IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF FLORIDA *Plaintiff,* v. UNITED STATES OF AMERICA and ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States *Defendants,* FLORIDA STATE CONFERENCE OF THE NAACP, BELINTHIA BERRY, SHARON CARTER, ELLA KATE COFFEE, HOWARD HARRIS, DIANNE HART, YVETTE LEWIS, MARVIN MARTIN, CHARLES MCKENZIE, JR., EARL RUTLEDGE, ALONDA VAUGHAN, AND PAULETTE WALKER *Applicants for Intervention.*	Civ. No. 1:11-cv-01428-CKK-MG-ESH

STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF PROPOSED INTERVENORS FLORIDA STATE CONFERENCE OF THE NAACP, BELINTHIA BERRY, SHARON CARTER, ELLA KATE COFFEE, HOWARD HARRIS, DIANNE HART, YVETTE LEWIS, MARVIN MARTIN, CHARLES MCKENZIE, JR., EARL RUTLEDGE, ALONDA VAUGHAN AND PAULETTE WALKER'S MOTION TO INTERVENE AS DEFENDANTS

Proposed Defendant-Intervenors Florida State Conference of the NAACP, Belinthia Berry, Sharon Carter, Ella Kate Coffee, Howard Harris, Dianne Hart, Yvette Lewis, Marvin Martin, Charles McKenzie, Jr., Earl Rutledge, Alonda Vaughan, and Paulette Walker (collectively, "Proposed Defendant-Intervenors"), by their undersigned counsel, respectfully submit this statement of points and authorities in support of their Motion to Intervene as of right pursuant to Rule 24(a)(2)

of the Federal Rules of Civil Procedure or, alternatively, for permissive intervention pursuant to Rule 24(b)(1).

PRELIMINARY STATEMENT

The State of Florida filed this action on July 29, 2011, seeking judicial preclearance of four voting changes pursuant to Section 5 of the Voting Rights Act of 1965 ("VRA"), 42 U.S.C. §1973c. This Motion to Intervene is filed on behalf of registered African-American voters in Florida counties covered by Section 5. As members of a class that the VRA was designed to protect, Proposed Defendant-Intervenors hold a direct and substantial interest in the outcome of this action.

Proposed Individual Intervenors Belinthia Berry, Sharon Carter, Ella Kate Coffee, Howard Harris, Dianne Hart, Yvette Lewis, Marvin Martin, Charles McKenzie, Jr., Earl Rutledge, Alonda Vaughan, and Paulette Walker (collectively, the "Proposed Individual Intervenors") are African-American residents of Hillsborough County, a jurisdiction covered by Section 5 of the Voting Rights Act, and registered voters of Florida. Proposed Individual Intervenors Berry, Carter, Coffee, Harris, Hart, Lewis, Martin, McKenzie, Vaughan, and Walker have relied on one or more of the benchmark practices at issue in this litigation, including the benchmark practice with respect to early voting during the 2008 and/or 2010 general elections.

Proposed Organizational Intervenor Florida State Conference of the NAACP ("Florida NAACP") is a nonprofit, nonpartisan organization in Florida. The NAACP was formed in 1909, and seeks to remove all barriers of racial discrimination through democratic processes and through the enactment and enforcement of federal, state and local laws securing civil rights, including laws relating to voting rights. Its members are predominantly African-American and other minority residents of Florida and include members who reside in each of the five counties in Florida that are covered by Section 5 of the Voting Rights Act. Proposed Individual Intervenors Coffee, Lewis, and

Vaughan are members of the Florida NAACP. The Florida NAACP also has branch units throughout Florida, including branch units that are located in or that cover each of the five counties in Florida that are covered by Section 5 of the Voting Rights Act. The Florida NAACP has held and sponsored voter registration and voter education activities for several years, and has been credited with registering thousands of voters in the state. Proposed Intervenor Florida NAACP's members have relied on the benchmark practices at issue in this litigation, including the benchmark practice with respect to early voting. Moreover, the Florida NAACP has itself relief on the benchmark practice with respect to voter registration drives. Thus, the Florida NAACP seeks to intervene in this litigation on behalf of itself as an organization, and as a representative of its members.

Proposed Defendant-Intervenors are dedicated to vigorously defending the voting rights of African-American residents and registered voters in Florida. The VRA is an essential piece of federal legislation that safeguards the voting rights of African Americans and other racial minorities in Florida. Proposed Defendant-Intervenors assert that their intervention is necessary to ensure the robust enforcement of Section 5 in this case.

