State*, COA No. 3354622, 2020 WL 5552822 (Mich Ct App, Sept 16, 2020). Petitioners made no effort before the election to contest this decision.

The Petition also alleges a variety of asserted misconduct on and shortly after November 3. Despite unprecedented levels of observation and supervision, tall tales of phantom fraud have spread widely in the weeks since election day, including in Michigan, where President-elect Joe Biden prevailed by more than *150,000 votes*. See *2020 Michigan Election Results*, Mich Sec'y of State, https://mielections.us/election/results/2020GEN_CENR.html (Nov 23, 2020). The *Detroit Free Press* reported that "Michigan has been no stranger to election-related falsehoods." Clara Hendrickson et al, *Michigan Was a Hotbed for Election-Related Misinformation: Here Are 17 Key Fact Checks*, Detroit Free Press (Nov 9, 2020), https://www.freep.com/ story/news/local/ michigan/detroit/2020/11/09/misinformation-michigan-16-election-related-fact-checks/6194128002. Indeed, several pieces of misinformation that have already been thoroughly debunked, see *id.*, make an appearance in the Petition.

Contrary to Petitioners' allegations of bias by election workers at TCF Center, where Detroit's absentee ballots were processed, the actual record establishes the open and transparent nature of that process. More than 100 Republican election challengers[1] observed the vote tabulation on election day, see App'x 2-3, and Donna MacKenzie, a credentialed challenger, attested that "there were many more Republican Party challengers than Democratic Party

[1] Election "challengers" are volunteers appointed by political parties or other organized groups who can observe the tabulation of absentee ballots and make challenges under certain circumstances. See, e.g., MCL 168.730, 168.733. Challengers are *not* permitted to "make a challenge indiscriminately," "handle the poll books . . . or the ballots," or "interfere with or unduly delay the work of the election inspectors." MCL 168.727(3). "Election inspectors," by contrast, are the poll workers appointed by local clerks who perform the tabulation duties. See MCL 168.677.

challengers" when she observed the count on November 4. App'x 10.[2] David Jaffe, another credentialed challenger at TCF Center who observed the processing of ballots on November 2, 3, and 4, has attested to his "perception that all challengers had a full opportunity to observe what was going on and to raise issues with supervisors and election officials." App'x 3. Ms. MacKenzie further attested that "the ballot counting process was very transparent," that challengers "were given the opportunity to look at ballots whenever issues arose," and that "[t]here were more than enough challengers to have observers at each table." App'x 10.

While Mr. Jaffe and his fellow challengers—Democratic and Republican alike—"observed minor procedural errors by election inspectors," they "called those errors to the attention of supervisors, and were satisfied that the supervisors had corrected the error and explained proper procedure to the election inspectors." App'x 3. Indeed, Mr. Jaffe "spoke with several Republican challengers who expressed their view, and in a couple of cases their surprise, that there were no material issues in the counting." *Id.* Although Mr. Jaffe "received very few reports of unresolved issues from Democratic challengers," he "did receive many reports of conduct by Republican or" Election Integrity Fund ("EIF") "challengers that was aggressive, abusive toward the elections inspectors," and "clearly designed to obstruct and delay the counting of votes." App'x 3-7, 12-13. And although election officials attempted to maintain social distancing and other preventative

[2] Proposed Intervenor-Defendant Michigan Democratic Party submitted the attached affidavits of David Jaffe, Donna MacKenzie, and Joseph Zimmerman along with its opposition to the plaintiffs' motion for preliminary relief in *Costantino v City of Detroit*, No. 20-014780-AW (Mich Cir Ct, Nov 11, 2020), another challenge to Wayne County's vote tabulation and election returns currently pending in state court. The court in that case credited the testimony offered in these affidavits in denying the plaintiffs' requested relief. See *Costantino v City of Detroit*, No 20-014780-AW, slip op at 12 (Mich Cir Ct, Nov 13, 2020) (App'x ##); see also *Costantino v City of Detroit*, No. 355443, slip op at 1 (Mich Ct App, Nov 16, 2020) (App'x ##) (denying motion for peremptory reversal and application for leave to appeal); *Costantino v City of Detroit*, No. 162245, slip op at 1 (Mich, Nov 23, 2020) (App'x ##) (similar).

measures to curb the potential transmission of COVID-19, Mr. Jaffe "observed that Republican and EIF challengers repeatedly refused to maintain the mandated distance from the elections inspectors." App'x 5. Consequently, some "Republican or EIF challengers were removed from the room after intimidating and disorderly conduct, or filming in the counting room in violation of the rules." App'x 6.

