UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

ONE WISCONSIN INSTITUTE, INC., CITIZEN ACTION OF WISCONSIN EDUCATION FUND, INC., RENEE M. GAGNER, ANITA JOHNSON, CODY R. NELSON, JENNIFER S. TASSE, SCOTT T. TRINDL and MICHAEL R. WILDER, Plaintiffs, v. JUDGE GERALD C. NICHOL, JUDGE ELSA LAMELAS, JUDGE THOMAS BARLAND, JUDGE HAROLD V. FROEHLICH, JUDGE TIMOTHY VOCKE, JUDGE JOHN FRANKE, KEVIN J. KENNEDY and MICHAEL HAAS, Defendants.	Case No. 3:15-cv-324

PLAINTIFFS' OPPOSITION TO MOTION TO INTERVENE

Plaintiffs in the above-captioned matter submit this opposition to the motion to intervene of Senator Van Wanggaard, Representative Kathy Bernier, Tim McCumber, Kathleen Novack, Ken Dragotta, and Ardis Cerny (collectively, "Proposed Intervenors"). Proposed Intervenors are not entitled to intervention as of right under Rule 24(a)(2) because they have failed to establish, by timely motion, that they have a legally protectable, direct interest that would be impeded or impaired by this action. And even if Proposed Intervenors had such an interest, they have failed to show that Defendants would not adequately represent that interest. Moreover, given the need for swift resolution of this case ahead of the November 2016 election and the delay, increased litigation costs, and unnecessarily complicated discovery that would inevitably result from the addition of Proposed Intervenors to the case, this Court should exercise its discretion under Rule 24(b)(1) to deny permissive intervention.

I. STATEMENT OF FACTS

Plaintiffs filed this action against eight members or staff of the Wisconsin Government Accountability Board ("GAB"), in their official capacities (collectively, "Defendants"), on May 29, 2015. *See* ECF No. 1. Plaintiffs filed an Amended Complaint on June 22, 2015. ECF No. 19 ("Am. Compl."). Plaintiffs allege that since 2011, the State of Wisconsin has enacted a number of provisions that "were intended to burden, abridge, and deny, and have had and will have the effect of burdening, abridging, and denying, the voting rights of Wisconsinites generally and of African-American, Latino, young, and/or Democratic voters in Wisconsin in particular." *Id.*, first intro. para. Plaintiffs challenge these provisions, as well as the law limiting in-person absentee ("early") voting to a single location per municipality, on the grounds that they violate Section 2 of the Voting Rights Act ("VRA") (Count I); unduly burden the right to vote in violation of the First and Fourteenth Amendments (Count II); treat voters disparately without a rational basis in violation of the Equal Protection Clause of the Fourteenth Amendment (Count III); were intended disproportionately to suppress the vote of Democratic voters without a compelling reason in violation of the First and Fourteenth Amendments (Count IV); were intended disproportionately to suppress the vote of African Americans and/or Latinos in violation of the Fourteenth and Fifteenth Amendments (Count V); and/or were intended disproportionately to suppress the vote of young voters in violation of the Twenty-Sixth Amendment (Count VI). *See id.*, second intro para. & ¶¶ 154-81.

On July 22, 2015, Defendants filed a motion to dismiss parts of Counts I and II of the Amended Complaint, and all of Counts III and IV. ECF No. 21; *see also* Memo. of Law in Supp. of Mot. to Dismiss, ECF No. 22 ("Def. Mot. to Dismiss"). That motion has been fully briefed and is pending before the Court. *See* ECF Nos. 28, 31. On July 30, 2015, the Public

Interest Legal Foundation, Inc. ("PILF"), moved the Court for leave to appear as *amicus curiae*. ECF No. 24. The Court denied that motion, noting that "Wisconsin's Attorney General and its Department of Justice are quite capable of defending the state's election laws." ECF No. 30. On August 6, 2015, the parties submitted a Joint Preliminary Pretrial Conference Statement. ECF No. 27. Additionally, a telephonic preliminary pretrial conference was held on August 11, 2015, and a Preliminary Pretrial Conference Order was issued two days later. ECF No. 29.

