UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

NANCY CAROLA JACOBSON, TERENCE FLEMING, SUSAN BOTTCHER, PRIORITIES USA, DNC SERVICES CORPORATION / DEMOCRATIC NATIONAL COMMITTEE, DSCC a/k/a DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE, DCCC a/k/a DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE, DEMOCRATIC GOVERNORS ASSOCIATION, and DEMOCRATIC LEGISLATIVE CAMPAIGN COMMITTEE,

Plaintiffs,

v.

KENNETH DETZNER, in his official capacity as the Florida Secretary of State,

Defendant.

No. 4:18-cv-00262-MW-CAS

PLAINTIFFS' OPPOSITION TO MOTION TO INTERVENE BY NATIONAL REPUBLICAN SENATE COMMITTEE AND REPUBLICAN GOVERNORS ASSOCIATION

Nancy Carola Jacobson, Terence Fleming, and Susan Bottcher, and Priorities USA, DNC Services Corporation / Democratic National Committee, DSCC a/k/a Democratic Senatorial Campaign Committee, DCCC a/k/a Democratic Congressional Campaign Committee, Democratic Governors Association, and Democratic Legislative Campaign Committee (collectively, "Plaintiffs") submit this opposition to the motion to intervene (the "Motion") of the National Republican Senate Committee and the Republican Governors Association

(collectively, "Proposed Intervenors"). For the reasons that follow, the Court should deny the Motion.

I. INTRODUCTION

This is a case about the constitutionality of a Florida law that grants, to the political party whose candidate wins a Governor's race, an unfair advantage to each of that party's candidates in *every single* partisan election thereafter, until the Governor's office changes party hands. *See* Fla. Stat. § 101.151(3)(a) (the "Ballot Order Statute"). A Republican has won each of the five gubernatorial elections held in Florida since Jeb Bush was first elected in 1998, so Republican candidates have enjoyed this advantage, unabated, up and down the ticket in Florida's partisan elections, for the last 20 years.[1] On average, the effect of the Ballot Order Statute is to confer an artificial advantage of 2.7 electoral percentage points to Republican candidates—more than the difference between the winner and loser in the last two gubernatorial elections in 2010 and 2014, in which Republican Rick Scott defeated the Democratic candidate by only 1.2% and 1% of the vote, respectively.

It is understandable that Proposed Intervenors would seek to involve themselves in this litigation, which threatens to level the playing field by eliminating the artificial advantage their candidates have benefited from since Governor Bush was first elected. Indeed, Proposed Intervenors' interest in intervening as defendants indicates that the people whose livelihood depends on

[1] In those twenty years, the advantage has been the result of five elections including three Republican candidates: Bush, in 1998 and then again in 2002; Charlie Crist, who ran as a Republican in 2006, but left the Republican Party and became an Independent in 2010, then running for U.S. Senate rather than seeking re-election as Governor; and Rick Scott in 2010 and 2014.

the small margins of victory that many Republican candidates have enjoyed in Florida elections in recent years are convinced that position bias creates a meaningful advantage, worth spending resources to defend and protect.

But not all interests are legally cognizable, and, in this case, any interest Proposed Intervenors have in maintaining their unfair advantage in 2018 cannot confer on them a right to intervene under Federal Rule of Civil Procedure 24(a)(2). Perhaps recognizing as much, the Motion carefully avoids explicitly asserting an interest in this continued artificial advantage (although it certainly alludes to it), relying instead on vague, conclusory, and wholly unsupported assertions of injury. When examined, however, none constitutes a legally protectable interest. For that reason alone, the Court should reject their request for intervention as of right. Moreover, the interests Proposed Intervenors purport to intervene to protect (including "maintaining the status quo of [a] lawfully enacted . . . statute" and an undefined and vague fear of voter "confusion") are clearly interests that the Defendant Secretary of State Kenneth Detzner (the "Secretary") is well equipped to represent. The fact that Proposed Intervenors propose a different briefing strategy than the Secretary in their pursuit of a shared objective—to uphold the Ballot Order Statute—does not support intervention as of right.

Further, and as evidenced by both Proposed Intervenors' request for oral argument on the present Motion and the unsustainable arguments included in their Proposed Motion to Dismiss, if the Motion to Intervene is granted, it will only delay and prejudice the adjudication of this case, to the detriment of the original parties and Florida's electorate, which should be given the opportunity to vote in

elections where the thumb is not heavily on the scale in favor of the Governor's party. In an effort to ensure fairness in the upcoming November elections, Plaintiffs have filed a Motion for a Preliminary Injunction. *See* ECF No. 29. But unlike the Plaintiffs (or Florida's voters), it is in Proposed Intervenors' interest to delay the swift resolution of this matter, because so long as the Ballot Order Statute remains in effect, they stand to benefit.

Finally, even if the Court were to conclude that it is appropriate to permit Proposed Intervenors to participate, allowing them to do so as *amicus curiae* at the appropriate time would protect against unreasonable delay and significant additional costs to the original parties, while at the same time allowing Proposed Intervenors to present their position to the Court.

For all of these reasons, and as discussed further below, the Motion should be denied.