Mr. Jaffe concluded that "while some of the Republican challengers were there in good faith, attempting to monitor the procedure, the greater number of Republican and EIF challengers were intentionally interfering with the work of the elections inspectors so as to delay the count of the ballots and to harass and intimidate election inspectors." App'x 6. Indeed, Joseph Zimmerman, a credentialed challenger on behalf of the Lawyers Committee for Civil Rights Under Law, observed Republican challengers "discussing a plan to begin challenging every single vote on the grounds of 'pending litigation'" and then "repeatedly challenging the counting of military ballots for no reason other than 'pending litigation.'" App'x 17.

B. The Lawsuits

Despite widespread acknowledgement that no fraud occurred, see, e.g., Nick Corasaniti et al., *The Times Called Officials in Every State: No Evidence of Voter Fraud*, N.Y. Times (Nov 10, 2020), https://www.nytimes.com/2020/11/10/us/politics/voting-fraud.html; *Joint Statement from Elections Infrastructure Government Coordinating Council & the Election Infrastructure Sector Coordinating Executive Committees*, Cybersecurity & Infrastructure Sec. Agency (Nov 12, 2020), https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election ("The November 3rd election was the most secure in American history."), multiple lawsuits have been filed in Michigan in an attempt to sow confusion and cast doubt on the legitimacy of the election—including a lawsuit filed by Petitioner Angelic Johnson in the US District Court for the Western District of Michigan just two weeks ago. All have failed

or been dismissed. In Johnson's federal court case, for example, which featured many of the same claims now raised here, the plaintiffs sought to enjoin the State from certifying Michigan's results "until an independent audit to ensure the accuracy and integrity of the election is performed" or some other judicially imposed review is completed. See Compl, *Johnson v Benson*, No. 1:20-cv-01098-JTN-PJG (WD Mich, Nov 18, 2020) (App'x 19). There, after Proposed Intervenors moved to intervene with an accompanying motion to dismiss, see Proposed Intervenor-Defs' Mot to Intervene, *Johnson v Benson*, No. 1:20-cv-01098-JTN-PJG (WD Mich, Nov 18, 2020) (App'x 45); Proposed Intervenor-Defs' Mot to Dismiss, *Johnson v Benson*, No. 1:20-cv-01098-JTN-PJG (WD Mich, Nov 18, 2020) (App'x 64), the *Johnson* plaintiffs voluntarily dismissed their action, see Pls' Voluntary Dismissal, *Johnson v Benson*, No. 1:20-cv-01098-JTN-PJG (WD Mich, Nov 18, 2020) (App'x 102). Although she and her fellow plaintiffs dropped the federal lawsuit in the face of that motion to dismiss and before waiting to see how the State certification process played out, Johnson, apparently dissatisfied with the State Board's decision, now turns to this Court to undo certification.

Other challenges to Michigan's returns—raising yet further iterations of the same general (and unsubstantiated) allegations brought in the other lawsuits, including this one—were also filed in federal court, some of which were similarly abandoned. See Compl for Declaratory, Emergency, & Permanent Injunctive Relief, *Donald J Trump for President, Inc v Benson*, No. 1:20-cv-01083-JTN-PJG (WD Mich, Nov 17, 2020) (App'x 105); Verified Compl for Declaratory & Injunctive Relief, *Bally v Whitmer*, No. 1:20-cv-01088-JTN-PJG (WD Mich, Nov 11, 2020) (App'x 136). In the Trump Campaign's lawsuit, Proposed Intervenors were granted intervention. See *Donald J Trump for President, Inc v Benson*, No. 1:20-cv-01083-JTN-PJG, slip op at 5 (WD Mich, Nov 17, 2020) (App'x 164). After the court set a briefing schedule on Proposed Intervenors' motion to