Proposed Defendant-Intervenors' recognize this Court's interest in the efficient disposition of the proceedings in this matter. To that end, Proposed Defendant-Intervenors are committed to (i) avoiding delays or the unnecessary duplication of efforts in areas satisfactorily addressed by the Defendants, to the extent possible; and (ii) coordinating future proceedings with the parties, to the extent possible.

Proposed Defendant-Intervenors possess direct, substantial, and legally protectable interests in the subject matter of this litigation that cannot be adequately represented by the Defendants. Because the Proposed Defendant-Intervenors meet all requirements for intervention as of right under Rule 24(a)(2), this Motion should be granted. In the alternative, the facts and circumstances of the

case warrant permissive intervention pursuant to Rule 24(b)(1). Counsel for Defendants United States and Attorney General Holder does not oppose permissive intervention by Proposed Defendant-Intervenors.

FACTUAL BACKGROUND

Five Florida counties are covered in their entirety by Section 5 of the VRA. Specifically, Collier, Hardee, Hendry, Hillsborough, and Monroe counties were designated as covered jurisdictions under Section 4 of the Voting Rights Act, 42 U.S.C. §1973b(b). As a result, Florida is required to submit all of its statewide voting changes for administrative or judicial preclearance before such changes can take effect.

On June 22, 2010, Plaintiff brought this declaratory judgment action seeking judicial preclearance of four provisions of an omnibus election bill, HB 1135, even though enacting these measures would have a retrogressive effect on racial minorities in Florida's five covered counties. These provisions alter, *inter alia*, the state's existing practices with respect to voter registration, early voting, election-day address changes, and constitutional amendments proposed by ballot initiative.

Plaintiff initially sought administrative preclearance of these provisions, but withdrew its request prior to a decision by the Department of Justice on the provisions' retrogressive effect. *See* Compl. ¶ 10. Plaintiff now seeks this Court's approval of, *inter alia*, these changes to voter registration, early voting, and election-day change of address processes, notwithstanding their discriminatory intent and/or retrogressive effect.

For the reasons stated below, intervention here is appropriate as of right, pursuant to Fed. R. Civ. P. 24(a)(2) or, in the alternative, permissively, pursuant to Fed. R. Civ. P. 24(b)(1).

ARGUMENT

I. Proposed Defendant-Intervenors Should be Permitted to Intervene as of Right Pursuant to Federal Rule of Civil Procedure 24(a)

Federal Rule of Civil Procedure 24(a), concerning intervention as a matter of right, states:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) 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.

Fed. R. Civ. P. 24(a). Federal courts, including those in the D.C. Circuit, have emphasized that Rule 24's intervention requirements should be construed flexibly and in favor of intervention. *See, e.g.*, *Nuesse v. Camp*, 385 F.2d 694, 702-04 (D.C. Cir. 1967) (recognizing need for liberal application of the rules permitting intervention as of right); *Am. Horse Prot. Ass'n., Inc. v. Veneman*, 200 F.R.D. 153, 157 (D.D.C. 2001) (noting the "liberal and forgiving" nature of the interest prong of the intervention as of right test); *Wilderness Soc'y v. Babbitt*, 104 F. Supp. 2d 10 (D.D.C. 2000) (recognizing D.C. Circuit's liberal approach to intervention); *Turn Key Gaming, Inc. v. Oglala Sioux Tribe*, 164 F.3d 1080, 1081 (8th Cir. 1999) ("Rule 24 should be construed liberally, and doubts resolved in favor if the proposed intervenor."); *Tachiona v. Mugabe*, 186 F. Supp. 2d 383, 394 (S.D.N.Y. 2002) (describing Rule 24 intervention standard as "a flexible and discretionary one"); *German v. Fed. Home Loan Mortg. Corp.*, 899 F. Supp. 1155, 1166 (S.D.N.Y. 1995) (recognizing the "liberal construction" of intervention requirements).

As discussed more fully below, Proposed Defendant-Intervenors' Motion satisfies Rule 24(a)(2)'s requirements for intervention for a number of reasons, including the nature of the

important voting rights subject matter at issue; the timeliness of the Motion; and because Proposed Defendant-Intervenors' direct and significant interests in this action cannot be adequately protected by the current parties to the litigation. *See Am. Horse Prot. Ass'n,* 200 F.R.D. at 157-58 (granting intervention where these factors have been satisfied). These factors strongly counsel in favor of granting the Proposed Defendant-Intervenors' Motion as of right pursuant to Rule 24(a)(2).

