IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF FLORIDA,

Plaintiff

vs. Civil No. 1:11-cv-01428-CKK-MG-ESH

UNITED STATES OF AMERICA and
ERIC H. HOLDER, Jr., in his official
capacity as Attorney General
of the United States,

Defendants.
_____/

THE STATE OF FLORIDA'S POINTS AND AUTHORITIES
OPPOSING MOTIONS TO INTERVENE AS DEFENDANTS

Plaintiff, the State of Florida, hereby responds to the motions for leave to intervene filed by three separate groups of proposed intervenor-defendants, comprising 22 individuals and 6 organizations (collectively "Movant-Intervenors"). (ECFs 13, 15, 16). Movant-Intervenors seek to intervene as defendants in this judicial preclearance action as of right under Federal Rule of Civil Procedure 24(a) or, alternatively, with the Court's permission under Federal Rule of Civil Procedure 24(b). (ECF 13 at 2-3, 5-6); (ECF 15 at 1, ¶ 14); (ECF 16 at 2). The Attorney General has filed one response to all of the motions to intervene, explaining that he does not oppose permissive intervention, but opposes it as of right. (ECF 26).

For the reasons set forth below, Florida agrees with the Attorney General that intervention as of right is unwarranted. Although participation as *amici curiae* would sufficiently allow the Movant-Intervenors to provide the Court the benefit of their "local perspective," Florida does not oppose permissive intervention subject to reasonable conditions imposed by the Court to avoid unnecessary duplication of issues.

I. ARGUMENT

A. MOVANT-INTERVENORS DO NOT MEET THE CRITERIA FOR INTERVENTION AS OF RIGHT.

Movant-Intervenors are not entitled to intervene as of right[1] under Federal Rule of Civil Procedure 24(a). Rule 24(a)(2) requires those seeking intervention as of right to "show that its application was timely, that it has an interest in the subject matter of the litigation, that it may be impeded in protecting that interest because of the action, and that its interest will not be adequately represented by existing parties." *The Humane Society of the United States v. Clark*, 109 F.R.D. 518 (D.D.C. 1985). As this Court has explained, "fail[ure] to make any showing whatsoever that any difference exists between their interest and that of the government" does not satisfy movants' burden to "demonstrate that their interests may not be adequately represented." *Id.* at 520. Moreover, "the fact that the government is a party makes it more difficult for movants in this Circuit to meet that minimal burden." *Sweet Home Chapter of Communities for a Great Oregon v. Lujan*, 1991 WL 277331, *3 (D.D.C. 1991) (unpublished).

Plaintiff agrees with the Attorney General that intervention as of right is not warranted here because "there is no indication that the Attorney General will not properly carry out his

[1] Contrary to the assertion made by Movant-Intervenors, (ECF 13-2 at 4-5; ECF 15-1 at 6-7 & n.1; ECF 16-3 at 8), this Court has *not* "routinely" granted intervention as of right in Section 5 cases. Rather, the Court has generally has granted permissive intervention, which Florida does not oppose—to the extent the Court finds it warranted in this instance. *See e.g.*, *City of Port Arthur v. United States*, 517 F. Supp. 987, 991 n.2 (D.D.C. 1991) (movants "were granted permission to intervene"); *Texas v. United States*, 1:11-cv-01303 (D.D.C. Aug. 16, 2011 and Sept. 8, 2011) (granting unopposed motions to intervene permissively); *Georgia v. Holder*, No. 1:10-cv-01062, ECF No. 30 (D.D.C. Aug. 3, 2010) (granting unopposed motions to intervene permissively); *Bossier Parish School Bd. v. Reno*, 157 F.R.D. 133 (D.D.C. 1994) (granting permissive intervention); *County Council of Sumter County v. United States*, 555 F. Supp. 694 (D.D.C. 1983) (movants "should be allowed to intervene on a limited basis"); *Texas v. United States*, 802 F. Supp. 481, 482 n.1 (D.D.C. 1983) (granting permissive intervention); *City of Port Arthur v. United States*, 517 F. Supp. 987, 991 & n.2 (D.D.C. 1981) ("with the consent of the parties" movants were "granted permission to intervene"). Only one case cited by Movant-Intervenors approved intervention as of right, but that was because the intervenors actually identified interests that were not adequately represented by the Attorney General. *See Georgia v. Ashcroft*, 539 U.S. 461, 477 (2003). However, because the Court did not elucidate what those interests were or how they differed from the United States, it provides no support for intervention of right here. *Id.* Indeed, Movant-Intervenors have not identified any interests that are different from the Attorney General's interest in preventing racial and language minority discrimination in voting.