II. STATEMENT OF FACTS

It is an open secret in the political world (repeatedly confirmed by statistical analyses and recognized by multiple federal and state courts) that the candidate listed first on a ballot attracts additional votes *solely* due to her position on the ballot.[2] *See also* Expert Rpt. of Dr. Jonathan Krosnick ("Krosnick Rpt." at 2, 15-

[2] *See, e.g.*, *McLain v. Meier*, 637 F.2d 1159, 1166 (8th Cir. 1980) (affirming "district court's finding of ballot advantage in the first position"); *Akins v. Sec'y of State*, 154 N.H. 67, 71 (2006) (affirming finding that "the primacy effect confers an advantage in elections"); *Graves v. McElderry*, 946 F. Supp. 1569, 1576 (W.D. Okla. 1996) (finding evidence supported existence of position bias in case involving statute that put Democrats first on ballot); *Gould v. Grubb*, 14 Cal. 3d 661, 664 (1975) (describing finding of position bias as "consistent with parallel findings rendered in similar litigation throughout the country"); *Holtzman v.*

22, 62), ECF No. 31. This phenomenon is known as "position bias" or "primacy effect," and Florida's Ballot Order Statute codifies it in favor of all candidates of the party that won the previous election for Governor, requiring that they be listed first on the ballot, before any other major political parties' candidates. *See* Fla. Stat. § 101.151(3)(a). As a result, candidates of the Governor's political party receive an unfair and artificial electoral advantage until such time as a candidate from another party wins a gubernatorial election.

The specific impacts of the Ballot Order Statute in Florida have been to give, on average, Republican candidates a 2.70 percentage point advantage and Democratic candidates a 1.96 percentage point advantage when listed first. Krosnick Rpt. at 3, 57. Because Republicans have won Florida's last five gubernatorial elections (including in 2010 and 2014, by 1.2% and 1% of the vote, respectively), they have enjoyed this artificial advantage in partisan elections for two decades.

Plaintiffs filed this action against the Secretary in his official capacity on May 24, 2018, challenging the Ballot Order Statute on the grounds that it treats similarly situated political parties differently—namely, "the party that received the highest number of votes for Governor in the last [gubernatorial] election," as compared to "the party that received the second highest vote for Governor," Fla. Stat. § 101.151(3)(a)—giving the former a statewide, consistent, unfair, and

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Power, 62 Misc. 2d 1020, 1023 (N.Y. Sup. Ct.) (noting belief "that there is a distinct advantage to the candidate whose name appears first on a ballot . . . appears to be so widespread and so universally accepted as to make it almost a matter of public knowledge"), *aff'd*, 34 A.D.2d 917 (1970).

arbitrary electoral advantage for four years at a time, based solely on the performance of that party's candidate in a single unrelated election, in violation of the Equal Protection Clause of the Fourteenth Amendment. *See generally* Compl., ECF No. 1. On June 19, 2018, the Secretary moved to dismiss the Complaint in its entirety. Sec'y's Mot. to Dismiss, ECF No. 21.

Two days later, Proposed Intervenors, two Republican political committees, filed the instant Motion to Intervene, along with a Proposed Motion to Dismiss. *See* Mot.; Intervenors' Proposed Mot. to Dismiss, ECF No. 23-1. In their Motion to Intervene, Proposed Intervenors argue that they are entitled to intervention as of right because they claim to be entities that are "governed" by the Ballot Order Statute; that their voters may be "confused" if the Statute is invalidated; that they would have to spend time and resources educating their employees, volunteers or voters about a new ballot ordering system if Plaintiffs prevail; and that they have "a specific interest in maintaining the status quo of the lawfully enacted ballot order statute." Mot. at 10-11. This Court directed Plaintiffs to file an expedited response to the Motion. ECF No. 24.

On June 29, 2018, the same day Plaintiffs filed this opposition brief, Plaintiffs also filed a Motion for a Preliminary Injunction seeking an order enjoining the Secretary from enforcing the Ballot Order Statute in advance of the November 2018 elections. *See* Pls.' Mot. for Preliminary Injunction, ECF No. 29. Specifically, Plaintiffs request that the Court order the Secretary to direct Florida's supervisors of elections ("SOEs") to rotate the order of major party candidates by precinct, whereby the candidates of each major political party are listed first in all

races for which they have a candidate on an approximately equal number of ballots throughout each county. *Id*. at 2. As explained in a declaration submitted in support of that motion from Ion Sancho, who served as the SOE for Leon County for nearly 28 years, Plaintiffs' requested relief would not impose an administrative burden to implement for several reasons, including that SOEs "routinely have to create multiple ballots within their assigned counties that differ on a precinct-by-precinct basis, and they are unable to begin building any general election ballots until after they receive a certified list of general election candidates," which will not happen until after the August 28 primary election. ECF No. 32 ¶¶ 6, 8.

III. ARGUMENT

Proposed Intervenors are not entitled to intervene as of right under Rule 24(a). While permissive intervention under Rule 24(b) is a matter within the Court's discretion, Plaintiffs submit that it is not appropriate here because of the delay and prejudice to the adjudication of the original parties' rights that will result if intervention is granted.

A. Proposed Intervenors Fail to Establish a Right to Intervene

Proposed Intervenors have no legally cognizable interest to support intervention, thus, the disposition of this action will not impede or impair the ability to protect any such interest. Independently meriting denial of the Motion, Proposed Intervenors also cannot overcome the strong presumption that the Secretary, who shares their same objective of upholding the Ballot Order Statute, will adequately represent their interest. Their Motion for intervention as of right should therefore be denied.

1. Legal Standard Under Rule 24(a)(2)

Under Rule 24(a)(2), a movant *only* has a right to intervene when he can satisfy all of the following four elements: "(1) his application to intervene is timely; (2) he has an interest relating to the property or transaction which is the subject of the action; (3) he is so situated that disposition of the action, as a practical matter, may impede or impair his ability to protect that interest; and (4) his interest is represented inadequately by the existing parties to the suit." *Stone v. First Union Corp.*, 371 F.3d 1305, 1308-09 (11th Cir. 2004) (quoting *Worlds v. Dep't of Health & Rehab. Servs.*, 929 F.2d 591, 593 (11th Cir. 1991)).