On September 1, 2015—more than three months after this case was filed and after the motion to dismiss had been fully briefed, Proposed Intervenors filed a motion to intervene in this lawsuit. ECF No. 33; *see also* Memo. of Law in Supp. of Mot. to Intervene, ECF No. 34 ("Prop. Int. Br."). That motion should be denied.

II. ARGUMENT

A. PROPOSED INTERVENORS HAVE NOT ESTABLISHED THAT THEY MAY INTERVENE AS OF RIGHT UNDER RULE 24(a)(2)

The Proposed Intervenors are not entitled to intervention as of right. This manner of intervention is available only where the applicant for intervention can satisfy each of the following four requirements: (1) the application must be timely; (2) the applicant must have a direct and substantial interest in the subject matter of the litigation; (3) the applicant's interest must be impaired by disposition of the action without the applicant's involvement; and (4) the applicant's interest must not be adequately represented by one of the existing parties to the action. Fed. R. Civ. P. 24(a)(2); *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985). The applicant for intervention has the burden of proving each of these elements. *Keith*, 764 F.2d at 1268.

Proposed Intervenors' motion fails on several fronts. Proposed Intervenors have failed to meet their burden of demonstrating that their purported interests are not adequately represented

by Defendants. In addition, Proposed Intervenors have failed to demonstrate that they have the type of interest in this litigation that is necessary to intervene as of right. Finally, Proposed Intervenors' motion to intervene is not timely.

1. Any purported interest Proposed Intervenors have in this case is adequately represented by Defendants

Any purported interest Proposed Intervenors have in this litigation is adequately represented by Defendants. In general, the burden of demonstrating inadequate representation for a proposed intervenor is "minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). However, as the Seventh Circuit has repeatedly held, a much stronger showing of inadequacy is required in cases where a prospective intervenor and the named party have the same goal. In such cases, "a presumption [exists] that the representation in the suit is adequate." *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 659 (7th Cir. 2013) (quoting *Shea v. Angulo*, 19 F.3d 343, 347 (7th Cir. 1994)). To rebut that presumption of adequacy, the prospective intervenor "must demonstrate, at the very least, that some conflict exists." *Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 205 (7th Cir. 1982) (denying a motion to intervene as of right where proposed intervenors and the state shared the same goal of protecting a statute against a constitutional challenge). Proposed Intervenors cannot do so here, as their goal in this litigation would be to obtain precisely the same result that Defendants are seeking: a judicial determination that the challenged laws should be upheld.

Proposed Intervenors also cannot overcome the presumption of adequacy that applies to Defendants as government officials. The Seventh Circuit has explained that in cases where a plaintiff has sued the government or a government official to challenge the validity of a state statute, the governmental defendant is presumed to be an adequate representative of all those who seek to uphold the law. *See Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 774-75 (7th Cir.

2007) (denying intervention to disabled persons, who sought to defend a challenged governmental practice, on the grounds that when the representative party is a governmental body charged by law with protecting the interests of the proposed intervenors, the representative is presumed to adequately represent their interests); *Keith*, 764 F.2d at 1268 (denying intervention to a group that sought to defend a challenged state law on the grounds that "[a]dequacy can be presumed when the party on whose behalf the applicant seeks intervention is a governmental body or officer charged by law with representing the interests of the proposed intervenor"); *see also Daggett v. Comm'n on Gov't Ethics & Election Practices*, 172 F.3d 104, 111 (1st Cir. 1999) (denying intervention to candidates for office, who sought to defend the validity of a challenged state campaign finance law, on the grounds that "the government in defending the validity of the statute is presumed to be representing adequately the interests of all citizens who support the statute); *Hopwood v. Texas*, 21 F.3d 603, 605-06 (5th Cir. 1994) (denying intervention to group of students on the grounds that "[i]n a suit involving a matter of sovereign interest, the State is presumed to represent the interest of all of its citizens"). The Seventh Circuit has further provided that the only way to defeat this presumption of adequate representation is by showing that the governmental defendants have acted with "gross negligence" or "in bad faith" in carrying out their duty to defend the validity of the law. *Ligas*, 478 F.3d at 774.