A. Courts Recognize the Significance of Rule 24 Intervention in Voting Rights Cases

This Court routinely grants intervention in voting rights cases to African Americans and other minority voters and organizations, recognizing that they share important interests and can offer important perspectives that bear on questions concerning the proper interpretation of Section 5 of the VRA. This Court has also recognized that the interests of minority voters may diverge from the positions of institutional parties, such as the United States. Intervention has been permitted in a broad range of voting matters, including declaratory judgment actions. *See, e.g., Texas v. United States*, No. 1:11-cv-01303, ECF No. 11 (D.D.C. Aug. 16, 2011) (granting intervention to minority voters in declaratory judgment action to preclear redistricting plan under Section 5); *Georgia v. Holder*, No. 1:10-cv-01062, ECF No. 30 (D.D.C. Aug. 3, 2010) (granting several motions to intervene presented by African-American, Latino and other minority voters in declaratory judgment action); *Shelby Cnty. v. Holder*, No. 1:10-cv-00651, ECF No. 29 (D.D.C. Aug. 25, 2010) (granting several motions to intervene by African-American voters in case challenging the constitutionality of section 5 of the VRA); *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 230 (D.D.C. 2008) (granting several motions to intervene presented by African-American, Latino and

other minority voters in case seeking bailout under section 4(a) of the VRA and challenging the constitutionality of section 5 of the VRA).[1]

Accordingly, the practice in this district, and others, is to recognize the vital interests of intervening minority voters in VRA challenges.

B. Proposed Defendant-Intervenors Satisfy the Requirements to Intervene as of Right Pursuant to Rule 24(a)(2)

Under Rule 24(a)(2), intervention as of right depends on four factors: (1) the timeliness of the motion; (2) whether the applicant "claims an interest relating to the property or transaction that is the subject of the action"; (3) whether the applicant "is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest"; and (4) whether "existing parties adequately represent that interest". Fed. R. Civ. P. 24(a)(2). *See Fund for Animals v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003); *see also Jones v. Prince George's Cnty.*, 348 F.3d 1014, 1017 (D.C. Cir. 2003); *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998).

[1] For additional examples of voting rights cases in which motions to intervene by organizations and individuals represented by the NAACP Legal Defense and Educational Fund, Inc. ("LDF"), among other counsel, have been granted by this Court, *see La. House of Representatives v. Ashcroft*, No. 02-62 (D.D.C. June 6, 2002) (granting coalition of organizations, African Americans, and other voters' motion to intervene in a Section 5 declaratory judgment action seeking preclearance of redistricting plan; voters were represented by LDF); *N.Y. State v. United States*, 65 F.R.D. 10, 12 (D.D.C. 1974) (LDF represented intervening organization); *Beer v. United States*, 374 F. Supp. 363, 367 n.5 (D.D.C. 1974), *vacated on other grounds*, 425 U.S. 130 (1976)(LDF represented intervening voters); *Virginia v. Reno*, 117 F. Supp. 2d 46 (D.D.C. 2000) (LDF represented intervening voters); *Georgia v. Ashcroft*, 539 U.S. 461, 477 (2003) (upholding D.C. District Court's grant to private parties' motion to intervene on grounds that intervenors' interests were not adequately represented by existing parties and finding that, as general matter, private parties may intervene in Section 5 declaratory judgment actions where they meet the requirements of Rule 24); *Smith v. Cobb Cnty. Bd. of Elections and Registrations*, 314 F. Supp. 2d 1274, 1311 (N.D. Georgia 2002) (African-American voters entitled to intervene in suit concerning reapportionment of districts since they asserted a legitimate interest that was not adequately represented by any of the parties); *Bossier Parish Sch. Bd. v. Reno*, 157 F.R.D. 133 (D.D.C. 1994) (granting intervention to African-American voters in declaratory judgment action concerning Section 5); *City of Lockhart v. United States*, 460 U.S. 125, 129 (1983) (noting intervention of Hispanic voters); *Cnty. Council of Sumter Cnty. v. United States*, 555 F. Supp. 694, 697 (D.D.C. 1983) (granting intervention to African-American voters in Section 5 declaratory judgment action); *City of Richmond v. United States*, 376 F. Supp. 1344, 1349 n.23 (D.D.C. 1974), *vacated on other grounds*, 422 U.S. 358 (1975); *City of Petersburg v. United States*, 354 F. Supp. 1021, 1024 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973). The grants of intervention to minority voters in these cases are informed by the holding in *Allen v. State Bd. of Elections*, which found an implied cause of action for private citizens to bring suits enforcing Section 5 of the VRA because they were beneficiaries of the Act. 393 U.S. 544, 557 (1969)("[t]he guarantee of § 5 . . . might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition"; LDF

In addition, under Rule 24(a)(2), a party seeking to intervene as of right must demonstrate that it has standing under Article III of the Constitution. Proposed Defendant-Intervenors satisfy each of these requirements.