To support intervention, a nonparty's interest must be "direct, substantial and *legally protectable*." *Mt. Hawley Ins. Co. v. Sandy Lake Props., Inc*., 425 F.3d 1308, 1311 (11th Cir. 2005) (emphasis added) (citation omitted). This requires "that the interest be one which the substantive law recognizes as belonging to or being owned by the applicant." *Id*. (emphasis added and citation omitted). In other words, "a legally protectable interest is an interest that derives from a legal right." *Id*. The question of whether the non-party has a substantial and legally protectable interest is "closely related" to the question of whether disposition of the litigation will impair the ability to "protect that interest." *Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989). Answering the first question in the negative therefore forecloses satisfaction of the second.

Adequate representation by the existing parties to the suit, moreover, is *presumed* where an existing party seeks the same objectives as the proposed intervenors. *Stone*, 371 F.3d at 1311 (citing *Clark v. Putnam County*, 168 F.3d 458,

461 (11th Cir. 1999)). To overcome the presumption, the proposed intervenors must come forward with some evidence to the contrary. *Id.*; *Clark*, 168 F.3d at 461. Even such proof is not enough, as a court will then "return[] to the general rule that adequate representation exists '[1] if no collusion is shown between the representative and an opposing party, [2] if the representative does not have or represent an interest adverse to the proposed intervener, and [3] if the representative does not fail in fulfillment of his duty.'" *Stone*, 371 F.3d at 1311 (alteration in original) (quoting Clark, 168 F.3d at 461).

Critiquing a representative's tactics does not support intervention. "[A] difference of opinion concerning the tactics with which the litigation should be handled . . . does not make the inadequate representation of those whose interests are identical with that of an existing party." *Bake House SB, LLC v. City of Miami Beach*, No. 17-20217-CV-LENARD/GOODMAN, 2017 WL 2645760, at *5 (S.D. Fla. June 20, 2017) (citing *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) ("Where parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention.")). Indeed, there is "'an assumption of adequacy when the government is acting on behalf of a constituency that it represents. In the absence of a 'very compelling showing to the contrary,' it will be presumed that a state adequately represents its citizens when the applicant shares the same interest.'" *California ex rel. Lockyer v. United States*, 450 F.3d 436, 443–44 (9th Cir. 2006) (quoting *Arakaki*, 324 F.3d at 1086)).

Proposed Intervenors have the burden to show that all four elements for intervention as of right are met. *See Chiles*, 865 F.2d at 1213; *see also United States v. City of Miami*, 278 F.3d 1174, 1178 (11th Cir. 2002) (same). They cannot.

2. Proposed Intervenors Have Not Established They Have a Legally Protectable Interest

No substantive law recognizes a legal right to an unfair political advantage. Proposed Intervenors appear to recognize this, studiously avoiding making the explicit argument that it is, in fact, the artificial advantage that they hope to intervene to defend. But hints of that come through in their Motion, which often only makes sense in the subtext. For example, Proposed Intervenors argue that deciding the validity of the Ballot Order Statute "without the input of ***the parties who stand to be most directly harmed*** by a change . . . would be inefficient and unjust." Mot. at 16 (emphasis added). Yet, nowhere in the Motion do they clearly articulate *why* they believe they "stand to be most directly harmed" by invalidating the Ballot Order Statute. To the contrary, the purported injuries that they would intervene to protect are not injuries unique to Republicans and their constituencies.

For instance, presumably, if voters will be "confused" by ballots that present candidates designated as Democrats before candidates designated as Republicans in the November 2018 election (and Proposed Intervenors never explain why this would be the case), the same is true of *all* voters, not just Republican voters. Similarly, their assertion that they have a "specific interest in maintaining the *status quo* of the lawfully enacted Ballot Order Statute," Mot. at 13, is surely shared by many more people than Republican entities (including the Secretary who

is already a defendant). Their assertion that they "stand to be most directly harmed," however, is only logical if, in fact, there is a real and meaningful primacy effect, and they do not want to lose their exclusive claim to it, for fear they may have trouble competing on a level playing field.

There is good reason not to allow parties to intervene simply to protect an unfair political advantage, and it would establish dangerous precedent to allow the Proposed Intervenors to achieve that end by concealing their intention here. Indeed, due to a drafting oversight, it is apparent Proposed Intervenors borrowed from their counsel's recent, failed motion to intervene on behalf of the Republican Congressional Delegation in *League of Women Voters of Michigan v. Johnson*, No. 17-cv-14148 (E.D. Mich.), ECF No. 21 at 2 (Feb. 28, 2018), a partisan gerrymandering challenge to Michigan's congressional map, when they assert here that Proposed Intervenors "have a substantial interest in this litigation and *the redrawing of the current congressional districting plan should the Court ultimately so order*." Mot. at 5-6 (emphasis added). Indeed, much of the language in the instant Motion is identical to the motion for intervention filed in that case. *Compare League of Women Voters of Mich.*, No. 17-cv-14148 (E.D. Mich.), ECF No. 21 at 8-9, *with* Mot. at 15-16. While it is not unusual for counsel to recycle work product when preparing motions on similar topics in different cases, it is telling that, in the Michigan case, the district court denied the strikingly similar motion to intervene, finding, *inter alia*, that: (1) "[e]lected office does not constitute a property interest;" (2) "[a]ll citizens of Michigan share a generalized interest in this litigation insofar as they have the right to vote, run for office, or

otherwise participate in the 2020 election;" (3) the Delegation's interest "was not materially distinguishable from the interest shared by all citizens;" and (4) the generalized interest is "adequately represented" by the Secretary of State's "interest in protecting the current apportionment plan and other governmental actions from charges of unconstitutionality." *League of Women Voters of Mich.*, No. 17-cv-14148 (E.D. Mich.), ECF No. 47 (April 4, 2018).[3]