Proposed Intervenors cannot show—indeed, do not allege—that Defendants have acted or will act with gross negligence or in bad faith. Plaintiffs brought this suit against eight members or staff of GAB, the agency charged with oversight of Wisconsin's campaign finance, elections, ethics, and lobbying laws and with ensuring the integrity of the electoral process. *See* Am. Compl. ¶¶ 18-26. In accordance with the Attorney General's duty to defend the constitutionality of state laws, Defendants are represented by the Wisconsin Attorney General

and the Department of Justice. *See State Public Intervenor v. Wis. Dept. of Natural Res.*, 339 N.W.2d 324, 327 (Wis. 1983) ("[I]t is the attorney general's duty to defend the constitutionality of state statutes."); 71 Op. Att'y Gen. 195, 196 (1982) ("Once legislation is enacted it becomes the affirmative duty of the Attorney General to defend its constitutionality."). And it is apparent that the Attorney General and the Department of Justice are vigorously defending the laws challenged in this suit. *See, e.g.*, Def. Mot. to Dismiss. This is fatal to Proposed Intervenors' claim of entitlement to intervene as of right.

Proposed Intervenors' contentions that they intend to present an equal protection argument as to Section 2 of the Voting Rights Act that was not raised in Defendants' motion to dismiss and that the Attorney General will not "represent the unique perspectives of local election officials who are required to implement the challenged laws," Prop. Int. Br. at 2, do not alter this conclusion. First, as the Court held when it denied PILF's request to participate in this case as *amicus curaie*, "Wisconsin's Attorney General and its Department of Justice are quite capable of defending the state's election laws." ECF No. 30 at 1. Indeed, as Defendants point out in their motion to dismiss, the Attorney General and Department of Justice recently successfully defended Wisconsin's voter ID law. *See* Def. Mot. to Dismiss at 3-5 (citing *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014)). Moreover, to the extent that the Attorney General's litigation strategy differs from the strategy that Proposed Intervenors would pursue, courts have found that "the use of different arguments as a matter of litigation judgment is not inadequate representation *per se*." *Daggett*, 172 F.3d at 112. It is only where "a refusal to present obvious arguments [is] . . . extreme" that a finding of inadequate representation by the existing parties is justified. *Id*. And there can be no such claim here.

Second, the Defendants can and will adequately represent Proposed Intervenors' interests in protecting local resources and maintaining the efficiency of local voting mechanisms. Proposed Intervenors have admitted as much, declaring that the municipal and county clerks (the "clerks") seeking to intervene and the Defendants share the same interests in defending this suit. *See* Prop. Int. Br. at 5 ("Under the black-letter law discussed above, any such limitation on the exercise of [the clerks'] official duties is the paradigmatic interest justifying intervention—indeed, *it is an interest that is functionally the same as that of the State Defendants themselves*.") (emphasis added). Because the Defendants and the clerks seeking to intervene have functionally the same interests to defend in this lawsuit, the Defendants will adequately represent the clerks' interests merely by protecting their own. Indeed, while the clerks play a crucial role in the administration of elections, the Defendants—members and staff of GAB—oversee and closely regulate the clerks' administration of elections. For example, GAB establishes the standards and training requirements for municipal election officials, conducts such required trainings, and provides the required certification. Wis. Admin. Code GAB §§ 12.02-12.05. Given this close alignment between the interests of the Defendants and the clerks, it is not plausible that the Defendants will fail adequately to represent the interests of the clerks. *See also Lee v. Va. State Bd. of Elec.*, No. 15-357, ECF No. 57 at 6-7 (E.D. Va. Sep. 4, 2015) (attached as Ex. A). Accordingly, Proposed Intervenors have failed to establish that the Defendants will not adequately represent their interests in this litigation, and they are not entitled to intervene as of right.