1. Proposed Defendant-Intervenors' Motion is Timely

Plaintiff filed its Complaint on July 29, 2011. Proposed Defendant-Intervenors submit this Motion fewer than six weeks after Plaintiff filed its Complaint. Timeliness is measured by when the prospective intervenor "knew or should have known that any of its rights would be directly affected by the litigation." *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003). Courts assess timeliness by considering factors such as the applicant's interest in the case, the need for intervention to preserve the applicant's rights, the extent of prejudice to the existing parties, the extent of prejudice to the Proposed Intervenor if the application is denied, and any unusual circumstances in favor of or opposed to intervention. *See Smoke v. Norton*, 252 F.3d 468, 470-471 (D.C. Cir. 2001) (setting forth timeliness factors); *Hirshon v. Republic of Bolivia*, 979 F. Supp. 908, 913 n.5 (D.D.C. 1997) (same, and denying intervention motion as untimely where it was filed 6 months after proposed intervenor became aware of injury).

Proposed Defendant-Intervenors submit this Motion in advance of the Defendants' Answer or the issuance of a scheduling order, and well before the commencement of discovery, the filing of dispositive motions, or before any other deadline set forth by this court. Under these circumstances, this Motion is timely and granting intervention pursuant to Rule 24(a)(2) would not unduly prejudice the existing parties, alter the court's discovery, or alter any oral argument or hearing date that may be set by the court. *See e.g.*, *Bible Way Church of Our Lord Jesus Christ World Wide, Inc. v. Showell*, 260 F.R.D. 1, 4 (D.D.C. 2009) (memorandum opinion) (intervening motion filed fifteen

represented appellant).

months after commencement of litigation is timely); *Nationwide Mut. Ins. Co. v. Nat'l REO Mgmt., Inc.* 205 F. R. D. 1, 6 (D.D.C. 2000) (memorandum opinion) (intervention motion six months after filing of action is timely)..

2. Proposed Defendant-Intervenors Have Direct, Substantial, and Legally Protectable Interests

The test for determining the sufficiency of intervenors' interest is a non-stringent, "practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Cook v. Boorstin*, 763 F.2d 1462, 1466 (D.C. Cir. 1985) (internal citations omitted). *See also S. Utah Wilderness v. Norton*, No. 01-2518, 2002 WL 32617198, *5 (D.D.C. June 28, 2002) (applying a "liberal approach" to the Rule 24(a) analysis).

Here, Proposed Defendant-Intervenors have direct, substantial, and legally protectable interests in this action. As African-American voters in Florida counties covered by Section 5, Proposed Individual Intervenors have a direct interest in ensuring that Section 5's preclearance process protects against Plaintiff's attempts to worsen their position with respect to voting. And, as a membership organization dedicated to protecting the civil rights of African Americans, Proposed Organizational Intervenor Florida NAACP has a similar interest in ensuring that Plaintiff's proposed voting changes are not implemented.

Courts have held that, in cases involving challenges to the application of a particular statutory scheme, "the interests of those who are governed by those schemes are sufficient to support intervention." *Chiles v. Thornburg*, 865 F.2d 1197, 1214 (11th Cir. 1989) (*quoting* 7C Charles Alan Wright, Arthur Miller and Mary Kay Kane, *Federal Practice and Procedure* 1908, at 285 (2d ed. 1986)). The experience and perspective of Proposed Defendant-Intervenors are relevant to this Court's assessment and analysis of Plaintiff's claims concerning the retrogressive effect of the

proposed change. Moreover, Proposed Defendant-Intervenors have a cognizable interest in this action as the issues presented bear directly on their federally-protected voting rights, or, in the case of Proposed Organizational Intervenor Florida NAACP, the voting rights of its members.

