

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

DONALD J. TRUMP FOR
PRESIDENT, INC., REPUBLICAN
NATIONAL COMMITTEE, NEW
JERSEY REPUBLICAN STATE
COMMITTEE,

Plaintiffs,

v.

PHILIP D. MURPHY, in his official
capacity as Governor of New Jersey,
TAHESHA WAY, in her official
capacity as Secretary of State of New
Jersey,

Defendants.

No. 3:20-cv-10753-MAS-ZNQ

**NOTICE OF MOTION TO
INTERVENE PURSUANT TO
RULE 24**

PLEASE TAKE NOTICE THAT, upon the accompanying memorandum of law, the certification of B. John Pendleton, Jr. and the exhibits attached thereto, and all other pleadings and proceedings in this action, Defendant-Intervenors League of Women Voters of New Jersey and NAACP New Jersey State Conference, by and through their undersigned counsel, will move this Court on October 5, 2020, or as soon as counsel may be heard, before the Honorable United States District Judge Michael A. Shipp, located at Clarkson S. Fisher Building & U.S. Courthouse, 402 East State Street, Trenton, NJ 08608, Courtroom 5W, for an

Order granting Proposed Defendant-Intervenors' motion to intervene, granting the relief set forth in Proposed Defendant-Intervenors' accompanying proposed order, and granting such other and further relief that the Court deems proper. Proposed Defendant-Intervenors request oral argument on this motion.

Dated: August 31, 2020

/s/ B. John Pendleton, Jr.

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**THE UNITED STATES DISTRICT COURT
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as Governor of New Jersey, TAHESHA
WAY, in her official capacity as Secretary of
State of New Jersey,

Defendants.

No. 3:20-cv-10753-MAS-ZNQ

**MEMORANDUM OF LAW IN SUPPORT OF LEAGUE OF WOMEN VOTERS OF
NEW JERSEY AND NAACP NEW JERSEY STATE CONFERENCE'S MOTION TO
INTERVENE**

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** Motion for admission pro hac vice forthcoming*

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Pursuant to Federal Rule of Civil Procedure 24, the League of Women Voters of New Jersey (“LWVNJ”) and the NAACP New Jersey State Conference (“NJ NAACP”) respectfully move to intervene as Defendants in the above-captioned action. For the reasons stated below, the Court should grant this motion.

FACTUAL BACKGROUND

LWVNJ is a membership organization, which has been dedicated to promoting civic engagement and protecting democracy through advocacy and voter education, assistance, and engagement for more than one hundred years. Part of LWVNJ’s mission is to expand access to voting and to ensure its members and the members of the broader communities it serves have access to safe and effective means of casting a ballot. LWVNJ’s work includes promoting voter registration and assisting members and others to register to vote; providing information to the community about upcoming elections and voting options; and encouraging its members and other eligible voters to get out and vote.¹LWVNJ has about 1,450 members across the state, many of whom intend to cast their ballot by mail.

NJ NAACP is an affiliate of the National Association for the Advancement of Colored People, the largest civil rights organization in the nation. The mission of the

¹See, e.g., Eric Keifer, *League Of Women Voters Of Montclair Issues Election Reminders*, PATCH.COM (Aug. 20, 2020), <https://patch.com/new-jersey/montclair/league-women-voters-montclair-issues-election-reminders> (providing a timeline of important election dates and information through the Montclair Chapter of the LWVNJ).

NJ NAACP is to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate racial discrimination. In support of that mission, NJ NAACP promotes civic engagement and political participation of its members and their communities, including by providing education about voting options, including vote by mail. The NJ NAACP has approximately 7,000 active members across the state, many of whom intend to cast their ballot by mail.

Since the beginning of the COVID-19 crisis, LWVNJ and NJ NAACP have engaged in consistent voter education efforts to encourage its members and the larger electorate to make plans to vote in a safe and effective manner, including voting by mail. LWVNJ and NJ NAACP have advocated on behalf of their members to the State of New Jersey to expand access to vote-by-mail in light of the pandemic. Specifically, both have repeatedly urged the Governor—prior to the primary election and for this upcoming general election—to safeguard voters’ access to the ballot during the COVID-19 pandemic by mailing ballots to all voters. *See* Certification of B. John Pendleton, Jr. in Support of Proposed Defendant-Intervenors League of Women Voters of New Jersey and NAACP New Jersey State Conference’s Motion to Intervene (“Pendleton Cert.”), Exs. 1-2 (April 27 and August 7, 2020 letters to the Governor: “All voters should have ballots mailed to them.”).