2. Proposed Intervenors have not established that they have any significantly protectable interest in this case

In addition, none of the Proposed Intervenors has demonstrated a significantly protectable interest in this case. The Proposed Intervenors' purported interests in this action are therefore too remote and too indirect to support intervention as of right.

a. Senator Van Wanggaard and Representative Kathy Bernier

Proposed Intervenors Senator Van Wanggaard and Representative Kathy Bernier claim a stake in this lawsuit based on a purported "direct interest in the process for determining qualified voters and votes in elections where they are candidates, particularly those parts of the process which implicate fraudulent votes that could cancel out their supporters' votes." Prop. Int. Br. at 6. This asserted interest fails to justify intervention as of right. Intervention as of right requires a "direct, significant[,] and legally protectable" interest in the question at issue in the lawsuit that is unique to the proposed intervenor. *Wis. Educ. Ass'n Council*, 705 F.3d at 658 (citation omitted). Where a proposed intervenor asserts an interest that is neither direct nor substantial, intervention as of right must be denied. *Id*. Indeed, courts have consistently denied intervention in cases where proposed intervenors assert a speculative or remote, instead of "direct and substantial," interest in the action. *See, e.g.*, *ManaSota-88 v. Tidwell*, 896 F.2d 1318, 1322 (11th Cir. 1990) (denying motion to intervene because proposed intervenors' interest in the case was "purely a matter of speculation" that would not impart the "kind of legally protectable interest" necessary to support intervention as of right); *Keith*, 764 F.2d at 1269 (denying intervention where interest in protection of unborn was too remote); *Air Lines Stewards & Stewardesses Ass'n v. Am. Airlines, Inc.*, 455 F.2d 101, 105 (7th Cir. 1972) (denying intervention as of right where the proposed intervenor's interest was "contingent and not direct"); *Fox Valley*

Reproductive Health Care Ctr., Inc. v. Arft, 82 F.R.D. 181, 182 (E.D. Wis. 1979) (denying intervention where proposed intervenors' interest was "no different from that of the general public").

Here, Proposed Intervenors have not made any showing—much less met their burden of showing—that the success of Plaintiffs in this case would result in an increase in voter fraud or otherwise impact Senator Wanggaard's and Representative Bernier's ability to win elections. *See* Prop. Int. Br. at 6-7.[1] In fact, careful research has discredited the notion that there is a significant amount of in-person voter-impersonation fraud anywhere in the United States. For instance, "[t]he Director of the Elections Crimes Branch of the Public Integrity Section of the Criminal Division for the United States Department of Justice stated that a review of data from DOJ's case management systems . . . and certain publicly available and related court records indicated that there were no apparent cases of in-person voter impersonation charged by DOJ's Criminal Division or by U.S. Attorney's offices anywhere in the United States, from 2004 through July 3, 2014." Gov't Accountability Office, *Elections: Issues Related to State Voter Identification Laws*, GAO-14-634, Report to Congressional Requesters 70, Sep. 2014, *available at* http://www.gao.gov/assets/670/665966.pdf (citing *Veasey v. Perry*, No. 13-193, ECF No. 390-2 (S.D. Tex. July 7, 2014)).

Similarly, Senator Wanggaard's and Representative Bernier's asserted interest in "guarding against corruption or the appearance of corruption" in the political process, which would "undermine public confidence in and diminish the legitimacy of their offices," Prop. Int. Br. at 7, is too speculative to justify intervention as of right. Proposed Intervenors have provided

[1] While the decrease in turnout that results from the challenged provisions benefits Republicans' electoral prospects, an interest in the suppression of votes is not cognizable.

no evidence that the result of this case will impact voters' confidence in the electoral system. *But cf.* Nathaniel Persily & Stephen Ansolabehere, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 Harv. L. Rev. 1737, 1756 (2008) ("[w]hether [a] state or local election administration frequently asks for voter identification or not seems to have no relationship to individuals' beliefs about the frequency of" voter-impersonation fraud or the casting of illegal votes by noncitizens or multiple ballots). Accordingly, Senator Wanggaard and Representative Bernier have not established a substantial and direct interest in this lawsuit.[2]

b. The Clerks

The clerks seeking to intervene in this lawsuit have also failed to show that they have a "direct, significant, and legally protectable" interest in this action. Proposed Intervenors claim that Plaintiffs' success in this suit will mean that the clerks (1) "will no longer have the 'power' to require a Voter ID to prevent fraud during the 'conduct of the election' and will instead be saddled with a 'duty' not to enforce the Voter ID and other ballot integrity requirements" and (2) will be burdened with the need to "engage in new training and adopt new procedures in response to whatever relief Plaintiffs may obtain." Prop. Int. Br. at 4-5. But these assertions do not establish that the clerks would be meaningfully burdened by the requested relief.