In any event, none of the four "interests" that Proposed Intervenors purport to assert in *this* Motion properly form the basis for intervention as of right. First, Proposed Intervenors contend that "they are governed by the statutory scheme in question." Mot. at 10. This is not so: the Ballot Order Statute governs the *administration* of elections as it relates to printing and preparing official ballots, and Proposed Intervenors cannot and do not claim that they have any role or duties in this regard. *See, e.g.*, Fla. Stat. § 101.2512(1) ("[SOEs] shall print on the general election ballot the names of candidates nominated by primary election or special primary election[.]"); *id.* § 101.21 ("[SOEs] shall determine the actual number of ballots to be printed.").[4]

[3] The district court also held that permissive intervention was improper there: "In light of the complex issues raised by the parties, the need for expeditious resolution in this case, and the massive number of citizens who share the Delegation's interest in this litigation, granting the Delegation's motion to intervene could create a significant likelihood of undue delay and prejudice to the original parties." *Id.*

[4] In support of their assertion that they are "governed" by the Ballot Order Statute, Proposed Intervenors rely exclusively on the wholly inapposite *Chiles*, in which immigrant detainees sought to intervene in a suit alleging that the federal government was illegally operating the immigration detention facility where the detainees were held. 865 F.2d at 1201.

Second, Proposed Intervenors' assertion that a ruling in Plaintiffs' favor "will inevitably lead to confusion for [Proposed Intervenors'] voting members and candidate members," Mot. at 10, is both unsubstantiated and appears to rest on a misapprehension of the relief that Plaintiffs seek. Proposed Intervenors claim that "[a]ny wholesale re-creation of the way candidates are ordered . . . is sure to cause—potentially massive—voter confusion to the Republican party's candidates and voter members." *Id.* at 12. But they fail to explain what would be so confusing to voters about a ballot upon which the major party candidates are clearly designated with their party affiliations (as Florida law otherwise requires[5]), with the only difference being that voters in half of a county's precincts will receive ballots that list Democrats first, and voters in the other half will have Republicans listed first. *See* Pls.' Mem. in Support of Preliminary Injunction, ECF. No. 30 at 2, 4.

Plaintiffs do not suggest that the Court should order a "wholesale" reshuffling of all candidates in all races; rather, the narrow relief that Plaintiffs seek would require only a minor adjustment to ballot order in half of a county's precincts consistently across all races, which should effectively negate the advantage currently conferred on the party that is always listed first under the current operation of the Ballot Order Statute. *See id*. In short, Plaintiffs' requested relief would not have individual ballots organized in such a way as would make it

[5] Plaintiffs do not challenge the clause of Fla. Stat. § 101.151(3)(a) which provides that "[t]he names of the candidates" be listed "together with an appropriate abbreviation of the party name."

difficult for Florida voters who desire to select only candidates from their preferred party up and down the ticket. Thus, Proposed Intervenors have no legally cognizable interest in avoiding this wholly imaginary risk.

Third, Proposed Intervenors allege, but again do not explain, that an "adverse ruling will have a negative impact on [their] Members campaigns." Mot. at 10-11. This assertion, too, is not well founded. As discussed, to the extent that the negative impact that they fear is that their Members will no longer enjoy an unfair, artificial electoral advantage in partisan elections in Florida, Proposed Intervenors lack any "legally protectable" interest in maintaining that advantage. *See Mt. Hawley Ins. Co.*, 425 F.3d at 1311. To the extent that Proposed Intervenors characterize this "negative impact" as "requiring member candidates to expend time and resources educating their employees, volunteers, and voters of any new ballot ordering system and participating in any such new system should one be implemented," Mot. at 11, it is unclear what exactly Proposed Intervenors' member candidates' employees, volunteers, or voters would have to do differently if Plaintiffs prevail. The Motion neither explains what relevant "education" their member candidates currently provide "their employees, volunteers, and voters" that is germane to operation of the Ballot Order Statute, or how that would have to change. As explained above, Proposed Intervenors' employees, volunteers, or voters have no role in designing or ordering the ballots that would be impacted by the relief that Plaintiffs seek. Moreover, Proposed Intervenors presumably already convey to voters that candidates whose names are followed by "REP" on the ballot

are Republican candidates, *see* Fla. Stat. § 101.151(3)(a), advice that would not have to change if Plaintiffs prevail.

