UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:10-cv-23968-UU

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

v.

STATE OF FLORIDA, CHARLIE CRIST, in his official capacity as Governor of the State of Florida, THE FLORIDA HOUSE OF REPRESENTATIVES, and THE FLORIDA SENATE,

Defendants.

DOCKET

SHEET

AMS

U.S. District Court
Southern District of Florida (Miami)
CIVIL DOCKET FOR CASE #: 1:10-cv-23968-UU

Brown et al v. State of Florida et al
Assigned to: Judge Ursula Ungaro
Referred to: Magistrate Judge Andrea M. Simonton
Cause: 28:2201 Constitutionality of State Statute(s)

Date Filed: 11/03/2010
Jury Demand: None
Nature of Suit: 950 Constitutional – State Statute
Jurisdiction: Federal Question

Plaintiff

Corrine Brown represented by **Stephen Michael Cody**
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ATTORNEY TO BE NOTICED

Plaintiff

Mario Diaz Balart represented by **Stephen Michael Cody**
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ATTORNEY TO BE NOTICED

V.

Intervenor Plaintiff

Florida House of Representatives represented by **Allen C. Winsor**
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V.

Defendant

State of Florida represented by **Jonathan A. Glogau**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Florida House of Representatives

Defendant

Florida Senate
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404 S. Monroe St.
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850-487-5173

Defendant

Governor of the State of Florida
Charlie Crist, in his official capacity as Governor of the State of Florida

Defendant

ACLU of Florida
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786-363-2700

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Defendant

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Defendant

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Defendant

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Defendant

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V.

Intervenor Defendant

Leon W Russell

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Intervenor Defendant

Patricia T Spencer

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J. Gerald Hebert
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Michael B. DeSanctis
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Paul M. Smith
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Stephen Frederick Rosenthal
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Intervenor Defendant

Carolyn H Collins represented by **Eric R. Haren**
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J. Gerald Hebert
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Intervenor Defendant

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Paul M. Smith
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Stephen Frederick Rosenthal
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Intervenor Defendant

Stephen Easdale represented by **Eric R. Haren**
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Michael B. DeSanctis
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Stephen Frederick Rosenthal
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Intervenor Defendant

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J. Gerald Hebert
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Stephen Frederick Rosenthal
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Intervenor Defendant

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Paul M. Smith
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PRO HAC VICE
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ATTORNEY TO BE NOTICED

Intervenor Defendant

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Intervenor Defendant

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Jon L. Mills
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PRO HAC VICE
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Intervenor Defendant

Luis R. Garcia represented by **Carl Edward Goldfarb**
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Jon L. Mills
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Intervenor Defendant

Joseph A. Gibbons represented by **Carl Edward Goldfarb**
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Jon L. Mills
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Intervenor Defendant

Perry E. Thurston represented by **Carl Edward Goldfarb**
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Jon L. Mills
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PRO HAC VICE
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
11/03/2010	1	COMPLAINT against Corrine Brown, Mario Diaz Balart. Filing fee $ 350.00 receipt number 113C–3279558, filed by Corrine Brown, Mario Diaz Balart.(Cody, Stephen) (Entered: 11/03/2010)
11/03/2010	2	Judge Assignment RE: Electronic Complaint to Judge Ursula Ungaro and Magistrate Judge Andrea M. Simonton (jcy) (Entered: 11/03/2010)
11/08/2010	3	AMENDED COMPLAINT against Corrine Brown, Mario Diaz Balart, filed by Corrine Brown, Mario Diaz Balart.(Cody, Stephen) (Entered: 11/08/2010)
11/09/2010	4	Summons Issued as to State of Florida–Attorney General Bill McCollum. (lk) (Entered: 11/09/2010)
11/18/2010	5	ORDER setting scheduling conference. (Scheduling Conference set for 2/4/2011 10:00 AM in Miami Division before Judge Ursula Ungaro.). Signed by Judge Ursula Ungaro on 11/17/2010. (lk) (Entered: 11/18/2010)
11/22/2010	6	SUMMONS (Affidavit) Returned Executed by Corrine Brown, Mario Diaz Balart. Corrine Brown served on 11/16/2010, answer due 12/7/2010; Mario Diaz Balart served on 11/16/2010, answer due 12/7/2010. (Cody, Stephen) (Entered: 11/22/2010)
11/22/2010	7	NOTICE of Striking 6 Summons Returned Executed filed by Mario Diaz Balart, Corrine Brown by Corrine Brown, Mario Diaz Balart (Cody, Stephen) (Entered: 11/22/2010)
11/22/2010	8	SUMMONS (Affidavit) Returned Executed by Corrine Brown, Mario Diaz Balart. State of Florida served on 11/16/2010, answer due 12/7/2010. (Cody, Stephen) (Entered: 11/22/2010)
12/07/2010	9	MOTION for Extension of Time to File Response/Reply as to 3 Amended Complaint by Corrine Brown, Mario Diaz Balart. (Cody, Stephen) (Entered: 12/07/2010)
12/09/2010	10	ORDER granting in part and denying in part 9 Motion for Extension of Time to File Response/Reply. Responses due by 1/11/2011. Signed by Judge Ursula Ungaro on 12/9/2010. (lk) (Entered: 12/10/2010)
12/16/2010	11	MOTION to Intervene by ACLU of Florida, Howard Simon, Susan Watson, Joyce Hamilton Henry, Benetta Standly. (Attachments: #1 Proposed Answer, #2 Text of Proposed Order)(Marshall, Randall) (Entered: 12/16/2010)
12/16/2010	12	MEMORANDUM in Support re 11 MOTION to Intervene by ACLU of Florida, Joyce Hamilton Henry, Howard Simon, Benetta Standly, Susan Watson. (Marshall, Randall) (Entered: 12/16/2010)
12/16/2010	13	MOTION to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing for Laughlin McDonald. Filing Fee $ 75. Receipt # 11265. (cw) (Entered: 12/20/2010)
12/27/2010	14	Order Denying 13 Motion to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing of Attorney Laughlin McDonald Notice of Termination delivered by US Mail to Laughlin McDonald.. Signed by Judge Ursula Ungaro on 12/27/2010. (jcy) (Entered: 12/27/2010)
12/27/2010	15	MOTION for Reconsideration re 14 Order on Motion to Appear Pro Hac Vice, by ACLU of Florida, Joyce Hamilton Henry, Howard Simon, Benetta Standly, Susan Watson. (Attachments: #1 Affidavit M. Laughlin McDonald)(Marshall, Randall) (Entered: 12/27/2010)
12/28/2010	16	Order Granting 15 Motion for Reconsideration re 13 MOTION to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing for Laughlin McDonald. Filing Fee $ 75. Receipt # 11265. Signed by Judge Ursula Ungaro on 12/28/2010. (jcy) (Entered: 12/28/2010)

12/28/2010		Attorney Moffatt Laughlin McDonald representing ACLU of Florida (Defendant) Activated. (cw) (Entered: 12/28/2010)
12/28/2010	17	RESPONSE in Opposition re 11 MOTION to Intervene filed by Corrine Brown, Mario Diaz Balart. (Cody, Stephen) (Entered: 12/28/2010)
12/31/2010	18	REPLY to Response to Motion re 11 MOTION to Intervene filed by ACLU of Florida, Joyce Hamilton Henry, Howard Simon, Benetta Standly, Susan Watson. (Marshall, Randall) (Entered: 12/31/2010)
01/06/2011	19	MOTION for Leave to File, MOTION to Intervene *as Defendants* by Leon W Russell, Patricia T Spencer, Carolyn H Collins, Edwin Enciso, Stephen Easdale, Florida State Conference of NAACP Branches, Democracia Ahora. (Rosenthal, Stephen) (Entered: 01/06/2011)
01/06/2011	20	MEMORANDUM in Support re 19 MOTION for Leave to File MOTION to Intervene *as Defendants* by Carolyn H Collins, Democracia Ahora, Stephen Easdale, Edwin Enciso, Florida State Conference of NAACP Branches, Leon W Russell, Patricia T Spencer. (Rosenthal, Stephen) (Entered: 01/06/2011)
01/06/2011	21	*Proposed* ANSWER and Affirmative Defenses to Amended Complaint by Carolyn H Collins, Democracia Ahora, Stephen Easdale, Edwin Enciso, Florida State Conference of NAACP Branches, Leon W Russell, Patricia T Spencer.(Rosenthal, Stephen) (Entered: 01/06/2011)
01/11/2011	22	MOTION for Leave to Appear *Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing* by Carolyn H Collins, Democracia Ahora, Stephen Easdale, Edwin Enciso, Florida State Conference of NAACP Branches, Leon W Russell, Patricia T Spencer. Responses due by 1/28/2011 (Attachments: # 1 Text of Proposed Order)(Rosenthal, Stephen) (Entered: 01/11/2011)
01/11/2011	23	MOTION for Leave to Appear *Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing* by Carolyn H Collins, Democracia Ahora, Stephen Easdale, Edwin Enciso, Florida State Conference of NAACP Branches, Leon W Russell, Patricia T Spencer. Responses due by 1/28/2011 (Attachments: # 1 Text of Proposed Order)(Rosenthal, Stephen) (Entered: 01/11/2011)
01/11/2011	24	MOTION for Leave to Appear *Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing* by Carolyn H Collins, Democracia Ahora, Stephen Easdale, Edwin Enciso, Florida State Conference of NAACP Branches, Leon W Russell, Patricia T Spencer. Responses due by 1/28/2011 (Attachments: # 1 Text of Proposed Order)(Rosenthal, Stephen) (Entered: 01/11/2011)
01/11/2011	25	MOTION for Leave to Appear *Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing* by Carolyn H Collins, Democracia Ahora, Stephen Easdale, Edwin Enciso, Florida State Conference of NAACP Branches, Leon W Russell, Patricia T Spencer. Responses due by 1/28/2011 (Attachments: # 1 Text of Proposed Order)(Rosenthal, Stephen) (Entered: 01/11/2011)
01/11/2011	26	Defendant's MOTION to Dismiss 3 Amended Complaint by State of Florida. Responses due by 1/28/2011 (Glogau, Jonathan) (Entered: 01/11/2011)
01/11/2011	27	MEMORANDUM in Support re 26 Defendant's MOTION to Dismiss 3 Amended Complaint by State of Florida. (Glogau, Jonathan) (Entered: 01/11/2011)
01/11/2011	28	MOTION to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing for J. Gerald Hebert. Filing Fee $ 75.00. Receipt # 12541. (ksa) (Entered: 01/12/2011)
01/11/2011	29	MOTION to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing for Michael B. DeSanctis. Filing Fee $ 75.00. Receipt # 12542. (ksa) (Entered: 01/12/2011)

01/11/2011	30	MOTION to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing for Paul M. Smith. Filing Fee $ 75.00. Receipt # 12543. (ksa) (Entered: 01/12/2011)
01/11/2011	31	MOTION to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing for Eric R. Haren. Filing Fee $ 75.00. Receipt # 12544. (ksa) (Entered: 01/12/2011)
01/14/2011	32	ORDER granting 28 Motion to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing ; granting 29 Motion to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing ; granting 30 Motion to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing ; granting 31 Motion to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing ; granting 22 Motion for Leave to Appear Pro Hac Vice; granting 23 Motion for Leave to Appear Pro Hac Vice; granting 24 Motion for Leave to Appear Pro Hac Vice; granting 25 Motion for Leave to Appear Pro Hac Vice. Signed by Judge Ursula Ungaro on 1/14/2011. (ls) (Entered: 01/14/2011)
01/14/2011	33	Unopposed MOTION to Intervene *as additional Plaintiff* by Florida House of Representatives. (Winsor, Allen) (Entered: 01/14/2011)
01/14/2011	34	Proposed Intervenor COMPLAINT, filed by Florida House of Representatives.(Winsor, Allen) (Entered: 01/14/2011)
01/20/2011	35	RESPONSE in Support re 33 Unopposed MOTION to Intervene *as additional Plaintiff* filed by Corrine Brown, Mario Diaz Balart. (Cody, Stephen) (Entered: 01/20/2011)
01/20/2011	36	AGREED MOTION for Leave to File *Second Amended Complaint* (Responses due by 2/7/2011), MOTION for Extension of Time to Comply *Scheduling Report* by Corrine Brown, Mario Diaz Balart. (Attachments: # 1 Exhibit)(Cody, Stephen) Modified relief on 1/21/2011 (tp). (Entered: 01/20/2011)
01/20/2011	37	RESPONSE in Opposition re 19 MOTION for Leave to File MOTION to Intervene *as Defendants* filed by Corrine Brown, Mario Diaz Balart. (Cody, Stephen) (Entered: 01/20/2011)
01/31/2011	38	Order on Defendant's Motion to Dismiss and Plaintiff's Motion for Leave to File Second Amended Complaint. Signed by Judge Ursula Ungaro on 1/31/2011. (jcy) (Entered: 01/31/2011)
01/31/2011	39	Order Resetting Planning and Scheduling Conference (-Joint Scheduling Report due by 4/1/2011, Scheduling Conference set for 4/8/2011 10:00 AM in Miami Division before Judge Ursula Ungaro.). Signed by Judge Ursula Ungaro on 1/31/2011. (jcy) (Entered: 01/31/2011)
01/31/2011	40	ORDER TO SHOW CAUSE, Show Cause Response due by 2/11/2011. Signed by Judge Ursula Ungaro on 1/31/2011. (jcy) (Entered: 01/31/2011)
01/31/2011	41	REPLY to Response to Motion re 19 MOTION for Leave to File MOTION to Intervene *as Defendants* filed by Carolyn H Collins, Democracia Ahora, Stephen Easdale, Edwin Enciso, Florida State Conference of NAACP Branches, Leon W Russell, Patricia T Spencer. (Attachments: # 1 Exhibit A - Committee Tracking System, # 2 Exhibit B - Naked Politics 1-20-11 Article, # 3 Exhibit C -- Naples Daily News 10-10-10 Artilce, # 4 Exhibit D - The Hotline 9-24-10 Article, # 5 Exhibit E - Patriot Room Radio Browning Interview, # 6 Exhibit F - "Fair Districts" 1-6-11 Article, # 7 Exhibit G - Letter from Matthews to DOJ, # 8 Exhibit H - Email with Withdrawal Letter, # 9 Exhibit I - The Miami Herald 1-25-11 Article, # 10 Exhibit J - Ocala.com 1-30-11 Article)(Rosenthal, Stephen) (Entered: 01/31/2011)
02/14/2011	42	Statement of: *Plaintiffs in Response to Order to Show Cause Regarding Jurisdiction* by Corrine Brown, Mario Diaz Balart re 40 Order to Show Cause (Cody, Stephen) (Entered: 02/14/2011)

02/14/2011	43	RESPONSE TO ORDER TO SHOW CAUSE by Corrine Brown, Mario Diaz Balart. (ls)(See Image at DE # 42) (Entered: 02/15/2011)
02/15/2011	44	Clerks Notice to Filer re 42 Statement. **Wrong Event Selected**; ERROR – The Filer selected the wrong event. The document was re–docketed by the Clerk, see [de#43]. It is not necessary to refile this document. (ls) (Entered: 02/15/2011)
03/01/2011	45	MOTION to Intervene by Janet Cruz, Arthenia L. Joyner, Luis R. Garcia, Joseph A. Gibbons, Perry E. Thurston. (Attachments: # 1 Proposed Answer)(Goldfarb, Carl) (Entered: 03/01/2011)
03/01/2011	46	MEMORANDUM in Support re 45 MOTION to Intervene by Janet Cruz, Luis R. Garcia, Joseph A. Gibbons, Arthenia L. Joyner, Perry E. Thurston. (Goldfarb, Carl) (Entered: 03/01/2011)
03/02/2011	47	MOTION to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing for Jon L. Mills. Filing Fee $ 75.00. Receipt # 14836. (ksa) (Entered: 03/03/2011)
03/07/2011	48	ORDER granting 47 Motion to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing. Signed by Judge Ursula Ungaro on 3/7/2011. (lbc) (Entered: 03/07/2011)
03/08/2011	49	NOTICE by Corrine Brown, Mario Diaz Balart *Of Supplemental Authority* (Attachments: # 1 Exhibit)(Cody, Stephen) (Entered: 03/08/2011)

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JS 44 (Rev. 2/08)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.) **NOTICE: Attorneys MUST Indicate All Re-filed Cases Below.**

I. (a) PLAINTIFFS

Mario Diaz-Balart and Corrine Brown

(b) County of Residence of First Listed Plaintiff Miami-Dade
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Stephen M. Cody, Esq., 16610 SW 82 Court, Palmetto Bay, FL 33157
Telephone 305-753-2250

DEFENDANTS

State of Florida, Charlie Crist, in his capacity as Governor of Florida, Florida House of Representatives, and Florida Senate

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT LAND INVOLVED.

Attorneys (If Known)

(d) Check County Where Action Arose: ☑ MIAMI- DADE ☐ MONROE ☐ BROWARD ☐ PALM BEACH ☐ MARTIN ☐ ST. LUCIE ☐ INDIAN RIVER ☐ OKEECHOBEE ☐ HIGHLANDS

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☑ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated or Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance	PERSONAL INJURY	PERSONAL INJURY	☐ 610 Agriculture	☐ 422 Appeal 28 USC 158	☐ 400 State Reapportionment
☐ 120 Marine	☐ 310 Airplane	☐ 362 Personal Injury - Med. Malpractice	☐ 620 Other Food & Drug	☐ 423 Withdrawal 28 USC 157	☐ 410 Antitrust
☐ 130 Miller Act	☐ 315 Airplane Product Liability	☐ 365 Personal Injury - Product Liability	☐ 625 Drug Related Seizure of Property 21 USC 881		☐ 430 Banks and Banking
☐ 140 Negotiable Instrument	☐ 320 Assault, Libel & Slander	☐ 368 Asbestos Personal Injury Product Liability	☐ 630 Liquor Laws	PROPERTY RIGHTS	☐ 450 Commerce
☐ 150 Recovery of Overpayment & Enforcement of Judgment	☐ 330 Federal Employers' Liability	PERSONAL PROPERTY	☐ 640 R.R. & Truck	☐ 820 Copyrights	☐ 460 Deportation
☐ 151 Medicare Act	☐ 340 Marine	☐ 370 Other Fraud	☐ 650 Airline Regs.	☐ 830 Patent	☐ 470 Racketeer Influenced and Corrupt Organizations
☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)	☐ 345 Marine Product Liability	☐ 371 Truth in Lending	☐ 660 Occupational Safety/Health	☐ 840 Trademark	☐ 480 Consumer Credit
☐ 153 Recovery of Overpayment of Veteran's Benefits	☐ 350 Motor Vehicle	☐ 380 Other Personal Property Damage	☐ 690 Other		☐ 490 Cable/Sat TV
☐ 160 Stockholders' Suits	☐ 355 Motor Vehicle Product Liability	☐ 385 Property Damage Product Liability	LABOR	SOCIAL SECURITY	☐ 810 Selective Service
☐ 190 Other Contract	☐ 360 Other Personal Injury		☐ 710 Fair Labor Standards Act	☐ 861 HIA (1395ff)	☐ 850 Securities/Commodities/ Exchange
☐ 195 Contract Product Liability			☐ 720 Labor/Mgmt. Relations	☐ 862 Black Lung (923)	☐ 875 Customer Challenge 12 USC 3410
☐ 196 Franchise			☐ 730 Labor/Mgmt.Reporting & Disclosure Act	☐ 863 DIWC/DIWW (405(g))	☐ 890 Other Statutory Actions
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	☐ 740 Railway Labor Act	☐ 864 SSID Title XVI	☐ 891 Agricultural Acts
☐ 210 Land Condemnation	☐ 441 Voting	☐ 510 Motions to Vacate Sentence	☐ 790 Other Labor Litigation	☐ 865 RSI (405(g))	☐ 892 Economic Stabilization Act
☐ 220 Foreclosure	☐ 442 Employment	Habeas Corpus:	☐ 791 Empl. Ret. Inc. Security Act	FEDERAL TAX SUITS	☐ 893 Environmental Matters
☐ 230 Rent Lease & Ejectment	☐ 443 Housing/ Accommodations	☐ 530 General		☐ 870 Taxes (U.S. Plaintiff or Defendant)	☐ 894 Energy Allocation Act
☐ 240 Torts to Land	☐ 444 Welfare	☐ 535 Death Penalty	IMMIGRATION	☐ 871 IRS—Third Party 26 USC 7609	☐ 895 Freedom of Information Act
☐ 245 Tort Product Liability	☐ 445 Amer. w/Disabilities - Employment	☐ 540 Mandamus & Other	☐ 462 Naturalization Application		☐ 900 Appeal of Fee Determination Under Equal Access to Justice
☐ 290 All Other Real Property	☐ 446 Amer. w/Disabilities - Other	☐ 550 Civil Rights	☐ 463 Habeas Corpus-Alien Detainee		
	☐ 440 Other Civil Rights	☐ 555 Prison Condition	☐ 465 Other Immigration Actions		☒ 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)

☑ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Re-filed- (see VI below) ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. RELATED/RE-FILED CASE(S). (See instructions second page):

a) Re-filed Case ☑ YES ☐ NO b) Related Cases ☐ YES ☑ NO

JUDGE DOCKET NUMBER

VII. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing and Write a Brief Statement of Cause (Do not cite jurisdictional statutes unless diversity):

28 USC 1983 challenge to Fla. Constit. Article III, § 20 as conflicting with Art. I, § 4 of U.S. Constitution

LENGTH OF TRIAL via 3 days estimated (for both sides to try entire case)

VIII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND $ CHECK YES only if demanded in complaint: JURY DEMAND: ☐ Yes ☑ No

ABOVE INFORMATION IS TRUE & CORRECT TO THE BEST OF MY KNOWLEDGE

SIGNATURE OF ATTORNEY OF RECORD DATE 11/3/10

FOR OFFICE USE ONLY

AMOUNT RECEIPT # IFP

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

vs.

STATE OF FLORIDA, CHARLIE CRIST, in his official capacity as Governor of the State of Florida, THE FLORIDA HOUSE OF REPRESENTATIVES, and THE FLORIDA SENATE,

Defendants.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiffs Corrine Brown and Mario Diaz-Balart, by and through their undersigned counsel, sue Defendants, the State of Florida, Charlie Crist, in his official capacity as the Governor of the State of Florida, the Florida House of Representatives, and the Florida Senate and as grounds therefore would show:

1. Plaintiffs bring this action seeking a declaratory judgment that Article III, Section 20 of the Florida Constitution is unconstitutional as well as injunctive relief prohibiting the enforcement of Article III, Section 20 of the Florida Constitution.

2. This case is an action for declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201-2202 and Federal Rule of Civil Procedure 57.

PARTIES

3. Defendant State of Florida is one of the several states of the United States of America. The State of Florida is named as a party because this lawsuit challenges the constitutionality of Article III, Section 20 of the Florida Constitution.

4. Charlie Crist is the Governor of the State of Florida and is sued in his official capacity only. Governor Crist is the chief executive officer of the State of Florida whose duties include approving or vetoing a congressional redistricting plan adopted by the Florida Legislature after its receipt of Census data following the 2010 decennial Census.

5. The Florida House of Representatives is one of two chambers of the Florida Legislature. Under the Florida Constitution, bills enacted by the Legislature, including a Congressional reapportionment plan, must be approved by a majority of both chambers of the Florida Legislature. A vetoed Congressional reapportionment plan must be overturned by an extra-ordinary vote of the Florida House and the Florida Senate.

6. The Florida Senate is upper chamber of the Florida Legislature. A Congressional redistricting plan must receive a majority of the votes case in Senate, as well as an extra-ordinary vote of the Senate to override a gubernatorial veto.

7. Plaintiff Mario Diaz-Balart is a citizen of the State of Florida and is registered to vote in Miami-Dade County. Since 2003, Diaz-Balart has represented the citizens of Congressional District 25 in the United States House of Representatives. Hispanics comprise more than 50 percent of the voting-age population in Congressional District 25. In January 2011, Plaintiff Diaz-Balart will be representing the residents of Florida District 21. Hispanics comprise more than 50 percent of the voting-age population in Congressional District 21. Plaintiff Diaz-Balart is a member of a protected language

minority under the Voting Rights Act of 1965, as amended. Plaintiff Diaz-Balart intends to run for Congress in 2012.

8. Plaintiff Corrine Brown is a citizen of the State of Florida and is registered to vote in Duval County. Since 1993, Brown has represented the citizens of Congressional District 3 in the United States House of Representatives. African-Americans comprise nearly half of the voting-age population in Congressional District 3. Plaintiff Brown is a member of a protected racial minority under the Voting Rights Act of 1965, as amended. Plaintiff Brown intends to run for Congress in 2012.

JURISDICTION AND VENUE

9. The Court has subject-matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1346(a)(2) because it arises under the Constitution and laws of the United States.

10. Venue is proper in this judicial district under 28 U.S.C. § 1391(b)(2), because no real property is involved in this action and the State of Florida is situated in this judicial district.

FACTS

11. On September 28, 2007, the Florida Department of State, Division of Elections, approved an initiative petition prepared by FairDistrictsFlorida.org for circulation that establishes new criteria for Congressional redistricting. The Congressional Petition obtained the necessary number of signatures and was certified for placement on the November 2010 general election ballot as Amendment 6.

12. At the general election held in Florida on November 2, 2010, Amendment 6 was approved by more than 60 percent of the voters casting ballots on the question.