dismiss, see *id.* at 6; see also Proposed Intervenor-Defs' Mot to Dismiss, *Donald J Trump for President, Inc v Benson*, No. 1:20-cv-01083-JTN-PJG (WD Mich, Nov 14, 2020) (App'x 170)—which raised many of the same arguments that Proposed Intervenors now assert here, see Ex. 1—the Trump Campaign voluntarily dismissed its suit, see Notice of Voluntary Dismissal, *Donald J Trump for President, Inc v Benson*, No. 1:20-cv-01083-JTN-PJG (WD Mich, Nov 19, 2020) (App'x 207). In *Bally*, the plaintiffs voluntarily dismissed their complaint within a week of filing. See Notice of Voluntary Dismissal, *Bally v Whitmer*, No. 1:20-cv-01088-JTN-PJG (WD Mich, Nov 11, 2020) (App'x 208). The latest in this string of federal cases was filed just days ago and is even more frivolous and utterly implausible than the ones before it, asserting claims rooted in (among many other things) an alleged "criminal conspiracy to manipulate Venezuelan elections in favor of dictator Hugo Chavez." Compl for Declaratory, Emergency, and Permanent Injunctive Relief, *King v Whitmer*, No. 2:20-cv-13134-LVP-RSW (ED Mich, Nov 25, 2020) (App'x 211).

Still more lawsuits raising similar claims have been filed and rejected in the state courts. In addition to its federal case, the Trump Campaign brought suit in the Michigan Court of Claims, where it sought an immediate cessation of the counting of absentee ballots based on allegations of insufficient oversight. See Verified Compl for Immediate Declaratory & Injunctive Relief, *Donald J Trump for President, Inc v Benson*, No. 20-000225-MZ (Mich Ct Cl, Nov 4, 2020) (App'x 286). The Court of Claims denied the Trump Campaign's emergency motion for declaratory relief, concluding that it was unlikely to succeed on the merits and that, even "overlooking the problems with the factual and evidentiary record," the matter had become moot because "the complaint and emergency motion were not filed until approximately 4:00 p.m. on November 4, 2020—despite being announced to various media outlets much earlier in the day." *Donald J Trump for President, Inc v Benson*, No. 20-000225-MZ, slip op at 5 (Mich Ct Cl, Nov 6, 2020) (App'x 297). The Trump

Campaign has since sought an appeal, see Mot for Immediate Consideration of Appeal Under MCR 7.211(C)(6), *Donald J Trump for President, Inc v Benson*, No. 355378 (Mich Ct App, Nov 6, 2020) (App'x 303), but has failed to correct numerous filing defects as requested by the Michigan Court of Appeals three weeks ago, see Appellate Docket Sheet, *Donald J Trump for President, Inc v Benson*, No. 355378 (Mich Ct App) (App'x 307).

Other challenges to Michigan's election procedures and results have been rejected as having no legal or factual merit. On election day, the Michigan Court of Claims denied an emergency motion to increase election oversight. See *Polasek-Savage v Benson*, No. 20-000217-MM, slip op at 3 (Mich Ct Cl, Nov 3, 2020) (App'x 311). And on November 6, the Third Judicial Circuit Court for Wayne County rejected an EIF-backed effort to delay certification of that County's ballots:

> This Court finds that it is mere speculation by plaintiffs that hundreds or thousands of ballots have, in fact, been changed and presumably falsified. . . .
>
> A delay in counting and finalizing the votes from the City of Detroit without any evidentiary basis for doing so, engenders a lack of confidence in the City of Detroit to conduct full and fair elections. The City of Detroit should not be harmed when there is no evidence to support accusations of voter fraud.

Stoddard v City Election Comm'n, No. 20-014604-CZ, slip op at 4 (Mich Cir Ct, Nov 6, 2020) (App'x 314); see also *Stoddard v City Election Comm'n*, No. 20-014604-CZ, order (Mich Cir Ct, Nov 13, 2020) (App'x 309) (granting DNC's motion to intervene).

MDP was granted intervention in another challenge to Wayne County's returns in the Third Judicial Circuit Court. See *Costantino v City of Detroit*, No. 20-014780-AW, slip op at 2 (Mich Cir Ct, Nov 13, 2020) (App'x 318). On November 13, the court denied the plaintiffs' motion for preliminary injunction in that case. After discounting affidavits reporting vague allegations of

suspicious conduct at TCF Center and concluding that the "[p]laintiffs' interpretation of events is incorrect and not credible," the court observed that

> [i]t would be an unprecedented exercise of judicial activism for this Court to stop the certification process of the Wayne County Board of Canvassers. . . .
>
> Waiting for the Court to locate and appoint an independent, nonpartisan auditor to examine the votes, reach a conclusion and then finally report to the Court would involve untold delay. It would cause delay in establishing the Presidential vote tabulation, as well as all other County and State races. It would also undermine faith in the Electoral System.