Lastly, Proposed Intervenors contend that "the *stare decisis* effect" of an adverse opinion may impact their "interest" in maintaining what are apparently similar, unfair, artificial political advantages in other states, under statutes not at issue here. Mot. at 11, 12. This argument reflects a basic misunderstanding of what *stare decisis* means and how it works. A decision by this Court that the Florida Ballot Order Statute is unconstitutional would not have the effect of automatically invalidating other statutes, however similar they might be to the Ballot Order Statute, just as the abundance of decisions that have previously invalidated other ballot ordering laws do not obviate the need for this litigation. *See*, *e.g.*, *McLain*, 637 F.2d at 1167 (finding North Dakota's "incumbent first" ballot order statute violated the Fourteenth Amendment); *Akins*, 154 N.H. at 72-73 (finding statute that listed first all candidates of party that received the most votes in the prior election was unconstitutional); *Mann v. Powell*, 398 U.S. 955 (1970) (summarily affirming the lower court's order enjoining state practice that gave incumbents advantage of being placed first on ballot and requiring candidates have an equal opportunity for first placement); *McElderry*, 946 F. Supp. at 1578-79 (finding Oklahoma statute that listed Democrats first in every partisan election unconstitutional); *Gould*, 14 Cal. 3d at 674 (affirming finding that an incumbent-first ballot ordering provision violated equal protection).

To support this argument, Proposed Intervenors rely on inapposite authority in *Chiles v. Thornburgh*, where the detainee intervenors faced a real risk of their

rights being impeded by *stare decisis*, because they "claim[ed] an interest in *the very property and very transaction* that [wa]s the subject of the main action." 865 F.2d at 1214 (emphasis added). Thus, the disposition of that case could have, for example, foreclosed subsequent *habeas corpus* petitions by the detainees regarding the same legal issue and challenged policy. In comparison, Proposed Intervenors claim only that, if Plaintiffs prevail, there may be one more persuasive decision for courts considering constitutional challenges to other ballot ordering statutes to review.[6]

Accordingly, Proposed Intervenors can establish neither a legally cognizable interest in the litigation, nor that the disposition of this matter will impede their ability to protect such an interest.

3. Proposed Intervenors Cannot Show that the Secretary Inadequately Represents Their Purported Interest

Even if Proposed Intervenors could establish both that they have a legally cognizable interest in this litigation and that their ability to protect such an interest

[6] The only other case on which Proposed Intervenors rely in making their *stare decisis* argument is also inapposite. In *Stone*, all parties agreed that the proposed intervenor plaintiffs—employees who, like the named plaintiff, alleged similar employment discrimination by the defendant—had a legitimate interest justifying intervention. 371 F.3d at 1309. There, *stare decisis* was a relevant consideration, because the employees were "alleging that the same First Union policy violated the ADEA and led to their injury." *Id.* at 1310. For that reason, the Eleventh Circuit noted that "one court's ruling on whether the bank's policy, as a matter of law, was in violation of the ADEA could influence later suits" challenging the *same* policy under the *same* legal theory. *Id.* Proposed Intervenors' claim that they have a legally protectable "interest" based on the fact that *other* ballot ordering laws, in *other* states, might also be vulnerable to constitutional challenge, clearly presents a very different situation.

would be impeded by a disposition here (which they cannot), they also fail to demonstrate that the Secretary inadequately represents their interest in the litigation.

This is understandable, given that it is the Secretary's job, as the State's chief elections officer, to defend the alleged constitutionality of the Ballot Order Statute. *See* Fla. Stat. § 97.012 (Secretary's duty to "[o]btain and maintain uniformity in the interpretation and implementation of the election laws"); *see also* Fla. Const. art. II, § 5(b) (state officers are sworn to "defend the . . . Government of . . . the State of Florida"). And, as another court in this district previously recognized, "the State of Florida has . . . repeatedly . . . shown little reluctance to pursue litigation on matters of this kind; the state is no shrinking violet." *League of Women Voters of Fla. v. Detzner*, 283 F.R.D. 687, 688 (N.D. Fla. 2012). This case is no exception: the Secretary has engaged a private law firm to assist him in defending against this lawsuit, retaining lawyers who have a history of zealously defending the interests of the Republican Party in voting litigation. *See*, *e.g.*, *Bainter v. League of Women Voters of Fla.*, 150 So.3d 1115 (Fla. 2014). And the Secretary has already filed a motion to dismiss the Complaint in its entirety. *See* Sec'y's Mot. to Dismiss, ECF No. 21.

Proposed Intervenors have not put forth any evidence to suggest that the representation by the very capable attorneys the Secretary has engaged will be inadequate. *See Clark*, 168 F.3d at 461 (when existing parties seek the same objective as the would-be intervenor, intervenor must produce "some evidence" that the current representation is inadequate; representation is presumed adequate if

there is no collusion, adverse interest, or failure of duty). Proposed Intervenors do not even attempt to make the argument that Plaintiffs and the Secretary are in collusion, that Proposed Intervenors' interests are adverse to the Secretary's, or that the Secretary is likely to fail in the fulfillment of the duties of his job. *See Stone*, 371 F.3d at 1311.

Further, Proposed Intervenors' own Proposed Motion to Dismiss reveals they have virtually the same immediate *and* overall objectives as the Secretary: (1) they both seek dismissal under Rule 12(b)(6) based on an argument that Plaintiffs have not asserted a sufficient burden on the right to vote to pursue their claims; and (2) they both seek a decision upholding the Ballot Order Statute. *Compare* Sec'y's Mot. to Dismiss, ECF No. 21, *with* Proposed Mot. to Dismiss, ECF No. 23-1; *see also Stone*, 371 F.3d at 1311 (adequate representation is presumed when objectives are the same); *Athens Lumber Co. v. FEC*, 690 F.2d 1364, 1366 (11th Cir. 1982) (affirming denial of intervention and rejecting inadequacy argument where proposed intervenor had same goal as government-entity defendant, i.e., upholding the constitutionality of statute).