3. Proposed Defendant-Intervenors' Interests Will Be Impacted by the Disposition of the Litigation

The disposition of this action will depend upon whether this Court finds that Florida's proposed changes to voter registration, early voting, and election-day change of address processes discriminate against African-American and other minority voters in Florida's covered counties and thus, should be denied preclearance and legal implementation. Proposed Individual Intevenors, as African-American voters in Florida counties covered by Section 5, have previously relied on the state's benchmark practices, including the benchmark practice with respect to early voting. Proposed Organizational Intervenor NAACP has itself relied on the state's benchmark practices with respect to voter registration drives, and its members have relied on the various benchmark practices at issue in this action, including the benchmark practice with respect to early voting. Consequently, the disposition of this litigation will have a substantial impact on Proposed Defendant-Intervenors' interests and/or voting rights. Moreover, this precedent will govern any future changes affecting the interests and/or voting rights of Proposed Individual Intervenors.

As a result, Proposed Defendant-Intervenors have a substantial interest in preventing Florida from implementing the proposed discriminatory voting changes at issue here.

4. Proposed Defendant-Intervenors' Interests Cannot Be Adequately Represented by the Present Parties

Because Proposed Defendant-Intervenors have significant protectable interests that will be impacted by the disposition of this litigation, they have the right to intervene as long as their interests will not be "adequately represented by the existing parties." Fed. R. Civ. P. 24(a)(2)

(emphasis added). Proposed Defendant-Intervenors's burden on this point is "not onerous," and is satisfied by a showing that the representation of their interests by the present parties "*may* be inadequate, not that representation will in fact be inadequate." *See Dimond v. District of Columbia*, 792 F. 2d 179, 192 (D.C. Cir. 1986) (emphasis added, internal quotation marks and citation omitted); *see also Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972) (showing burden should be treated as minimal); *accord Natural Res. Def. Council v. Costle*, 561 F.2d 904, 911 (D.C. Cir. 1977); *State of Georgia v. Ashcroft*, 195 F. Supp. 2d 25 (D.D.C. 2002) (where three-judge panel in state redistricting declaratory judgment action granted intervention pursuant to African-American voters pursuant to Fed. R. Civ. Proc. 26(a)(2)); Wright, et al., *supra*, § 1909 (An applicant ordinarily should be permitted to intervene as of right "unless it is *clear* that the party will provide adequate representation for the absentee" (emphasis added)). Even "a partial congruence of interests" is insufficient to "guarantee the adequacy of representation." *Fund for Animals*, 322 F.3d at 737.

Proposed Defendant-Intervenors meet that burden here. The interests of Proposed Defendant-Intervenors will not be adequately protected by existing Defendants, the United States and Attorney General Holder. The Defendants do not have the same stake in this matter as do Proposed Individual Intervenors, who are among the intended beneficiaries of the VRA, and whose voting rights would be harmed by an adverse ruling on Plaintiff's claims. Further, courts—recognizing that the government must necessarily address the needs of diverse, and sometimes conflicting, groups of citizens—have frequently found that the United States and other governmental entities cannot, within the meaning of Rule 24(a)(2), "adequately represent the interests of aspiring intervenors." *Fund for Animals*, 322 F.3d at 736. Government entities are charged with "represent[ing] the interests of the American people," whereas aspiring intervenors, as here, are

dedicated to representing their personal interests. *Id.*; *see also Natural Res. Def. Council*, 561 F.2d at 912-13; *Smuck v. Hobson*, 408 F.2d 175, 181 (D.C. Cir. 1969); *Friends of Animals v. Kempthorne*, 452 F. Supp. 2d 64, 70 (D.D.C. 2006).

Even an overlap in interests or a general agreement in principles between Proposed Defendant-Intervenors and the Government is insufficient to find that Proposed Defendant-Intervenors' interests will be adequately represented by the Government. "[A] shared general agreement does not necessarily ensure agreement in all particular respects." *Fund for Animals*, 322 F.3d at 737 (quoting *Natural Res. Def. Council*, 561 F.2d at 912) (internal quotation marks omitted). *See also Gen. Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 331 (1980) (granting individual aggrieved party's motion to intervene in order to protect their personal interests, which may at times be in conflict with those of the EEOC); *Nuesse*, 385 F.2d at 702-04 (although proposed intervenor and Comptroller of Currency had similar interests, their interests were not identical); *Wash. Mut., Inc. v. F.D.I.C.*, 659 F. Supp. 2d 152, 155 (D.D.C. 2009) (although government's and movant bank's positions were similar, permitting intervention because government did not adequately represent bank's interests); *Cnty. of San Miguel v. MacDonald*, 244 F. R.D. 36 (D.D.C. 2007) (cattleman's association aligned in interest with Department of Interior permitted to intervene because its interests were not adequately represented by U.S. government); *People for the Ethical Treatment of Animals v. Babbitt*, 151 F.R.D. 6 (D.D.C. 1993) (government tasked with enforcing regulatory scheme cannot adequately represent private party's interest); *accord Dimond*, 792 F.2d at 192 (private party seeking to protect its financial interest allowed to intervene despite presence of government which represented general public interest); *Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency*, 99 F.R.D. 607, 610 n.5 (D.D.C. 1983) (pesticide manufacturers allowed to intervene because, even though both EPA and intervenors wanted to