13. Upon its receipt of more than 60 percent of the votes cast, Amendment 6 became Article III, section 20 of the Florida Constitution, which provides:

> Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES
>
> In establishing Congressional district boundaries:
>
> (1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
>
> (2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
>
> (3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

See, Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries, 2 So. 3d 175 (Fla. 2009) for the text of the language of Amendment 6.

14. Section 5 of the VRA, which applies to changes in electoral practices and procedures in five Florida counties (Collier, Hardy, Hendry, Hillsborough, and Monroe), prohibits changes that "lead to retrogression in the position of racial minorities with respect to the effective exercise of the electoral franchise." *Georgia v. Ashcroft*, 539 U.S. 461, 477 (2003) (quoting *Miller v. Johnson*, 515 U.S. 900, 926 (1995)). Whether a change will result in retrogression "depends on an examination of all the relevant circumstances," including "the extent of the minority group's opportunity to participate in the political process." *Id.* at 479.

15. Section 5 of the Voting Rights Act of 1965, as amended, ensures that no voting change "has the purpose or will have the effect of diminishing the ability of any citizen of the United States on account of race or color . . . to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b). Section

5 does not guarantee equality, but merely prevents backsliding, or "retrogression." The benchmark for comparison is the status quo, and not the ideal of equality.

16. One component of the opportunity to participate in the political process is the preservation of minority incumbents in positions of legislative influence and leadership. *Id.* at 483. Thus, the VRA requires the Legislature to weigh incumbency when it assesses compliance with Section 5, and permits it to favor minority incumbents as a means of compliance.

17. The Legislature will not be fully able to assess and protect racial minorities' opportunity to participate in the political process unless it assesses and protects the achievements of minority incumbents. Because the conflicting requirements in subsection (1) of Article III, section 20 claim equal dignity in the hierarchy of requirements, the constitutional amendment creates an irreconcilable contradiction. This internal conflict presents a facial conflict with Section 5 of the Voting Rights Act of 1965, as amended.

18. There is an actual controversy of sufficient immediacy and concreteness relating to the legal rights and duties of the Legislature in drawing Congressional districts to warrant relief under 28 U.S.C. § 2201.

19. The harm to the citizens and voters in the State of Florida, including Plaintiffs, is sufficiently real and/or imminent to warrant the issuance of a conclusive declaratory judgment usefully clarifying the legal relations of the parties.

20. Plaintiffs have retained the undersigned counsel and have agreed to pay him a reasonable fee for his services.

COUNT I – VIOLATION OF THE SUPREMACY AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION

21. Plaintiffs repeat and realleges the allegations of paragraphs 1 through 20 as if set forth herein.

22. The Supremacy Clause of the Constitution mandates that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2.

23. The first clause of the Fourteenth Amendment to the United States Constitution provides:

> Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Emphasis supplied.

24. The United States Constitution delegates the task of setting the time, place, and manner of setting Congressional elections to the Legislatures of each of the several States.

25. Article I, Section 4, Clause 1 specifically provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.

26. The authority to draw Congressional Districts falls within the ambit of "time, place and manner" authority found in Article I, Section 4, Clause 1. *See Vieth v. Jubelirer*, 541 U.S. 267, 275 (2004) (plurality opinion) ("Article I, § 4, while leaving in state legislatures the initial power to draw districts for federal elections, permitted Congress to 'make or alter' those districts if it wished.")

27. Congress has exercised the authority reserved to in Article I, Section 4, Clause 1. In The Apportionment Act of 1842, 5 Stat. 491, Congress provided that Representatives must be elected from single-member districts "composed of contiguous territory." Congress again imposed these requirements in The Apportionment Act of 1862, 12 Stat. 572, and in 1872 further required that districts "contai[n] as

nearly as practicable an equal number of inhabitants," 17 Stat. 28, § 2. In The Apportionment Act of 1901, Congress imposed a compactness requirement. 31 Stat. 733. The requirements of contiguity, compactness, and equality of population were repeated in the 1911 apportionment legislation, 37 Stat. 13, but were not thereafter continued. Today, only the single member-district requirement remains. See 2 U. S. C. § 2c.

28. Article III, Section 20 of the Florida Constitution represents an impermissible effort by Florida to limit the discretion directly delegated by the United States Constitution to the Florida Legislature.

29. Under Article 1, Section 4, Clause 1, the discretion to set the time, place, and manner of holding Congressional elections belongs to the Florida Legislature. That discretion may only be limited or circumscribed by the Congress and not by way of an amendment to the Florida Constitution.

30. Article III, Section 20 may not immediately and unconditionally be enforced unless and until Congress authorizes circumscription of the Florida Legislature's power to set the time, place and manner of Congressional elections, including drawing districts.

31. Accordingly, Article III, Section 20 of the Florida Constitution violates the Supremacy Clause and is invalid.

32. A violation of the United States Constitution may be challenged pursuant to 42 U.S.C. § 1983.

COUNT II – PREEMPTION UNDER FEDERAL LAW

33. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 20 and 22 through 32 as if set forth herein.

34. Article III, Section 20 of the Florida Constitution is preempted by Article I, Section 4, Clause 1 of the United States Constitution.

35. Article III, Section 20 of the Florida Constitution is also preempted by Section 5 of the Voting Rights Act of 1965, as amended, and the regulations promulgated thereunder.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

A. Enter an order declaring that Article III, Section 20 of the Florida Constitution is unconstitutional on its face as an attempt to circumscribe the Constitutional discretion that devolves from Article I, Section 4, Clause 1 of the United States Constitution to the Florida Legislature to set the time, place, and manner of Congressional elections, including the drawing of Congressional districts;

B. Enter an order declaring that Article III, Section 20 of the Florida Constitution is unconstitutional on its face as being in direct violation of Section 5 of the Voting Rights Act of 1965, as amended, and the regulations promulgated thereunder.

B. Enjoin Defendants and any other agency or official acting on behalf of Defendants from enforcing Article III, Section 20 of the Florida Constitution;

C. Award Plaintiffs reasonable attorney's fees and costs pursuant to 42 U.S.C. § 1988 by and through 42 U.S.C. § 1983 and 28 U.S.C. § 1343; and

D. Grant such other relief as the Court deems just and proper.

STEPHEN M. CODY, ESQ.
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Palmetto Bay, FL 33157
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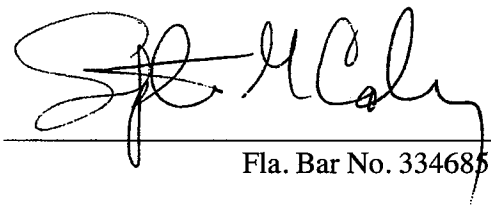
Fax: (305) 468-6421
Email: stcody@stephencody.com



Fla. Bar No. 334685

002

003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10 – CV- 23968 -UNGARO

MARIO DIAZ-BALART and CORRINE BROWN,

Plaintiffs,

vs.

STATE OF FLORIDA,

Defendant.

AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiffs Mario Diaz-Balart and Corrine Brown, by and through their undersigned counsel, sue Defendant. the State of Florida, and as grounds therefore would show:

1. Plaintiffs bring this action seeking a declaratory judgment that Article III, Section 20 of the Florida Constitution is unconstitutional as well as injunctive relief prohibiting the enforcement of Article III, Section 20 of the Florida Constitution.

2. This case is an action for declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201-2202 and Federal Rule of Civil Procedure 57.

PARTIES

3. Defendant State of Florida is one of the several states of the United States of America. The State of Florida is named as a party because this lawsuit challenges the constitutionality of Article III, Section 20 of the Florida Constitution.

4. Plaintiff Mario Diaz-Balart is a citizen of the State of Florida and is a resident of and registered to vote in Miami-Dade County. Since 2003, Diaz-Balart has represented the citizens of Congressional District 25 in the United States House of Representatives. Hispanics comprise more than

50 percent of the voting-age population in Congressional District 25. In January 2011, Plaintiff Diaz-Balart will be representing the residents of Florida District 21. Hispanics comprise more than 50 percent of the voting-age population in Congressional District 21. Plaintiff Diaz-Balart is a member of a protected language minority under the Voting Rights Act of 1965, as amended. Plaintiff Diaz-Balart intends to run for Congress in 2012.

5. Plaintiff Corrine Brown is a citizen of the State of Florida and is a resident of and registered to vote in Duval County. Since 1993, Brown has represented the citizens of Congressional District 3 in the United States House of Representatives. African-Americans comprise nearly half of the voting-age population in Congressional District 3. Plaintiff Brown is a member of a protected racial minority under the Voting Rights Act of 1965, as amended. Plaintiff Brown intends to run for Congress in 2012.

JURISDICTION AND VENUE

6. The Court has subject-matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1346(a)(2) because it arises under the Constitution and laws of the United States.

7. Venue is proper in this judicial district under 28 U.S.C. § 1391(b)(2), because no real property is involved in this action and the State of Florida is situated in this judicial district.

FACTS

8. On September 28, 2007, the Florida Department of State, Division of Elections, approved an initiative petition prepared by FairDistrictsFlorida.org for circulation that establishes new criteria for Congressional redistricting. The Congressional Petition obtained the necessary number of signatures and was certified for placement on the November 2010 general election ballot as Amendment 6.

9. At the general election held in Florida on November 2, 2010, Amendment 6 was approved by more than 60 percent of the voters casting ballots on the question.

10. Upon its receipt of more than 60 percent of the votes cast, Amendment 6 became Article III, section 20 of the Florida Constitution, which provides:

> Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES
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> (1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
>
> (2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
>
> (3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

See, Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries, 2 So. 3d 175 (Fla. 2009) for the text of the language of Amendment 6.

11. Section 5 of the VRA, which applies to changes in electoral practices and procedures in five Florida counties (Collier, Hardy, Hendry, Hillsborough, and Monroe), prohibits changes that "lead to retrogression in the position of racial minorities with respect to the effective exercise of the electoral franchise." *Georgia v. Ashcroft*, 539 U.S. 461, 477 (2003) (quoting *Miller v. Johnson*, 515 U.S. 900, 926 (1995)). Whether a change will result in retrogression "depends on an examination of all the relevant circumstances," including "the extent of the minority group's opportunity to participate in the political process." *Id.* at 479.

12. Section 5 of the Voting Rights Act of 1965, as amended, ensures that no voting change "has the purpose or will have the effect of diminishing the ability of any citizen of the United States on

account of race or color . . . to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b). Section 5 does not guarantee equality, but merely prevents backsliding, or "retrogression." The benchmark for comparison is the status quo, and not the ideal of equality.

13. One component of the opportunity to participate in the political process is the preservation of minority incumbents in positions of legislative influence and leadership. *Id.* at 483. Thus, the VRA requires the Legislature to weigh incumbency when it assesses compliance with Section 5, and permits it to favor minority incumbents as a means of compliance.

14. The Legislature will not be fully able to assess and protect racial minorities' opportunity to participate in the political process unless it assesses and protects the achievements of minority incumbents. Because the conflicting requirements in subsection (1) of Article III, section 20 claim equal dignity in the hierarchy of requirements, the constitutional amendment creates an irreconcilable contradiction. This internal conflict presents a facial conflict with Section 5 of the Voting Rights Act of 1965, as amended.

15. There is an actual controversy of sufficient immediacy and concreteness relating to the legal rights and duties of the Legislature in drawing Congressional districts to warrant relief under 28 U.S.C. § 2201.

16. The harm to the citizens and voters in the State of Florida, including Plaintiffs, is sufficiently real and/or imminent to warrant the issuance of a conclusive declaratory judgment usefully clarifying the legal relations of the parties.

17. Plaintiffs have retained the undersigned counsel and have agreed to pay him a reasonable fee for his services.

COUNT I – VIOLATION OF THE SUPREMACY AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION

18. Plaintiffs repeat and realleges the allegations of paragraphs 1 through 17 as if set forth herein.

19. The Supremacy Clause of the Constitution mandates that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2.

20. The first clause of the Fourteenth Amendment to the United States Constitution provides:

> Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Emphasis supplied.

21. The United States Constitution delegates the task of setting the time, place, and manner of setting Congressional elections to the Legislatures of each of the several States.

22. Article I, Section 4, Clause 1 specifically provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.

23. The authority to draw Congressional Districts falls within the ambit of "time, place and manner" authority found in Article I, Section 4, Clause 1. *See Vieth v. Jubelirer*, 541 U.S. 267, 275 (2004) (plurality opinion) ("Article I, § 4, while leaving in state legislatures the initial power to draw districts for federal elections, permitted Congress to 'make or alter' those districts if it wished.")

24. Congress has exercised the authority reserved to in Article I, Section 4, Clause 1. In The Apportionment Act of 1842, 5 Stat. 491, Congress provided that Representatives must be elected from single-member districts "composed of contiguous territory." Congress again imposed these requirements in The Apportionment Act of 1862, 12 Stat. 572, and in 1872 further required that districts "contai[n] as nearly as practicable an equal number of inhabitants," 17 Stat. 28, § 2. In The Apportionment Act of 1901, Congress imposed a compactness requirement. 31 Stat. 733. The requirements of contiguity, compactness, and equality of population were repeated in the 1911 apportionment legislation, 37 Stat. 13, but were not thereafter continued. Today, only the single member-district requirement remains. See 2 U. S. C. § 2c.

25. Article III, Section 20 of the Florida Constitution represents an impermissible effort by Florida to limit the discretion directly delegated by the United States Constitution to the Florida Legislature.

26. Under Article 1, Section 4, Clause 1, the discretion to set the time, place, and manner of holding Congressional elections belongs to the Florida Legislature. That discretion may only be limited or circumscribed by the Congress and not by way of an amendment to the Florida Constitution.

27. Article III, Section 20 may not immediately and unconditionally be enforced unless and until Congress authorizes circumscription of the Florida Legislature's power to set the time, place and manner of Congressional elections, including drawing districts.

28. Accordingly, Article III, Section 20 of the Florida Constitution violates the Supremacy Clause and is invalid.

29. A violation of the United States Constitution may be challenged pursuant to 42 U.S.C. § 1983.

COUNT II – PREEMPTION UNDER FEDERAL LAW

30. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 17 and 19 through 29 as if set forth herein.

31. Article III, Section 20 of the Florida Constitution is preempted by Article I, Section 4, Clause 1 of the United States Constitution.

32. Article III, Section 20 of the Florida Constitution is also preempted by Section 5 of the Voting Rights Act of 1965, as amended, and the regulations promulgated thereunder.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

A. Enter an order declaring that Article III, Section 20 of the Florida Constitution is unconstitutional on its face as an attempt to circumscribe the Constitutional discretion that devolves from Article I, Section 4, Clause 1 of the United States Constitution to the Florida Legislature to set the time, place, and manner of Congressional elections, including the drawing of Congressional districts;

B. Enter an order declaring that Article III, Section 20 of the Florida Constitution is unconstitutional on its face as being in direct violation of Section 5 of the Voting Rights Act of 1965, as amended, and the regulations promulgated thereunder;

C. Enjoin Defendant and any other agency or official acting on behalf of Defendant from enforcing Article III, Section 20 of the Florida Constitution;

D. Award Plaintiffs reasonable attorney's fees and costs pursuant to 42 U.S.C. § 1988 by and through 42 U.S.C. § 1983 and 28 U.S.C. § 1343; and

E. Grant such other relief as the Court deems just and proper.

STEPHEN M. CODY, ESQ.
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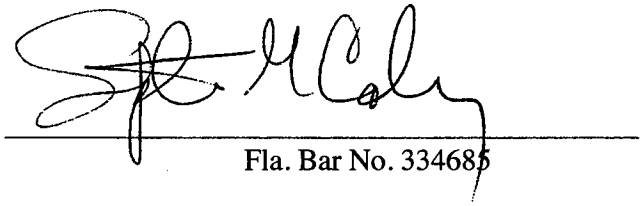
Email: stcody@stephencody.com



Fla. Bar No. 334685

004

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Florida

Mario Diaz-Balart and Corrine Brown

Plaintiff

v.

State of Florida

Defendant

Civil Action No. 10 – CV- 23968 -UNGARO

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* State of Florida, by serving Attorney General Bill McCollum
The Capitol, PL-01
Tallahasse, Florida

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Stephen M. Cody, Esq., 16610 SW 82 Court, Palmetto Bay, FL 33157

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Steven M. Larimore

CLERK OF COURT

Date: 11/9/10

Signature of Clerk or Deputy Clerk

005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO: 10-23968-CIV-UNGARO

CORRINE BROWN, et al.,

Plaintiff,

v.

STATE OF FLORID, et al.,

Defendants,

----------/

ORDER SETTING INITIAL PLANNING AND SCHEDULING CONFERENCE

THIS CAUSE is hereby set for an Initial Planning and Scheduling Conference before the Honorable Ursula Ungaro, at the United States Courthouse, 400 N. Miami Avenue, 12th Floor, Courtroom 4, Miami, Florida, on **Friday, FEBRUARY 4, 2011 at 10:00 A.M.**

Counsel for the Plaintiff(s) is instructed to provide copies of this order to all counsel of record and to any unrepresented parties that have appeared in the case. Pursuant to Fed.R.Civ.P. 26(f) and Local Rule 16.1B, the parties are jointly responsible for conferring to develop a proposed discovery plan; thereafter, the parties are to file and serve a Joint Planning and Scheduling Report, together with a proposed Scheduling Order, and an attached service list including the parties' names, phone numbers and facsimile numbers. The report and proposed order must be filed by **JANUARY 21, 2011** and must recite the following:

1. A plain statement of the nature of the claim and any counterclaims, cross-claims, or third-party claim, including the amount of damages claimed and any other relief sought.

2. A brief summary of the facts which are uncontested or which can be stipulated to without discovery.

3. A brief summary of the issues as presently known.

4. Whether discovery should be conducted in phases or limited to particular issues.

5. A detailed schedule of discovery for each party.

6. Proposed deadlines for joinder of other parties and to amend the pleadings, to file and hear motions and to complete discovery.

7. Proposed approximate dates for final pre-trial conferences and trial.

8. The projected time necessary for trial and a statement of whether the case is jury or non-jury trial.

9. A list of all pending motions, whether each motion is "ripe" for review, the date each motion became ripe, and a summary of the parties' respective positions with respect to each ripe motion.

10. Any unique legal or factual aspects of the case requiring special consideration by the Court.

11. Any potential need for references to a special master or magistrate.

12. The status and likelihood of settlement.

13. Such other matters as are required by Local Rule 16.1(B) and as may aid the Court in setting the case for status or pretrial conference and in the fair and expeditious administration and disposition of this action.

With respect to initial disclosures required under Fed. R. Civ. P. 26(a)(1)-(2), pursuant to Rule 26(a), the disclosures must be made at or before the time the parties confer to develop the discovery plan. The parties must certify in the Joint Scheduling Report that such disclosures have been made unless a party objects during the conference that the required disclosure(s) is not appropriate in the circumstances of the action and files an objection to the specific disclosure(s) with the Court. Such objections must be filed no later than fifteen (15) days prior to the Initial Planning and Scheduling Conference and must include a full explanation of the basis for the objections.

In the event that motions are pending before the Court at the time of the Conference, the parties shall be prepared to argue, at the Court's discretion, the merits of such motions.

In the event the Court issues a Scheduling Order prior to the Initial Planning and Scheduling Conference based on the information provided by the parties in their Joint Planning and Scheduling Report, the Court will notify the parties whether the Conference will be canceled.

DONE AND ORDERED this 17 day of November, 2010 at Miami, Florida.

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

cc: all counsel of record

006

RETURN OF SERVICE

State of Florida **County of Southern** **District Court**

Case Number: 10-CV 23968 UNGARO

Plaintiff:
Mario Diaz-Balart and Corrine Brown,

vs.

Defendant:
State of Florida,

For:
Stephen Cody
Stephen M. Cody, Esquire
16610 S.W. 82 Ct.
Palmetto Bay, FL 33157

Received by Process Service of America, Inc., Leon County, on the 12th day of November, 2010 at 5:20 pm to be served on **State Of Florida, by Serving Attorney General Bill McCollum, The Capitol,, PL-01, Tallahassee, FL.**

I, Christopher Compton, do hereby affirm that on the **16th day of November, 2010** at **4:05 pm, I:**

CORPORATE: served by delivering a true copy of the **Summons, Amended Complaint for Injunctive and Declaratory Relief, Civil Cover Sheet, and Complaint for Injunctive and Declaratory Relief** with the date and hour of service endorsed thereon by me, to: **Sue Watkins** as **Administrative Assistant 3** for **State Of Florida, by Serving Attorney General Bill McCollum**, at the address of: **The Capitol,, PL-01, Tallahassee, FL**, and informed said person of the contents therein, in compliance with state statutes.

I certify that I am over the age of 18, have no interest in the above action, and am a Certified Process Server, in good standing, in the Second Judicial Circuit in which the process was served. Under penalty of perjury I declare I have read the foregoing documents and that the facts stated in it are true. Notary not required pursuant to FL Statute 92.525 Sec (2).

Christopher Compton
Certified Process Server # 101

Process Service of America, Inc., Leon County,
P.O. Box 5848
Tallahassee, FL 32314-5848
(850) 877-9809

Our Job Serial Number: SKT-2010017480

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Florida

Mario Diaz-Balart and Corrine Brown

Plaintiff

v.

State of Florida

Defendant

Civil Action No. 10 – CV- 23968 -UNGARO

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* State of Florida, by serving Attorney General Bill McCollum
The Capitol, PL-01
Tallahasse, Florida

SJ 11/16/10 4:05pm
Hyone gs #101

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Stephen M. Cody, Esq., 16610 SW 82 Court, Palmetto Bay, FL 33157

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Steven M. Larimore

CLERK OF COURT

Date: 11/9/10

Signature of Clerk or Deputy Clerk

007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10 – CV- 23968 -UNGARO

MARIO DIAZ-BALART and CORRINE BROWN,

Plaintiffs,

vs.

STATE OF FLORIDA,

Defendant.

NOTICE OF STRIKING DE 6

Plaintiffs hereby give notice of striking Proof Of Service, Docket Entry 6 because it referenced Plaintiffs as the served party rather than Defendant State of Florida.

I HEREBY CERTIFY that on November 22, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document was served this day on all counsel of record and pro se parties either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized matter for those counsel or parties who are not authorized to receive Notices of Electronic Filing.

STEPHEN M. CODY, ESQ.
Florida Bar No. 334685
16610 SW 82nd Court
Palmetto Bay, FL 33157
Telephone (305) 753-2250
Facsimile (305)468-6421

s/Stephen M. Cody

Fla. Bar No. 334685

008

RETURN OF SERVICE

State of Florida **County of Southern** **District Court**

Case Number: 10-CV 23968 UNGARO

Plaintiff:
Mario Diaz-Balart and Corrine Brown,

vs.

Defendant:
State of Florida,

For:
Stephen Cody
Stephen M. Cody, Esquire
16610 S.W. 82 Ct.
Palmetto Bay, FL 33157

Received by Process Service of America, Inc., Leon County, on the 12th day of November, 2010 at 5:20 pm to be served on **State Of Florida, by Serving Attorney General Bill McCollum, The Capitol,, PL-01, Tallahassee, FL.**

I, Christopher Compton, do hereby affirm that on the **16th day of November, 2010** at **4:05 pm, I:**

CORPORATE: served by delivering a true copy of the **Summons, Amended Complaint for Injunctive and Declaratory Relief, Civil Cover Sheet, and Complaint for Injunctive and Declaratory Relief** with the date and hour of service endorsed thereon by me, to: **Sue Watkins** as **Administrative Assistant 3** for **State Of Florida, by Serving Attorney General Bill McCollum**, at the address of: **The Capitol,, PL-01, Tallahassee, FL**, and informed said person of the contents therein, in compliance with state statutes.

I certify that I am over the age of 18, have no interest in the above action, and am a Certified Process Server, in good standing, in the Second Judicial Circuit in which the process was served. Under penalty of perjury I declare I have read the foregoing documents and that the facts stated in it are true. Notary not required pursuant to FL Statute 92.525 Sec (2).

Christopher Compton
Certified Process Server # 101

Process Service of America, Inc., Leon County,
P.O. Box 5848
Tallahassee, FL 32314-5848
(850) 877-9809

Our Job Serial Number: SKT-2010017480

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Florida

Mario Diaz-Balart and Corrine Brown

Plaintiff

v.

State of Florida

Defendant

Civil Action No. 10 – CV- 23968 -UNGARO

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* State of Florida, by serving Attorney General Bill McCollum
The Capitol, PL-01
Tallahasse, Florida

SJ 11/16/10 1:40 5pm
Hyone gs #101

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Stephen M. Cody, Esq., 16610 SW 82 Court, Palmetto Bay, FL 33157

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Steven M. Larimore

CLERK OF COURT

Date: 11/9/10

Signature of Clerk or Deputy Clerk

009

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10 – CV- 23968 -UNGARO

MARIO DIAZ-BALART and CORRINE BROWN,

Plaintiffs,

vs.

STATE OF FLORIDA,

Defendant.

PLAINTIFFS' MOTION TO ABATE

Plaintiffs Mario Diaz-Balart and Corrine Brown, by and through their undersigned counsel move this Court for entry of a temporary abatement of this action and as grounds therefore would show:

1. Plaintiffs have brought this action seeking a declaratory judgment that Article III, Section 20 of the Florida Constitution is unconstitutional as well as injunctive relief prohibiting the enforcement of Article III, Section 20 of the Florida Constitution.