That Proposed Intervenors claim they will advance some slightly different strategy than the Secretary in defending the Ballot Order Statute—e.g., that they would make an argument under the doctrine of laches in their Answer rather than on their Motion to Dismiss, *see* Mot. at 14—is insufficient to establish that Proposed Intervenors' interests will not be adequately defended. *See*, *e.g.*, *Bake House*, 2017 WL 2645760, at *5 ("[A] difference of opinion concerning the tactics with which the litigation should be handled . . . does not make inadequate the

representation of those whose interests are identical with that of an existing party."); *see also Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 954 (9th Cir. 2009) ("[M]ere differences in litigation strategy . . . are not enough to justify intervention as a matter of right.") (alterations, brackets, citations and internal quotation marks omitted); *Saldano v. Roach*, 363 F.3d 545, 555 (5th Cir. 2004) ("Simply because the [intervenor] would have made a different [litigation] decision does not mean that the Attorney General is inadequately representing the State's interest[.]"); *Chiglo v. City of Preston*, 104 F.3d 185, 188 (8th Cir. 1997) ("[T]he proposed intervenor cannot rebut the presumption of representation by merely disagreeing with the litigation strategy . . . of the party representing him."); 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1909 (3d ed. 2007) ("A mere difference of opinion concerning the tactics with which the litigation should be handled does not make inadequate the representation of those whose interests are identical with that of an existing party[.]").

Proposed Intervenors' attempt to distinguish their Proposed Motion to Dismiss from the Secretary's Motion is both confusing and unavailing. Specifically, Proposed Intervenors argue that their motion is somehow meaningfully different because they allege: (1) "a reliance interest in the current ballot ordering scheme;" and (2) that the Florida Legislature has the constitutional authority "to implement time, place, and manner restrictions on elections" under the U.S. Constitution's Election Clause. Mot. at 15. However, whatever Proposed Intervenors' purported "reliance interest" might be, it is neither defined,

mentioned, nor described anywhere in their Proposed Motion, let alone supported by any proffered evidence.[7] Instead, the thrust of their Proposed Motion to Dismiss focuses exclusively on minimizing Plaintiffs' injuries when compared with "Florida's important state interests" in "preventing confusion, promoting a uniform ballot, and promoting predictability on the ballot." *Id.* at 15. Where Proposed Intervenors can only point to "*Florida's*" interest in defending the Ballot Order Statute, it becomes even clearer that the Secretary is in the best position to represent such an interest. *See League of Women Voters of Fla.*, 283 F.R.D. at 688-89 (denying permissive intervention where original defendants, including the Secretary, were "after all, officials of the State of Florida," and proposed intervenors sought "to advocate for a statute and rule they had no right to have enacted in the first place"). Moreover, it is unlikely that Proposed Intervenors have *standing* to enforce or defend the Florida Legislature's authority under the Elections Clause. *See* Proposed Mot. to Dismiss at 15-17; *see also Norris v. Detzner*, No. 3:15cv343-MCR/EMT, 2015 WL 12669919, at *2 (N.D. Fla. Sept. 17, 2015) (denying intervention as defendants in a challenge to a law where "the Proposed Intervenors lack standing because they have no role in enforcing a duly enacted constitutional amendment" at issue) (citing *Hollingsworth v. Perry*, 570 U.S. 693, 707 (2013)).[8]

[7] As discussed, if that interest is reliance on an unfair and artificial electoral advantage, it is not cognizable.

[8] In any event, even if Proposed Intervenors did have standing, their argument in their Proposed Motion to Dismiss otherwise fails, because: (1) the purported risk of voter confusion is wholly imaginary here, *see supra* at Section III.A.2; and (2) even if there were a legitimate state interest in avoiding an actual risk of voter

Accordingly, Proposed Intervenors' request that they be permitted to intervene as of right should be denied.

B. Proposed Intervenors' Request for Permissive Intervention Should Be Denied

The Court should further exercise its discretion to deny Proposed Intervenors' request that they be granted permissive intervention, because Proposed Intervenors lack any legally cognizable interest in the litigation, are likely to delay adjudication of the rights of the original parties, and are unlikely to add anything of substance to the resolution of the case.

1. Legal Standard Under Rule 24(b)

Although courts have broad discretion to grant or deny a motion for permissive intervention, "[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(1), (3); *see also Mt. Hawley Ins.*, 425 F.3d at 1312 (explaining permissive intervention is only appropriate "where a party's claim or defense and the main action have a question of law or fact in common *and* the intervention will not unduly prejudice or delay the adjudication of the rights of the original parties") (emphasis added) (citation omitted). "[T]he court may also consider other factors in the exercise of its discretion, including 'the nature and extent of the intervenors' interest' and 'whether the intervenors'

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confusion, it would not justify the constitutional harm. *See*, *e.g.*, *McLain*, 637 F.2d at 1167 (rejecting similar arguments). As the Secretary raises virtually the same argument in his Motion to Dismiss, Plaintiffs will fully address this argument in Plaintiffs' forthcoming opposition to the Secretary's Motion.

interests are adequately represented by other parties.'" *Perry*, 587 F.3d at 955 (citation omitted); *see also Bake House*, 2017 WL 2645760, at *6 (when deciding whether to grant a motion under Rule 24(b), "a district court 'can consider almost any factor rationally relevant'" (citation omitted)); *In re Pinchuk*, No. 13-MC-22857-GOODMAN, 2014 WL 12600728, at *6 (S.D. Fla. Jan. 27, 2014) ("Although the issue of whether the intervenors' interests are adequately represented by other parties is a required element of the analysis for intervention of right, it is also a factor to be balanced in a permissive intervention assessment.").