Costantino v City of Detroit, No. 20-014780-AW, slip op at 11-13 (Mich Cir Ct, Nov 13, 2020) (App'x 320). The Michigan Court of Appeals later denied the plaintiffs' motion for peremptory reversal and application for leave to appeal the circuit court's order, see *Costantino v City of Detroit*, No. 355443, slip op at 1 (Mich Ct App, Nov 16, 2020) (App'x 333), and this Court then denied a further application for leave to appeal the decision of the Court of Appeals, see *Costantino v City of Detroit*, No. 162245, slip op at 1 (Mich, Nov 23, 2020) (App'x 334).

Petitioners have now filed yet another baseless lawsuit attempting to disrupt the democratic process. Proposed Intervenors move to intervene. DNC is a national political committee as defined in 52 U.S.C. § 30101 that is, among other things, dedicated to electing local, state, and national candidates of the Democratic Party in Michigan. MDP is the Democratic Party's official state party committee for the State of Michigan, and its mission is to elect Democratic Party candidates to offices across Michigan, up and down the ballot. Both seek intervention on their own behalf and on behalf of their members, candidates, and voters.

ARGUMENT

Proposed Intervenors seek to intervene in this action under MCR 2.209(A) or, alternatively, under MCR 2.209(B). Those rules state, in relevant part:

> (A) **Intervention of Right.** On timely application a person has a right to intervene in an action . . . (3) when the applicant claims an interest relating to the property or

> transaction which is the subject of the action and is so situated that disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless applicant's interest is adequately represented by existing parties.
>
> (B) **Permissive Intervention.** On timely application a person may intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common.

"The rule for intervention should be liberally construed to allow intervention where the applicant's interests may be inadequately represented." *Neal v Neal*, 219 Mich App 490, 492; 557 NW2d 133 (1996); accord *State Treasurer v Bences*, 318 Mich App 146, 150; 896 NW2d 93 (2016). Because Proposed Intervenors' participation is necessary for a full and fair adjudication and resolution of this case, the Court should allow them to intervene as defendants.

A. Proposed Intervenors should be granted intervention as a matter of right.

Here, Proposed Intervenors readily satisfy the requirements for intervention as of right under MCR 2.209(A). MCR 2.209(A)(3) requires (1) timely application, (2) a determination whether "disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest," and (3) inadequate representation of the applicant's interests by existing parties. *Oliver v State Police Dep't*, 160 Mich App 107, 115; 408 NW2d 436 (1987).

1. This motion is timely.

Although Michigan courts have not defined any particular factors to analyze the timeliness of an intervention motion, the Michigan Court of Appeals has held that a motion to intervene was timely when filed "before any proceedings or discovery had been taken." *Karrip v Twp of Cannon*, 115 Mich App 726, 731; 321 NW2d 690 (1982). Moreover, because MCR 2.209 is similar to Federal Rule of Civil Procedure 24, it is proper to look to the federal courts for guidance. *D'Agostini v Roseville*, 396 Mich 185, 188; 240 NW2d 252 (1976). The Sixth Circuit weighs the following five factors in determining whether an intervention is timely:

(1) the stage of the proceedings;

(2) the purpose of the intervention;

(3) the length of time between when the proposed intervenor knew (or should have known) about his interest and the motion;

(4) the prejudice to the original parties by any delay; and

(5) any unusual circumstances militating in favor of or against intervention.

Jansen v Cincinnati, 904 F2d 336, 340 (CA 6, 1990).

These proceedings have just begun. Defendants have not even filed their answer. Proposed Intervenors are therefore positioned to participate fully throughout the entire case. Moreover, Proposed Intervenors have a compelling interest in ensuring expeditious resolution of these disputed issues, and they seek to intervene to protect against irreparable harm to themselves and to safeguard their members' fundamental rights. This is unquestionably a "legitimate" purpose, and this is a case where "the motion to intervene was timely in light of the stated purpose for intervening." *Kirsch v Dean*, 733 F App'x 268, 275 (CA 6, 2018) (quoting *Linton ex rel Arnold v Comm'r of Health & Env't*, 973 F2d 1311, 1318 (CA 6, 1992)). And Proposed Intervenors have filed as promptly as possible upon learning about this action; they have not delayed or adopted a wait-and-see approach. Because Proposed Intervenors are requesting permission to participate from the very beginning, there is no possible delay or prejudice. Proposed Intervenors will, of course, adhere to any scheduling order or briefing schedule issued by the Court. Thus, no party can seriously contest this motion's timeliness.