responsibility to defend this lawsuit." (ECF 26 at 3, 4-5). Intervention as of right should also be denied for the additional reasons set forth below.

1. Adequacy of Representation

Although the Movant-Intervenors allege that the Attorney General may not adequately represent their interests, they have not alleged any interests that diverge from the Attorney General's interest "in eradicating discrimination in voting." (ECF 26 at 5). Movant-Intervenors merely speculate that their litigation strategy might differ, their "local perspectives" would not otherwise be represented, and their interests are narrower than the public's interest in eradicating discrimination in voting. *See* (ECF 13-2 at 10-11, 6-7); (ECF 15-1 at 13-15, 11); (ECF 16-3 at 13-14). These are insufficient grounds to support a claim that the Attorney General will not adequately represent the interests of the Movant-Intervenors. Litigation strategy—especially where Movant-Intervenors lack their own cause of action—is not an independent interest; it is at most a means of effectuating an interest. *See Little Rock Sch. Dist. v. N. Little Rock Sch. Dist.*, 378 F.3d 774, 780 (8th Cir. 2004) ("It is not sufficient that the party seeking intervention merely disagrees with the litigation strategy or objectives of the party representing its interests.").

Moreover, bare allegations and insinuations that an existing party may exercise "bad or poor judgment in conducting or settling the cause of action" are "insufficient to demonstrate inadequate representation for the purposes of intervention." *Aref v. Holder*, 774 F. Supp. 2d 147, 172 (D.D.C. 2011); *accord Bush v. Viterna*, 740 F.2d 350, 357 (5th Cir. 1984) (holding that "the mere possibility that a party *may* at some future time enter into a settlement cannot alone show inadequate representation"). Even if intervention were granted, Movant-Intervenors would be "powerless to participate [in settlement] in a meaningful way." *Comm'rs Court of Medina County v. United States*, 683 F.2d 435, 440-41 (D.C. Cir. 1982) (explaining the "unusual

position" of a defendant-intervenor in a Section 5 preclearance case). Nor can Movant-Intervenors rest their argument for intervention as of right solely on their intent to more forcefully advocate for their own interests. "[A]n argument for intervention as of right based on vigor alone cannot succeed." *Sweet Home Chapter of Communities for a Great Oregon*, 1991 WL 277331, at *4 (D.D.C. 1991); *see also The Humane Society of the United States*, 109 F.R.D. at 521 (denying intervention as of right because the argument that federal defendants may not have the incentive to advocate as vigorously as movants is not sufficient).

Movant-Intervenors' "local perspectives" also are not the type of protected "interests" supporting intervention as of right under Rule 24(a).[2] To the extent these perspectives are relevant and useful to the Court, they can be presented in an *amicus* brief. After all, one purpose of an *amicus* brief is to entertain precisely that "unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Jin v. Ministry of State Security*, 557 F. Supp. 2d 131, 137 (D.D.C. 2008).

Finally, as the D.C. Circuit has explained, the "certain circumstances" involved in the "class of cases in this circuit recognizing the inadequacy of governmental representation of the interests of private parties" are where the movant "is seeking to protect a more narrow and 'parochial' *financial*[3] interest not shared by the citizens" represented by the government.

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[2] The grant of intervention in *Sumter County*, relied on by Movant-Intervenors, was not based on the local perspective of the movants. *See* (ECF 13-2 at 6; ECF 15-1 at 15; ECF 16-3 at 14) (citing *County Council of Sumter County v. United States*, 555 F. Supp. 694 (D.D.C. 1983)). Movants were "allowed to intervene" in *Sumter County* on a "limited basis" solely to address an issue of "first impression" that the Attorney General rightly abandoned. *Sumter County*, 555 F. Supp. at 697; *see Georgia v. Ashcroft*, 539 U.S. 461, 478, 123 S. Ct. 2498, 2510 (2003) (noting that Section 5 and Section 2 "differ in structure, purpose, and application").