On August 14, 2020, New Jersey Governor Phil Murphy issued Executive Order No. 177, outlining an emergency election plan in light of the ongoing COVID-

19 crisis—the worst pandemic in nearly a century that has killed nearly 16,000 New Jerseyans in only six months. Among other provisions, the executive order called for vote-by-mail ballots to be sent to all active registered voters in the state. LWVNJ and NJ NAACP supported the executive order when it was issued, and have already worked to educate New Jersey voters about the executive order, assuring members that active voters need not apply to receive a mail-in ballot. LWVNJ and NAACP continue to encourage them to make a voting plan ahead of Election Day, and to vote-by-mail if they are concerned that voting in person would expose them to COVID-19.² Given the publicity received by the executive order, as well as

²See *Institute and League of Women Voters of NJ Respond to Gov. Murphy's General Election Plan*, INSIDER NJ (Aug 15, 2020), <https://www.insidernj.com/press-release/institute-league-women-voters-nj-respond-gov-murphys-general-election-plan/>; New Brunswick Area NAACP, *Check Your Voter Registration Status*, FACEBOOK (Aug. 27, 2020), https://www.facebook.com/new.naacp/?hc_ref=ARR-KHZEwrZY8Ptam53dHcrpsWWJZ1XARJISN8XEwIFSNO6v3MvoYRBkx4AVsCl-vm8&fref=nf&__xts__%5B0%5D=68.ARCj0z7N8YIDc5cBbOCw-Wn_a7dKdOkfmxvyHsEBIbwyIc65skkqHRbRKFyEi__qaag8210JbU1CwQezoI7_ScIISL6jwQr7kAiGTd09bLesJrFidxR-slwypkYg89HhWdhikvq-CLqCtDpCk9zH6V3VYguZxH6M4igKrraEGL5J-DrXNh-7t_qiqIREwlmVz74M_b-120QBCm418Pw-H_F05LXSKDXTs7ZQfQvkSzmYA3iUdEKjmdRFLIP1d0RyPi40v20w9m1TRGveJ5_d9CidVDqkcZVGzBDJvawialVQvOwB6ZDXdteSBUZgUp_WDs-DF7MTysDvCE16C_QgKXtBQ&__tn__=kC-Rl (“It is important to make sure your status is ‘active’ because only active voters will be automatically sent vote-by-mail ballots.”); Newark NAACP, *The November 3rd Election Will be Primarily Vote-By Mail*, FACEBOOK (Aug. 15, 2020, 8:53 AM), https://www.facebook.com/NewarkNJNAACP/?hc_ref=ARQ1MGZVAtkF0WzZbPz-12dzCpyX7LaWh-GntUbFB7WpsloRzTzt9ALEd4ef4JybpvQ&fref=nf&__xts__%5B0%5D=68.ARDJGjiYsE9aamLdGCkFlcorzjB3wa-3XJ7VBoQTQOFRLm8kwaZGCBLPGJLg2GKwvk6I66ETEQUION_XgmLc3dEKsVYlthJ9whgH5NQ-7FeE51jzIUC8L4lpk6Q-WVillodxVxlVAd_iQNj_wHcqEOpqz8LZoe2t6ranuvD2iMxl1HJ5Glyf6DXQFRgf1YacHYg_z4

LWVNJ's and NJ NAACP's own voter education efforts, members of both organizations have changed their plans and no longer intend to apply for a mail-in ballot because they know one will be sent to them automatically.

On August 18, 2020, Plaintiffs filed the present action against the Governor and the Secretary of State of New Jersey, alleging that the Governor's executive order violates state and federal law. Dkt. No. 1. Plaintiffs seek to enjoin enforcement of the order, which threatens to curtail LWVNJ and NJ NAACP members' access to vote by mail during the COVID-19 pandemic, confuse members that believe they will receive their ballot automatically, undermine LWVNJ's and NJ NAACP's voter education efforts thus far, and require LWVNJ and NJ NAACP to divert substantial resources to attempt to alleviate voter confusion.