2. Proposed Intervenors have sufficient interests that may be impaired by the disposition of this case.

The next element "requires a determination whether disposition of the action may as a practical matter impair or impede the applicant's ability to protect his interests." *Oliver*, 160 Mich

App at 115 (quotation marks and alterations omitted). The requirement is not an onerous one. See *Purnell v Akron*, 925 F2d 941, 948 (CA 6, 1991) (holding applicant need not demonstrate "that impairment will inevitably ensue from an unfavorable disposition; the would-be intervenors need only show that the disposition may impair or impede their ability to protect their interest"). "[C]lose cases should be resolved in favor of recognizing an interest." *Grutter v Bollinger*, 188 F3d 394, 399 (CA 6, 1999) (interpreting analogous Federal Rule 24(a)).

Courts have routinely granted Proposed Intervenors and other political parties intervenor status where the requested relief could impact the political party's electoral prospects, candidates, or voters. See, e.g., *Paher v Cegavske*, No. 20-cv-00243, 2020 WL 2042365, p *4 (D Nev, April 28, 2020) (granting DNC and other Democratic Party entities intervention in election law case brought by conservative interest group); *Parnell v Allegheny Bd of Elections*, No. 20-cv-01570 (WD Pa, Oct 22, 2020) (App'x 341) (granting intervention to Democratic Congressional Campaign Committee in lawsuit regarding processing of ballots); *Mi Familia Vota v Hobbs*, No. CV-20-01903-PHX-SPL, 2020 WL 5904952, p *1 (D Ariz, Oct 5, 2020) (granting Republican National Committee and National Republican Senatorial Committee intervention in challenge to Arizona voter registration deadline); *Donald J Trump for President v Bullock*, No. 20-cv-66, 2020 WL 5810556, p *2 (D Mont, Sept 30, 2020) (granting DCCC, DSCC, and Montana Democratic Party intervention in lawsuit by four Republican party entities); *Cook Co Republican Party v Pritzker*, No. 20-cv-4676, 2020 WL 5573059, p *2 (ND Ill, Sept 17, 2020) (granting DCCC intervention in lawsuit by Republican party entity); *Donald J Trump for President, Inc v Way*, No. 20-cv-10753, 2020 WL 5229209, p *1 (DNJ, Sept 1, 2020) (granting DCCC intervention in lawsuit by Republican candidate and party entities); *Issa v Newsom*, No. 20-cv-01044, 2020 WL 3074351, p *3 (ED Cal, June 10, 2020) (granting DCCC and California Democratic Party intervention in

lawsuit by Republican congressional candidate); *Nielsen v DeSantis*, No. 4:20cv236-RH-MJF (ND Fla, May 28, 2020) (App'x 352) (granting three Republican Party organizations intervention in challenge to Florida voting laws); *Priorities USA v Nessel*, No. 19-13341, 2020 WL 2615504, p *5 (ED Mich, May 22, 2020) (granting Republican National Committee and Michigan Republican Party intervention in challenge to Michigan's absentee voter law); *Democratic Nat'l Comm v Bostelmann*, No. 20-cv-249-wmc, 2020 WL 1505640, p *1 (WD Wis, Mar 28, 2020) (granting Republican National Committee and Republican Party of Wisconsin intervention in challenge brought by Democratic Party organizations); see also, e.g., *Tex Democratic Party v Benkiser*, 459 F3d 582, 586-587 (CA 5, 2006) (recognizing "harm to [] election prospects" constitutes "a concrete and particularized injury"); *Owen v Mulligan*, 640 F2d 1130, 1132 (CA 9, 1981) (holding "the potential loss of an election" is sufficient injury to confer Article III standing).