[3] Most of the decisions Movant-Intervenors relies on for the proposition that more narrow interests were not adequately represented by the government involved *financial* interests. *See Nuesse v. Camp*, 385 F.2d 694, 703 (D.C. Cir. 1967) ("The interest that the state bank is suing to protect is its own commercial integrity, while the interest sought to be promoted by the Commissioner is the 'competitive equality' of national and state banks in general."); *Washington Mutual, Inc. v. FDIC*, 659 F. Supp. 2d 152, 154 (D.D.C. 2009) (intervenor sought to "protect its ownership interests in the assets it purportedly purchased from the FDIC"); *County of San Miguel v. MacDonald*, 24 F.R.D. 36, 47-48 (D.D.C. 2007) (intervenors pursuing their "economic livelihoods" and members' "business

Dimond v. District of Columbia, 792 F.2d 179, 192-94 (D.C. Cir. 1986) (emphasis added). Movant-Intervenors have not alleged any distinct financial interests. The Attorney General has noted that he represents the "public interest" in "eradicating discrimination in voting" and Movant-Intervenors have failed to explain how their alleged interests—apart from hypothetical future litigation strategy and their "local perspectives"—would diverge from the interests of the Attorney General. Allowing Movant-Intervenors to intervene as of right under Rule 24(a)(2) would be inappropriate for this reason alone.

2. Standing

Certain Movant-Intervenors also lack standing to intervene, or have standing to intervene only as to particular counts of the Complaint. In addition to establishing their qualification for intervention as of right under Rule 24(a)(2), Movant-Intervenors "must demonstrate that [they] ha[ve] standing under Article III" by showing—like any party must show—"injury-in-fact, causation and redressability." *The Fund for Animals, Inc v. Norton*, 322 F.3d 728, 731-32, 733 (D.C. Cir. 2003) (explaining that "because a Rule 24 intervenor seeks to participate on an equal

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operations"); *People for Ethical Treatment of Animals v. Babbitt*, 151 F.R.D. 6, 7-8 (D.D.C. 1993) (intervenor had "substantial economic need in preserving all possible rights to use the orangutans in his nightclub act" as his "livelihood may rest on the revocation of a single permit"); *Natural Resources Defense Council, Inc. v. Envtl. Prot. Agency*, 99 F.R.D. 607, 610 (D.D.C. 1983) (movants had financial interest in continued registration of their pesticide products); *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977) (rubber and chemical companies' interests were in establishing rules under which their commercial activity would be regulated); *Gen. Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 331 (1980) (intervenor was in direct conflict with other class members over employment benefits); *New York Pub. Interest Research Group, Inc. v. Regents of Univ. of N.Y.*, 516 F.2d 350, 352 (2d Cir. 1975) (intervening pharmacists had financial interest – an "economic side"); *Associated Gen. Contractors of Connecticut, Inc. v. City of New Haven*, 130 F.R.D. 4, 11 (D. Conn. 1990) ("interest in the set-aside is compelling economically and thus distinct from that of the City"); *Chiles v. Thrornburgh*, 865 F.2d 1197, 1210 (11th Cir. 1989) ("County is mainly concerned with the expenditures that have to be made"); *United Guar. Residential Ins. Co. of Iowa v. Philadelphia Sav. Fund Soc'y*, 819 F.2d 473, 475-76 (4th Cir. 1987) (intervenor had interest in protecting $37,000,000 in mortgage certificates). The others involved wholly distinct or directly conflicting interests identified by the intervenor. *See Friends of Animals v. Kempthorne*, 452 F. Supp. 2d 64 (D.D.C. 2006) (hunting and conservation); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003) (Mongolia's people and American people); *In re Sierra Club*, 945 F.2d 776, 780 (4th Cir. 1991) (proponents and opponents of hazardous waste facilities); *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972) (union members and union—member intervention was limited to Secretary's claims). As explained above, Movant-Intervenors have failed to identify any conflicting interests represented by the Attorney General.

footing with the original parties to the suit, he must satisfy the standing requirements imposed on those parties"). "Standing to sue or defend is an aspect of the case-or-controversy requirement." *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 64 (1997). "Thus, a party that seeks to intervene as of right must demonstrate that it has standing to participate in the action." *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998).