uphold regulations, their interests cannot always be expected to coincide; recognizing that the "EPA represents the public interest not solely that of the . . . industry").[2]

In *Trbovich*, 404 U.S. 528, the Supreme Court allowed intervention by a union member in an action brought by the Secretary of Labor even though the Secretary was broadly charged with protecting the public interest. The Court reasoned that the Secretary of Labor protects not only the rights of individual union members but also the public interest, two functions which "may not always dictate precisely the same approach to the conduct of the litigation." *Id.* at 539. Therefore, under the prevailing standard set forth by the Court in *Trbovich*, Proposed Defendant-Intervenors have satisfied the adequacy of representation requirement of Rule 24, showing that the Government's representation of their interests will not be adequate; and the burden of making that showing should be treated as minimal. *Id*. at 538 n.10. Proposed Defendant-Intervenors, therefore, should be permitted to intervene so that they will not be subject to the uncertainties associated with how the United States and its agencies will present arguments concerning the retrogressive effect or otherwise discriminatory aspects of these proposed changes.

Moreover, federal agencies can revise a litigation strategy or theory of the case mid-course, or abandon a prior institutional position altogether. Proposed Individual Intervenors, whose voting rights are tied to continued enforcement of the VRA's provisions, should be permitted to intervene so that they will not be subject to the uncertainties associated with whether, or how, the United

[2] Other courts have also recognized that governmental entities often do not adequately represent the interests of individual aggrieved parties. *In re Sierra Club*, 945 F.2d 776, 780 (4th Cir. 1991) (state "cannot be an adequate representative of environmental groups"); *N.Y. Pub. Interest Research Grp., Inc. v. Regents of the Univ. of the State of N.Y.*, 516 F.2d 350, 352 (2d Cir. 1975) (pharmacists allowed to intervene in challenge by consumer group to enjoin the Regents' enforcement of statewide regulation because "there is a likelihood that the pharmacists will make a more vigorous presentation of the economic side of the argument than would the Regents"); *Associated Gen. Contractors of Connecticut, Inc. v. City of New Haven*, 130 F.R.D. 4, 11 (D. Conn. 1990) (minority contractors allowed to intervene in challenge to minority set-aside program because it was "sufficiently shown that as a minority contractor, its interest in the set-aside is compelling economically and thus distinct from that of the City" also defending the program).

States and its agencies will present arguments concerning the retrogressive effect or otherwise discriminatory aspects of Florida's proposed voting changes.

Indeed, in a declaratory judgment action brought last year by the State of Georgia in this Court for preclearance of a voting change, the Government reversed its position, from denying administrative preclearance of the proposed change, to preclearing a similar statute without public comment during the course of preclearance litigation. *See* Notice By Defendant-Intervenors, *Georgia v. Holder*, No. 1:10-cv-01062, ECF No. 47 (D.D.C. Aug. 21, 2010). This is not the first time that the Government changed its position in a civil rights matters. *See e.g., United States v. New York City Bd. of Educ.*, No. 96-CV-0374, slip op. at 5, 31 (E.D.N.Y. Sept. 11, 2006) (after bringing action challenging employment exam under Title VII, United States entered into a Settlement Agreement, but subsequently "decided that it would not defend the lawfulness of the Agreement's remedies for those beneficiaries who had not taken any of the challenged exams"). This risk makes it difficult for the VRA's intended beneficiaries to rely exclusively on Defendants to both consistently and adequately defend their cognizable interests here.

The United States and private minority voters have diverged on the appropriate strategies for ensuring the protection of minority voting rights. In *Nw. Austin Mun. Util. Dist. No. One*, for instance, Defendant Intervenors emphasized different aspects of the Congressional record and presented arguments and evidence that supplemented those provided by the Attorney General in its defense of Section 5. Indeed, the brief filed by those Defendant Intervenors in the Supreme Court was referenced at oral argument in the Supreme Court. *See* Transcript of Oral Argument at 55, 57, *Nw. Austin Mun. Util. Dist. No. One*, 129 S. Ct. 2504 (No. 08-322).