LWVNJ and NJ NAACP seek to intervene as Defendants in this litigation. Two other entities have already sought to intervene—the Atlantic County Democratic Committee (“ACDC”) and the Democratic Congressional Campaign Committee (“DCCC”) (collectively, the “Proposed Intervenor Defendants”). Their motions are pending. LWVNJ and NJ NAACP sought the Plaintiffs' and other Proposed Intervenor Defendants' position on this motion on Friday, August 28.

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Pendleton Cert. ¶ 3. The Proposed Intervenor Defendants are not opposed to the motion. *Id.* Plaintiffs, however, oppose the motion. *Id.* LWVNJ and NJ NAACP have not sought the position of Defendants because counsel for Defendants have not yet appeared in this matter.

LWVNJ and NJ NAACP are entitled to intervene as of right under Rule 24(a) as the present litigation poses a significant threat to their interests, and those interests are not adequately represented by the existing defendants in this case. In the alternative, LWVNJ and NJ NAACP request that this Court permit them to intervene pursuant to its discretion under Rule 24(b).

LEGAL ARGUMENT

I. League of Women Voters of New Jersey and NAACP New Jersey State Conference Are Entitled to Intervene as of Right Pursuant to Rule 24(a).

Pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, LWVNJ and NJ NAACP are entitled to intervene of right. Rule 24 entitles a party to intervene as of right if: (1) the application is timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter by the disposition of the action; and (4) the interest is not adequately represented by an existing party in the litigation. *Commonwealth of Pennsylvania v. President United States of Am.*, 888 F.3d 52, 57 (3d Cir. 2018). Under this standard, the “facts assume overwhelming importance in each decision.” *Id.* at 58. Rule 24(a) is to be liberally

construed in favor of intervention. *N.L.R.B. v. Frazier*, 144 F.R.D. 650, 655 (D.N.J. 1992).

A. LWVNJ and NJ NAACP’s Motion to Intervene is Timely.

LWVNJ and NJ NAACP’s motion to intervene is timely. The Third Circuit uses three factors to determine whether a motion to intervene is timely: (1) how far the proceedings have gone when the movant seeks to intervene, (2) the prejudice which resultant delay might cause to other parties, and (3) the reason for the delay. *Benjamin ex rel. Yock v. Department of Public Welfare of Pennsylvania*, 701 F.3d 938, 949 (3d Cir. 2012). “There is a general reluctance to dispose of a motion to intervene as of right on untimeliness grounds because the would-be intervenor actually may be seriously harmed if not allowed to intervene.” *Id.*

Here, LWVNJ and NJ NAACP did not delay in seeking to intervene. First, the proceedings are in the beginning stages, having only been filed two weeks prior to this motion to intervene. Plaintiffs filed their complaint on August 18, 2020. Dkt. No. 1. ACDC and DCCC filed their motions to intervene on August 21, 2020 and August 24, 2020, respectively, and those motions remain pending. Dkt. Nos. 9, 10. LWVNJ and NJ NAACP filed this motion on Monday, August 31, 2020, only a few days later. Plaintiffs have not filed any motions for relief yet in this case or taken any steps to further the action.

Second, no prejudice would result to the other parties if LWVNJ and NJ NAACP are granted intervention. The original State Defendants are not harmed by LWVNJ and NJ NAACP's intervention because they have not answered Plaintiffs' complaint as of the filing of this motion. None of the original parties have filed any dispositive motions since Plaintiffs initiated the case. Likewise, ACDC and DCCC filed motions to intervene merely days before LWVNJ and NJ NAACP filed their own, and therefore ACDC and DCCC will not be harmed by LWVNJ and NJ NAACP's prompt intervention.