2. Permissive Intervention Should be Denied

Proposed Intervenors give their alternative argument short shrift, but as countless cases demonstrate, when considering whether to grant permissive intervention, courts in this Circuit carefully weigh the interests of the parties, the potential for intervention to protract the litigation, and whether intervention is likely to add anything of substance to the resolution. *See, e.g.*, *Vazzo v. City of Tampa*, No. 8:17-cv-2896-T-36AAS, 2018 WL 1629216, at *5 (M.D. Fla. Mar. 15, 2018); *Lacasa v. Townsley*, No. 12-22432-CIV, 2012 WL 13069998, at *2 (S.D. Fla. July 6, 2012) (denying permissive intervention where proposed intervenor's interest "will be adequately represented by the existing Defendant" and permitting intervention "will only present a risk of delaying the adjudication of the case"); *Wollschlaeger v. Farmer*, No. 11-22026-CIV-COOKIE/TURNOFF, 2011 WL 13100241, at *3 (S.D. Fla. July 11, 2011) (denying permissive intervention where "[t]he duplicative nature of" proposed intervenors' "claims or interests will unduly delay the adjudication of the rights of the parties to this lawsuit and [are] unlikely

shed any new light on the constitutional issues in this case."); *see also ManaSota-88, Inc. v. Tidwell*, 896 F.2d 1318, 1323 (11th Cir. 1990) (affirming a denial of permissive intervention where proposed intervenor sought to "inject numerous issues into the case," the litigation was time sensitive, and intervention "would severely protract litigation"). Such motions are regularly denied where, as here, proposed intervenors lack any legally cognizable interest in the litigation, duplicate interests advanced by an existing party to the litigation, and are likely to delay adjudication of the rights of the original parties without adding anything of substance to the resolution of the case.

As discussed at length above, Proposed Intervenors lack any legitimate interest in this case, and the *only* defense that Proposed Intervenors raise in their appended "pleading" (i.e., their Proposed Motion to Dismiss) is a defense that they likely lack standing to raise. Simply put, Proposed Intervenors seek to intervene to argue for exactly what the Secretary will argue—that the Ballot Order Statute should be upheld—where Proposed Intervenors neither had a right to have the Statute enacted in the first place, nor have any right or duty to enforce it. *See, e.g.*, *League of Women Voters of Fla.*, 283 F.R.D. at 689 (denying permissive intervention where the proposed intervenors sought only to defend "a statute and rule they had no right to have enacted in the first place" and "ha[d] no right to prevent others from conducting voter-registration drives" or "to make it harder for other qualified applicants to register to vote"); *Norris*, 2015 WL 12669919, at *2 (denying permissive intervention where proposed intervenors had "no enforcement

role in upholding the challenged amendments . . . and thus they d[id] not share a claim or defense in this suit").

Considerations about the efficient and timely resolution of this matter also counsel against granting Proposed Intervenors permission to intervene as defendants. Fed. R. Civ. P. 24(b)(3) (permissive intervention should be denied when intervention will "unduly delay . . . the adjudication of the original parties' rights"); *see also Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1250 (11th Cir. 2002) (holding court must be satisfied permissive intervention will not unduly prejudice or delay adjudication of the original parties' rights). Thus, in *Florida Clean Water Network, Inc. v. United States Environmental Protection Agency*, this Court denied the timely motion to intervene of several associations in a Clean Water Act case where it found that their "intervention . . . will unduly delay the adjudication of the rights of the parties by adding witnesses and corollary issues," and would "add nothing of substance to the resolution of the instant case." No. 4:09-cv-165-SPM/WCS, 2009 WL 10674045, at *2 (N.D. Fla. Sept. 29, 2009); *see also Ansley v. Warren*, No. 1:16-cv-54, 2016 WL 3647979, at *3 (W.D.N.C. July 7, 2016) (denying timely motions to intervene by Republican state legislators filed shortly after plaintiffs filed complaint where "allowing the Movants to intervene . . . would needlessly prolong and complicate this litigation, including discovery, and delay the final resolution of this case"); *Am. Ass'n of People With Disabilities v. Herrera*, 257 F.R.D. 236, 259 (D.N.M. 2008) (denying timely motions to intervene filed four weeks after filing of the complaint by Republican state legislators and Republican Party seeking to defend a law that restricted the

right to vote when "intervention is likely to lead to delays that could prejudice the Plaintiff's case and the Defendant" by increasing pleadings and discovery); *Vazzo*, 2018 WL 1629216, at *7 (although motion was "timely and its defense appears to share a common question of law and fact with the" defense, denying permissive intervention because it "would unduly delay and prejudice the adjudication of the original parties' rights"); *see also supra* at n. 5.

Such is the case here. "Intervening parties are entitled to all the rights and responsibilities of original parties to the litigation, including the right to present evidence and to have their schedules considered in setting hearing dates." *Herrera*, 257 F.R.D. at 259; *Chiles*, 865 F.2d at 1215. If Proposed Intervenors are permitted to participate fully as defendants in the lawsuit, the briefing schedules will undoubtedly become more complex, the number of pages that the Court will have to review and the parties respond to will multiply, setting dates for hearings will become more difficult, and even negotiating stipulations will take more time. *See, e.g.*, *South Carolina v. North Carolina*, 558 U.S. 256, 287 (2010) (Roberts, C.J., concurring and dissenting) ("Intervenors do not come alone—they bring along more issues to decide [and] more discovery requests[.]"). Indeed, that Proposed Intervenors have requested oral argument on their Motion to Intervene only underscores this point.