Other examples exist as well. In *City of Lockhart v. United States*, 460 U.S. at 130, the minority intervenors presented the sole argument in the Supreme Court on behalf of the appellees

while the United States stood in support of the appellants. In *Blanding v. DuBose*, 454 U.S. 393, 398 (1982), the minority plaintiffs, but not the United States, appealed and prevailed in a voting rights suit in the Supreme Court. In *Cnty. Council of Sumter Cnty. v. United States*, 555 F. Supp. 694, 696 (D.D.C. 1983), the United States and African-American intervenors took conflicting positions regarding the application of Section 2 in the Section 5 preclearance process. In *Miller v. Brooks*, 158 F.3d 1230, 1233 (11th Cir. 1998), both minority plaintiffs and the United States filed similar actions challenging Georgia's adoption of a statewide majority-vote requirement. Although the cases were consolidated, the United States unilaterally dismissed its action prior to trial. In *Young v. Fordice*, 520 U.S. 273, 281 (1997), the United States opted not to appeal a lower court's adverse ruling, leaving only the private plaintiffs to appeal to the U.S. Supreme Court and win reversal.

Additionally, Proposed Defendant-Intervenors bring to the litigation a "[l]ocal perspective on the current and historical facts at issue," which would not otherwise be represented in this litigation, and which would benefit this Court's disposition of Plaintiff's claims. *Cnty. Council of Sumter Cnty*, 555 F. Supp. at 697. *See Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004) (granting individual voters' motion to intervene in HAVA suit); *Commack Self-Service Kosher Meats, Inc. v. Rubin*, 170 F.R.D. 93 (E.D.N.Y. 1996); (noting that intervenors would bring a different perspective to case that might assist court, and intervention came early in the action); *Fiandaca v. Cunningham*, 827 F.2d 825, 835 (1st Cir. 1987) (likelihood that applicants would introduce additional evidence favors intervention). Thus, as demonstrated above, Proposed Defendant-Intervenors have made a sufficient showing that, even if Defendants appropriately oppose preclearance of the proposed voting changes, the Defendants' effort to represent Proposed

Defendant-Intervenors' distinct interests *may* nevertheless ultimately prove inadequate, such that intervention is appropriate here.

5. Proposed Defendant-Intervenors Satisfy the Requirements of Article III Standing

Because Proposed Defendant-Intervenors seek to participate on "an equal footing with the original parties to the suit" they must satisfy the standing requirements imposed on all parties. *City of Cleveland v. NRC*, 17 F.3d 1515, 1517 (D.C. Cir. 1994). As set forth above, Proposed Defendant-Intervenors have concrete and cognizable interests in this litigation that, under circuit precedent, satisfy Article III's demands. *See e.g.*, *Fund for Animals v. Norton*, 322 F.3d 728 (D.C. Cir. 2003) (finding intervenors satisfied standing requirements because they "would suffer concrete injury if the court grant[ed] the relief the petitioners [sought]"). *Cf. S. Christian Leadership Conference v. Kelley*, 747 F.2d 777, 779 (D.C. Cir. 1984) (stating that Article III's "gloss" on Rule 24 requires an intervenor to have a "legally protectable" interest). *See also Military Toxics Project v. EPA*, 146 F.3d 948, 953 (D.C.Cir.1998); *Mova Pharm.*, 140 F.3d at 1074; *Building & Constr. Trades Dep't v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994); *Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 539-40 (D.C. Cir. 1999) (*quoting City of Cleveland*,17 F.3d at 1517 (per curiam)).

Proposed Defendant-Intervenors' status as "aggrieved parties" is clear, as each has a vested interest in preventing the implementation of the state's proposed changes to voter registration, early voting, and election-day change of address processes that would prevent and frustrate the registration and voting of African-American voters in Florida's five covered counties. Implementation of Plaintiff's proposed voting changes would significantly harm Proposed Defendant-Intervenors' voting rights and those of their members. *See Babbit v. United Farm Workers National Union*, 422 U.S. 289, 298 (1979) (imminent harm satisfies the injury-in-fact

requirement in suits regarding prospective injury). A favorable ruling from this court, denying Plaintiff's requested relief, would remedy this injury.