Finally, LWVNJ and NJ NAACP filed its motion promptly after becoming aware of the litigation. LWVNJ and NJ NAACP decided to intervene soon after—upon realizing that the existing parties could not adequately represent their interests nor the interests of their members—retained counsel, and filed this motion as expeditiously as possible. *See Benjamin*, 701 F.3d at 950 (finding that any “delay should be measured from the time the proposed intervenor knows or should have known of the alleged risks to his or her rights or the purported representative's shortcomings”). LWVNJ and NJ NAACP did not delay in filing this motion to intervene. Therefore, the motion to intervene is timely.

B. LWVNJ and NJ NAACP’s Interests Will Be Substantially Impaired If Plaintiffs Prevail.

In order to demonstrate a “sufficient interest in the litigation,” a putative intervenor must show that its interest is “significantly protectable.” *Commonwealth of Pennsylvania v. President United States of Am.*, 888 F.3d 52, 57–58 (3d Cir. 2018) (citing *Donaldson v. United States*, 400 U.S. 517, 531 (1971)). To do so, the intervenor must show that its interest is “specific to [the intervenor], is capable of demonstration, and will be directly affected in a substantially concrete fashion by the relief sought.” *Id.* at 58.

LWVNJ and NJ NAACP’s interest in defending the executive order in this litigation is specific to their missions to expand access to voting and promoting civic engagement by, *inter alia*, encouraging voters to vote by mail if they do not want to expose themselves to COVID-19 by voting in person. LWVNJ and NJ NAACP have protectable interests in safeguarding the Governor’s executive order—which makes voting by mail easier for their members and communities—as well as avoiding voter confusion and protecting the integrity of their voter education efforts thus far. Both LWVNJ and NJ NAACP advocated for executive action so that voters who otherwise would be reluctant to vote in person during a pandemic are able to vote by mail. Specifically, LWVNJ and NJ NAACP advocated for a plan—like that outlined in the Executive Order—that expanded New Jersey voters’ access to vote-by-mail

in a timely manner. LWVNJ and NJ NAACP have advocated for their members and community members to vote by mail, have worked to educate them on the process for doing so under the executive order, and have encouraged their members to make a voting plan. As such, LWVNJ's and NJ NAACP's members are expecting to receive their ballots in the mail directly and therefore do not plan to apply for mail-in ballots. LWVNJ and NJ NAACP have an interest in protecting their members' access to those ballots.

Many of LWVNJ's 1,450 members and NJ NAACP's 7,000 members are active New Jersey voters who have already made plans to vote by mail under the executive order. Additionally, many of LWVNJ's and NJ NAACP's members are immunocompromised, elderly, caretakers, or otherwise considered high-risk. A recent analysis found that, in each county in New Jersey, Black or Latino communities had the highest rates of coronavirus.³ The actual toll on communities of color in New Jersey is likely worse than reported, as evidence shows that death rates of Black, Hispanic, and Asian people in New Jersey this year—of all causes—are significantly higher than normal.⁴ LWVNJ and NJ NAACP members that are in

³Richard A. Oppel Jr., et al., *The Fullest Look Yet at the Racial Inequity of Coronavirus*, NY TIMES (July 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html>.

⁴Anna Flagg, et al., *COVID-19's Toll on People of Color Is Worse Than We Knew*, THE MARSHALL PROJECT (August 21, 2020; 12:22 PM), <https://www.themarshallproject.org/2020/08/21/covid-19-s-toll-on-people-of-color-is-worse-than-we-knew>.

these demographics are acutely affected by the potential changes to New Jersey's election rules should Plaintiffs prevail, because they will be forced to change their plans last minute, and some members may decide not to vote at all if they must vote in person and risk exposure to COVID-19. Finally, voters who planned to vote by mail, and are expecting to receive their ballots in the mail, risk being disenfranchised entirely if that option is eliminated. As such, the outcome of this litigation directly affects the ability of LWVNJ and NJ NAACP to carry out their specific goals of ensuring their members and community members can vote in a safe and effective manner.