2. Plaintiffs served their Amended Complaint upon Attorney General Bill McCollum on November 16, 2010. The response to the Amended Complaint is due on or about December 9, 2010.

3. Attorney General McCollum's term expires on January 4, 2011 and his successor, Pam Bondi will be sworn in on that day.

4. Governor Charlie Crist's term will also expire on January 4th and his successor, Rick Scott, will assume that office on that day as well.

5. The undersigned was contacted by Douglas B. MacInnes, Assistant Deputy Attorney General for Civil Litigation, who requested that the case be put on a brief abatement so that the new

administrations of both the Governor and the Attorney General can be put into place before the State of Florida is required to file its response to the Amended Complaint in this action.

6. Assistant Deputy Attorney General MacInnes requested that the Plaintiffs seek an abatement of this action until January 11, 2011 so that the new administrations can decide how to proceed in the case.

7. Plaintiffs have consented to this short abatement period.

8. The abatement sought will not interfere with the Court's deadline to submit the scheduling order in this matter or the attendance of the parties at the initial pre-trial conference.

WHEREFORE, Plaintiffs respectfully request that the Court enter an Order abating this matter briefly and directing that the State of Florida respond to the Amended Complaint on or before January 11, 2011.

STEPHEN M. CODY, ESQ.
16610 SW 82 Court
Palmetto Bay, FL 33157
Telephone: (305) 753-2250
Fax: (305) 468-6421
Email: stcody@stephencody.com

s/Stephen M. Cody

Fla. Bar No. 334685

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy was furnished to Douglas B. MacInnes, Assistant Deputy Attorney General for Civil Litigation, Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050 via email to Douglas.MacInnes@myfloridalegal.com.

s/Stephen M. Cody

010

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 10-23968-UNGARO

MARIO DIAZ-BALART and
CORRINE BROWN,

Plaintiff,

vs.

STATE OF FLORIDA,

Defendant.
_____/

ORDER ON PLAINTIFFS' MOTION TO ABATE

THIS CAUSE is before the Court upon Plaintiffs' Motion to Abate this action, filed December 7, 2010 (D.E. 9).

THE COURT has considered the Motion, the pertinent portions of the record, and is otherwise fully advised in the premises. Plaintiffs request that this Court abate this action and direct Defendant to respond to the Amended Complaint on or before January 11, 2011. It is hereby

ORDERED AND ADJUDGED that the Motion (D.E. 9) is GRANTED IN PART. Defendant SHALL respond to the Amended Complaint on or before January 11, 2011. In all other espects, the motion is DENIED.

DONE AND ORDERED in Chambers, in Miami, Florida this 9th day of December, 2010.

Ursula Ungaro

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

cc: counsel of record

011

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, Defendant, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON, BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY, Defendant-Intervenors.	)	Case No. 10-CV-23968-UNGARO

MOTION FOR LEAVE TO INTERVENE AS DEFENDANTS

The American Civil Liberties Union of Florida ("ACLU-FL"), Howard Simon, Benetta M. Standly, Susan Watson, and Joyce Hamilton Henry, hereby move the Court for leave to intervene as defendants in this action as of right pursuant to Rule 24(a)(2), Fed.R.Civ.P., or alternatively to intervene permissibly pursuant to Rules 24(b)(1)(B), Fed.R.Civ.P. The individual applicants are residents and registered voters of Florida, and are members and officers of the ACLU-FL. Benetta M. Standly and Joyce Hamilton Henry are African-Americans.

The grounds for the motion for intervention as of right pursuant to Rule 24(a)(2) are that the individual applicants, as residents and voters of Florida, and the ACLU-FL on behalf of its voter members registered in Florida, claim an interest relating to the property or transaction that is the

subject of this action, and are so situated that disposing of the action may as a practical matter impair or impede their ability to protect its interest. Movants further allege that their interests are not adequately represented by existing parties. The grounds for the motion for permissive intervention pursuant to Rule 24(b)(1)(B), are that movants have a defense that shares with the main action a common question of law or fact.

This motion is accompanied by movants' answer setting forth the claims and defenses for which intervention is sought.

WHEREFORE, movants request that their Motion for Leave to Intervene as Defendants be granted.

Respectfully submitted,

/s Randall C. Marshall

RANDALL C. MARSHALL
American Civil Liberties Union
Foundation of Florida, Inc.
4500 Biscayne Blvd Suite 340
Miami, FL 33137
Tel: (786) 363-2700
Fax: (786) 363-1108
Rmarshall@aclufl.org
FL Bar Number 181765

LAUGHLIN McDONALD[1]
American Civil Liberties Union Foundation, Inc.
230 Peachtree Street, NW, Suite 1440
Atlanta, GA 30303-1227
Tel: (404) 523-2721
Fax: (404) 653-0331
Lmcdonald@aclu.org

Attorneys for Movants

[1] Motion for leave to appear *pro hac vice* pending.

CERTIFICATE OF CONFERENCE

I hereby certify that pursuant to S.D. Fla. L.R. 7.1(a)(3), I conferred with counsel for plaintiffs. Plaintiffs oppose this motion. Although no entry of appearance has been filed, I twice attempted to confer with the Attorney General's office but was unable to obtain the State of Florida's position with regard to this motion.

s/ Randall C. Marshall

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List via transmission of Notices of Electronic Filing generated by CM/ECF or by e-mail as indicated below.

s/ Randall C. Marshall

SERVICE LIST

Case No. 10-CV-23968-UNGARO

via CM/ECF:

Stephen M. Cody, Esq.
16610 SW 82 Court
Palmetto Bay, FL 33157

via e-mail:

Douglas B. MacInnes, Assistant Deputy Attorney General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Douglas.MacInnes@myfloridalegal.com

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, Defendant, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON, BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY, Defendant-Intervenors.	)	Case No. 10-CV-23968-UNGARO

PROPOSED ANSWER OF ACLU DEFENDANT-INTERVENORS TO AMENDED COMPLAINT

1. Intervenors admit the allegations in paragraph 1 of the amended complaint, but deny Plaintiffs are entitled to any relief on their claims.

2. Intervenors admit the allegations in paragraph 2 of the amended complaint, but deny Plaintiffs are entitled to any relief on their claims.

3. Intervenors admit that Florida is one of the several states of the United States, but deny that Florida is a proper party to this lawsuit.

4. Intervenors admit the allegations in paragraph 4 of the amended complaint, but are without sufficient knowledge to admit or deny whether Plaintiff Diaz-Balart intends to run for Congress in 2012.

5. Intervenors admit the allegations in paragraph 5 of the amended complaint, but are without sufficient knowledge to admit or deny whether Plaintiff Brown intends to run for Congress in 2012.

. 6. Intervenors admit the allegations in paragraph 6 of the amended complaint.

7. Intervenors admit the allegations in paragraph 7 of the amended complaint.

8. Intervenors admit the allegations in paragraph 8 of the amended complaint.

9. Intervenors admit the allegations in paragraph 9 of the amended complaint.

10. Intervenors admit the allegations of paragraph 10 of the amended complaint.

11. Intervenors admit that Section 5 of the Voting Rights Act applies to five Florida counties, but the remaining allegations in paragraph 11 contain statements of law and/or conclusions of law to which no response is required.

12. Intervenors admit the allegations in paragraph 12 that Section 5 of the Voting Rights Act prohibits retrogression of minority voting strength, but the remaining allegations in paragraph 12 contain statements of law and/or conclusions of law to which no response is required.

13. Intervenors deny the allegations in paragraph 13 of the amended complaint.

14. Intervenors deny the allegations in paragraph 14 of the amended complaint

15. Intervenors deny the allegations in paragraph 15 of the amended complaint.

16. Intervenors deny the allegations in paragraph 16 of the amended complaint.

17. Intervenors lack sufficient knowledge to admit or deny the allegations in paragraph 17 of the amended complaint.

18. Intervenors repeat and reallege their responses to the allegations in paragraphs 1 through 17 set forth above.

19. The allegations in paragraph 19 of the amended complaint are statements of law and/or conclusions of law to which no response is required.

20. The allegations in paragraph 20 of the amended complaint are statements of law and/or conclusions of law to which no response is required.

21. The allegations in paragraph 21 of the amended complaint are statements of law and/or conclusions of law to which no response is required.

22. The allegations in paragraph 22 of the amended complaint are statements of law and/or conclusions of law to which no response is required.

23. The allegations in paragraph 23 of the amended complaint are statements of law and/or conclusions of law to which no response is required.

24. The allegations in paragraph 24 of the amended complaint are statements of law and/or conclusions of law to which no response is required.

25. Intervenors deny the allegations in paragraph 25 of the amended complaint

. 26. Intervenors deny the allegations in paragraph 26 of the amended complaint.

27. Intervenors deny the allegations in paragraph 27 of the amended complaint.

28. Intervenors deny the allegations in paragraph 28 of the amended complaint.

29. Intervenors admit that a violation of the Constitution may be challenged under 42 U.S.C. § 1983, but deny that Article III, Section 20 is unconstitutional.

30. Intervenors repeat and reallege their responses to the allegations in paragraphs 1 through 17 and 19 through 29 set forth above.

31. Intervenors deny the allegations in paragraph 31 of the amended complaint.

32. Intervenors deny the allegations in paragraph 32 of the amended complaint.

Intervenors deny Plaintiffs are entitled to any of the relief prayed for in their Prayer for Relief.

Affirmative Defenses

1. Absent a waiver of sovereign immunity, the State of Florida is not a proper party to this litigation and should be dismissed as the defendant.

2. Absent a proper party defendant, the amended complaint should be dismissed for failure to state a claim upon which relief can be granted.

3. The amended complaint should be dismissed for failure to state a claim upon which relief can be granted.

Respectfully submitted,

/s Randall C. Marshall

RANDALL C. MARSHALL
American Civil Liberties Union
Foundation of Florida, Inc.
4500 Biscayne Blvd Suite 340
Miami, FL 33137
Tel: (786) 363-2700
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FL Bar Number 181765

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Tel: (404) 523-2721
Fax: (404) 653-0331
Lmcdonald@aclu.org

Attorneys for Movants

[1] Motion for leave to appear *pro hac vice* pending.

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List via transmission of Notices of Electronic Filing generated by CM/ECF or by e-mail as indicated below.

s/ Randall C. Marshall

SERVICE LIST

Case No. 10-CV-23968-UNGARO

via CM/ECF:

Stephen M. Cody, Esq.
16610 SW 82 Court
Palmetto Bay, FL 33157

via e-mail:

Douglas B. MacInnes, Assistant Deputy Attorney General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Douglas.MacInnes@myfloridalegal.com

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, Defendant, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON, BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY, Defendant-Intervenors.	)	Case No. 10-CV-23968-UNGARO

ORDER

This matter is before the Court on motion by four residents and registered voters of the State of Florida, two of whom are racial minorities, and by the American Civil Liberties Union of Florida, for leave to intervene as defendants.

Having reviewed the motion as well as the memorandum of points of authorities in support of the motion, the Court finds that movants may intervene as of right pursuant to Rule 24(a)(2), Fed.R.Civ.P., in that they have timely filed their motion, they have an interest in the outcome of the case that will be prejudiced if they cannot intervene; and because the State of Florida cannot be expected to represent their interests adequately within the meaning of Rule 24. Even if applicants could not intervene as a matter of right, the Court would permit applicants to intervene permissively

pursuant to Rules 24(b)(1)(B). Therefore, the motion to intervene is GRANTED.

AND IT IS SO ORDERED, this ___ day of _____, 2010.

_____
URSULA UNGARO
UNITED STATES DISTRICT JUDGE

012

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, Defendant, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON, BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY, Defendant-Intervenors.	)	Case No. 10-CV-23968-UNGARO

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AS DEFENDANTS

I. Introduction

This action was brought by two residents of Florida seeking a declaratory judgment that Article III, Section 20 of the Florida Constitution is unconstitutional and an injunction against its enforcement. Applicants have moved the Court for leave to intervene as defendants in this action as of right pursuant to Rule 24(a)(2), Fed.R.Civ.P., or alternatively to intervene permissibly pursuant to Rules 24(b)(1)(B), Fed.R.Civ.P.

The individual applicants, Howard Simon, Benetta M. Standly, Susan Watson, and Joyce Hamilton Henry, are residents and registered voters of Florida, and are members and officers of the American Civil Liberties Union of Florida ("ACLU-FL"). Benetta M. Standly and Joyce Hamilton Henry are African-Americans.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 500,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. As part of that

commitment, the ACLU has been active in defending the equal right of all persons to participate in the electoral process. The ACLU-FL is the state affiliate of the ACLU, and Howard Simon is the affiliate's Executive Director. The ACLU-FL has approximately 25,000 members, 18 volunteer-led chapters, and 24 staff members located in its Miami headquarters and regional offices in Pensacola, Jacksonville, and Tampa. The ACLU and the ACLU-FL have represented voters and candidates in numerous election cases to protect the right to vote and the right to participate in an election process that is fair. Recent voting rights case in which the ACLU-FL has been involved include: Wexler v. Lepore, 878 So.2d 1276 (Fla. 4th DCA 2004); Florida Caucus of Black State Legislators, Inc. v. Crosby, 877 So.2d 861 (Fla. 1st DCA 2004); and Friedman v. Snipes, 345 F.Supp.2d 1356 (S.D. Fla. 2004).

ACLU-FL and its members have also worked extensively on behalf of adoption of Article III, Section 20 of the Florida Constitution. In 2008, the ACLU-FL Board of Directors voted to support the proposed congressional redistricting amendment and to join FairDistrictsFlorida.org, the organization that was the principal sponsor of the proposed amendment. At its March 2010 meeting, the Board of Directors created a political committee (People Over Politics) to work in support of passage of the amendment at the November 2010 election. The ACLU-FL asserts the interests of its members who are registered voters in Florida. See, e.g., Doe v. Stincer, 175 F.3d 879, 882 (11th Cir. 1999) ("It has long been settled that an organization has standing to sue to redress injuries suffered by its members without a showing of injury to the association itself and without a statute explicitly permitting associational standing.").

II. The Motion to Intervene Is Timely

As an initial matter, an application for intervention under Rules 24(a) and (b) must be "timely." The answer of the State of Florida will not be due until January 11, 2011. No status conference has been held, no discovery has been undertaken, no dispositive orders have been entered in the case, and no trial has been set or held. Granting intervention would not, therefore, cause any delay in the trial of the case nor prejudice the rights of any existing party. See Bossier

Parish School Board v. Reno, 157 F.R.D. 133, 135 (D. D.C. 1994) (intervention granted as timely where motion was filed on the same day the court held its first status conference).

The most important factor in determining whether intervention is timely is whether any delay in seeking intervention will prejudice the existing parties to the case. See, e.g., McDonald v. E.J. Lavino Co., 430 F.2d 1065, 1073 (5th Cir. 1970) ("[i]n fact, this may well be the only significant consideration when the proposed intervenor seeks intervention of right"). Where intervention will not delay resolution of the litigation, intervention should be allowed. Texas v. United States, 802 F. Supp. 481, 482 n.1 (D. D.C. 1992) (affirming the propriety of granting intervention); Cummings v. United States, 704 F.2d 437, 441 (9th Cir. 1983) (it was an abuse of discretion for the trial court to deny intervention in the absence of a showing of prejudice to the government).

III. Intervention As of Right Is Warranted

Rule 24(a)(2) provides:

> On timely motion, the court must permit anyone to intervene who . . . 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.

A. Movants Have an Interest in the Transaction

Movants plainly have a direct, substantial, and legally protectible interest in the "transaction that is the subject of the action," Rule 24(a)(2), i.e., the constitutionality of Article III, Section 20. Movants strongly supported passage of the constitutional amendment and will be directly affected if it is declared to be unconstitutional. They have the important personal interest in maintaining the existing constitutional system that will govern their exercise of political power. Because of the importance of that interest, intervention in election cases is favored, and the courts have routinely allowed it. See, e.g., Nw. Austin Mun. Util. Dist. No. One v. Holder, 573 F. Supp. 2d 221, 230 (D.D.C. 2008) (granting multiple 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 VRA); Johnson v. Mortham, 915 F.Supp. 1529, 1536 (N.D. Fla.

1995) (registered voters had "a sufficiently substantial interest to intervene" in a suit challenging congressional redistricting); Clark v. Putnam County, 168 F.3d 458, 462 (11th Cir. 1999) ("black voters had a right to intervene" in action challenging county redistricting, and listing recent voting cases allowing intervention); Burton v. Sheheen, 793 F.Supp 1329, 1338 (D. S.C. 1992); Brooks v. State Board of Elections, 838 F.Supp. 601, 604 (S.D. Ga. 1993); Baker v. Regional High School District No. 5, 432 F.Supp. 535, 537 (D. Conn. 1977) (residents of school district had an interest in method of electing school board that entitled them to intervene in apportionment challenge).

The Eleventh Circuit, in reversing a district court denial of intervention to county residents in a voting rights case, articulated the substantial, legally protected interests of voters in their election system:

> intervenors sought to vindicate important personal interest in maintaining the election system that governed their exercise of political power ... As such, they alleged a tangible actual or prospective injury.

Meek v. Metropolitan Dade County, 985 F.2d 1471, 1480 (11th Cir. 1993).

Intervention is particularly appropriate in this case because movants, unlike the State of Florida, include actual residents and voters who were actively involved in the process that led to the adoption of Article III, Section 20. They are therefore in a special position to provide the Court with a local appraisal of the facts and circumstances involved in the litigation. In County Council of Sumter County v. United States, 555 F.Supp. 694, 697 (D. D.C. 1983), the court allowed African American citizens to intervene in a Section 5 preclearance action in part specifically because of their "local perspective on the current and historical facts at issue." See also, Bossier Parish Sch. Bd. v. Reno, 907 F. Supp 434 (D.D.C. 1995) (making extensive reference to arguments presented by Defendant Intervenors, African-American voters, in Section 5 declaratory judgment action); Busbee v. Smith, 549 F. Supp. 494 (D.D.C. 1982) (recognizing arguments presented by Intervenors, African-American voters, in Section 5 declaratory judgment action), aff'd, 459 U.S. 1166 (1983); 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).

Movants have an interest in the subject matter of this action sufficient to warrant intervention. Indeed, as voters who actively supported adoption of Article III, Section 20, no entity could have a greater interest.

B. Movants' Ability to Protect Their Interests Will Be Impaired or Impeded if Intervention Is Denied

The outcome of this action may as a legal and practical matter impair or impede movants' ability to protect their interests. Rule 24(a)(2). If Article III, Section 20 is found to be unconstitutional, movants would be denied the protection of the provision. The State of Florida would then be free to redistrict without complying with the retrogression and other provisions of Section 20, including that districts should be drawn neither to favor nor disfavor a political party or an incumbent.

C. Movants' Interests Cannot Be Adequately Represented by the Existing Parties

Movants can satisfy Rule 24(a)(2)'s inadequate representation requirement by showing merely that representation of their interests "'may be' inadequate" and "the burden of making this showing should be treated as 'minimal.'" United Guaranty Residential Insurance Co. v. Philadelphia Sav. Fund, 819 F.2d 473, 475 (4th Cir. 1987) (quoting Trbovich v. United Mine Workers of America, 404 U.S. 528, 538 n. 10 (1972)). See also In re Sierra Club, 945 F.2d 776, 779 (4th Cir. 1991) (same). The court in Nuesse v. Camp, 385 F.2d 694, 702 (D.C. Cir. 1967), held that Rule 24 "underscores both the burden of those opposing intervention to show the adequacy of the existing representation and the need for a liberal application in favor of permitting intervention." See also Smuck v. Hobson, 408 F.2d 175, 181 (D.C. Cir. 1969) (same).

Although the State of Florida and the movants for intervention "may share some objectives" with respect to the constitutionality of Article III, Section 20, In re Sierra Club, 945 F.2d at 780, that does not mean that the State of Florida's interests and movants' interests are identical or that their approaches to litigation would be the same. In City of Lockhart v. United States, 460 U.S. 125, 130

(1983), for example, the government and minorities disagreed on the proper application of the Voting Rights Act and what constitutes adequate protection of voting rights. See also Blanding v. DuBose, 454 U.S. 393, 398-399 (1982) (minority plaintiffs, but not the United States, appealed and prevailed in the Supreme Court in voting rights case); County Council of Sumter County, 555 F.Supp. at 696 (United States and minority intervenors took opposite positions regarding the application of Section 2 to Section 5 preclearance).

The Supreme Court has "recognized that when a party to an existing suit is obligated to serve two distinct interests, which, although related, are not identical, another with one of those interests should be entitled to intervene." United Guaranty Residential Insurance, 819 F.2d at 475 (referring to Trbovich, 404 U.S. at 538-539). In Trbovich, the Supreme Court allowed a union member to intervene in an action brought by the Secretary of Labor to set aside union elections for violation of the Labor-Management Reporting and Disclosure Act of 1959, even though the Secretary was broadly charged with protecting the public interest. The Court reasoned that the Secretary of Labor could not adequately represent the union member because the Secretary had a "duty to serve two distinct interests," 404 U.S. at 539, a duty to protect both the public interest and the rights of union members.

In a similar case, the Fourth Circuit allowed an environmental group to intervene as a party defendant in an action where the South Carolina Department of Health and Environmental Control (DHEC) was defending the constitutionality of a state regulation governing the issuance of permits for hazardous waste facilities. The court reasoned that DHEC could not adequately represent the environmental group because "in theory, [DHEC] should represent all of the citizens of the state, including the interests of those citizens who may be ... proponents of new hazardous waste facilities," In re Sierra Club, 945 F.2d at 780, while the environmental group "on the other hand, appears to represent only a subset of citizens concerned with hazardous waste – those who would prefer that few or no new hazardous waste facilities receive permits." Id. See also, Dimond v. District of Columbia, 792 F.2d 179, 192 (D.C. Cir. 1986) (private party seeking to protect its

financial interest allowed to intervene despite presence of government which represented general public interest); Natural Res. Def. Council, Inc. v. United States Envtl. Prot. 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, since the court recognized that the AEPA represents the public interest not solely that of the ... industry"); Georgia v. Ashcroft, 539 U.S. 461 (2003) (upholding grant of private parties' motion to intervene on grounds that intervenors' interests were not adequately represented by the existing parties); Chiles v. Thornburgh, 865 F.2d 1197, 1214-15 (11th Cir. 1989) (federal prison detainees' interests may not be adequately represented by county); New York Public Interest Research Group, Inc. v. Regents of the University of the State of New York, 516 F.2d 350, 352 (2nd Cir. 1975) (pharmacists and pharmacy association allowed to intervene where "there is a likelihood that the pharmacists will make a more vigorous presentation of the economic side of the argument than would" the state Regents); Associated General Contractors of Connecticut, Inc. v. City of New Haven, 130 F.R.D. 4, 11-12 (D. Conn. 1990) (minority contractors allowed to intervene because "its interest in the set-aside is compelling economically and thus distinct from that of the City").

Movants' interests in this litigation are, in like fashion, sufficiently different from those of the State of Florida to justify intervention. The State of Florida must represent the interests of its citizenry generally – including the interests of the Plaintiffs. Trbovich, 404 U.S. at 538-39; In re Sierra Club, 945 F.2d at 780. Where a party represents such dual interests in litigation, the "test" of whether that party will adequately represent the interests of potential intervenors is "whether each of the dual interests [of the party] may 'always dictate precisely the same approach to the conduct of the litigation.' 404 U.S. 539." United Guaranty Residential Insurance Co., 819 F.2d at 475. Consequently, even if the State of Florida vigorously performs its duty to represent its citizenry, representation of movants' distinct interests may still be inadequate because the State of Florida must balance the competing interests presented by the proposed intervenors as well as those individuals or entities, like the Plaintiffs, who oppose it. While the interests of the State of Florida

and movants may converge on issues such as the constitutionality of Section 20, they may diverge when it comes to arguments to be made and appealing any adverse decisions.

Movants meet the standards for intervention as of right, and their motion should be granted.

IV. Permissive Intervention Is Also Appropriate

Even if this Court should determine that movants do not satisfy the requirements for intervention of right, it should grant permissive intervention under Rule 24(b)(1)(B). Rule 24(b)(1)(B) permits intervention when an applicant "has a claim or defense that shares with the main action a common question of law or fact." As discussed above, movants seek to defend the constitutionality of Article III, Section 20, which claim and defense shares common factual and legal questions with the main action.

In Arizona v. California, 460 U.S. 605 (1983), Indian tribes were permitted to intervene in a water rights action between states, despite intervention by the United States on behalf of the tribes. The Court reasoned that "the Indian's participation in litigation critical to their welfare should not be discouraged." Id. at 615. The pending litigation is no less critical to movant's welfare, and accordingly intervention should be granted.

Rule 24(b)(3) also provides that: "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." As discussed above, intervention is timely and will not delay or prejudice the adjudication of the rights of the original parties. Prejudice should not, of course, be confused with the convenience of the parties. See McDonald v. E.J. Lavino Co., 430 F.2d at 1073 ("mere inconvenience is not in itself a sufficient reason to reject as untimely a motion to intervene as of right"); Clark v. Putnam County, 168 F.3d 458, 462 (11th Cir. 1999) (same).

Conclusion

For the above and foregoing reasons, the Court should permit the movants to intervene in this action as party defendants.

Respectfully submitted,

/s Randall C. Marshall

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Fax: (404) 653-0331
Lmcdonald@aclu.org

Attorneys for Movants

[1] Motion for leave to appear *pro hac vice* pending.