Proposed Defendant-Intervenors meet the requirements of the Rule's plain text. Intervenors of right need only an "interest" in the litigation—not a "cause of action" or "permission to sue." See Fed. R. Civ. P. 24(a)(2). *See also Trbovich*, 404 U.S. 528 (1972) (Court permitted a union member to intervene in a suit brought by the Secretary of Labor even though the applicable federal statute expressly prohibited union members from initiating such actions on their own). *Id*. at 531-32 (*citing* 29 U.S.C. § 483); *United States v. Phillip Morris USA*, 566 F.3d 1095, 1145 (D.C. Cir. 2009) (party need not have a "cause of action" in order to satisfy the requirements of Rule 24(a)). As minority voters who reside in the covered jurisdictions at issue in this case, Proposed Individual Intervenors have a "significantly protectable interest" in the outcome of this matter. *Donaldson v. United States*, 400 U.S. 517, 531 (1971). Like the private parties in *Allen*, these aggrieved individuals and organizations now seek to intervene in this declaratory judgment suit to defend the status of their federally protected voting rights. For these reasons, Proposed Defendant-Intervenors have standing to participate in this suit.

II. In the Alternative, Permissive Intervention is Appropriate in this Case

Rule 24(b) of the Federal Rules of Civil Procedure provides an alternative basis for the Proposed Defendant-Intervenors' intervention in this action. Under Rule 24(b), permissive intervention may be granted "when an applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b)(2). When assessing a motion for permissive intervention, the primary consideration is "whether the intervention will unduly delay or prejudice the existing parties." *Commack Self-Service Kosher Meats*, 170 F.R.D. at 106 (E.D.N.Y. 1996). Courts do not interpret this provision strictly. *Nuesse*, 385 F.2d at 704 (D.C. Cir. 1967). The

decision to allow permissive intervention is within the discretion of the court, and the court is to consider whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Fed. R. Civ. P. 24(b)(2). *Huron Envt'l. Activist League v. United States Envt'l. Protection Agency*, 917 F. Supp. 34, 43 (D.D.C. 1996) (permissive intervention was granted where plaintiffs' claims have both questions of law and fact in common with the main action and the court concluded that the intervention would not unduly delay the adjudication of the rights of the original parties).

Here, the requirements for permissive intervention have been met. Proposed Defendant-Intervenors' claims have questions of fact and law in common with those already before this Court. Proposed Organizational Intervenor's interest is in defending the voting rights of African-American residents and registered voters in Section 5-covered counties in Florida. Proposed Defendant-Intervenors also seek to have the VRA's provisions enforced in accordance with congressional intent. Given the unique perspective of Proposed Defendant-Intervenors with respect to the experiences and registration of African-American and other minority voters in Section 5-covered counties in Florida, their intervention in this matter would very likely aid or enhance the Court's understanding of the underlying legal and factual issues and, thereby, assist in the proper resolution of this action.

Moreover, intervention in this case will not delay the litigation, as the action has just commenced, Defendants have not filed their answer, discovery has not commenced, dispositive motions have not been filed, oral argument has not been scheduled and Proposed Defendant-Intervenors agree to participate on the same schedule established for the existing parties. As noted, Counsel for Defendants United States and Attorney General Holder have advised that they do not oppose permissive intervention by Proposed Defendant-Intervenors.

Finally, counsel for Proposed Defendant-Intevenors have substantial experience in VRA litigation . *See, e.g.*, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009) (mixed claim for bailout and constitutional challenge to the 2006 reauthorization of Section 5 of the VRA); *Shelby Cnty. v. Holder*, No. 1:10-cv-00651 (D.D.C.) (constitutional challenge to the 2006 reauthorization of Section 5), Section 5 declaratory judgment actions before three-judge panels in this Court (*e.g.*, *Georgia v. Holder*, No. 1:10-cv-01062 (D.D.C.) (mixed claim for preclearance and constitutional challenge to the application of Section 5 to the State of Georgia); and the congressional record that led both to the initial enactment and subsequent reauthorization of the Act. Counsel's significant experience provides Proposed Defendant-Intervenors with competent, effective representation, and will also very likely benefit the Court in the adjudication of the issues presented in this case.

Taken together, these considerations clearly demonstrate the propriety of the Proposed Defendant-Intervenors' permissive intervention request. This Court should, therefore, grant the Proposed Defendant-Intervenors' alternative request for permissive intervention, in the event that the Court declines to grant intervention as of right.

CONCLUSION

For the reasons set forth above, the Motion to Intervene should be granted.

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Respectfully submitted,

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