Moreover, Petitioners' requested relief of undoing the certification process threatens Proposed Intervenors' members' right to vote. "[T]o refuse to count and return the vote as cast [is] as much an infringement of that personal right as to exclude the voter from the polling place." *United States v Saylor*, 322 US 385, 387-388; 64 S Ct 1101; 88 L Ed 1341 (1944). In turn, the disruptive and potentially disenfranchising effects of Petitioners' action would require Proposed Intervenors to divert resources to safeguard the certification of statewide results, thus implicating another of their protected interests. See, e.g., *Crawford v Marion Co Election Bd*, 472 F3d 949, 951 (CA 7, 2007) (concluding electoral change "injure[d] the Democratic Party by compelling the party to devote resources" that it would not have needed to devote absent new law), aff'd, 553 US 181; 128 S Ct 1610; 170 L Ed 2d 574 (2008); *Democratic Nat'l Comm v Reagan*, 329 F Supp 3d 824, 841 (D Ariz, 2018) (finding standing where law "require[d] Democratic organizations . . . to

retool their [get-out-the-vote] strategies and divert [] resources"), rev'd on other grounds sub nom *Democratic Nat'l Comm v Hobbs*, 948 F3d 989 (CA 9, 2020) (en banc).

3. No current party adequately represents Proposed Intervenors' interests.

The final requirement for intervention under MCR 2.209(A)(3) is a "showing that the representation of the applicant's interests by existing parties is or may be inadequate." *Oliver*, 160 Mich App at 115. The burden of demonstrating inadequate representation is "minimal." *Karrip*, 115 Mich App at 731-732. The moving party need not "definitely establish[]" inadequate representation; mere concern suffices. *Vestevich v West Bloomfield Twp*, 245 Mich App 759, 761-762; 630 NW2d 646 (2001). And where such "concern exists, the rules of intervention should be construed liberally in favor of intervention." *Id.* Put differently, MCR 2.209(A)(3) "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *D'Agostini*, 396 Mich at 188-189, quoting *Trbovich v United Mine Workers*, 404 US 528, 538 n 10; 92 S Ct 630; 30 L Ed 2d 686 (1972).

No current party adequately represents Proposed Intervenors' interests. While Defendants have an interest in defending the actions of state officials, Proposed Intervenors have different objectives: ensuring that the valid ballot of every Democratic voter in Michigan is counted and safeguarding the election of Democratic candidates. Courts have "often concluded that governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals, Inc v Norton*, 322 F3d 728, 736 (CA DC, 2003); accord *Citizens for Balanced Use v Mont Wilderness Ass'n*, 647 F3d 893, 899 (CA 9, 2011) ("[T]he government's representation of the public interest may not be 'identical to the individual parochial interest' of a particular group just because 'both entities occupy the same posture in the litigation.'" (quoting *WildEarth Guardians v US Forest Serv*, 573 F3d 992, 996 (CA 10, 2009))). That is the case here. Proposed Intervenors have specific interests and concerns—from their overall electoral prospects to the most efficient

use of their limited resources—that neither Defendants nor any other party in this lawsuit share. See *Paher*, 2020 WL 2042365, at *3 (granting intervention as of right where proposed intervenors "may present arguments about the need to safeguard [the] right to vote that are distinct from [state defendants'] arguments"). As one court recently explained under similar circumstances,

> [w]hile Defendants' arguments turn on their inherent authority as state executives and their responsibility to properly administer election laws, the Proposed Intervenors [including a state political party] are concerned with ensuring their party members and the voters they represent have the opportunity to vote in the upcoming federal election, advancing their overall electoral prospects, and allocating their limited resources to inform voters about the election procedures. As a result, the parties' interests are neither "identical" nor "the same."

Issa, 2020 WL 3074351, at *3 (citation omitted). Because Proposed Intervenors' particular interests are not shared by the present parties, they cannot rely on Defendants or anyone else to provide adequate representation. They have thus satisfied the four requirements for intervention as of right. See *id.* at *3-4; *Paher*, 2020 WL 2042365, at *3.

B. Alternatively, Proposed Intervenors should be granted permissive intervention.

In the alternative, Proposed Intervenors should be granted permissive intervention under MCR 2.209(B)(2). That rule provides for permissive intervention where a party timely files a motion and the party's "claim or defense and the main action have a question of law or fact in common." MCR 2.209(B)(2). A court "has a great deal of discretion in granting or denying [permissive] intervention." *Mason v Scarpuzza*, 147 Mich App 180, 187; 383 NW2d 158 (1985). As discussed above, Proposed Intervenors' motion is timely. And Proposed Intervenors will undoubtedly raise common questions of law and fact in opposing Petitioners' suit.

CONCLUSION

For the foregoing reasons, Proposed Intervenors respectfully ask this Court to grant its motion to intervene.

Dated this 30th day of November, 2020.

Respectfully submitted,

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