Proposed Intervenors have no incentive to promote the expeditious litigation of this case where any delay will heighten the chances that their candidates will continue to benefit from position bias in the upcoming November 2018 election. For the same reasons, delay will *unduly* prejudice Plaintiffs. And in their Motion to

Intervene, Proposed Intervenors have already begun attempting to lay the groundwork for delay, asserting (without evidence) that Proposed Intervenors "stand to be harmed by any change to the Ballot Order Statute, *especially this close to an election*." Mot. at 5 (emphasis added). Several courts have recognized the particularly significant prejudice that can arise in election-related cases from complications and delay resulting from the intervention of unnecessary parties, and have declined to exercise their discretion to allow permissive intervention under similar circumstances. *See, e.g.*, *One Wis. Inst., Inc. v. Nichol*, 310 F.R.D. 394, 399 (W.D. Wis. 2015) (denying permissive intervention of four Republican state government officials and two Republican voters who had the same objective in upholding the challenged voting laws as the attorney general defendant; "[T]he nature of this case requires a higher-than-usual commitment to a swift resolution. Plaintiffs are challenging Wisconsin's election procedures, and the court must resolve these challenges well ahead of the November 2016 election to avoid any voter confusion."); *Herrera*, 257 F.R.D. at 259 (denying motions to intervene by various Republican officials and entities in voting rights case, in part because, "[t]his case is very time sensitive, as the deadline for book-closing preceding the general election is fast approaching. With less than one month until the book-closing, the Court believes that it is important to avoid any unnecessary delays.") (citation omitted).

Further, when evaluating a motion for permissive intervention a court may consider "the nature and extent of the intervenors' interest" in the action as well as "whether the intervenors' interests are adequately represented by other parties."

Perry, 587 F.3d at 955 (citation omitted). These considerations militate strongly against intervention here. As discussed, Proposed Intervenors have no legally cognizable interests that entitles them to intervene, and any interests they do have are either facially illegitimate or are already more than adequately protected by the Secretary. *See supra* Section III.A.2, 3. Permissive intervention is therefore improper. *See Wollschlaeger*, 2011 WL 13100241, at *3; *Herrera*, 257 F.R.D. at 259; *see also Nichol*, 310 F.R.D. at 399 ("[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.") (citation omitted). Proposed Intervenors' legal and factual arguments will duplicate Defendant's such that their participation will not contribute in any way to the Court's resolution of the case. *See Dillard v. City of Foley*, 926 F. Supp. 1053, 1062 (M.D. Ala. 1995); *Wollschlaeger*, 2011 13100241, at *3; *see also Chiles*, 865 F.2d at 1215.

Finally, "[i]n cases like this one, where a group of plaintiffs challenge state legislation, the court should evaluate requests to intervene with special care, lest the case be swamped by extraneous parties who would do little more than reprise the political debate that produced the legislation in the first place." *Nichol*, 310 F.R.D. at 397. Where, as here, proposed intervenor defendants advance only a generalized interest in upholding a law, without any enforcement authority with regard to the challenged law, permissive intervention is improper. *See Norris*, 2015 WL 12669919, at *2 (denying permissive intervention where proposed intervenors were "attempting to assert a generalized interest in avoiding political

gerrymandering," and had "no enforcement role in upholding the challenged amendments or in opposing the asserted speech rights, and thus they do not share a claim or defense in this suit").[9]

In sum, Proposed Intervenors provide no basis for granting permissive intervention here.

V. CONCLUSION

For all of the reasons set forth above, Proposed Intervenors' Motion to Intervene as of right under Rule 24(a) should be denied, and Plaintiffs respectfully request that the Court exercise its sound discretion in denying permissive intervention under Rule 24(b).

LOCAL RULE 7.1(F) CERTIFICATION

Counsel for Plaintiffs, Fritz Wermuth, Esquire, certifies that this motion contains 7,506 words.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 29, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

[9] Denying intervention here need not foreclose Proposed Intervenors from participating in this case. Rather, Proposed Intervenors "may seek leave to file an amicus curiae brief . . . if they wish to set forth their legal contentions as to" the Ballot Order Statute. *Ansley*, 2016 WL 3647979, at *3; *see also Vazzo*, 2018 WL 1629216, at *6 (denying advocacy group's motion to permissively intervene and permitting group to appear as amicus to provide the court with its "'helpful, alternative viewpoint' without causing undue delay or prejudice to the adjudication of the original parties' rights").

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By: /s/ Frederick S. Wermuth

Frederick S. Wermuth
Florida Bar No.: 0184111
KING, BLACKWELL,
ZEHNDER & WERMUTH, P.A.
P.O. Box 1631
Orlando, FL 32802-1631
Telephone: (407) 422-2472
Facsimile: (407) 648-0161
fwermuth@kbzwlaw.com

Marc E. Elias
Elisabeth C. Frost*
Amanda Callais*
Jacki L. Anderson*
John M. Geise*
Alexi Velez*
PERKINS COIE LLP
700 Thirteenth St., N.W.,
Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-9959
melias@perkinscoie.com
efrost@perkinscoie.com
acallais@perkinscoie.com
jackianderson@perkinscoie.com
jgeise@perkinscoie.com
avelez@perkinscoie.com

Abha Khanna*
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: (206) 359-8000
Facsimile: (206) 359-9000
akhanna@perkinscoie.com

Counsel for the Plaintiffs
**Admitted Pro Hac Vice*