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List via transmission of Notices of Electronic Filing generated by CM/ECF or by e-mail as indicated below.

s/ Randall C. Marshall

SERVICE LIST

Case No. 10-CV-23968-UNGARO

via CM/ECF:

Stephen M. Cody, Esq.
16610 SW 82 Court
Palmetto Bay, FL 33157

via e-mail:

Douglas B. MacInnes, Assistant Deputy Attorney General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Douglas.MacInnes@myfloridalegal.com

013

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN,

Plaintiffs,

vs.

STATE OF FLORIDA,

Defendant.

and,

THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON, BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY,

Defendant-Intervenors.

Case No. 10-CV-23968-UNGARO

MOTION TO APPEAR *PRO HAC VICE*, CONSENT TO DESIGNATION, AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILING

In accordance with Local Rules 4(b) of the Special Rules Governing the Admission and Practice of Attorneys of the United States District Court for the Southern District of Florida, the undersigned respectfully moves for the admission *pro hac vice* of Laughlin McDonald of the American Civil Liberties Union Foundation, Inc., 230 Peachtree Street, NW, Suite 1440, Atlanta, GA 30303-1227, 404-523-2721, for purposes of appearance as co-counsel on behalf of Defendant-Intervenors ("ACLU of Florida Intervenors") in the above-styled case only, and pursuant to Rule 2B of the CM/ECF Administrative Procedures, to permit Laughlin McDonald to receive electronic filings in this case, and in support thereof states as follows:

1. Laughlin McDonald is not admitted to practice in the Southern District of Florida and is a member in good standing of the Georgia Bar, the United States District Court for the Northern District of Georgia, and the Eleventh Circuit.

2. Movant, Randall C. Marshall of the American Civil Liberties Union Foundation of Florida, Inc., 4500 Biscayne Blvd Suite 340, Miami, FL 33137-3227, 786-363-2700, is a member in good standing of The Florida Bar and the United States District Court for the Southern District of Florida, maintains an office in this State for the practice of law, and is authorized to file through the Court's electronic filing system. Movant consents to be designated as a member of the Bar of this Court with whom the Court and opposing counsel may readily communicate regarding the conduct of the case, upon whom filings shall be served, who shall be required to electronically file all documents and things that may be filed electronically, and who shall be responsible for filing documents in compliance with the CM/ECF Administrative Procedures.

3. In accordance with the local rules of this Court, Laughlin McDonald has made payment of this Court's $75 admission fee. A certification in accordance with Rule 4(b) is attached hereto.

4. Laughlin McDonald, by and through designated counsel and pursuant to Section 2B CM/ECF Administrative Procedures, hereby requests the Court to provide Notice of Electronic Filings to Laughlin McDonald at email address: Lmcdonald@aclu.org.

WHEREFORE, Randall C. Marshall moves this Court to enter an Order permitting Laughlin McDonald, to appear before this Court on behalf of the ACLU of Florida Intervenors,

for all purposes relating to the proceedings in the above-styled matter and directing the Clerk to provide notice of electronic filings to Laughlin McDonald.

Date: December 16, 2010

Respectfully submitted,

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Attorneys for ACLU of Florida Intervenors

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, Defendant. and, THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON, BENETTA M. STANDLY, SUSAN WATSON, and JOYCE H.HENRY, Defendant-Intervenors.	)	Case No. 10-CV-23968-UNGARO

CERTIFICATION OF LAUGHLIN McDONALD

Laughlin McDonald, Esquire, pursuant to Rule 4(b) of the Special Rules Governing the Admission and Practice of Attorneys, hereby certifies that (1) I have studied the Local Rules of the United States District Court for the Southern District of Florida; and (2) I am a member in good standing of the Georgia Bar, the United States District Court for the Northern District of Georgia, and the Eleventh Circuit.

Laughlin McDonald

LAUGHLIN McDONALD
American Civil Liberties Union Foundation, Inc.
230 Peachtree Street, NW
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 16, 2010, I filed the foregoing document with the Clerk of the Court and sent a copy by U.S. mail, postage pre-paid, and by e-mail to the following counsel:

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16610 SW 82 Court
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Douglas B. MacInnes, Assistant Deputy Attorney General
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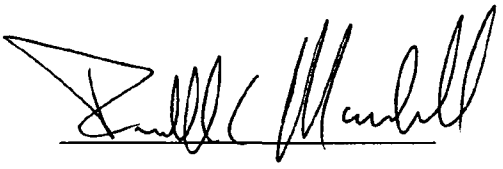

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UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, Defendant. and, THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON, BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY, Defendant-Intervenors.	)	Case No. 10-CV-23968-UNGARO

ORDER GRANTING MOTION TO APPEAR *PRO HAC VICE*, CONSENT TO DESIGNATION AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILING

THIS CAUSE having come before the Court on the Motion to Appear *Pro Hac Vice* for Laughlin McDonald, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing (the "Motion"), pursuant to the Special Rules Governing the Admission and Practice of Attorneys in the United States District Court for the Southern District of Florida and Section 2B of the CM/ECF Administrative Procedures. This Court having considered the motion and all other relevant factors, it is hereby

ORDERED AND ADJUDGED that:

The Motion is GRANTED. Laughlin McDonald may appear and participate in this action on behalf of the ACLU of Florida Intervenors. The Clerk shall provide electronic notification of all electronic filings to Laughlin McDonald at Lmcdonald@aclu.org.

DONE AND ORDERED in Chambers at Miami, Florida, this ___ day of December, 2010.

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

cc: all counsel of record

014

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 10-23968-CIV-UNGARO

MARIO DIAZ-BALART and
CORRINE BROWN,

Plaintiffs,

v.

STATE OF FLORIDA, *et al.*,

Defendants.
_____/

ORDER DENYING MOTION TO APPEAR PRO HAC VICE

THIS CAUSE is before the Court upon the Motion to Appear Pro Hac Vice. (D.E. 13.)

THE COURT has considered the Motion and the pertinent portions of the record and is otherwise fully advised in the premises. In the Motion, the putative Intervenors represent that Laughlin McDonald is a member in good standing of the bars of the state of Georgia, the United States District Court for the Northern District of Georgia, and the United States Court of Appeals for the Eleventh Circuit. (D.E. 13.) However, neither the Georgia Bar nor the Northern District of Georgia has a record of this attorney as a member. Accordingly, it is

ORDERED AND ADJUDGED that said Motion (D.E. 13) is DENIED WITHOUT PREJUDICE. The putative Intervenors may re-file a motion for Laughlin McDonald to appear pro hac vice in this matter; however, such motion must be accompanied by a certification that Mr. McDonald is a member in good standing of the bar of any United States Court or of the highest Court of any State of the United States, as required by Local Rule 4 of the Special Rules Governing the Admission and Practice of Attorneys.

DONE AND ORDERED in Chambers at Miami, Florida, this _27th__ day of December, 2010.

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

copies provided:
counsel of record

015

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

Case No. 10-CV-23968-UNGARO

MARIO DIAZ-BALART and
CORRINE BROWN,

Plaintiffs,

vs.

STATE OF FLORIDA,

Defendant.

_____/

MOTION FOR RECONSIDERATION

Counsel for the putative Intervenors respectfully request the Court's reconsideration of its Order Denying Motion to Appear Pro Hac Vice (D.E. 14). As grounds for this motion, the undersigned states as follows:

1. Attorney McDonald's full given name is Moffatt Laughlin McDonald. Undersigned counsel has always known him by "Laughlin" and therefore failed to state his full name in the original motion (D.E. 13). Counsel apologizes to the Court for this oversight.

2. As shown by the attached declaration, Attorney McDonald goes by "Laughlin McDonald" but is registered as M. Laughlin McDonald with the Georgia Bar and as Moffatt Laughlin McDonald with the Northern District of Georgia.

3. Attorney McDonald's membership in the State Bar of Georgia is reflected on the Bar's website as:

Mr. M. Laughlin McDonald

Company: ACLU Foundation Inc.
Address: 230 Peachtree Street, N.W., Suite 1440

Atlanta, GA 30303-1513
Work Phone: (404) 523-2721
Fax: (404) 653-0331
Email: lmcdonald@aclu.org
Admit Date: 11/7/1975
Law School: University of Virginia
Status: Active Member in Good Standing
Public Disciplinary History: None on Record

https://www.members.gabar.org/Custom/Directory/Default.aspx?iSession=a2e1edfd7de64cf79a13fdd4866f199e (search for Last Name – McDonald, Company – ACLU).

4. Similarly, Attorney McDonald's membership in the Northern District of Georgia is reflected at its website (http://www.gand.uscourts.gov/output/m.php) as:

Name	Date Admitted	Status	Firm Name
McDonald, Moffatt Laughlin	01/12/1976	Active	American Civil Liberties Union Foundation

WHEREFORE, Randall C. Marshall respectfully moves this Court to reconsider its Order (D.E. 14) and grant the Motion to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing (D.E. 13).

Date: December 27, 2010

Respectfully submitted,

/s Randall C. Marshall

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Attorneys for ACLU of Florida Intervenors

CERTIFICATE OF CONFERENCE

I hereby certify that pursuant to S.D. Fla. L.R. 7.1(a)(3), I conferred with counsel for plaintiffs. Plaintiffs do not oppose this motion (although they continue to oppose the intervention).

s/ Randall C. Marshall

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified below via transmission of Notices of Electronic Filing generated by CM/ECF:

Stephen M. Cody, Esq.
16610 SW 82 Court
Palmetto Bay, FL 33157

s/ Randall C. Marshall

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, Defendant.	)	Case No. 10-CV-23968-UNGARO

DECLARATION OF M. LAUGHLIN McDONALD

I submit this Declaration in support of Defendant-Intervenors Motion for Reconsideration.

1. My birth name is Moffatt Laughlin McDonald. However, I was known and called throughout my childhood and most of my adult life as Laughlin McDonald.

2. I was admitted to the State Bar of Georgia in 1975 under the name of M. Laughlin McDonald. My membership number is 489550.

3. I was admitted to the U.S. District Court for the Northen District of Georgia on January 12, 1976, under the name of Moffatt Laughlin McDonald.

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 27, 2010.

S/ M. Laughlin McDonald

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016

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 10-23968-CIV-UNGARO

MARIO DIAZ-BALART and
CORRINE BROWN,

Plaintiffs,

v.

STATE OF FLORIDA, *et al.*,

Defendants.
_____/

ORDER GRANTING MOTION FOR RECONSIDERATION

THIS CAUSE is before the Court upon the Motion for Reconsideration filed December 27, 2010. (D.E. 13.)

THE COURT has considered the Motion and the pertinent portions of the record and is otherwise fully advised in the premises. In the Motion, the putative Intervenors ask that the Court reconsider its December 27, 2010 Order denying without prejudice a motion to appear pro hac vice filed on behalf of Mr. Laughlin McDonald. As requested by the Court in that Order, the putative Intervenors have provided the Court with a certification that Mr. M. Laughlin McDonald is a member in good standing of the bars of the state of Georgia and the United States District Court for the Northern District of Georgia. Accordingly, it is

ORDERED AND ADJUDGED that Motion for Reconsideration (D.E. 13) is GRANTED M. Laughlin McDonald may appear and participate in this action on behalf of the ACLU of Florida Intervenors. The Clerk shall provide electronic notification of all electronic filings to M. Laughlin McDonald, at email address: Lmcdonald@aclu.org.

DONE AND ORDERED in Chambers at Miami, Florida, this _28th__ day of December, 2010.

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

copies provided:
counsel of record

TallahasseeRunners

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017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10 – CV- 23968 -UNGARO

MARIO DIAZ-BALART and CORRINE BROWN,

Plaintiffs,

vs.

STATE OF FLORIDA,

Defendant.

PLAINTIFFS' RESPONSE TO MOTION TO INTERVENE

Plaintiffs Mario Diaz-Balart and Corrine Brown, by and through their undersigned counsel respond in opposition to the motion to intervene filed by The American Civil Liberties Union Of Florida, Howard Simon, Benetta M. Standly, Susan Watson, and Joyce Hamilton Henry.

Background

Plaintiffs have brought this action seeking a declaratory judgment that Article III, Section 20 of the Florida Constitution is unconstitutional as well as injunctive relief prohibiting the enforcement of Article III, Section 20 of the Florida Constitution. The American Civil Liberties Union Of Florida ("ACLU-FL"), Howard Simon, Benetta M. Standly, Susan Watson, and Joyce Hamilton Henry have moved to intervene in this action pursuant to either Rule 24(a)(2) or Rules 24(b)(1)(B). The motion to intervene alleges that the individual intervenors are Florida registered voters and are members and officers of the ACLU-FL. Apparently, the Intervenors do not trust the Defendant in the case, the State of Florida, to defend the action to their liking.[1]

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[1] The Court has granted the State of Florida an extension of time to respond to the Amended Complaint through January 11, 2011. The terms of the present Governor and Attorney General, Charlie Crist and Bill McCollum, respectively, expire on January 4th and the State requested the extension so that the new

Argument

I. The Motion to Intervene Under Rule 24(a)(2) Should Be Denied

This action seeks a declaration that the newly enacted amendment found in Article III, Section 20 of the Florida Constitution impermissibly conflicts with Article I, Section 4 of the United States Constitution. The State of Florida is named as the party defendant. The Supreme Court in *Diamond v. Charles*, 476 U.S. 54, 62 (1986) held that "a State has standing to defend the constitutionality of its statute." The Intervenors move on the basis that they have an "interest" in the instant litigation, which is sufficient to grant them standing as party defendants. However, the courts have recognized a great difference between a proposed intervenor being "interested in" a case and having "an interest" in the matter. The former may support intervention, while the latter will not.

Rule 24 of the Federal Rules of Civil Procedure contemplates two distinct species of intervention: intervention of right, under Rule 24(a), and permissive intervention under Rule 24(b). The Intervenors here seek to enter this case under either avenue. The intervention should be denied.

Rule 24(a)(2) provides:

> On timely motion, the court must permit anyone to intervene who: &
>
> (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.

Rule 24(a)(2), Fed.R.Civ.P. (emphasis supplied). The Eleventh Circuit has adopted the well-recognized four-step analysis of intervention under Rule 24(a)(2):

> Federal Rule of Civil Procedure 24(a) & "set bounds that must be observed. The original parties have an interest in the prompt disposition of their controversy and the public also has an interest in efficient disposition of court business." 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1904, at 270 (3d ed. 2007). To

---

administrations of Rick Scott and Pam Bondi could make the decision of how to respond to this lawsuit on behalf of the State of Florida.

> intervene of right under Rule 24(a)(2), a party must establish that "(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." *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989) (citing *Athens Lumber Co. v. FEC*, 690 F.2d 1364, 1366 (11th Cir. 1982)).

Fox v. Tyson Foods, Inc., 519 F.3d 1298, 1302-03 (11th Cir. 2008); *accord Stone v. First Union Corp.*, 371 F.3d 1305, 1308-09 (11th Cir. 2004). Because the Intervenors must meet all four parts of this test, failure to satisfy any one of the criteria justifies denial of its motion.

Of the four criteria set out in *Tyson Foods*, the Intervenors can only satisfy the first. Plaintiffs concede that the motion to intervene is timely. However, the Plaintiffs dispute the Intervenors' claims that they satisfy the remaining three.

The Intervenor's cannot demonstrate a sufficient interest relating "to the property or transaction which is the subject of the action" in order to satisfy the second *Tyson Foods* criteria. Unlike a case where intervention is sought pursuant to Rule 24(a)(1), where party has a right to intervene set forth in federal law, a party seeking to intervene under Rule 24(a)(2) must establish a right of standing of his or her own.

The Intervenors' motion should be denied because they lack a "significant protectable interest" that may be practically impaired or impeded by the disposition of this case. *Donaldson v. United States*, 400 U.S. 517, 531 (1971). "[A]n undifferentiated, generalized interest in the outcome of an ongoing action" is insufficient. *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002) (internal quotation marks omitted). Rather, "at some fundamental level the proposed intervenor must have a stake in the litigation." *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 946 (7th Cir. 2000) (internal quotation marks and brackets omitted).

ACLU-FL claims that it has an interest in this litigation because it has appeared as a party in other cases that have touched upon the right to vote.[2] The four named individuals allege that they supported the passage of the amendment to Florida's constitution, giving them a protectable interest in seeing that the provision stays in the State's charter. In neither case does the interest rise to the level required. *See, Allen v. Wright*, 468 U.S. 737, 754 (1984) ("[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court"). Taken another way, the Intervenors here could not allege a federal cause of action or claim a federal right was being infringed if the State of Florida did not enforce the new amendment. Their only remedy would lie in state court in Florida.

A party has standing within the meaning of Article III when it establishes three elements: (1) injury, (2) causation, and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61. The injury must be an injury in fact, i.e., the invasion of a legally protected interest that is concrete and particularized, not conjectural or hypothetical. *Id.* at 560. "Moreover, there must be some causal connection between the asserted injury and the challenged action, and the injury must be of the type likely to be redressed by a favorable decision." *Gutherman v. 7-Eleven, Inc.*, 278 F.Supp.2d 1374, 1378 (S.D. Fla. 2003) (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985)). These three requirements have been described as "immutable," and as the "irreducible constitutional minimum" of standing under the "case or controversy" clause, *Bennett v. Spear*, 520 U.S. 154, 162 (1997), and *Defenders of Wildlife*, 504 U.S. at 560-61.

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[2] ACLU-FL cites to three specific cases. In *Wexler v. Lapore*, 878 So.2d 1276 (Fla. 4th DCA 2004), cited by Intervenors, ACLU-FL appeared as an amicus. From the docket at the First District Court of Appeals, ACLU-FL appears to have appeared as counsel for the appellant in *Florida Caucus of Black State Legislators, Inc. v. Crosby*, 877 So.2d 861 (Fla. 1st DCA 2004) and was also counsel, but not a party in *Friedman v. Snipes*, 345 F.Supp.2d 1356 (S.D. Fla. 2004). None of these cases stands as precedent for the proposition that a supporter of a successful initiative has standing to intervene as a defendant in a case challenging the constitutionality of the initiative.

It "is not enough that an organization alleges that a particular party's conduct is against the policies or goals of that organization. It is precisely this type of broad organizational interest which the Supreme Court rejected in *Sierra Club v. Morton*, 405 U.S. 727 (1972), since it is too abstract to represent a meaningful basis for standing." *Williams v. Adams*, 625 F.Supp. 256, 260 (N.D. Ill. 1985). Under *Sierra Club*, ACLU-FL's interest in the amendment at issue is too abstract. The only inference to drawn from the facts plead by the Intervenors is that ACLU-FL has no other stated purpose than to act as a vehicle for litigation. However, the propensity of an organization to file lawsuits, standing alone, does not anoint it with the status of one who has been injured in fact. In *Fair Housing Council of Suburban Philadelphia v. Montgomery Newspapers*, 141 F.3d 71 (3d Cir. 1998), the Third Circuit held "that the pursuit of litigation alone cannot constitute an injury sufficient to establish standing under Article III." *Id.* at 80. To find otherwise, any litigant could create injury in fact by bringing a case, and Article III would present no real limitation. *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C.Cir. 1990). What ACLU-FL seeks to assert in this case is an "abstract social interest" not cognizable as a protectable interest under Article III. *See, Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

The tenor of Intervenors' primary argument — that, as initiative supporters, they have a quasi-legislative interest in defending the measure they successfully advocated — must be rejected because they are not elected state officials or authorized by state law to represent the State's interests. In *Karcher v. May*, 484 U.S. 72, 82 (1987), the Supreme Court noted that applications of the Speaker of the General Assembly and the President of the Senate to intervene as parties-respondent on behalf of the legislature in defense of a legislative enactment was proper where New Jersey law empowered the state's legislature to defend the constitutionality of state enactments. However, the Supreme Court has never identified initiative proponents or supporters as Article III qualified defendants. In *The Don't Bankrupt Washington Committee v. Continental Illinois National Bank & Trust Co.*, 460 U.S. 1077 (1983)

(mem.), the Supreme Court held that an initiative proponent lacked standing to bring an appeal. The Don't Bankrupt Washington Committee was the proponent of a Washington state initiative. *Continental Ill. Nat'l Bank & Trust Co. v. Washington*, 696 F.2d 692, 694 (9th Cir. 1983). On a challenge to the initiative by the federal government, in which the Committee was permitted to intervene, the Ninth Circuit invalidated the initiative. *Id.* at 694, 702. The Committee appealed to the Supreme Court, but the Court dismissed the appeal because the Committee lacked standing, notwithstanding the fact that it had intervened in the case below.[3]

Here, the Amended Complaint alleges that the new provisions found in Article III, Section 20 of the Florida Constitution conflict with Article I, Section 4 and the Supremacy Clause of the United States Constitution. At its most primal level, the Intervenors cannot be found to have a vital interest in ensuring that a portion of state law that impinges upon duties that devolve directly from the United States Constitution to the Florida Legislature remain in effect, in spite of the command of the Supremacy Clause. If, as the Plaintiffs allege, the new amendment violates the federal Constitution, then it must give way, regardless of how many voters approved it or how fervently these Intervenors advocated its passage. Their enthusiasm for the new measure and their desire to see that it remain in place when the Legislature takes up redistricting commencing in the spring of 2011 does not vest them with standing and the requisite interest to be a party defendant in this action.

Because the State has sought and was granted a brief extension of time, the Intervenors cannot rightfully claim that they are not adequately represented at the present time. The Eleventh Circuit has stated that courts should "presume adequate representation when an existing party seeks the same objectives as the would-be interveners." *Clark v. Putnam County*, 168 F.3d 458, 461 (11th Cir. 1999). Although this presumption is "weak," it imposes on the proposed intervener "the burden of coming

[3] That dismissal was a decision on the merits that is binding on lower courts on the issues presented and necessarily decided. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (*per curiam*).

forward with some evidence to the contrary." Id. (emphasis added). Here, the Intervenors have failed to make any factual showing.

Accordingly, the Intervenor's motion to intervene as a matter of right must be denied.

II. The Motion to Intervene Under Rule 24(b) Should Also Be Denied

As an alternative to intervention as a matter of right, the Intervenors request that they be granted leave to enter the case under Rule 24(b). Rule 24(b) provides:

> (b) Permissive Intervention.
>
> (1) In General.
>
> On timely motion, the court may permit anyone to intervene who:
>
> (A) is given a conditional right to intervene by a federal statute; or
>
> (B) has a claim or defense that shares with the main action a common question of law or fact.

The Eleventh Circuit in *In re Ford Motor Co.*, 471 F.3d 1233, 1246 (11th Cir., 2006) noted:

> If a nonparty lacks the right to intervene, Rule 24(b) allows the court to grant it permission to do so "when a statute of the United States confers a conditional right to intervene," or "when [the] applicant's claim or defense and the main action have a question of law or fact in common." Fed.R.Civ.P. 24(b); see also *Chiles* [*v. Thornburgh*, 865 F.2d 1197 (11th Cir.1989)] at 1213. "[I]t is wholly discretionary with the court whether to allow intervention under Rule 24(b) and even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied, the court may refuse to allow intervention." *Worlds v. Dep't of Health and Rehabilitative Servs.*, 929 F.2d 591, 595 (11th Cir.1991) (quoting 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure, § 1913, at 376-77 (2d ed.1986)).

In the instant case, the proposed answer offered by the Intervenors shows that they offer nothing unique to the case. The Intervenors admit some of the facts alleged in the Amended Complaint and deny others. They assert three affirmative defenses. The first, sovereign immunity, is a defense

personal to the State of Florida and may not be asserted by these parties.[4] The second defense, that the State of Florida is not a proper party, is also a defense that belongs to the State and cannot be raised by these Intervenors. The third and final defense, that the Amended Complaint fails to state a cause of action, is a generic defense that does not need the presence of the Intervenors to be evaluated by the Court.

In short, the Intervenors bring nothing of substance to the case. The fact that they are merely "interested in" the outcome of this case does not give them standing to participate in this matter. The Amended Complaint seeks declaratory and injunctive relief against the State of Florida. Whether that relief is granted or denied, the decision of the Court will not affect the Intervenors to a greater degree than the millions of voters who cast ballots in the November 2010 election either in support or opposition to the amendment in question. The Intervenors's desire to affect the outcome of this case or, at the very least, to have their voices heard does not create a "defense that shares with the main action a common question of law or fact" as contemplated by Rule 24(b).

"[B]ecause an intervenor participates on equal footing with the original parties to a suit, a movant for leave to intervene ... must satisfy the same Article III standing requirements as original parties." *Building and Constr. Trades Dept., AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir.1994) (citations omitted). As the Eighth Circuit held:

> [A]n Article III case or controversy, once joined by intervenors who lack standing, is – put bluntly – no longer an Article III case or controversy. An Article III case or controversy is one where all parties have standing, and a would-be intervenor, because he seeks to participate as a party must have

[4] The Amended Complaint does not seek compensatory damages, so even the broadest reading of the Eleventh Amendment would not bar this action. Further, it is ironic that ACLU-FL, which holds itself out as a champion of the voter, would even hint that a state is constitutionally protected from a federal lawsuit which raises constitutional question. Its zeal in interjecting itself into this case could be used as a reason to foreclose it from bringing actions in the future challenging Florida's reapportionment under the 2010 Census, regardless of whether based upon Article I or the Equal Protection Clause of the Fourteenth Amendment or the Voting Rights Act.