Here, Movant-Intervenor Ion Sancho lacks standing to intervene as to any aspect of this case. Mr. Sancho is the Supervisor of Elections in Leon County, a non-covered jurisdiction.[4] This action seeks preclearance of four changes to the Elections Code so that the changes may be enforced in Florida's five covered counties: Collier, Hardee, Hendry, Hillsborough, and Monroe. Because Leon County is not subject to preclearance, Mr. Sancho cannot allege that the Court's determination here will affect his legally protected interests in any way. *See, e.g., U.S. v. Hays*, 515 U.S. 737, 745-47 (1995).

All of the organizations,[5] to the extent that they seek to intervene for themselves and not their members, allege facts supporting standing as to only one of the four changes submitted to the Court for preclearance: Section 4, which concerns third party voter registration organizations. *See* (ECFs 13, 13-2; ECFs 15, 15-1; ECF 16-3) (alleging only the organization's activity as a third party voter registration organization). Organizations cannot vote or register to vote and none of the movant organizations have alleged that they plan to circulate an initiative petition. As a consequence, the organizations lack standing to intervene – on their own behalf – as to any change other than that contained in Section 4.

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[4] Only Collier, Hardee, Hendry, Hillsborough and Monroe Counties are covered counties subject to preclearance. *See* 28 C.F.R. Part 51, Appendix; *see* 40 FR 43746 (Hardee, Hillsborough and Monroe Counties); *see also* 41 FR 34329 (Collier and Hendry Counties). Neither the sixty-two remaining counties—including Leon County—nor the State of Florida are covered jurisdictions.

[5] Project Vote, Voting for America, Florida AFL-CIO, NAACP, National Council of La Raza, and the League of Women Voters of Florida.

3. Interest That May be Impaired or Impeded

The Movant-Intervenors that lack standing also lack an interest sufficient to intervene as of right. Rule 24(a) "impliedly refers not to *any* interest the applicant can put forward, but only to a legally protectable one." *City of Cleveland v. Nuclear Regulatory Comm'n*, 17 F.3d 1515, 1517 (D.C. Cir. 1994); *see also Donaldson v. United States*, 400 U.S. 517, 531 (1971) (applicant must demonstrate "significantly protectable interest"). "Such a gloss upon the rule is in any case required by Article III of the Constitution." *City of Cleveland*, 17 F.3d at 1517. Thus, even if Rule 24(a)'s requirements were met, which they are not, "the nature of [the movant-intervenor's] 'interest' may play a role in determining the sort of intervention which should be allowed—whether . . . he should be permitted to contest all issues." *Smuck v. Hobson*, 408 F.2d 175, 180 (D.C. Cir. 1969).

B. TO THE EXTENT THE COURT ALLOWS MOVANT-INTERVENORS TO PERMISSIVELY INTERVENE IN THIS CASE, IT SHOULD IMPOSE APPROPRIATE LIMITS ON THEIR PARTICIPATION.

Because the Movant-Intervenors appear to be primarily interested in providing the Court information about their "local perspectives" on the election law changes that are the subject of this action, Florida submits that participation as *amici curiae* would be the most appropriate course. However, Florida would not object to allowing Movant-Intervenors to permissibly intervene if the Court imposes reasonable limitations on their participation consistent with the expeditious resolution of this case.

Unlike intervention as of right, permissive intervention allows this Court to set the terms of Movant-Intervenors' participation. *See Columbus-America Discovery* Group, 974 F.2d 450, 469 (4th Cir. 1992) ("When granting an application for permissive intervention, a federal district court is able to impose almost any condition, including the limitation of discovery") (citation

omitted); *Beauregard, Inc. v. Sword Services LLC*, 107 F.3d 351, 352 n.2 (5th Cir. 1997) ("It is undisputed that virtually any condition may be attached to a grant of permissive intervention."). "Even highly restrictive conditions may be appropriately placed on a permissive intervenor, because such a party has by definition neither a statutory right to intervene nor any interest at stake that the other parties will not adequately protect or that it could not adequately protect in another proceeding." *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 382 n.1 (1987) (Brennan, J., concurring).