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[2] Senator Wanggaard's and Representative Bernier's claims to an interest in this case on the grounds that they spent time advocating for so-called voter-integrity measures and that the results of this case could affect their ability to pursue similar measures in the future and their public image, *see* Prop. Int. Br. at 8, are also insufficient to justify intervention as of right. Under the logic of these claims, any legislator who supported a bill would be permitted to intervene as of right in the defense of that bill. The argument thus proves too much. *See generally Tarsney v. O'Keefe*, 225 F.3d 929, 939 (8th Cir. 2000) ("[W]hen a court declares an act of the state legislature to be unconstitutional, individual legislators who voted for the enactment have no standing to intervene.") (internal quotation marks omitted). Moreover, the fact that Senator Wanggaard and Representative Bernier expended time and effort on the challenged laws in the past clearly does not mean that they have an ongoing interest in the laws.

An order enjoining the voter ID law would almost certainly have the effect of reducing the number of voters who need to cast provisional ballots, meaning that election officials would be able to spend less time instructing voters about provisional ballots and less time ascertaining whether such ballots should be counted. In addition, increasing the number of early voting locations and days would result in shorter lines at the polls and surely reduce complaints and the need to undertake efforts to remediate long lines. The requested relief, in other words, will make it easier, not harder, for the clerks to do their jobs; and the clerks certainly have not met their burden of showing otherwise.

The clerks' purported interest in avoiding the need to "engage in new training and adopt new procedures in response to whatever relief Plaintiffs may obtain," Prop. Int. Br. at 5, also does not support intervention as of right. Municipal clerks are required to undergo training sponsored by GAB *at least* once every two years. *See* Wis. Stat. § 7.15(1m). Given that, the link between the result of this case and the training burdens on the clerks is tenuous, rather than direct and significant, and these purported burdens do not warrant intervention as of right.[3]

c. Wisconsin Voters

The Wisconsin voters seeking to intervene (the "voters") have failed to meet their burden of demonstrating a direct and substantial interest in this litigation as well. To the extent that the voters assert an interest in not having "their votes canceled out by fraudulent ballots," Prop. Int. Br. at 8, that interest is too speculative to justify intervention as of right for the same reasons set forth above in the discussion of the Wisconsin legislators' interest in this case. Moreover, it is a generalized interest that could be asserted by any voter and thus cannot justify intervention as of

[3] Proposed Intervenors' claim that a decision in favor of Plaintiffs could expose the clerks to personal liability "for enforcing other sensible, nondiscriminatory measures to protect the sanctity of the ballot," Prop. Int. Br. at 6, is devoid of merit and much too speculative to justify intervention as of right.

right. *See* Order Denying Leave to Intervene, ECF No. 49 (slip. op.) at 3-4, *United States v. Florida*, No. 12-285 (N.D. Fla. Nov. 6, 2012) (concluding that "confidence in the election process" is an interest shared by every other registered voter in the state and that "[g]eneralized interests of this kind plainly do not afford a voter . . . a *right* to intervene under Rule 24(a)") (emphasis in original); Order Denying Intervention of True the Vote, ECF No. 113 (slip op.) at 1, *Veasey v. Perry*, No. 13-00193 (S.D. Tex. Dec. 11, 2013) (same); *see also Athens Lumber Co. v. Fed. Election Comm'n*, 690 F.2d 1364, 1366 (11th Cir. 1982) (affirming district court's denial of intervention when an intervenor did not assert a particularized interest).