> standing as well. The Supreme Court has made it very clear that "[those] who do not possess Art. III standing may not litigate as suitors in the courts of the United States."

Mausolf v. Babbit, 85 F.3d 1295, 1300 (8th Cir.).

The best gloss that can be put on the Intervenors' motion is that are interested bystanders. However, no matter how hard they press their case, they cannot demonstrate that they have a interest which is any different from the millions of voters who voted for the measure or the thousands who actively campaigned for it and urged their friends and neighbors to support it. In the end, the Intervenors should be left where they are, on the sidelines, free to observe this case, but not free to participate as an equal party.

Conclusion

Plaintiffs respectfully request that the Court deny the motion to intervene filed by The American Civil Liberties Union Of Florida, Howard Simon, Benetta M. Standly, Susan Watson, and Joyce Hamilton Henry.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 28, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document was served this day on all counsel of record and pro se parties either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized matter for those counsel or parties who are not authorized to receive Notices of Electronic Filing. I also certify that a true and correct copy was furnished to Douglas B. MacInnes, Assistant Deputy Attorney General for Civil Litigation, Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050 via email to Douglas.MacInnes@myfloridalegal.com.

s/Stephen M. Cody

018

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, Defendant, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON, BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY, Defendant-Intervenors.	)	Case No. 10-CV-23968-UNGARO

DEFENDANT-INTERVENORS' REPLY
TO PLAINTIFFS' RESPONSE TO MOTION TO INTERVENE

I. Defendant-Intervenors Are not Required to Prove Standing

Plaintiffs spend most of their brief erroneously arguing that Defendant-Intervenors are required to establish standing under Article III of the U.S. Constitution as a condition for intervention pursuant to Rules 24(a) and (b), Fed.R.Civ.P. Plaintiffs' Response, DE 17, pp. 3-9. According to Plaintiffs, "a party seeking to intervene under Rule 24(a)(2) must establish a right of standing of his or her own." Id., p. 3. Plaintiffs repeat this argument with respect to permissive intervention pursuant to Rule 24(b). Id., p. 8. Plaintiffs also erroneously claim that "Intervenors move on the basis that they have an 'interest' in the instant litigation, which is sufficient to grant

them standing as party defendants." Id., p. 2. While Defendant-Intervenors contend they have an interest in the litigation sufficient to justify intervention, the basis for their intervention is Rule 24, which does not require proof of standing.

Notably, Plaintiffs omit any discussion of Chiles v. Thornburg, 865 F.2d 1197, 1213 (11th Cir. 1989), which established the rule in the Eleventh Circuit that "a party seeking to intervene need not demonstrate that he has standing in addition to meeting the requirements of Rule 24 as long as there exists a justiciable case and controversy between the parties already in the lawsuit." This rule has consistently been followed in this Circuit. See: Lloyd v. Alabama Dept. of Corrections, 176 F.3d 1336, 1339 (11th Cir. 1999); Dillard v. Chilton County Com'n, 495 F.3d 1324, 1337 (11th Cir. 2007).[1] Under applicable Eleventh Circuit precedent, there is no requirement that Defendant-Intervenors establish Article III standing as a condition for intervention in this action.

Plaintiffs obviously believe that a justiciable case and controversy exists between the parties already in the lawsuit. They have also stated that any citizen or voter would have standing to bring a similar lawsuit. In their amended complaint, they allege that: "The harm to the citizens and voters in the State of Florida, including Plaintiffs, is sufficiently real and/or imminent to warrant the issuance of a conclusive declaratory judgment usefully clarifying the legal relations of the parties." Amended Complaint, ¶ 16 (DE 3). If Plaintiffs and other citizens or voters would

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[1]Plaintiffs reliance upon Allen v. Wright, 468 U.S. 737 (1984) (DE 17, p. 4), is misplaced. The Court held that parents did not have standing to bring suit to prevent the government from violating the law in granting tax exemptions, but the case did not involve intervention. See also Diamond v. Charles, 476 U.S. 54, 68-9 (1986) (declining to reach the question whether every intervenor must demonstrate standing in addition to the requirements of Rule 24(a)).

have standing to bring a law suit, Defendant-Intervenors must be acknowledged as also having standing to intervene to seek a "declaratory judgment clarifying the legal relations of the parties." Id.

In addition, were Plaintiffs correct that Defendant-Intervenors lacked standing, then it would follow that Plaintiffs also lacked standing. While they disagree with Defendant-Intervenors on the constitutionality of the state law, Plaintiffs' interests in clarifying the legal relations of the parties are similar to those of Defendant-Intervenors.

II. The Cases Denying Intervention Relied Upon by Plaintiffs Are Inapposite

The cases Plaintiffs rely upon in support of their argument that intervention under Rule 24(a)(2) is unwarranted (DE 17, p. 3) are inapposite. In Southern Calif. Edison Co. v. Lynch, 307 F.3d 794, 803 (9th Cir. 2002), the court affirmed the denial of intervention as of right because the "pending litigation would not resolve" the proposed intervenors' claims. Those claims were "based on a contingent, unsecured claim against a third-party debtor" which the court held "falls far short of the 'direct, non-contingent, substantial and legally protectable' interest required for intervention as a matter of right." Id. (citation omitted). Permissive intervention was also denied movants because "no common question of law or fact exists between their claims and the main action." Id. As the court concluded, intervention is "not intended to allow the creation of whole new lawsuits by the intervenors." Id. at 804 (citation omitted). Here, however, the pending litigation would in fact decide Defendant-Intervenors' claims, and would not create a new lawsuit but resolve common questions of law and fact.

In Sokaogon Chippewa Cmty. v. Babbitt, 214 F.2d 941 (7th Cir. 2000), also relied upon

by Plaintiffs (DE 17, p. 3), the court denied intervention for a variety of reasons, none of which are present here. Those reasons included: intervention was not sought until five years after the original complaint was filed; any impact of the litigation on intervenors' interests "is pure speculation at this point;" intervenors failed to document that the suit would have a detrimental impact "on its interests;" intervention "serves no conceivable purpose other than to bloc a settlement agreement that it does not like;" and intevenors were free to bring litigation challenging the settlement. Id. at 947-49. Here, by contrast, intervention is timely, the impact of the litigation on intervenors' rights is real and not speculative, the purpose of intervention is to protect voting rights, and this litigation would be dispositive. See Stone v. First Union Corp., 371 F.3d 1305, 1309-10 (11th Cir. 2004) ("the potential for a negative stare decisive effect 'may supply that practical disadvantage which warrants intervention of right'") (citation omitted).

Defendant-Intervenors satisfy the requirements of Rule 24(a)(2) in that they claim an interest in the property or transaction that is the subject of the action, and are so situated that disposing of the action may as a practical matter impair or impede their ability to protect their interest. Under the circumstances, intervention in this case is warranted.

III. Defendant-Intervenors' Interests Are not Adequately Represented

Plaintiffs claim that "Intervenors cannot rightfully claim that they are not adequately represented at the present time." DE 17, p. 6. The very case they rely upon to support this argument, i.e., Clark v. Putnam County, 168 F.3d 458 (11th Cir. 1999), directly refutes it.

In Clark v. Putnam County, the court of appeals reversed in part and vacated and remanded a decision of the district court denying intervention as of right to black voters and the

Georgia NAACP. The action in which they sought to intervene had been brought by white voters challenging the constitutionality of a districting plan implemented to remedy the dilution of minority voting strength caused by at-large voting. The Putnam County Commission had affirmatively stated that "they represent the interests of all Putnam County citizens." 168 F.3d at 461. The court of appeals concluded, however, that the fact that the County Commission will "represent everyone in itself indicates that the commission represents interests adverse to the proposed intervenors." Id. Similarly, the fact that the State of Florida may represent the interests of all Floridians, including the Plaintiffs, establishes that Defendant-Intervenors' interests are not adequately represented within the meaning of Rule 24(a)(2).

Plaintiffs also claim that "the Intervenors do not trust the Defendants in the case, the State of Florida, to defend the action to their liking." DE 17, p. 1. The standard for determining lack of adequate representation for purposes of intervention under Rule 24(a)(2) is not a lack of trust but whether "it is clear" that existing parties "will provide adequate representation." Chiles v. Thornburg, 865 F.2d at 1214. As the Supreme Court has held, the "requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972). And as Clark v. Putnam County provides, the fact that the State of Florida will represent everyone indicates that the State's interests are adverse to those of Defendant-Intervenors.

IV. Plaintiffs Other Arguments Are Irrelevant, Without Merit, or Frivolous

Plaintiffs make other arguments, many addressing the issue of standing, that are

irrelevant, without merit, or frivolous, and which will be responded to only briefly.

Plaintiffs contend that "ACLU-FL has no other stated purpose than to act as a vehicle for litigation." DE 17, p. 5. While ACLU-FL does engage in ligation, its purposes are larger than that and include public advocacy, public education, reform of state and local laws and institutions, lobbying, the advancement of the public interest, and the protection of constitutional and civil rights. See: www.aclufl.org; www.aclu.org.

Plaintiffs also contend that Defendant-Intervenors have no legitimate interest in protecting the challenged constitutional amendment because it is "a quasi-legislative interest" which "must be rejected because they are not elected state officials or authorized by state law to represent the State's interests." DE 17, p. 5. Defendant-Intervenors, as residents and voters of Florida and as a civil right organization, are not state officials but they have a recognizable interest in the enforcement of voting laws so that they provide all voters with the equal opportunity to participate in the political process and elect representatives of their choice, which are rights the challenged amendment protects. As Plaintiffs themselves have acknowledged, citizens and voters in the State of Florida have a sufficient interest to warrant the issuance of a declaratory judgment clarifying the legal relations of the parties. DE 3, ¶ 16.

Plaintiffs also argue that intervenors "could not allege a federal cause of action or claim a federal right was being infringed if the State of Florida did not enforce the new amendment." DE 17, p. 4. To the contrary, intervenors as residents and voters would have standing to bring suit in federal court against state officials whose actions violated federal law. See, e.g., Thornburg v. Gingles, 478 U.S. 30 (1986).

Plaintiffs also claim that Defendant-Intervenors "cannot be found to have a vital interest

in ensuring that a portion of state law that impinges upon duties that devolve directly from the United States Constitution to the Florida Legislature remain in effect." DE 17, p. 6. The argument assumes that the challenged state law is unconstitutional, an argument that Defendant-Intervenors believe is without merit but in any event has yet to be considered or decided by the district court.

Finally, Plaintiffs claim ACLU-FL's "zeal in interjecting itself into this case could be used as a reason to foreclose it from bringing actions in the future challenging Florida's reapportionment under the 2010 Census." DE 17, p. 8 n.4. While Defendant-Intervenors believe Plaintiffs' decision to sue only the State of Florida raises Eleventh Amendment immunity problems, nothing would preclude ACLU-FL or voters and residents of Florida from suing state officials on the grounds that a future reapportionment they sought to implement violated the Fourteenth Amendment or the Voting Rights Act. See, e.g., Wesberry v. Sanders, 376 U.S. 1 (1964); Thornburg v. Gingles.

Conclusion

For the above and foregoing reasons, movants request that their motion for leave to intervene be granted.

Respectfully submitted,

s/Randall C. Marshall

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CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified below via transmission of Notices of Electronic Filing generated by CM/ECF:

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s/ Randall C. Marshall

019

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, Defendant, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON; BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY, Defendant-Intervenors, and FLORIDA STATE CONFERENCE OF NAACP BRANCHES; DEMOCRACIA AHORA; LEON W. RUSSELL; PATRICIA T. SPENCER; CAROLYN H. COLLINS; EDWIN ENCISO; and STEPHEN EASDALE, Defendant-Intervenors.	Case No. 10-CV-23968-UNGARO

MOTION FOR LEAVE TO INTERVENE AS DEFENDANTS

The Florida State Conference of NAACP Branches ("Florida NAACP"), Leon W. Russell, Patricia T. Spencer, and Carolyn H. Collins (collectively the "NAACP Intervenors"), Democracia Ahora, Edwin Enciso, and Stephen Easdale (collectively the "Democracia Intervenors") respectfully move the Court for leave to intervene in the above-captioned case as of right pursuant to Federal Rule of Civil Procedure 24(a)(2), or instead for permissive intervention under Federal Rule of Civil Procedure 24(b). Intervenors Russell, Spencer, Collins,

Enciso, and Easdale are residents of Florida and registered Florida voters who voted for Amendments 5 and 6, the recently enacted amendments to the Florida Constitution concerning redistricting reform. Russell, Spencer, and Collins are African-Americans; Enciso and Easdale are Hispanic-Americans.

The Florida NAACP is comprised of 67 local branches throughout Florida with over 11,000 individual members. Like its national parent organization, the Florida NAACP's missions are the advancement and improvement of the political, educational, social and economic status of minority persons, including African-Americans; the elimination of racial prejudice; the publicizing of adverse effects of discrimination; and the initiation of legal redress to secure the elimination of racial and ethnic bias. The Florida NAACP has participated actively in litigation on behalf of Florida's minority voters, including prior litigation involving reapportionment and redistricting. *See, e.g., Florida State Conference of the NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008); *Pleus v. Crist*, 14 So. 3d 941 (Fla. 2009).

Democracia Ahora is a Florida association that is affiliated with the national Hispanic civic organization, Democracia U.S.A. It has individual members throughout Florida. Democracia Ahora's primary purposes are to empower Hispanic citizens who are engaged in civic and democratic endeavors; and to assist members of Hispanic communities in identifying and articulating issues of concern, including voting rights issues.

Both the Florida NAACP and Democracia Ahora worked hard to secure the passage of Amendments 5 and 6, and participated in litigation in the Florida Supreme Court to ensure their inclusion on the ballot. *See Roberts v. Brown*, 43 So.3d 673 (Fla. 2010).

As explained in the memorandum of law filed herewith, the Court should grant this motion because Movants – African-American and Hispanic residents and voters of Florida, and

organizations representing African-American, Hispanic, and other minority interests – have a clear interest relating to the transaction that is the subject of this action, and are so situated that disposing of the action as a practical matter will impair or impede their ability to protect those interests. Their interests are not adequately represented by any existing party. The Court should, in any event, permit permissive intervention because Movants have a defense that shares with the main action a common question of law or fact. This motion is accompanied by Movants' answer setting forth the claims and defenses for which intervention is sought.

For the reasons stated herein and in the accompanying memorandum of law, Movants respectfully request that the Court grant this motion to intervene.

Date: January 6, 2011

Respectfully submitted,

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020

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, Defendant, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON; BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY, Defendant-Intervenors, and FLORIDA STATE CONFERENCE OF NAACP BRANCHES; DEMOCRACIA AHORA; LEON W. RUSSELL; PATRICIA T. SPENCER; CAROLYN H. COLLINS; EDWIN ENCISO; and STEPHEN EASDALE, Defendant-Intervenors.	Case No. 10-CV-23968-UNGARO

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AS DEFENDANTS

In support of their Motion for Leave to Intervene as Defendants, the Florida State Conference of NAACP Branches ("Florida NAACP"), Leon W. Russell, Patricia T. Spencer, and Carolyn H. Collins (collectively the "NAACP Intervenors"), and Democracia Ahora, Edwin Enciso, and Stephen Easdale (collectively the "Democracia Intervenors") submit this

memorandum of law. As African-American and Hispanic registered voters who voted for Amendments 5 and 6, and organizations representing the interests of African-American and Hispanic voters and residents of Florida, Movants are entitled to intervene in this action pursuant to Federal Rule of Civil Procedure 24(a)(2), or the Court should permit their intervention under Federal Rule of Civil Procedure 24(b).

I. INTRODUCTION

In the November 2010 election, Florida voters spoke loudly and clearly in support of fundamental reform of Florida's redistricting processes. On the ballot were "Amendment 5" (applicable to state legislative redistricting) and "Amendment 6" (applicable to congressional redistricting). Among other things, the Amendments prohibit the drawing of congressional and state legislative district lines in a way that intentionally favors any particular incumbents or political parties or that diminishes the voting strength of Florida's racial and language minorities. ***More than sixty-two percent*** of Florida voters approved Amendments 5 and 6, which are now codified in Florida's Constitution as Article III, Section 21 and Article III, Section 20, respectively.

Securing passage of the Amendments was an arduous endeavor. Their sponsor, FairDistrictsFlorida.org, obtained millions of signatures from Florida voters seeking to reform the redistricting process. Simultaneously, the Amendments' placement on the ballot was fought every step of the way. Opponents of the measures, by some accounts, spent millions to prevent their enactment. *See* Allison Ross, *PAC Opposed to Amendments 5, 6 Musters $3.8 Million in a Month*, PALM BEACH POST, Oct. 30, 2010. Nevertheless, the Florida Supreme Court issued two opinions approving their placement on the ballot, s*ee Roberts v. Brown*, 43 So.3d 673 (Fla. 2010); *Advisory Opinion to Attorney General re Standards For Establishing Legislative Dist. Boundaries*, 2 So.3d 175 (Fla. 2009), and the Amendments overwhelmingly passed. Now that

the desire of Florida's voters for redistricting reform is enshrined in Florida's Constitution, reform opponents continue their efforts, of which this action is a part.

Plaintiffs are two incumbent members of the U.S. House of Representatives who have their own political interests in challenging the new Art. III, Sec. 20, applicable to Congressional redistricting. Rep. Corrine Brown represents the Third Congressional District, of which African-Americans allegedly "comprise nearly half of the voting-age population." Compl. ¶ 5. Rep. Mario Diaz-Balart represents the Twenty-Fifth Congressional District. Comp. ¶ 4. "In January 2011, Plaintiff Diaz-Balart will be representing the residents of Florida District 21," of which it is alleged that "Hispanics comprise more than 50 percent of the voting-age population." Compl. ¶ 4. Despite who they might represent in Congress, Plaintiffs ***in this litigation*** represent only their own electoral interests as incumbent politicians and, apparently, as voters who still oppose the constitutional amendments. Those interests diverge starkly from the interests of the majority of Florida's voters, including Movants.

Movants include African-American and Hispanic residents and registered voters of the State of Florida voters who cast their ballots in favor of redistricting reform, including Amendment 6 (which is challenged here). Movants also include the Florida NAACP and Democracia Ahora, which represent the interests of racial and language minority voters statewide. Both fought hard for the passage of the Amendments, and both participated in litigation before the Florida Supreme Court to ensure the Amendments' placement on the ballot. *See* Florida Supreme Court Order, July 23, 2010.[1] The Florida NAACP is comprised of 67 local branches throughout Florida with over 11,000 individual members. Like its national parent

[1] The brief filed by the Florida NAACP and Democracia Ahora is available at http://www.floridasupremecourt.org/ pub_info /summaries/briefs/10/10-1362/Filed_07-22-2010_NAACP_Amicus_Brief.pdf.

organization, the Florida NAACP's missions are the advancement and improvement of the political, educational, social and economic status of minority persons, including African-Americans; the elimination of racial prejudice; the publicizing of adverse effects of discrimination; and the initiation of legal redress to secure the elimination of racial and ethnic bias. The Florida NAACP has long participated actively in litigation on behalf of Florida's minority voters, including prior litigation involving reapportionment and redistricting. *See, e.g.*, *Florida State Conference of the NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008); *Pleus v. Crist*, 14 So. 3d 941 (Fla. 2009). Democracia Ahora is a Florida association with individual members throughout the state, and is affiliated with the national Hispanic civic organization, Democracia U.S.A. Democracia Ahora's primary purposes are to empower Hispanic citizens who are engaged in civic and democratic endeavors; and to assist members of Hispanic communities in identifying and articulating issues of concern, including voting rights issues.

II. THE COURT MUST PERMIT MOVANTS TO INTERVENE AS OF RIGHT.

Under Federal Rule of Civil Procedure 24(a)(2), "[o]n timely motion, the court ***must*** permit anyone to intervene who . . . 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." (emphasis added). Like groups of racial and language minority voters in prior election law cases, Movants plainly meet this standard.

At the outset, Movants' motion is "timely." No time limit is specified in the rule, but "[t]he requirement of timeliness must have accommodating flexibility toward both the court and the litigants if it is to be successfully employed to regulate intervention in the interest of justice." *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989) (quoting *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir. 1970)). Courts, then, have sensibly focused on prejudice in

determining whether to permit intervention. *Id.* Here, there is no such prejudice. Defendant's answer is not due until January 11, 2011, and the Court has not yet held a status conference. Further, the parties have not engaged in any discovery, and the Court has not issued any dispositive orders – indeed, the Court has barely issued any orders at all. In these circumstances, the timing of Movants' motion is entirely non-prejudicial to the parties. Movants' motion thus is timely. *Id.* ("We believe that the detainees' motion to intervene was timely. It was filed only seven months after Senator Chiles filed his original complaint, three months after the government filed its motion to dismiss, and before any discovery had begun. None of the parties already in the lawsuit could have been prejudiced by the detainees' intervention."); *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1125-26 (5th Cir. 1970) (motion to intervene was timely because it would not cause delay in the process of the overall litigation even where filed more than a year after the action was commenced and after the completion of discovery); *Bossier Parish School Board v. Reno*, 157 F.R.D. 133, 135 (D.D.C. 1994); *Cummings v. United States*, 704 F.2d 437, 441 (9th Cir. 1983). Plaintiffs have conceded that the ACLU Intervenors' motion is timely. It necessarily follows that Movants' motion is timely as well.

Movants likewise "claim an interest" that "relat[es] to the property or transaction that is the subject of the action." Fed. R. Civ. P. 24(a)(2). Movants are Florida voters, and organizations representing them, who actively supported the passage of Amendment 6 (now Fla. Const. Art. III, § 20) and voted for its passage. As courts have recognized, voters have a direct and substantial legal interest in maintaining the election system that governs their exercise of political power through the electoral franchise. *See Burson v. Freeman*, 504 U.S. 191, 214 (1992) (Kennedy, J., concurring) ("Voting is one of the most fundamental and cherished liberties in our democratic system of government."); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The

right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.").

Because of the importance of that interest in our democracy, courts routinely allow interested voters to intervene in election law cases to protect their own unique, cognizable interests in the political process. *See Abrams v. Johnson*, 521 U.S. 74, 78 (1997) ("The private appellants are various voters, defendant-intervenors below, who contend that the interests of Georgia's black population were not adequately taken into account"); *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 129 S. Ct. 2504, 2508-09 (2009) (listing parties);[2] *Johnson v. Mortham*, 915 F. Supp. 1529, 1536 (N.D. Fla. 1995) (holding that registered voters had "a sufficiently substantial interest to intervene" in a suit challenging congressional redistricting"). Moreover, as members of racial and language minorities, individual Movants have an even more acute interest in this action than do ordinary voters. Here, Plaintiffs assert constitutional and statutory claims that, if correct (which they are not), would directly impair minority interests by eliminating state-law protections of minority voting power – in particular the prohibition on drawing congressional districts "with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice." Fla Const. Art III, § 20(a). As members of racial and language minority groups, the individual Movants have a uniquely particularized interest in intervening. And the Eleventh Circuit and other courts have recognized that they are entitled to do so. *See, e.g., Clark v. Putnam County*, 168 F.3d 458, 462 (11th Cir. 1999) ("black voters had a right to intervene" in action challenging county redistricting, and listing recent

[2] The District Court for the District of Columbia, sitting with Circuit Judge David S. Tatel and District Judges Paul L. Friedman and Emmet G. Sullivan, granted numerous such motions to intervene in a single order. *See* Order, Nov. 9, 2006, Dkt. # 33, *Northwest Austin Mun. Sch. Dist. No. One v. Holder*, Case No. 06-1384 (D.D.C.).

voting cases allowing intervention); *see also Northwest Austin*, 129 S. Ct. at 2508-09 (listing parties); *County of Sumter v. United States*, 555 F. Supp. 694, 697 (D.D.C. 1983) (recognizing that African-American voters could bring a "local perspective on the current and historical facts at issue" in a Section 5 preclearance action); *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982) (recognizing arguments presented by Intervenors, African-American voters, in Section 5 declaratory judgment action), *aff'd*, 459 U.S. 1166 (1983).

Plaintiffs' contention that "a party seeking to intervene under Rule 24(a)(2) must establish a right of standing of his or her own," Pl. Opp., at 3 (filed Dec. 28, 2010), is simply wrong. As the Eleventh Circuit has explained, "***a party seeking to intervene need not demonstrate that he has standing*** in addition to meeting the requirements of Rule 24 as long as there exists a justiciable case or controversy between the parties already in the lawsuit." *Chiles*, 865 F.2d at 1213 (emphasis added); *accord Diamond v. Charles*, 476 U.S. 54, 64 (1986) (explaining that, had state appealed, intervenor-defendant would have had the "ability to ride 'piggyback' on the State's undoubted standing"); *City of Colorado Springs v. Climax Molybdenum Co.*, 587 F.3d 1071, 1079 (10th Cir. 2009) ("[P]arties seeking to intervene under Rule 24(a) or (b) need not establish [independent] Article III standing so long as another party with constitutional standing on the same side as the intervenor remains in the case.") (citations omitted); *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2004) ("Requiring standing of someone who seeks to intervene as a defendant . . . runs into the doctrine that ***the standing inquiry is directed at those who invoke the court's jurisdiction***" (emphasis added)); *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994).