Specifically, if this Court grants permissive intervention, Florida requests that the Court hold Movant-Intervenors to what they have pledged: to avoid delays and duplication of effort and to coordinate amongst themselves and with the Attorney General. (ECF 13 at 6); (ECF 15 at 2); *see also* (ECF 16-3 at 16) (stating that they will not add to the proceedings). Avoiding duplication and delay, however, should not merely be to the extent Movant-Intervenors subjectively find it "possible" or to those areas that they deem "satisfactorily addressed and represented" by the Attorney General. (ECF 13 at 6); (ECF 15 at 2). Movant-Intervenors should be prohibited from engaging in cumulative briefing or interjecting new issues or defenses into the case. And to the extent discovery becomes necessary, Movant-Intervenors should be limited to participation set by the principal parties.

Finally, a requirement that the 28 Movant-Intervenors and Defendants coordinate their efforts is also necessary to control "the concomitant issue proliferation and confusion [that] will result in delay as parties and court expend resources trying to overcome the centrifugal forces springing from intervention, and prejudice . . . from not only of the extra cost but also of an increased risk of error." *Massachusetts Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 782 (D.C. Cir. 1997). This Court has limited intervenors' participation in Section 5

preclearance cases before and should do so again here. *See, e.g., County Council of Sumter County v. United States*, 555 F. Supp. 694 (D.D.C. 1983); *see also* Fed. R. Civ. P. 24, advisory committee's note (stating that intervention "may be subject to appropriate conditions or restrictions").

Florida has no objection to the Movant-Intervenors expressing their views of the legal merits of this challenge to the Court; rather, Florida is concerned with having the issues timely resolved in advance of the 2012 election cycle. Florida's interest in promoting an orderly election process far outweighs any Movant-Intervenor's interest in taking cumulative discovery or needlessly injecting new issues into the proceeding.

II. CONCLUSION

For the foregoing reasons, the State of Florida respectfully requests that the Court deny the Movant-Intervenors' Motions to Intervene as of right under Rule 24(a) and instead either allow them to participate as *amici curiae* or to intervene permissively under Rule 24(b), subject to reasonable conditions on their participation set forth in the Proposed Order.

Respectfully submitted,

/s/ *Ashley E. Davis*

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PROPOSED ORDER

Upon consideration of the motions to intervene as defendants in this action (ECFs 13, 15, 16) filed by 22 individuals and 6 organizations (collectively "Movant-Intervenors"), all materials supporting those motions, and the responses to those motions filed by the Defendants and Plaintiff, State of Florida, it is hereby:

ORDERED that such motions to intervene under Fed. R. Civ. P. 24(a) are **DENIED**; and it is further

ORDERED that ECF 13 is **DENIED** in part under Fed. R. Civ. P. 24(b) as to Ion Sancho; and it is further

ORDERED that ECFs 13, 15 and 16 are **DENIED** in part under Fed. R. Civ. P. 24(b) as to Project Vote, Voting for America, Florida AFL-CIO, NAACP, National Council of La Raza, and the League of Women Voters of Florida, to the extent they seek intervention on their own behalf and not on behalf of their members, with respect to Section 23 (addressing state constitutional amendments proposed by initiative), Section 26 (addressing change of residence at the polls), and Section 39 (addressing early voting); and it is further

ORDERED that, to the extent not otherwise denied, ECFs 13, 15, and 16 are **GRANTED** under Fed. R. Civ. P. 24(b); and it is further

ORDERED that such permissive intervention is limited to Movant-Intervenors filing joint papers addressing only issues and defenses raised by the State of Florida or Attorney General, and limited to participation in discovery set by the State of Florida or Attorney General.

SO ORDERED this ____ day of _____ 2011.

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UNITED STATES DISTRICT JUDGE