Further, LWVNJ and NJ NAACP's interests in voter education and advocacy are also impacted by Plaintiffs' efforts to enjoin enforcement of the executive order. If Plaintiffs prevail, not only will the result of LWVNJ's and NJ NAACP's advocacy be reversed, and not only may LWVNJ and NJ NAACP members be forced to choose between protecting their health and exercising their right to vote,⁵ but LWVNJ's and NJ NAACP's voter education efforts on the executive order will have

⁵Contrary to Plaintiffs' callous misrepresentations in the Complaint, the health and safety of all New Jerseyans is *still* at risk from the COVID-19 pandemic—especially that of the immunocompromised, elderly, and minorities—many of whom are members of LWVNJ and NJ NAACP. Indeed, earlier this month, the rate of transmission in New Jersey surged to 1.32, a dangerous level at which the virus will spread quickly and widely. Dan Stamm, *NJ Reports 7-Month-Old COVID-19 Death: Gov. Focusing on Slowing Spread*, NBC PHILADELPHIA (August 5, 2020), <https://www.nbcphiladelphia.com/news/coronavirus/watch-gov-murphy-addresses-spread-of-coronavirus-in-new-jersey/2491914/>.

been counterproductive. And they will have little time to inform voters that the rules for voting have changed, and to ensure that they are not disenfranchised because of the changes effected by the litigation. If Plaintiffs prevail, LWVNJ and NJ NAACP will be forced to divert scarce resources away from their ongoing voter registration and engagement efforts towards combating the confusion that is sure to arise among voters who expected to receive their ballot in the mail, as they have done in both the May local elections and the July primary elections.

LWVNJ and NJ NAACP's interests are "specifically protectable" by LWVNJ and NJ NAACP alone, and they properly seek to defend those interests through intervention. Indeed, chapters of LWV have previously been permitted to intervene in voting rights actions in order to safeguard its members' interests. *See, e.g., Virginia Voter's Alliance, Inc. et al v. Leider*, No. 1:16-cv-00394-LMB-MSN (E.D.Va. June 16, 2016), Dkt. 23 (granting intervention in action concerning the purging of voter rolls in Alexandria, Virginia).

"The polestar for evaluating a claim for intervention is always whether the proposed intervenor's interest is direct or remote." *Keissler v. U.S. Forest Service*, 157 F.3d 964, 972 (3d Cir. 1998). Here, where Plaintiffs' requested relief would curtail LWVNJ's and NJ NAACP's members' access to their mail-in ballots, reverse the fruits of their advocacy, and undermine their voter education efforts thus far and

require the diversion of more resources to address voter confusion, the proposed intervenors' interests are certainly direct.

C. No Existing Defendant Can Adequately Represent LWVNJ's and NJ NAACP's Interests in Their Absence.

LWVNJ's and NJ NAACP's interests diverge from those of all existing defendants, and their interests are inadequately represented as a result. "The possibility that the interests of the applicant and the parties may diverge 'need not be great,'" *Am. Farm Bureau Fed'n v. Env'tl. Prot. Agency*, 278 F.R.D. 98, 110 (M.D. Pa. 2011) (internal cite omitted), and a party's interest is not adequately represented if the interests "diverge sufficiently from the interests of the existing party, such that 'the existing party cannot devote proper attention to the applicant's interests.'" *Commonwealth of Pennsylvania*, 888 F.3d at 60 (internal cite omitted). Both the Supreme Court and this Circuit have held that "[t]he requirement of the Rule 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." *Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 368 (3d Cir. 1995) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972)); see also *Hoots v. Pennsylvania*, 672 F.2d 1133, 1135 (3d Cir. 1982).

Here, while LWVNJ and NJ NAACP obviously share some of the same interests as the State of New Jersey, their interests are far from identical to those of the State. Like the state in *Commonwealth of Pennsylvania*, the Governor and Secretary of State must defend “numerous complex and conflicting interests.” 888 F.3d at 60. Here, the government defendants must balance their interest in protecting the substance of challenged executive orders against a myriad of other interests, including litigating the boundaries of the governor’s executive authority. LWVNJ and NJ NAACP’s interests, however, are solely in ensuring that its members and the members of the communities it serves, particularly those that are often marginalized, have access to safe and effective means of casting a ballot and are not forced to choose between their health and their right to vote.⁶