Similarly unavailing is the voters' assertion that they have an interest in this case because Plaintiffs' success will mean that poll workers would have to be re-trained and voters would have to be re-educated, which would cause longer lines and wait times at polling places. Prop. Int. Br. at 8-9. As with the voters' asserted interest in not having their votes cancelled out by fraudulent ballots, this is the type of generalized interest that cannot support intervention as of right. Further, the notion that eliminating the voter ID law and expanding early voting—two remedies Plaintiffs seek in this lawsuit—would *cause* voter and poll worker confusion and *longer* wait times to vote is, at best, remote and general, *see Fox Valley Reproductive Health Care Ctr., Inc.*, 82 F.R.D. at 183; indeed, it is illogical. For this reason, and those set forth above, the Proposed Intervenors have not met their burden of demonstrating that the voters have a direct and significant interest in this case.

3. Proposed Intervenors' motion is not timely

Even if Proposed Intervenors could assert a direct and significant interest in this litigation that was not already adequately represented by the Defendants—and they cannot—Proposed Intervenors' motion to intervene is untimely. The Seventh Circuit has held that the "most

important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties to the case." *Nissei Sangyo Am., Ltd. v. United States*, 31 F.3d 435, 439 (7th Cir. 1994). Here, as noted above, a schedule has already been set for this case, and the parties have fully briefed Defendants' motion to dismiss. If Proposed Intervenors are permitted to intervene, the Plaintiffs could be forced to respond to another motion to dismiss or a motion for judgment on the pleadings and thus to divert efforts that otherwise could be used to litigate this case against the Defendants. Further, swift resolution is particularly important in this case in light of the proximity of the November 2016 election and the Supreme Court's holding in *Purcell v. Gonzalez*, 549 U.S. 1 (2006), that changes to election laws and procedures must be made before an election is "imminen[t]" in order to prevent voter confusion. *Id*. at 5-6. Any change in this case that creates a risk of delay—as the addition of intervenor-defendants surely would—therefore threatens to prevent Plaintiffs from obtaining a timely judgment and meaningful relief for the 2016 election.

Moreover, Proposed Intervenors have not articulated any reason for their delay in applying for intervention in this case. As a result, the cases cited in their brief are inapposite. *See, e.g.*, *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995) (approving intervention nineteen months after complaint was filed because potential intervenors had no reason to believe their interests were not represented by existing parties until that point, and potential intervenors moved to intervene immediately after they discovered that their interests were not adequately represented); *Citizens Opposing Pollution v. Jewell*, No. 14-1107, 2015 U.S. Dist. LEXIS 99759, at *18 (S.D. Ill. July 30, 2015) (finding intervention was timely when filed after motion to dismiss was briefed because the potential intervenor argued that "it did not receive notice of the case until almost a month after the suit was filed" and did not discover the

full scope of the purpose and design for the litigation until the plaintiff filed a response to the motion to dismiss in the case). Thus, the motion to intervene is untimely and should be denied.

B. THE COURT SHOULD DENY PERMISSIVE INTERVENTION

The Court should also deny Proposed Intervenors' request for permissive intervention. This form of intervention may be granted on a timely motion to a party with a "claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Permissive intervention is discretionary with this Court, which, in exercising its discretion, must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights. Fed. R. Civ. P. 24(b)(3); *see Menominee Tribe of Wis. v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996) (noting that the grant or denial of permissive intervention is within the discretion of the court).

Permissive intervention is inappropriate here for several reasons discussed above. In particular, the intervention requested is not timely and would create a substantial risk of prejudice to Plaintiffs. In addition, this Court has held that "[w]hen intervention of right is denied for the proposed intervenor's failure to overcome the presumption of adequate representation by the government, the case for permissive intervention disappears." *Menominee Tribe of Wis.*, 164 F.R.D. at 678. As explained, the presumption of adequate representation by the government has not been overcome here. Moreover, having two parties rather than one defending the case with the same goal will surely result in redundant sets of document requests, redundant questioning in depositions and at trial, duplication of expert testimony, and overlapping briefing, all of which will result in an unnecessary waste of resources and which will cause a delay in the proceedings. Permissive intervention, in short, is not appropriate in this case.

III. CONCLUSION

For the reasons set forth above, this Court should deny Proposed Intervenors' motion to intervene.

Dated this 15th day of September, 2015.

Respectfully submitted,

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