Moreover, even assuming that Movants were required to have Article III standing (which they are not) they clearly would have it. The Plaintiffs in this case claim to have standing simply

because of their status as citizens and voters of the State of Florida. *See* Compl. ¶ 16 ("The harm to the citizens and voters in the State of Florida, including Plaintiffs, is sufficiently real and/or imminent to warrant the issuance of a conclusive declaratory judgment usefully clarifying the legal relations of the parties."). If Plaintiffs have standing to challenge Article III, § 20 of the Florida Constitution based on their being citizens and voters of Florida, then so too must the individual Movants have standing to intervene to defend it. The Plaintiffs cannot have it both ways.[3]

Likewise, even if Article III standing were required, the Florida NAACP and Democracia Ahora would have the right to intervene to protect the interests of their members, who include Movants and other minority residents and voters of Florida. *See Borrero v. United Healthcare of New York, Inc.*, 610 F.3d 1296 (11th Cir. 2010) ("It has long been settled that an organization has standing to sue to redress injuries suffered by its members without a showing of injury to the association itself and without a statute explicitly permitting associational standing.") (quoting *Doe v. Stincer*, 175 F.3d 879, 882 (11th Cir. 1999)); *see also Browning*, 522 F.3d at 1160 (applying same to Florida NAACP); *Delgado v. Smith*, 861 F.2d 1489, 1491 n.1 (11th Cir. 1988) ("The Florida English Campaign, U.S. English Legislative Task Force, Inc., and U.S. English Foundation, Inc. intervened as defendants. These organizations support the proposed constitutional amendment and represent the interests of the 362,555 proponents of it."); *Democratic Party of Washington State v. Reed*, 343 F.3d 1198, 1201 (9th Cir. 2003) ("The Washington State Grange intervened as a defendant, supporting the blanket primary system");

[3] *See generally Clark*, 168 F.3d at 462; *County of Sumter*, 555 F. Supp. at 697; *Busbee*, 549 F. Supp. 494; *Northwest Austin*, 129 S. Ct. at 2508-09; *Abrams*, 521 U.S. at 78; *Mortham*, 915 F. Supp. at 1536.

Granholm v. Heald, 544 U.S. 460, 469 (2005) (noting intervention of trade association and other organizations to protect the interests of their members).

In turn, the disposition of this action may very well "impair or impede" Movants' very significant interests. If the Court were to enjoin the enforcement of Article III, § 20 of the Florida Constitution, individual Movants would be denied the substantial benefits of the redistricting reform for which they and more than sixty-two percent of Florida voters cast their ballots in November. Indeed, if Plaintiffs were to succeed in this action and the legislature were to adopt new congressional districts that otherwise would have violated Article III, § 20's protections for racial and language minorities and its proscription against the intentional favoritism of particular parties or incumbents, Movants' interests likely will remain impaired for a decade – until the next redistricting cycle – or more.

Finally, the existing parties will not adequately represent Movants' interests. Numerous courts have recognized that a potential intervenor's burden on this issue is "minimal" and requires only that existing parties' representation of a potential intervenor's interests "may be inadequate."[4] *Clark*, 168 F.3d at 460 (quoting *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n. 10 (1972)); *Federal Sav. and Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993); *United Guaranty Residential Insurance Co. v. Philadelphia Sav. Fund*, 819 F.2d 473, 475 (4th Cir. 1987). "Any doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed intervenors

[4] Opposing the ACLU Intervenors' motions, Plaintiffs refer the Court to precedent holding that courts should "presume adequate representation when an existing party seeks the same objectives as the would-be interveners." *Clark*, 168 F.3d at 461. However, any applicable "presumption is weak." *Id.* All a proposed intervenor must show is that "representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Id.* (quoting *Trbovich v. United Mine Workers*, 404 U.S. at 538 n. 10).

because it allows the court to resolve all related disputes in a single action." *Federal Sav.*, 983 F.2d at 216. Movants easily meet that test.

As elected officials, Plaintiffs have their own political interests at stake, and they cannot represent Movants' interests. "[L]ike all elected officials they have an interest in 'remaining popular and effective leaders,'" *Clark*, 168 F.3d at 462, and here are diametrically opposed to Movants' position and interest.

Likewise, the defendant State of Florida (and associated elected officials and legislative bodies) cannot represent Movants' particularized interests. Even if the State denies all the allegations in the complaint, it necessarily represents the interests of the State as an entity or, at best, of all citizens. It does not and cannot properly represent the singular interests of the Movants as voters and, in particular, racial and language minority voters and organizations. Moreover, it must weigh the vigorousness of its defense against the management of the state coffers and competing priorities for its employees' attention. *See Clark*, 168 F.3d at 462. And, of course, the State acts through elected incumbent officials, each with his or her own interest and party affiliation. Thus, the Eleventh Circuit has explained that "because elected officials in a majority-rule democracy may represent only part of the electorate (for instance, members of their party), 'it is normal practice in reapportionment controversies to allow intervention of voters . . . supporting a position that could theoretically be adequately represented by public officials.'" *Clark*, 168 F.3d at 462 n.3 (quoting *Nash v. Blunt*, 140 F.R.D. 400, 402 (W.D. Mo. 1992), *summarily aff'd. sub nom., African Am. Voting Rights Legal Defense Fund, Inc. v. Blunt*, 507 U.S. 1015 (1993)). *Cf. Georgia v. U.S. Army Corps of Engineers*, 302 F.3d 1242, 1259 (11th Cir. 2002) (reversing denial of intervention as of right where government and private intervenors sought identical outcome of litigation, but governmental entity nevertheless could not be said to

represent proposed intervenors' motivational interests and share all of its positions). In fact, cases are legion in which governmental entities and individual minority voters had different motivational interests, and pursued different positions and strategies, in voting rights litigation. *See, e.g.*, *City of Lockhart v. United States*, 460 U.S. 125, 130 (1983); *Blanding v. DuBose*, 454 U.S. 393, 398-99 (1982); *Sumter County*, 555 F. Supp. at 696; *United Guaranty Residential Ins.*, 819 F.2d at 475 (holding that Secretary of Labor could not adequately represent union member's interests) (citing *Trbovich*, 404 U.S. at 538-39).

Nor will the proposed ACLU Intervenors, if they are permitted to intervene, adequately represent Movants' interests. Neither group can adequately represent the other. The ACLU Intervenors – both the organization and the individual ACLU Intervenors, who are members and officers of the organization – bring to the case the ACLU's particular organizational interests and agenda, which certainly may differ from those of the NAACP Intervenors and Democracia Intervenors. Because of this potential divergence of interests, it is routine that non-profit organizations like the ACLU and minority interest groups and voters such as Movants have been permitted to intervene separately in numerous election law cases in the past. *See, e.g.*, *id.* at 2508-09 (listing numerous such parties); *Johnson*, 915 F. Supp. at 1531-32 (same); *Johnson v. Miller*, 929 F. Supp. 1529, 1531 (S.D. Ga. 1996) (three-judge court) (same); *cf. Smith v. Beasley*, 946 F. Supp. 1174, 1176 (D.S.C. 1996) (three-judge court) (noting that voters represented by the ACLU and other voters were on opposite sides of the case); *Seattle Sch. Dist. No. 1 of King County v. Washington*, 473 F. Supp. 2d 996, 998 (W.D. Wash. 1979) (noting presence of ACLU and individual plaintiffs in school desegregation case).

Because they satisfy all the requirements for intervention of right under Rule 24(a)(2), Movants are entitled to intervene. *See Chiles*, 865 F.2d at 1213.

III. THE COURT SHOULD GRANT PERMISSIVE INTERVENTION.

At a minimum, the Court should permit Movants to intervene permissively. Under Federal Rule of Civil Procedure 24(b)(1)(B), intervention is permitted when a party seeking to intervene "has a claim or defense that shares with the main action a common question of law or fact." Movants will, if this motion is granted, vigorously defend their interests by arguing that Article III, § 20 of the Florida Constitution is consistent with the U.S. Constitution and federal law. Because that defense precisely overlaps with the question presented in the main action, Movants can intervene in this action under Rule 24(b)(1)(B)'s plain language. Further, while the Court undoubtedly "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights," Fed. R. Civ. P. 24(b)(3), Movants' motion is timely and will not prejudice any party.

IV. CONCLUSION

This action represents yet another effort to stall the implementation of a constitutional amendment designed to reform the redistricting process and grant minority voters new legal protections. The electorate resoundingly approved that amendment in November, and it is now part of the Florida Constitution. *See* Fla. Const. Art. III, § 20. Movants – as racial and language minority Florida voters who voted for that amendment, and organizations representing such voters – have a unique and substantial interest in this action. The Court must grant their intervention motion.

Date: January 6, 2011

Respectfully submitted,

s/

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021

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, Defendant, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON; BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY, Defendant-Intervenors, and FLORIDA STATE CONFERENCE OF NAACP BRANCHES; DEMOCRACIA AHORA; LEON W. RUSSELL; PATRICIA T. SPENCER; CAROLYN H. COLLINS; EDWIN ENCISO; and STEPHEN EASDALE, Defendant-Intervenors.	Case No. 10-CV-23968-UNGARO

PROPOSED ANSWER OF DEFENDANT-INTERVENORS FLORIDA NAACP, DEMOCRACIA AHORA, RUSSELL, SPENCER, COLLINS, ENCISO, AND EASDALE

In accordance with Rule 8 of the Federal Rules of Civil Procedure, proposed Defendant-Intervenors Florida State Conference of NAACP Branches, Leon W. Russell, Patricia T. Spencer, and Carolyn H. Collins; Democracia Ahora, Edwin Enciso, and Stephen Easdale hereby answer the amended complaint in this action as follows:

1. Individual Intervenors deny that Plaintiffs are entitled to any relief on the claims referenced in Paragraph 1 of the Amended Complaint.

2. Individual Intervenors deny that Plaintiffs are entitled to any relief on the claims referenced in Paragraph 2 of the Amended Complaint.

3. Individual Intervenors admit Florida is a state in the United States, but deny that Florida is a proper party to this lawsuit.

4. Individual Intervenors lack sufficient knowledge to admit or deny the allegations in Paragraph 4 of the Amended Complaint.

5. Individual Intervenors lack sufficient knowledge to admit or deny the allegations in Paragraph 5 of the Amended Complaint.

6. Individual Intervenors admit the allegations of Paragraph 6 of the Amended Complaint.

7. Individual Intervenors admit the allegations of Paragraph 7 of the Amended Complaint.

8. Individual Intervenors admit the allegations in Paragraph 8 of the Amended Complaint.

9. Individual Intervenors admit the allegations in Paragraph 9 of the Amended Complaint.

10. Individual Intervenors admit the allegations of Paragraph 10 of the Amended Complaint.

11. Individual Intervenors admit that Section 5 of the Voting Rights Act applies to five Florida counties, but the other allegations in Paragraph 11 are statements of law and do not require a response.

12. Individual Intervenors admit the allegations in Paragraph 12 that Section 5 of the Voting Rights Act prohibits retrogression of minority voting strength, but the remaining allegations in paragraph 12 contain statements of law and/or conclusions of law to which no response is required.

13. Individual Intervenors deny the allegations in Paragraph 13 of the Amended Complaint.

14. Individual Intervenors deny the allegations in Paragraph 14 of the Amended Complaint.

15. Individual Intervenors deny the allegations in Paragraph 15 of the Amended Complaint.

16. Individual Intervenors deny the allegations in Paragraph 16 of the Amended Complaint.

17. Individual Intervenors lack sufficient knowledge to admit or deny the allegations in Paragraph 17.

18. Individual Intervenors repeat and reallege their responses to the allegations in Paragraph 1 though 17, as set forth above.

19. The allegations in Paragraph 19 of the Amended Complaint are statements of law and/or conclusions of law to which no response is required.

20. The allegations in Paragraph 20 of the Amended Complaint are statements of law and/or conclusions of law to which no response is required.

21. The allegations in Paragraph 21 of the Amended Complaint are statements of law and/or conclusions of law to which no response is required.

22. The allegations in Paragraph 22 of the Amended Complaint are statements of law and/or conclusions of law to which no response is required.

23. The allegations in Paragraph 23 of the Amended Complaint are statements of law and/or conclusions of law to which no response is required.

24. The allegations in Paragraph 24 of the Amended Complaint are statements of law and/or conclusions of law to which no response is required.

25. Individual Intervenors deny the allegations in Paragraph 25 of the Amended Complaint.

26. Individual Intervenors deny the allegations in Paragraph 26 of the Amended Complaint.

27. Individual Intervenors deny the allegations in Paragraph 27 of the Amended Complaint.

28. Individual Intervenors deny the allegations in Paragraph 28 of the Amended Complaint.

29. The allegations in Paragraph 29 of the Amended Complaint are statements of law and/or conclusions of law to which no response is required. Nevertheless, Individual Intervenors deny

that any such violation alleged in Paragraph 29 has occurred or that Plaintiffs are entitled to any relief.

30. Individual Intervenors repeat and reallege their responses to the allegations in paragraphs 1 through 17 and 19 through 29, as set forth above.

31. Individual Intervenors deny the allegations in Paragraph 31 of the Amended Complaint.

32. Individual Intervenors deny the allegations in Paragraph 32 of the Amended Complaint.

AFFIRMATIVE DEFENSES

1. Absent a waiver of sovereign immunity, the State of Florida is not a proper party to this litigation and should be dismissed as the defendant.

2. Absent a proper party defendant, the Amended Complaint should be dismissed for failure to state a claim upon which relief can be granted.

3. The Amended Complaint should be dismissed for failure to state a claim upon which relief can be granted.

4. The Amended Complaint should be dismissed because all claims alleged therein are unripe.

5. The Amended Complaint should be dismissed because Plaintiffs lack standing.

Date: January 6, 2011

Respectfully submitted,

s/

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022

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, Defendant, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON; BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY, Defendant-Intervenors, and LEON W. RUSSELL; PATRICIA T. SPENCER; CAROLYN H. COLLINS; EDWIN ENCISO; STEPHEN EASDALE; FLORIDA STATE CONFERENCE OF NAACP BRANCHES; and DEMOCRACIA AHORA, Defendant-Intervenors.	Case No. 10-CV-23968-UNGARO

MOTION TO APPEAR *PRO HAC VICE*, CONSENT TO DESIGNATION, AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILING

In accordance with Local Rules 4(b) of the Special Rules Governing the Admission and Practice of Attorneys of the United States District Court for the Southern District of Florida, the undersigned respectfully moves for the admission *pro hac vice* of Eric R. Haren of the law firm of Jenner & Block LLP, 1099 New York Avenue, NW, Washington, DC 20001, (202) 639-6000, for purposes of appearance as co-counsel on behalf of proposed Defendant-Intervenors Leon W. Russell, Patricia T. Spencer, Carolyn H. Collins, Edwin Enciso, Stephen Easdale, the

Florida State Conference of NAACP Branches ("Florida NAACP"), and Democracia Ahora in the above-styled case only, and pursuant to Rule 2B of the CM/ECF Administrative Procedures, to permit Eric R. Haren to receive electronic filings in this case, and in support thereof states as follows:

1. Eric R. Haren is not admitted to practice in the Southern District of Florida and is a member in good standing of the Bars of the following jurisdictions: California (Bar No. 250291); District of Columbia (Bar No. 985189); the U.S. Courts of Appeals for the Sixth and Federal Circuits; and the United States Court of Federal Claims.

2. Movant, Stephen F. Rosenthal, Esquire, of the law firm of Podhurst Orseck, P.A., 25 West Flagler Street, Suite 800, Miami, FL 33130, (305) 358-2800, is a member in good standing of the Florida Bar and the United States District Court for the Southern District of Florida, maintains an office in this State for the practice of law, and is authorized to file through the Court's electronic filing system. Movant consents to be designated as a member of the Bar of this Court with whom the Court and opposing counsel may readily communicate regarding the conduct of the case, upon whom filings shall be served, who shall be required to electronically file all documents and things that may be filed electronically, and who shall be responsible for filing documents in compliance with the CM/ECF Administrative Procedures. *See* Section 2B of the CM/ECF Administrative Procedures.

3. In accordance with the local rules of this Court, Eric R. Haren has made payment of this Court's $75 admission fee. A certification in accordance with Rule 4(b) is attached hereto.

4. Eric R. Haren, by and through designated counsel and pursuant to Section 2B CM/ECF Administrative Procedures, hereby requests the Court to provide Notice of Electronic Filings to Eric R. Haren at the email address eharen@jenner.com.

WHEREFORE, Stephen F. Rosenthal, moves this Court to enter an Order permitting Eric R. Haren to appear before this Court on behalf of Defendant-Intervenors Leon W. Russell, Patricia T. Spencer, Carolyn H. Collins, Edwin Enciso, Stephen Easdale, the Florida NAACP, and Democracia Ahora for all purposes relating to the proceedings in the above-styled matter and directing the Clerk to provide notice of electronic filings to Eric R. Haren.

Date: January 7, 2011

Respectfully submitted,

/s

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UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, Defendant, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON; BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY, Defendant-Intervenors, and LEON W. RUSSELL; PATRICIA T. SPENCER; CAROLYN H. COLLINS; EDWIN ENCISO; STEPHEN EASDALE; FLORIDA STATE CONFERENCE OF NAACP BRANCHES; and DEMOCRACIA AHORA Defendant-Intervenors	Case No. 10-CV-23968-UNGARO

CERTIFICATION OF ERIC R. HAREN

I, Eric R. Haren, Esquire, pursuant to Rule 4(b) of the Special Rules Governing the Admission and Practice of Attorneys, hereby certify that (1) I have studied the Local Rules of the United States District Court for the Southern District of Florida; and (2) I am a member in good standing of the Bars of the following jurisdictions: California (Bar No. 250291); District of Columbia (Bar No. 985189); the U.S. Courts of Appeals for the Sixth and Federal Circuits; and the United States Court of Federal Claims.

Eric R. Haren

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Appear *Pro Hac Vice*, Consent to Designation and Request to Electronically Receive Notices of Electronic Filings was served by electronic mail, on January 7th, 2011 to the following counsel:

Stephen Michael Cody
Stephen Cody
800 S Douglas Road
Suite 850
Coral Gables, FL 33134-2088
305-416-3135
Fax: 416-3153
Email: stcody@stephencody.com
Attorney for Plaintiffs

Randall C. Marshall
American Civil Liberties Union Foundation of Florida
4500 Biscayne Boulevard
Suite 340
Miami, FL 33137-3227
786-363-2700
Fax: 786-363-1108
Email: rmarshall@aclufl.org
Attorney for Defendant-Intervenor ACLU of Florida, Howard Simon, Susan Watson, Joyce Hamilton Henry, and Benetta Standly

Moffatt Laughlin McDonald
American Civil Liberties Union Foundation Inc
230 Peachtree Street NW
Suite 1440
Atlanta, GA 30303-1227
404-523-2721
Email: lmcdonald@aclu.org
Attorney for Defendant-Intervenor ACLU of Florida

s/ Stephen F. Rosenthal

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, Defendant, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON; BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY, Defendant-Intervenors, and LEON W. RUSSELL; PATRICIA T. SPENCER; CAROLYN H. COLLINS; EDWIN ENCISO; STEPHEN EASDALE; FLORIDA STATE CONFERENCE OF NAACP BRANCHES; and DEMOCRACIA AHORA, Defendant-Intervenors.	Case No. 10-CV-23968-UNGARO

ORDER GRANTING MOTION TO APPEAR *PRO HAC VICE*, CONSENT TO DESIGNATION, AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILING

THIS CAUSE having come before the Court on the Motion to Appear *Pro Hac Vice* for Eric R. Haren, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing (the "Motion"), pursuant to the Special Rules Governing the Admission and Practice of Attorneys in the United States District Court for the Southern District of Florida and Section 2B of the CM/ECF Administrative Procedures. This Court having considered the motion and all other relevant factors, it is hereby

ORDERED AND ADJUDGED that:

The Motion is GRANTED. Eric R. Haren may appear and participate in this action on behalf of proposed Defendant-Intervenors Leon W. Russell, Patricia T. Spencer, Carolyn H. Collins, Edwin Enciso, Stephen Easdale, the Florida NAACP, and Democracia Ahora. The Clerk shall provide electronic notification of all electronic filings to Eric R. Haren at eharen@jenner.com.
DONE AND ORDERED in Chambers at _____, Florida, this _____ day of _____.

_____
United States District Judge

Copies furnished to:
All Counsel of Record (*via electronic filing*)

023

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, Defendant, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON; BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY, Defendant-Intervenors, and LEON W. RUSSELL; PATRICIA T. SPENCER; CAROLYN H. COLLINS; HEATHER VEGA; FRANZ VILLATE, FLORIDA STATE CONFERENCE OF NAACP BRANCHES; and DEMOCRACIA AHORA, Defendant-Intervenors.	Case No. 10-CV-23968-UNGARO

MOTION TO APPEAR *PRO HAC VICE*, CONSENT TO DESIGNATION, AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILING

In accordance with Local Rules 4(b) of the Special Rules Governing the Admission and Practice of Attorneys of the United States District Court for the Southern District of Florida, the undersigned respectfully moves for the admission *pro hac vice* of J. Gerald Hebert, 191 Somervelle Street, #405, Alexandria, VA 22304, (703) 628-4673, for purposes of appearance as

co-counsel on behalf of proposed Defendant-Intervenors Leon W. Russell, Patricia T. Spencer, Carolyn H. Collins, Heather Vega, Franz Villate, the Florida State Conference of NAACP Branches ("Florida NAACP"), and Democracia Ahora in the above-styled case only, and pursuant to Rule 2B of the CM/ECF Administrative Procedures, to permit J. Gerald Hebert to receive electronic filings in this case, and in support thereof states as follows:

1. J. Gerald Hebert is not admitted to practice in the Southern District of Florida and is a member in good standing of the Bars of the following jurisdictions: Virginia (Bar No. 48432); District of Columbia (Bar No. 447676); U.S. District Court for the Eastern District of Virginia; and the U.S. District Court for the District of Columbia. I am also a member of the bar in good standing of the United States Courts of Appeals for the Fifth, Eighth and Eleventh Circuits, and a member of the bar in good standing of the United States Supreme Court.

2. Movant, Stephen F. Rosenthal, Esquire, of the law firm of Podhurst Orseck, P.A., 25 West Flagler Street, Suite 800, Miami, FL 33130, (305) 358-2800, is a member of good standing of the Florida Bar and the United States District Court for the Southern District of Florida, maintains an office in this State for the practice of law, and is authorized to file through the Court's electronic filing system. Movant consents to be designated as a member of the Bar of this Court with whom the Court and opposing counsel may readily communicate regarding the conduct of the case, upon whom filings shall be served, who shall be required to electronically file all documents and things that may be filed electronically, and who shall be responsible for filing documents in compliance with the CM/ECF Administrative Procedures. *See* Section 2B of the CM/ECF Administrative Procedures.

3. In accordance with the local rules of this Court, J. Gerald Hebert has made payment of this Court's $75 admission fee. A certification in accordance with Rule 4(b) is attached hereto.

4. J. Gerald Hebert, by and through designated counsel and pursuant to Section 2B CM/ECF Administrative Procedures, hereby requests the Court to provide Notice of Electronic Filings to J. Gerald Hebert at the email address GHebert@campaignlegalcenter.org.

WHEREFORE, Stephen F. Rosenthal, moves this Court to enter an Order permitting J. Gerald Hebert to appear before this Court on behalf of Defendant-Intervenors Leon W. Russell, Patricia T. Spencer, Carolyn H. Collins, Heather Vega, Franz Villate, the Florida NAACP, and Democracia Ahora for all purposes relating to the proceedings in the above-styled matter and directing the Clerk to provide notice of electronic filings to J. Gerald Hebert.

Date: January 11, 2011

Respectfully submitted,

/s

Stephen F. Rosenthal
Fla. Bar No. 0131458
Podhurst Orseck P.A.
25 West Flagler Street, Suite 800
Miami, FL 33130
Office (305) 358-2800
srosenthal@podhurst.com

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, Defendant, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON; BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY, Defendant-Intervenors, and LEON W. RUSSELL; PATRICIA T. SPENCER; CAROLYN H. COLLINS; HEATHER VEGA; and FRANZ VILLATE, Defendant-Intervenors.	)	Case No. 10-CV-23968-UNGARO

CERTIFICATION OF J. GERALD HEBERT

I, J. Gerald Hebert, Esquire, pursuant to Rule 4(b) of the Special Rules Governing the Admission and Practice of Attorneys, hereby certify that (1) I have studied the Local Rules of the United States District Court for the Southern District of Florida; and (2) I am a member in good standing of the Bars of the following jurisdictions: Virginia (Bar No. 48432); District of Columbia (Bar No. 447676); the Supreme Court of the United States; the United States Courts of Appeals for the Fifth, Eighth and Eleventh Circuits; the U.S. District Court for the Eastern District of Virginia; and the U.S. District Court for the District of Columbia.