As organizations devoted to civic engagement, LWVNJ and NJ NAACP will also have to divert substantial resources to renewed voter education if Plaintiffs prevail. And NJ NAACP in particular has an interest in representing the Black community’s particularized interests in safeguarding the executive order. Like the intervenors in *Commonwealth of Pennsylvania*, there is no guarantee that the government defendants will focus their litigation strategy on LWVNJ’s and NJ NAACP’s interests in expanding access to vote-by-mail and preventing voter

⁶See *Voting Rights and Good Government*, League of Women Voters, <https://www.lwvnj.org/issues-2/voting-rights>.

confusion for its members while, for example, defending its right to promulgate executive orders pursuant to its powers during a pandemic. *See id.* at 60. As the Third Circuit has recognized: “[W]hen an agency’s views are necessarily colored by its view of the public welfare rather than the more parochial views of a proposed intervenor whose interest is personal to it, the burden [of establishing inadequacy of representation] is comparatively light.” *Kleissler*, 157 F.3d at 972. The LWVNJ’s and NJ NAACP’s interests, therefore, diverge substantially from that of the State’s such that the State cannot adequately represent them in this matter.

Second, Proposed Intervenor Defendants ACDC and DCCC have starkly different interests than that of LWVNJ and NJ NAACP. LWVNJ and NJ NAACP are nonpartisan organizations, whose members span both political parties. LWVNJ’s and NJ NAACP’s organizational missions include the expansion of ballot access regardless of the outcome of any given election. The Proposed Intervenor Defendants, on the other hand, are partisan organizations, whose mission is to advance the interests of the Democratic Party. As nonpartisan, nonprofit organizations, LWVNJ and NJ NAACP cannot be adequately represented by the Proposed Intervenor Defendants whose goals are explicitly partisan. LWVNJ and NJ NAACP provide a non-partisan voter-centered perspective not represented by Defendants or the Proposed Intervenor Defendants.

II. In the Alternative, LWVNJ and NJ NAACP Request That This Court Grant Permissive Intervention Pursuant to Rule 24(b).

Rule 24(b) allows permissive intervention for any party who has a defense that shares a common question of law or fact with the main action. Fed. R. Civ. P. 24(b)(1)(B). Courts must consider “whether the delay will unduly delay or prejudice the adjudication of the rights of the original parties.” *Id.* “Whether to allow a party to permissively intervene is left to the sound discretion of the Court.” *Worthington v. Bayer Healthcare, LLC*, No. 11– 2793, 2011 WL 6303999, at *8 (D.N.J. Dec. 15, 2011).

Permissive intervention is appropriate here and has been granted in substantially similar circumstances. *See* Pendleton Cert., Ex. 3 (*Donald J. Trump for President v. Boockvar*, 2:20-cv-966, Doc. 309 (Aug. 3, 2020) (finding permissive intervention by League of Women Voters of Pennsylvania and NAACP Pennsylvania state conference under similar circumstances where intervention was filed within few weeks of initial complaint and intervenors sought to defend constitutionality of state’s election practices).

This motion to intervene is timely, and intervention would not unduly delay the present litigation. As discussed above, LWVNJ and NJ NAACP sought intervention before the original Defendants filed their answer, before any merits motions have been filed, and only days after the other Proposed Defendant-

Intervenors moved. As a result, LWVNJ and NJ NAACP's intervention will not delay the ongoing litigation in any way. Intervention will not prejudice the rights of the original parties, because the litigation is in the beginning stages.

Finally, LWVNJ and NJ NAACP's intended defense of the executive order shares a common question of law or fact with the main action, namely that the executive order does not violate the United States Constitution. Therefore, permissive intervention is appropriate, even if the Court determines LWVNJ and NJ NAACP are not entitled to intervention as of right (they are).

CONCLUSION

This litigation directly effects LWVNJ, NJ NAACP, and their members' interests in ensuring that New Jersey voters can vote in a safe and effective manner in the upcoming general election. Because they cannot be adequately represented by any of the existing defendants in this litigation, the LWVNJ and NJ NAACP respectfully request that the Court grant LWVNJ's and NJ NAACP's intervention as of right pursuant to Rule 24(a), or in the alternative permissive intervention pursuant to Rule 24(b).

Dated: August 31, 2020

/s/ B. John Pendleton, Jr.

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