J. Gerald Hebert

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Appear *Pro Hac Vice*, Consent to Designation and Request to Electronically Receive Notices of Electronic Filings was served by electronic mail, on January 11, 2011, to the following counsel:

Stephen Michael Cody
Stephen Cody
800 S Douglas Road
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305-416-3135
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Email: stcody@stephencody.com
Attorney for Plaintiffs

Randall C. Marshall
American Civil Liberties Union Foundation of Florida
4500 Biscayne Boulevard
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786-363-2700
Fax: 786-363-1108
Email: rmarshall@aclufl.org
Attorney for Defendant-Intervenor ACLU of Florida, Howard Simon, Susan Watson, Joyce Hamilton Henry, and Benetta Standly

Moffatt Laughlin McDonald
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230 Peachtree Street NW
Suite 1440
Atlanta, GA 30303-1227
404-523-2721
Email: lmcdonald@aclu.org
Attorney for Defendant-Intervenor ACLU of Florida

s/
Stephen F. Rosenthal

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, Defendant, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON; BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY, Defendant-Intervenors, and LEON W. RUSSELL; PATRICIA T. SPENCER; CAROLYN H. COLLINS; HEATHER VEGA; and FRANZ VILLATE, Defendant-Intervenors.	Case No. 10-CV-23968-UNGARO

ORDER GRANTING MOTION TO APPEAR *PRO HAC VICE*, CONSENT TO DESIGNATION, AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILING

THIS CAUSE having come before the Court on the Motion to Appear *Pro Hac Vice* for J. Gerald Hebert, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing (the "Motion"), pursuant to the Special Rules Governing the Admission and Practice of Attorneys in the United States District Court for the Southern District of Florida and Section 2B of the CM/ECF Administrative Procedures. This Court having considered the motion and all other relevant factors, it is hereby

ORDERED AND ADJUDGED that:

The Motion is GRANTED. J. Gerald Hebert may appear and participate in this action on behalf of proposed Defendant-Intervenors Leon W. Russell, Patricia T. Spencer, Carolyn H. Collins,

Heather Vega, Franz Villate, the Florida NAACP, and Democracia Ahora. The Clerk shall provide electronic notification of all electronic filings to J. Gerald Hebert at GHebert@campaignlegalcenter.org.

DONE AND ORDERED in Chambers at _____, Florida, this _____ day of _____.

_____
United States District Judge

Copies furnished to:
All Counsel of Record (*via electronic filing*)

024

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, Defendant, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON; BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY, Defendant-Intervenors, and LEON W. RUSSELL; PATRICIA T. SPENCER; CAROLYN H. COLLINS; EDWIN ENCISO; STEPHEN EASDALE; FLORIDA STATE CONFERENCE OF NAACP BRANCHES; and DEMOCRACIA AHORA, Defendant-Intervenors.	Case No. 10-CV-23968-UNGARO

MOTION TO APPEAR *PRO HAC VICE*, CONSENT TO DESIGNATION, AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILING

In accordance with Local Rules 4(b) of the Special Rules Governing the Admission and Practice of Attorneys of the United States District Court for the Southern District of Florida, the undersigned respectfully moves for the admission *pro hac vice* of Michael B. DeSanctis of the law firm of Jenner & Block LLP, 1099 New York Avenue, NW, Washington, DC 20001, (202) 639-6000, for purposes of appearance as co-counsel on behalf of proposed Defendant-Intervenors Leon W. Russell, Patricia T. Spencer, Carolyn H. Collins, Edwin Enciso, Stephen

Easdale, the Florida State Conference of NAACP Branches ("Florida NAACP"), and Democracia Ahora in the above-styled case only, and pursuant to Rule 2B of the CM/ECF Administrative Procedures, to permit Michael B. DeSanctis to receive electronic filings in this case, and in support thereof states as follows:

1. Michael B. DeSanctis is not admitted to practice in the Southern District of Florida and is a member in good standing of the Bars of the following jurisdictions: District of Columbia (Bar No. 460961); New Jersey (Bar No. 1009-1998); New York (Bar No. 2876803); Supreme Court of the United States; the U.S. Courts of Appeals for the Second, Third, Fourth, Sixth, Ninth, Eleventh, and District of Columbia Circuits; the U.S. District Court for the District of Columbia; the U.S. District Court for the District of Maryland; the U.S. District Court for the District of New Jersey; and the U.S. District Court for the Southern District of New York.

2. Movant, Stephen F. Rosenthal, Esquire, of the law firm of Podhurst Orseck, P.A., 25 West Flagler Street, Suite 800, Miami, FL 33130, (305) 358-2800, is a member in good standing of the Florida Bar and the United States District Court for the Southern District of Florida, maintains an office in this State for the practice of law, and is authorized to file through the Court's electronic filing system. Movant consents to be designated as a member of the Bar of this Court with whom the Court and opposing counsel may readily communicate regarding the conduct of the case, upon whom filings shall be served, who shall be required to electronically file all documents and things that may be filed electronically, and who shall be responsible for filing documents in compliance with the CM/ECF Administrative Procedures. *See* Section 2B of the CM/ECF Administrative Procedures.

3. In accordance with the local rules of this Court, Michael B. DeSanctis has made payment of this Court's $75 admission fee. A certification in accordance with Rule 4(b) is attached hereto.

4. Michael B. DeSanctis, by and through designated counsel and pursuant to Section 2B CM/ECF Administrative Procedures, hereby requests the Court to provide Notice of Electronic Filings to Michael B. DeSanctis at the email address mdesanctis@jenner.com.

WHEREFORE, Stephen F. Rosenthal, moves this Court to enter an Order permitting Michael B. DeSanctis to appear before this Court on behalf of Defendant-Intervenors Leon W. Russell, Patricia T. Spencer, Carolyn H. Collins, Edwin Enciso, Stephen Easdale, the Florida NAACP, and Democracia Ahora for all purposes relating to the proceedings in the above-styled matter and directing the Clerk to provide notice of electronic filings to Michael B. DeSanctis.

Date: January 11, 2011

Respectfully submitted,

/s

Stephen F. Rosenthal
Fla. Bar No. 0131458
Podhurst Orseck P.A.
25 West Flagler Street, Suite 800
Miami, FL 33130
Office (305) 358-2800
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UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, Defendant, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON; BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY, Defendant-Intervenors, and LEON W. RUSSELL; PATRICIA T. SPENCER; CAROLYN H. COLLINS; EDWIN ENCISO; STEPHEN EASDALE; FLORIDA STATE CONFERENCE OF NAACP BRANCHES; and DEMOCRACIA AHORA, Defendant-Intervenors.	)	Case No. 10-CV-23968-UNGARO

CERTIFICATION OF MICHAEL B. DESANCTIS

I, Michael B. DeSanctis, Esquire, pursuant to Rule 4(b) of the Special Rules Governing the Admission and Practice of Attorneys, hereby certify that (1) I have studied the Local Rules of the United States District Court for the Southern District of Florida; and (2) I am a member in good standing of the Bars of the following jurisdictions: District of Columbia (Bar No. 460961); New Jersey (Bar No. 1009-1998); New York (Bar No. 2876803); Supreme Court of the United States; the U.S. Courts of Appeals for the Second, Third, Fourth, Sixth, Ninth, Eleventh, and

District Court for the District of Maryland; the U.S. District Court for the District of New Jersey; and the U.S. District Court for the Southern District of New York.

Michael B. DeSanctis

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Appear *Pro Hac Vice*, Consent to Designation and Request to Electronically Receive Notices of Electronic Filings was served by electronic mail, on January 11, 2011 to the following counsel:

Stephen Michael Cody
Stephen Cody
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Email: stcody@stephencody.com
Attorney for Plaintiffs

Randall C. Marshall
American Civil Liberties Union Foundation of Florida
4500 Biscayne Boulevard
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Fax: 786-363-1108
Email: rmarshall@aclufl.org
Attorney for Defendant-Intervenor ACLU of Florida, Howard Simon, Susan Watson, Joyce Hamilton Henry, and Benetta Standly

Moffatt Laughlin McDonald
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230 Peachtree Street NW
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Atlanta, GA 30303-1227
404-523-2721
Email: lmcdonald@aclu.org
Attorney for Defendant-Intervenor ACLU of Florida

s/ Stephen F. Rosenthal

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, Defendant, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON; BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY, Defendant-Intervenors, and LEON W. RUSSELL; PATRICIA T. SPENCER; CAROLYN H. COLLINS; EDWIN ENCISO; STEPHEN EASDALE; FLORIDA STATE CONFERENCE OF NAACP BRANCHES; and DEMOCRACIA AHORA, Defendant-Intervenors.	Case No. 10-CV-23968-UNGARO

ORDER GRANTING MOTION TO APPEAR *PRO HAC VICE*, CONSENT TO DESIGNATION, AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILING

THIS CAUSE having come before the Court on the Motion to Appear *Pro Hac Vice* for Michael B. DeSanctis, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing (the "Motion"), pursuant to the Special Rules Governing the Admission and Practice of Attorneys in the United States District Court for the Southern District of Florida and Section 2B of the CM/ECF Administrative Procedures. This Court having considered the motion and all other relevant factors, it is hereby

ORDERED AND ADJUDGED that:

The Motion is GRANTED. Michael B. DeSanctis may appear and participate in this action on behalf of proposed Defendant-Intervenors Leon W. Russell, Patricia T. Spencer, Carolyn H. Collins, Edwin Enciso, Stephen Easdale, the Florida NAACP, and Democracia Ahora. The Clerk shall provide electronic notification of all electronic filings to Michael B. DeSanctis at mdesanctis@jenner.com.

DONE AND ORDERED in Chambers at _____, Florida, this _____ day of _____.

_____
United States District Judge

Copies furnished to:
All Counsel of Record (*via electronic filing*)

025

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, Defendant, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON; BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY, Defendant-Intervenors, and LEON W. RUSSELL; PATRICIA T. SPENCER; CAROLYN H. COLLINS; EDWIN ENCISO; STEPEHN EASDALE; FLORIDA STATE CONFERENCE OF NAACP BRANCHES; and DEMOCRACIA AHORA, Defendant-Intervenors.	Case No. 10-CV-23968-UNGARO

MOTION TO APPEAR *PRO HAC VICE*, CONSENT TO DESIGNATION, AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILING

In accordance with Local Rules 4(b) of the Special Rules Governing the Admission and Practice of Attorneys of the United States District Court for the Southern District of Florida, the undersigned respectfully moves for the admission *pro hac vice* of Paul M. Smith of the law firm of Jenner & Block LLP, 1099 New York Avenue, NW, Washington, DC 20001, (202) 639-6000, for purposes of appearance as co-counsel on behalf of proposed Defendant-Intervenors Leon W. Russell, Patricia T. Spencer, Carolyn H. Collins, Edwin Enciso, Stephen Easdale, the Florida State Conference of NAACP Branches ("Florida NAACP"), and Democracia Ahora in

the above-styled case only, and pursuant to Rule 2B of the CM/ECF Administrative Procedures, to permit Paul M. Smith to receive electronic filings in this case, and in support thereof states as follows:

1. Paul M. Smith is not admitted to practice in the Southern District of Florida and is a member in good standing of the Bars of the following jurisdictions: District of Columbia (Bar No. 358870); Maryland (Bar No. 27182); New York (Bar No. 4372447); the Supreme Court of the United States; the U.S. Courts of Appeals for the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, District of Columbia, and Federal Circuits; the U.S. District Court for the District of Columbia; the U.S. District Court for the District of Colorado; the U.S. District Court for the Northern District of Illinois; the U.S. District Court for the District of Maryland; and the U.S. District Court for the Southern District of New York.

2. Movant, Stephen F. Rosenthal, Esquire, of the law firm of Podhurst Orseck, P.A., 25 West Flagler Street, Suite 800, Miami, FL 33130, (305) 358-2800, is a member of good standing of the Florida Bar and the United States District Court for the Southern District of Florida, maintains an office in this State for the practice of law, and is authorized to file through the Court's electronic filing system. Movant consents to be designated as a member of the Bar of this Court with whom the Court and opposing counsel may readily communicate regarding the conduct of the case, upon whom filings shall be served, who shall be required to electronically file all documents and things that may be filed electronically, and who shall be responsible for filing documents in compliance with the CM/ECF Administrative Procedures. *See* Section 2B of the CM/ECF Administrative Procedures.

3. In accordance with the local rules of this Court, Paul M. Smith has made payment of this Court's $75 admission fee. A certification in accordance with Rule 4(b) is attached hereto.

4. Paul M. Smith, by and through designated counsel and pursuant to Section 2B CM/ECF Administrative Procedures, hereby requests the Court to provide Notice of Electronic Filings to Paul M. Smith at the email address psmith@jenner.com.

WHEREFORE, Stephen F. Rosenthal, moves this Court to enter an Order permitting Paul M. Smith to appear before this Court on behalf of Defendant-Intervenors Leon W. Russell, Patricia T. Spencer, Carolyn H. Collins, Edwin Enciso, Stephen Easdale, the Florida NAACP, and Democracia Ahora for all purposes relating to the proceedings in the above-styled matter and directing the Clerk to provide notice of electronic filings to Paul M. Smith.

Date: January 11, 2011

Respectfully submitted,

/s

Stephen F. Rosenthal
Fla. Bar No. 0131458
Podhurst Orseck P.A.
25 West Flagler Street, Suite 800
Miami, FL 33130
Office (305) 358-2800
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UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, Defendant, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON; BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY, Defendant-Intervenors, and LEON W. RUSSELL; PATRICIA T. SPENCER; CAROLYN H. COLLINS; EDWIN ENCISO; STEPHEN EASDALE; FLORIDA STATE CONFERENCE OF NAACP BRANCHES; and DEMOCRACIA AHORA, Defendant-Intervenors	)	Case No. 10-CV-23968-UNGARO

CERTIFICATION OF PAUL M. SMITH

I, Paul M. Smith, Esquire, pursuant to Rule 4(b) of the Special Rules Governing the Admission and Practice of Attorneys, hereby certify that (1) I have studied the Local Rules of the United States District Court for the Southern District of Florida; and (2) I am a member in good standing of the Bars of the following jurisdictions: District of Columbia (Bar No. 358870); Maryland (Bar No. 27182); New York (Bar No. 4372447); the Supreme Court of the United States; the U.S. Courts of Appeals for the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, District of Columbia, and Federal Circuits; the U.S. District

District Court for the Northern District of Illinois; the U.S. District Court for the District of Maryland; and the U.S. District Court for the Southern District of New York.

Paul M. Smith

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Appear *Pro Hac Vice*, Consent to Designation and Request to Electronically Receive Notices of Electronic Filings was served by electronic mail, on January 11, 2011, to the following counsel:

Stephen Michael Cody
Stephen Cody
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Attorney for Plaintiffs

Randall C. Marshall
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786-363-2700
Fax: 786-363-1108
Email: rmarshall@aclufl.org
Attorney for Defendant-Intervenor ACLU of Florida, Howard Simon, Susan Watson, Joyce Hamilton Henry, and Benetta Standly

Moffatt Laughlin McDonald
American Civil Liberties Union Foundation Inc
230 Peachtree Street NW
Suite 1440
Atlanta, GA 30303-1227
404-523-2721
Email: lmcdonald@aclu.org
Attorney for Defendant-Intervenor ACLU of Florida

s/ Stephen F. Rosenthal

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, Defendant, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON; BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY, Defendant-Intervenors, and LEON W. RUSSELL; PATRICIA T. SPENCER; CAROLYN H. COLLINS; EDWIN ENCISO; STEPHEN EASDALE; FLORIDA STATE CONFERENCE OF NAACP BRANCHES; and DEMOCRACIA AHORA, Defendant-Intervenors	)	Case No. 10-CV-23968-UNGARO

ORDER GRANTING MOTION TO APPEAR *PRO HAC VICE*, CONSENT TO DESIGNATION, AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILING

THIS CAUSE having come before the Court on the Motion to Appear *Pro Hac Vice* for Paul M. Smith, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing (the "Motion"), pursuant to the Special Rules Governing the Admission and Practice of Attorneys in the United States District Court for the Southern District of Florida and Section 2B of the CM/ECF Administrative Procedures. This Court having considered the motion and all other relevant factors, it is hereby

ORDERED AND ADJUDGED that:

The Motion is GRANTED. Paul M. Smith may appear and participate in this action on behalf of proposed Defendant-Intervenors Leon W. Russell, Patricia T. Spencer, Carolyn H. Collins,

Edwin Enciso, Stephen Easdale, the Florida NAACP, and Democracia Ahora. The Clerk shall provide electronic notification of all electronic filings to Paul M. Smith at psmith@jenner.com. DONE AND ORDERED in Chambers at _____, Florida, this _____ day of _____.

_____
United States District Judge

Copies furnished to:
All Counsel of Record (*via electronic filing*)

026

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-CV-23968-UNGARO

MARIO DIAZ-BALART and
CORRINE BROWN,

Plaintiffs,

v.

STATE OF FLORIDA,

Defendant.
_____/

DEFENDANT'S MOTION TO DISMISS

Defendant, the STATE OF FLORIDA, moves to dismiss this case pursuant to Rule 12(b)(1), Fed. R. Civ. P., and states:

1. This court lacks subject matter jurisdiction over Plaintiffs' claim under Art. I, § 4, U.S. Const., based on the State's Eleventh Amendment immunity.
2. This Court lacks subject matter jurisdiction over plaintiffs' claim under the Voting Rights Act because the District Court for the District of Columbia has exclusive jurisdiction over substantive claims under § 5 of the Act.

WHEREFORE, Defendant, the State of Florida, respectfully requests that this court enter an order dismissing this case.

Respectfully submitted this 11th Day of January, 2011.

PAMELA JO BONDI
ATTORNEY GENERAL

s/Jonathan A. Glogau
Jonathan A. Glogau
Chief, Complex Litigation
Fla. Bar No. 371823
Timothy Osterhaus
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 11, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

s/Jonathan A. Glogau
Attorney

027

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-CV-23968-UNGARO

MARIO DIAZ-BALART and CORRINE BROWN,

Plaintiffs,

v.

STATE OF FLORIDA,

Defendant.
_____/

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Plaintiffs, two minority members of the United States House of Representatives representing districts in Florida, have sued the State of Florida challenging the validity of newly-enacted article III, section 20, of the Florida Constitution ("Amendment 6"). Florida's voters passed Amendment 6, which was a citizens' initiative (*see* art. XI, § 3, Fla. Const.) in the November, 2010 General Election. Plaintiffs allege that Amendment 6 conflicts with article I, section 4, of the United States Constitution and violates section 5 of the Voting Rights Act.

Amendment 6 states:

> § 20. Standards for establishing congressional district boundaries
>
> In establishing Congressional district boundaries:
>
> (1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

> (2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
>
> (3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

For the reasons discussed below, this Court should dismiss Plaintiffs' claims pursuant to Federal Rule of Civil Procedure 12(b)(1), because it lacks jurisdiction over the article I, section 4 claim in view of the State of Florida's Eleventh Amendment immunity, and Plaintiffs' section 5 (Voting Rights Act) claim cannot be adjudicated in this Court because exclusive jurisdiction lies with the United States District Court for the District of Columbia.

I. The Court Lacks Subject Matter Jurisdiction over Plaintiffs' Article I, § 4-based Claim Due to the State's Eleventh Amendment Immunity.

Plaintiffs claim that Amendment 6 is preempted by article I, section 4, of the United States Constitution. This claim, however, is barred by the State's Eleventh Amendment immunity. It is axiomatic that, absent consent, or abrogation by Congress, a state is immune from suit in federal court. As the United States Supreme Court stated in *Seminole Tribe*: "For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'" *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (quoting *Hans v. Louisiana*, 134 U.S. 1, 15 (1890)). The State of Florida has not consented to suit; therefore, to bring such a claim against the State, Plaintiffs must show that Congress has abrogated the States' immunity by a clear statement of intent to abrogate and acts via a valid exercise of

congressional powers. *Seminole Tribe of Fla.*, 517 U.S., at 56; *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242-43 (1985).

Congressional intent to abrogate the States' immunity from suit must be obvious from "a clear legislative statement." *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 786 (1991). This rule arises from the important role played by the Eleventh Amendment and the broader principles it reflects. *See Atascadero State Hosp.*, 473 U.S., at 238-239; *Quern v. Jordan*, 440 U.S. 332, 345 (1979). In *Atascadero*, the Court held that "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." 473 U.S., at 246, *see also Blatchford, supra*, at 786, n.4 ("The fact that Congress grants jurisdiction to hear a claim does not suffice to show Congress has abrogated all defenses to that claim") (emphasis deleted). The Court further held:

> To temper Congress' acknowledged powers of abrogation with due concern for the Eleventh Amendment's role as an essential component of our constitutional structure, we have applied a simple but stringent test: Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.

Dellmuth v. Muth, 491 U.S. 223, 227-28 (1989); *see also Welch v. Tex. Dept. of Highways & Public Transp.*, 483 U.S. 468, 474 (1987) (plurality opinion).

Pursuant to the seminal case of *Ex Parte Young* and its progeny, an exception to Eleventh Amendment immunity exists when suit is brought against a state officer, in his official capacity, seeking prospective relief to enjoin an ongoing violation of federal law. *Ex Parte Young*, 209 U.S. 123 (1908). Here, however, Plaintiffs have sued only the "State of Florida" and have articulated no applicable exception to its sovereign immunity; sovereign immunity thereby bars Plaintiffs' claims.

As grounds for jurisdiction, Plaintiffs cite 28 U.S.C. sections 2201-2202 (Declaratory Judgment Act), 28 U.S.C. section 1331 (general federal question jurisdiction) and 28 U.S.C. section 1346(a)(2) (suits against the United States). Later in the Amended Complaint, Plaintiffs cite 42 U.S.C. section 1983. These statutes either contain no clear statement of intent to abrogate or were not passed via a valid exercise of congressional powers or both; they, therefore, do not validly abrogate the State's immunity.

Plaintiffs' citation of the Declaratory Judgment Act is insufficient to establish jurisdiction. Passage of that Act was not intended to and could not have abrogated the State's Eleventh Amendment immunity because it passes neither of the tests of abrogation: it contains no clear statement of intent to abrogate and the congressional authority for the passage of the Act is insufficient for the task. *See Ameritech Corp. v. McCann*, 176 F. Supp. 2d 870 (E.D. Wis. 2001). In *McCann*, the court determined that Congress acted pursuant to its powers under article III of the Constitution rather than section 5 of the Fourteenth Amendment; for this reason, the court held that "the creation of a federal declaratory judgment remedy. . . did not abrogate the sovereign immunity of the States." *Id.* at 877; *see also Comfort ex rel. Neumyer v. Lynn Sch.*, 131 F. Supp. 2d 253, 255 (D. Mass. 2001) ("Sovereign immunity bars counts for declaratory relief under 28 U.S.C. §§ 2201 & 2202 because those actions do not arise under Congress' valid exercise of its Fourteenth Amendment Enforcement Clause power.")

Similarly, 28 USC section 1331 is insufficient. In *Blatchford*, the Native Villages argued that 28 U.S.C. section 1362 served to abrogate the State's immunity. 501 U.S., at 786. The Court held:

> § 1362 does not reflect an "unmistakably clear" intent to abrogate immunity, made plain "in the language of the statute." As we have already noted, the text is no more specific than § 1331, the grant of general federal-question jurisdiction to

> district courts, and no one contends that § 1331 suffices to abrogate immunity for all federal questions.

Id. (citation omitted). Abrogation under section 1331 would eviscerate the Eleventh Amendment for all federal question cases, a proposition no court has ever seriously entertained.

Reliance on 42 U.S.C. section 1983 is also unavailing. Although passed pursuant to section 5 of the Fourteenth Amendment, abrogation language is missing. The State is not a "person" under section 1983 and its Eleventh Amendment immunity has not been affected. *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71 (1989) ("We hold that neither a State nor its officials acting in their official capacities are "persons" under § 1983."). Finally, 28 U.S.C. section 1346(a)(2) is inapposite because this suit is not against the United States.

This Court should thus dismiss Plaintiffs' article I, section 4, claim for lack of subject matter jurisdiction in view of the State of Florida's Eleventh Amendment immunity.

II. The United States District Court for the District of Columbia Has Exclusive Jurisdiction Over This Suit

Plaintiffs' second claim – that implementation of Amendment 6 will cause retrogression of minority voting rights and therefore that it is invalid under section 5 of the Voting Rights Act ("Section 5") – must also be dismissed for jurisdictional reasons because the United States District Court for the District of Columbia retains exclusive jurisdiction over this sort of claim.

The courts have recognized two basic types of suit under Section 5: suits to enjoin enforcement of a newly enacted law until it receives preclearance either from the United States Attorney General or the D.C. District Court; and suits challenging the substance of newly enacted voting provision as having a discriminatory purpose or effect. *See Perkins v. Matthews*, 400 U.S. 379, 383-385 (1971) (Congress intended to treat 'coverage' questions differently from 'substantive discrimination' questions) (citing *Allen v. State Bd. of Elections*, 393 U.S. 544

(1969)). As to suits grounded in the former allegations, the Supreme Court in *Allen* held that the D.C. District Court restriction provided in section 14(b) of the Voting Rights Act[1] does not apply, insofar as the suit brought by private litigants seeks only a declaration that a state enactment is subject to the approval requirements of Section 5; these actions may be brought in a local district court outside the District of Columbia. 393 U.S. at 560. Thus, in *Connor v. Waller,* 421 U.S. 656 (1975), the Court held that the Mississippi laws were required to be submitted pursuant to section 5 of the Voting Rights Act; that those laws would not be effective until and unless cleared pursuant to section 5; and that the District Court erred in deciding the constitutional challenges to the Acts based upon claims of racial discrimination. In other words, the District Court should have decided the coverage question – the laws required preclearance; and should not have reached the racial discrimination claim which was the sole province of the D.C. District. *See also Bone Shirt v. Hazeltine*, 200 F.Supp.2d 1150, 1153 (D.S.D. 2002) ("This court plays only a limited role in enforcing § 5. The statute vests exclusive preclearance authority in the Attorney General and the District of Columbia District Court. Accordingly, we lack authority to decide the merits of whether any voting change in the 2001 Plan had the purpose or will have the effect proscribed by § 5"); *State of S.C. v. United States*, 589 F.Supp. 757, 759 -760 (D.D.C. 1984) (holding in a substantive preclearance matter that "this Court is the only court in the land where the matter can be heard at all").

District courts other than the D.C. District may adjudicate claims that preclearance has not been obtained where it was needed (*see Riley v. Kennedy*, 553 U.S. 406 (2008) (affirming a three-judge district court panel in Alabama that invalidated a gubernatorial appointment for

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[1] Section 14(b) provides "No court other than the District Court for the District of Columbia shall have jurisdiction to issue any declaratory judgment pursuant to section 1973b or 1973c of this title...."

failing to comply with preclearance requirement of the Voting Rights Act)); or enjoin elections for failure to obtain preclearance (*Clark v. Roemer*, 500 U.S. 646 (1991) (holding that the district court should have enjoined the state from conducting elections for judicial seats pursuant to voting statutes which had not obtained requisite judicial or administrative preclearance)). However, the D.C. District Court has exclusive jurisdiction to hear cases alleging substantive violations of Section 5 – i.e. that a qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in [the Act]."

This case is in the latter category. Plaintiffs have alleged only a substantive Section 5 violation, which claims are the exclusive province of the D.C. District Court. As such, this Court lacks jurisdiction to adjudicate Plaintiffs' Voting Rights Act claim and it should be dismissed.

CONCLUSION

Plaintiffs' claim against the State of Florida under article I, section 4, of the United States Constitution is barred under Eleventh Amendment immunity principles. The statutes upon which the Plaintiffs rely for jurisdiction in this case do not unequivocally express Congressional intent to abrogate Eleventh Amendment immunity, nor were they passed with the requisite authority (or both). As to Plaintiffs' Voting Rights Act claim, the District Court for the District of Columbia has exclusive jurisdiction over substantive claims, such as this, under Section 5. Dismissal is thereby proper.

Respectfully submitted this 11th day of January, 2011.

PAMELA JO BONDI
ATTORNEY GENERAL

s/Jonathan A. Glogau
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 11, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

s/Jonathan A. Glogau
Attorney

028

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN,

Plaintiffs,

vs.

STATE OF FLORIDA,

Defendant,

and

THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON; BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY,

Defendant-Intervenors,

and

LEON W. RUSSELL; PATRICIA T. SPENCER; CAROLYN H. COLLINS; HEATHER VEGA; FRANZ VILLATE, FLORIDA STATE CONFERENCE OF NAACP BRANCHES; and DEMOCRACIA AHORA,

Defendant-Intervenors.

Case No. 10-CV-23968-UNGARO

MOTION TO APPEAR *PRO HAC VICE*, CONSENT TO DESIGNATION, AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILING

In accordance with Local Rules 4(b) of the Special Rules Governing the Admission and Practice of Attorneys of the United States District Court for the Southern District of Florida, the undersigned respectfully moves for the admission *pro hac vice* of J. Gerald Hebert, 191 Somervelle Street, #405, Alexandria, VA 22304, (703) 628-4673, for purposes of appearance as

co-counsel on behalf of proposed Defendant-Intervenors Leon W. Russell, Patricia T. Spencer, Carolyn H. Collins, Heather Vega, Franz Villate, the Florida State Conference of NAACP Branches ("Florida NAACP"), and Democracia Ahora in the above-styled case only, and pursuant to Rule 2B of the CM/ECF Administrative Procedures, to permit J. Gerald Hebert to receive electronic filings in this case, and in support thereof states as follows:

1. J. Gerald Hebert is not admitted to practice in the Southern District of Florida and is a member in good standing of the Bars of the following jurisdictions: Virginia (Bar No. 48432); District of Columbia (Bar No. 447676); U.S. District Court for the Eastern District of Virginia; and the U.S. District Court for the District of Columbia. I am also a member of the bar in good standing of the United States Courts of Appeals for the Fifth, Eighth and Eleventh Circuits, and a member of the bar in good standing of the United States Supreme Court.

2. Movant, Stephen F. Rosenthal, Esquire, of the law firm of Podhurst Orseck, P.A., 25 West Flagler Street, Suite 800, Miami, FL 33130, (305) 358-2800, is a member of good standing of the Florida Bar and the United States District Court for the Southern District of Florida, maintains an office in this State for the practice of law, and is authorized to file through the Court's electronic filing system. Movant consents to be designated as a member of the Bar of this Court with whom the Court and opposing counsel may readily communicate regarding the conduct of the case, upon whom filings shall be served, who shall be required to electronically file all documents and things that may be filed electronically, and who shall be responsible for filing documents in compliance with the CM/ECF Administrative Procedures. *See* Section 2B of the CM/ECF Administrative Procedures.

3. In accordance with the local rules of this Court, J. Gerald Hebert has made payment of this Court's $75 admission fee. A certification in accordance with Rule 4(b) is attached hereto.

4. J. Gerald Hebert, by and through designated counsel and pursuant to Section 2B CM/ECF Administrative Procedures, hereby requests the Court to provide Notice of Electronic Filings to J. Gerald Hebert at the email address GHebert@campaignlegalcenter.org.

WHEREFORE, Stephen F. Rosenthal, moves this Court to enter an Order permitting J. Gerald Hebert to appear before this Court on behalf of Defendant-Intervenors Leon W. Russell, Patricia T. Spencer, Carolyn H. Collins, Heather Vega, Franz Villate, the Florida NAACP, and Democracia Ahora for all purposes relating to the proceedings in the above-styled matter and directing the Clerk to provide notice of electronic filings to J. Gerald Hebert.

Date: January 11, 2011

Respectfully submitted,

/s

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UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, Defendant, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON; BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY, Defendant-Intervenors, and LEON W. RUSSELL; PATRICIA T. SPENCER; CAROLYN H. COLLINS; HEATHER VEGA; and FRANZ VILLATE, Defendant-Intervenors.	)	Case No. 10-CV-23968-UNGARO

CERTIFICATION OF J. GERALD HEBERT

I, J. Gerald Hebert, Esquire, pursuant to Rule 4(b) of the Special Rules Governing the Admission and Practice of Attorneys, hereby certify that (1) I have studied the Local Rules of the United States District Court for the Southern District of Florida; and (2) I am a member in good standing of the Bars of the following jurisdictions: Virginia (Bar No. 48432); District of Columbia (Bar No. 447676); the Supreme Court of the United States; the United States Courts of Appeals for the Fifth, Eighth and Eleventh Circuits; the U.S. District Court for the Eastern District of Virginia; and the U.S. District Court for the District of Columbia.

J. Gerald Hebert

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Appear *Pro Hac Vice*, Consent to Designation and Request to Electronically Receive Notices of Electronic Filings was served by electronic mail, on January 11, 2011, to the following counsel:

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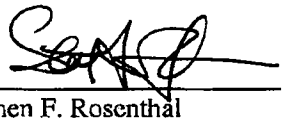
s/ 
Stephen F. Rosenthal

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, Defendant, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON; BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY, Defendant-Intervenors, and LEON W. RUSSELL; PATRICIA T. SPENCER; CAROLYN H. COLLINS; HEATHER VEGA; and FRANZ VILLATE, Defendant-Intervenors.	Case No. 10-CV-23968-UNGARO

ORDER GRANTING MOTION TO APPEAR *PRO HAC VICE*, CONSENT TO DESIGNATION, AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILING

THIS CAUSE having come before the Court on the Motion to Appear *Pro Hac Vice* for J. Gerald Hebert, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing (the "Motion"), pursuant to the Special Rules Governing the Admission and Practice of Attorneys in the United States District Court for the Southern District of Florida and Section 2B of the CM/ECF Administrative Procedures. This Court having considered the motion and all other relevant factors, it is hereby

ORDERED AND ADJUDGED that:

The Motion is GRANTED. J. Gerald Hebert may appear and participate in this action on behalf of proposed Defendant-Intervenors Leon W. Russell, Patricia T. Spencer, Carolyn H. Collins,

Heather Vega, Franz Villate, the Florida NAACP, and Democracia Ahora. The Clerk shall provide electronic notification of all electronic filings to J. Gerald Hebert at GHebert@campaignlegalcenter.org.

DONE AND ORDERED in Chambers at _____, Florida, this _____ day of _____.

_____
United States District Judge

Copies furnished to:
All Counsel of Record (*via electronic filing*)

SANDRA RODRIGUEZ

From: cmecfautosender@flsd.uscourts.gov
Sent: Tuesday, January 11, 2011 3:52 PM
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Subject: Activity in Case 1:10-cv-23968-UU Brown et al v. State of Florida et al Motion for Leave to Appear

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Southern District of Florida

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The following transaction was entered by Rosenthal, Stephen on 1/11/2011 3:52 PM EST and filed on 1/11/2011

Case Name: Brown et al v. State of Florida et al Case Number: 1:10-cv-23968-UU
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Filer: Florida State Conference of NAACP BranchesDemocracia AhoraLeon W RussellPatricia T SpencerCarolyn H CollinsEdwin EncisoStephen Easdale

Document Number: 23

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Docket Text:
MOTION for Leave to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing by Carolyn H Collins, Democracia Ahora, Stephen Easdale, Edwin Enciso, Florida State Conference of NAACP Branches, Leon W Russell, Patricia T Spencer. Responses due by 1/28/2011 (Attachments: # (1) Text of Proposed Order)(Rosenthal, Stephen)

1:10-cv-23968-UU Notice has been electronically mailed to:
Moffatt Laughlin McDonald lmcdonald@aclu.org

Randall C. Marshall rmarshall@aclufl.org, randallmarshall@yahoo.com

Stephen Frederick Rosenthal
srosenthal@podhurst.com,
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Document description: Main Document

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Document description: Text of Proposed Order Original filename: n/a Electronic document
Stamp:
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029

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN,

Plaintiffs,

vs.

STATE OF FLORIDA,

Defendant,

and

THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON; BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY,

Defendant-Intervenors,

and

LEON W. RUSSELL; PATRICIA T. SPENCER; CAROLYN H. COLLINS; EDWIN ENCISO; STEPHEN EASDALE; FLORIDA STATE CONFERENCE OF NAACP BRANCHES; and DEMOCRACIA AHORA,

Defendant-Intervenors.

Case No. 10-CV-23968-UNGARO

MOTION TO APPEAR *PRO HAC VICE*, CONSENT TO DESIGNATION, AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILING

In accordance with Local Rules 4(b) of the Special Rules Governing the Admission and Practice of Attorneys of the United States District Court for the Southern District of Florida, the undersigned respectfully moves for the admission *pro hac vice* of Michael B. DeSanctis of the law firm of Jenner & Block LLP, 1099 New York Avenue, NW, Washington, DC 20001, (202) 639-6000, for purposes of appearance as co-counsel on behalf of proposed Defendant-Intervenors Leon W. Russell, Patricia T. Spencer, Carolyn H. Collins, Edwin Enciso, Stephen

Easdale, the Florida State Conference of NAACP Branches ("Florida NAACP"), and Democracia Ahora in the above-styled case only, and pursuant to Rule 2B of the CM/ECF Administrative Procedures, to permit Michael B. DeSanctis to receive electronic filings in this case, and in support thereof states as follows:

1. Michael B. DeSanctis is not admitted to practice in the Southern District of Florida and is a member in good standing of the Bars of the following jurisdictions: District of Columbia (Bar No. 460961); New Jersey (Bar No. 1009-1998); New York (Bar No. 2876803); Supreme Court of the United States; the U.S. Courts of Appeals for the Second, Third, Fourth, Sixth, Ninth, Eleventh, and District of Columbia Circuits; the U.S. District Court for the District of Columbia; the U.S. District Court for the District of Maryland; the U.S. District Court for the District of New Jersey; and the U.S. District Court for the Southern District of New York.

2. Movant, Stephen F. Rosenthal, Esquire, of the law firm of Podhurst Orseck, P.A., 25 West Flagler Street, Suite 800, Miami, FL 33130, (305) 358-2800, is a member in good standing of the Florida Bar and the United States District Court for the Southern District of Florida, maintains an office in this State for the practice of law, and is authorized to file through the Court's electronic filing system. Movant consents to be designated as a member of the Bar of this Court with whom the Court and opposing counsel may readily communicate regarding the conduct of the case, upon whom filings shall be served, who shall be required to electronically file all documents and things that may be filed electronically, and who shall be responsible for filing documents in compliance with the CM/ECF Administrative Procedures. *See* Section 2B of the CM/ECF Administrative Procedures.

3. In accordance with the local rules of this Court, Michael B. DeSanctis has made payment of this Court's $75 admission fee. A certification in accordance with Rule 4(b) is attached hereto.

4. Michael B. DeSanctis, by and through designated counsel and pursuant to Section 2B CM/ECF Administrative Procedures, hereby requests the Court to provide Notice of Electronic Filings to Michael B. DeSanctis at the email address mdesanctis@jenner.com.

WHEREFORE, Stephen F. Rosenthal, moves this Court to enter an Order permitting Michael B. DeSanctis to appear before this Court on behalf of Defendant-Intervenors Leon W. Russell, Patricia T. Spencer, Carolyn H. Collins, Edwin Enciso, Stephen Easdale, the Florida NAACP, and Democracia Ahora for all purposes relating to the proceedings in the above-styled matter and directing the Clerk to provide notice of electronic filings to Michael B. DeSanctis.

Date: January 11, 2011

Respectfully submitted,

/s

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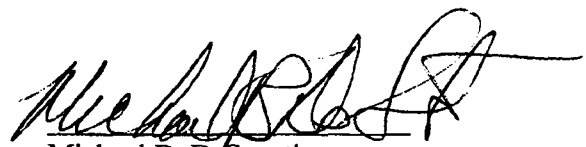
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, Defendant, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON; BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY, Defendant-Intervenors, and LEON W. RUSSELL; PATRICIA T. SPENCER; CAROLYN H. COLLINS; EDWIN ENCISO; STEPHEN EASDALE; FLORIDA STATE CONFERENCE OF NAACP BRANCHES; and DEMOCRACIA AHORA, Defendant-Intervenors.	)	Case No. 10-CV-23968-UNGARO

CERTIFICATION OF MICHAEL B. DESANCTIS

I, Michael B. DeSanctis, Esquire, pursuant to Rule 4(b) of the Special Rules Governing the Admission and Practice of Attorneys, hereby certify that (1) I have studied the Local Rules of the United States District Court for the Southern District of Florida; and (2) I am a member in good standing of the Bars of the following jurisdictions: District of Columbia (Bar No. 460961); New Jersey (Bar No. 1009-1998); New York (Bar No. 2876803); Supreme Court of the United States; the U.S. Courts of Appeals for the Second, Third, Fourth, Sixth, Ninth, Eleventh, and

District Court for the District of Maryland; the U.S. District Court for the District of New Jersey; and the U.S. District Court for the Southern District of New York.



Michael B. DeSanctis

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Appear *Pro Hac Vice*, Consent to Designation and Request to Electronically Receive Notices of Electronic Filings was served by electronic mail, on January 11, 2011 to the following counsel:

Stephen Michael Cody
Stephen Cody
800 S Douglas Road
Suite 850
Coral Gables, FL 33134-2088
305-416-3135
Fax: 416-3153
Email: stcody@stephencody.com
Attorney for Plaintiffs

Randall C. Marshall
American Civil Liberties Union Foundation of Florida
4500 Biscayne Boulevard
Suite 340
Miami, FL 33137-3227
786-363-2700
Fax: 786-363-1108
Email: rmarshall@aclufl.org
Attorney for Defendant-Intervenor ACLU of Florida, Howard Simon, Susan Watson, Joyce Hamilton Henry, and Benetta Standly

Moffatt Laughlin McDonald
American Civil Liberties Union Foundation Inc
230 Peachtree Street NW
Suite 1440
Atlanta, GA 30303-1227
404-523-2721
Email: lmcdonald@aclu.org
Attorney for Defendant-Intervenor ACLU of Florida

s/ Stephen F. Rosenthal

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, Defendant, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON; BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY, Defendant-Intervenors, and LEON W. RUSSELL; PATRICIA T. SPENCER; CAROLYN H. COLLINS; EDWIN ENCISO; STEPHEN EASDALE; FLORIDA STATE CONFERENCE OF NAACP BRANCHES; and DEMOCRACIA AHORA, Defendant-Intervenors.	Case No. 10-CV-23968-UNGARO

ORDER GRANTING MOTION TO APPEAR *PRO HAC VICE*, CONSENT TO DESIGNATION, AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILING

THIS CAUSE having come before the Court on the Motion to Appear *Pro Hac Vice* for Michael B. DeSanctis, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing (the "Motion"), pursuant to the Special Rules Governing the Admission and Practice of Attorneys in the United States District Court for the Southern District of Florida and Section 2B of the CM/ECF Administrative Procedures. This Court having considered the motion and all other relevant factors, it is hereby

ORDERED AND ADJUDGED that:

The Motion is GRANTED. Michael B. DeSanctis may appear and participate in this action on behalf of proposed Defendant-Intervenors Leon W. Russell, Patricia T. Spencer, Carolyn H. Collins, Edwin Enciso, Stephen Easdale, the Florida NAACP, and Democracia Ahora. The Clerk shall provide electronic notification of all electronic filings to Michael B. DeSanctis at mdesanctis@jenner.com.

DONE AND ORDERED in Chambers at _____, Florida, this _____ day of _____.

_____
United States District Judge

Copies furnished to:
All Counsel of Record (*via electronic filing*)

SANDRA RODRIGUEZ

From: cmecfautosender@flsd.uscourts.gov
Sent: Tuesday, January 11, 2011 3:56 PM
To: flsd_cmecf_notice@flsd.uscourts.gov
Subject: Activity in Case 1:10-cv-23968-UU Brown et al v. State of Florida et al Motion for Leave to Appear

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NOTE TO PUBLIC ACCESS USERS Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.
U.S. District Court
Southern District of Florida

Notice of Electronic Filing
The following transaction was entered by Rosenthal, Stephen on 1/11/2011 3:55 PM EST and filed on 1/11/2011

Case Name: Brown et al v. State of Florida et al Case Number: 1:10-cv-23968-UU
https://ecf.flsd.uscourts.gov/cgi-bin/DktRpt.pl?367968

Filer: Florida State Conference of NAACP BranchesDemocracia AhoraLeon W RussellPatricia T SpencerCarolyn H CollinsEdwin EncisoStephen Easdale

Document Number: 24

Copy the URL address from the line below into the location bar of your Web browser to view the document: Document: https://ecf.flsd.uscourts.gov/doc1/05108848063?caseid=367968&de_seq_num=96&magic_num=56149988

Docket Text:
MOTION for Leave to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing by Carolyn H Collins, Democracia Ahora, Stephen Easdale, Edwin Enciso, Florida State Conference of NAACP Branches, Leon W Russell, Patricia T Spencer. Responses due by 1/28/2011 (Attachments: # (1) Text of Proposed Order)(Rosenthal, Stephen)

1:10-cv-23968-UU Notice has been electronically mailed to:
Moffatt Laughlin McDonald lmcdonald@aclu.org

Randall C. Marshall rmarshall@aclufl.org, randallmarshall@yahoo.com

Stephen Frederick Rosenthal srosenthal@podhurst.com, srodriguez@podhurst.com

Stephen Michael Cody stcody@stephencody.com

1:10-cv-23968-UU Notice has not been delivered electronically to those listed below and will be provided by other means. For further assistance, please contact our Help Desk at 1-888-318-2260.:

The following document(s) are associated with this transaction:
Document description: Main Document

Original filename: n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1105629215 [Date=1/11/2011] [FileNumber=8376709-0]
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80ea89f80c8627b1b5c4dea4bcde4aa2cb9067d]]

Document description: Text of Proposed Order Original filename: n/a Electronic document
Stamp:
[STAMP dcecfStamp_ID=1105629215 [Date=1/11/2011] [FileNumber=8376709-1]
[09e34f5411e3382ccd4f8b0a4d0f933ea065f10c375085605730d4e4ac9dcaa3707069f0c5f92fefcabecbfea
5b4d2f58ab3fab1875509acc659b19471ff8578]]

030

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN,

Plaintiffs,

vs.

STATE OF FLORIDA,

Defendant,

and

THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON; BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY,

Defendant-Intervenors,

and

LEON W. RUSSELL; PATRICIA T. SPENCER; CAROLYN H. COLLINS; EDWIN ENCISO; STEPEHN EASDALE; FLORIDA STATE CONFERENCE OF NAACP BRANCHES; and DEMOCRACIA AHORA,

Defendant-Intervenors.

Case No. 10-CV-23968-UNGARO

MOTION TO APPEAR *PRO HAC VICE*, CONSENT TO DESIGNATION, AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILING

In accordance with Local Rules 4(b) of the Special Rules Governing the Admission and Practice of Attorneys of the United States District Court for the Southern District of Florida, the undersigned respectfully moves for the admission *pro hac vice* of Paul M. Smith of the law firm of Jenner & Block LLP, 1099 New York Avenue, NW, Washington, DC 20001, (202) 639-6000, for purposes of appearance as co-counsel on behalf of proposed Defendant-Intervenors Leon W. Russell, Patricia T. Spencer, Carolyn H. Collins, Edwin Enciso, Stephen Easdale, the Florida State Conference of NAACP Branches ("Florida NAACP"), and Democracia Ahora in

the above-styled case only, and pursuant to Rule 2B of the CM/ECF Administrative Procedures, to permit Paul M. Smith to receive electronic filings in this case, and in support thereof states as follows:

1. Paul M. Smith is not admitted to practice in the Southern District of Florida and is a member in good standing of the Bars of the following jurisdictions: District of Columbia (Bar No. 358870); Maryland (Bar No. 27182); New York (Bar No. 4372447); the Supreme Court of the United States; the U.S. Courts of Appeals for the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, District of Columbia, and Federal Circuits; the U.S. District Court for the District of Columbia; the U.S. District Court for the District of Colorado; the U.S. District Court for the Northern District of Illinois; the U.S. District Court for the District of Maryland; and the U.S. District Court for the Southern District of New York.

2. Movant, Stephen F. Rosenthal, Esquire, of the law firm of Podhurst Orseck, P.A., 25 West Flagler Street, Suite 800, Miami, FL 33130, (305) 358-2800, is a member of good standing of the Florida Bar and the United States District Court for the Southern District of Florida, maintains an office in this State for the practice of law, and is authorized to file through the Court's electronic filing system. Movant consents to be designated as a member of the Bar of this Court with whom the Court and opposing counsel may readily communicate regarding the conduct of the case, upon whom filings shall be served, who shall be required to electronically file all documents and things that may be filed electronically, and who shall be responsible for filing documents in compliance with the CM/ECF Administrative Procedures. *See* Section 2B of the CM/ECF Administrative Procedures.

3. In accordance with the local rules of this Court, Paul M. Smith has made payment of this Court's $75 admission fee. A certification in accordance with Rule 4(b) is attached hereto.

4. Paul M. Smith, by and through designated counsel and pursuant to Section 2B CM/ECF Administrative Procedures, hereby requests the Court to provide Notice of Electronic Filings to Paul M. Smith at the email address psmith@jenner.com.

WHEREFORE, Stephen F. Rosenthal, moves this Court to enter an Order permitting Paul M. Smith to appear before this Court on behalf of Defendant-Intervenors Leon W. Russell, Patricia T. Spencer, Carolyn H. Collins, Edwin Enciso, Stephen Easdale, the Florida NAACP, and Democracia Ahora for all purposes relating to the proceedings in the above-styled matter and directing the Clerk to provide notice of electronic filings to Paul M. Smith.

Date: January 11, 2011

Respectfully submitted,

/s

Stephen F. Rosenthal
Fla. Bar No. 0131458
Podhurst Orseck P.A.
25 West Flagler Street, Suite 800
Miami, FL 33130
Office (305) 358-2800
srosenthal@podhurst.com

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, Defendant, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON; BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY, Defendant-Intervenors, and LEON W. RUSSELL; PATRICIA T. SPENCER; CAROLYN H. COLLINS; EDWIN ENCISO; STEPHEN EASDALE; FLORIDA STATE CONFERENCE OF NAACP BRANCHES; and DEMOCRACIA AHORA, Defendant-Intervenors	)	Case No. 10-CV-23968-UNGARO

CERTIFICATION OF PAUL M. SMITH

I, Paul M. Smith, Esquire, pursuant to Rule 4(b) of the Special Rules Governing the Admission and Practice of Attorneys, hereby certify that (1) I have studied the Local Rules of the United States District Court for the Southern District of Florida; and (2) I am a member in good standing of the Bars of the following jurisdictions: District of Columbia (Bar No. 358870); Maryland (Bar No. 27182); New York (Bar No. 4372447); the Supreme Court of the United States; the U.S. Courts of Appeals for the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, District of Columbia, and Federal Circuits; the U.S. District

District Court for the Northern District of Illinois; the U.S. District Court for the District of Maryland; and the U.S. District Court for the Southern District of New York.

Paul M. Smith

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Appear *Pro Hac Vice*, Consent to Designation and Request to Electronically Receive Notices of Electronic Filings was served by electronic mail, on January 11, 2011, to the following counsel:

Stephen Michael Cody
Stephen Cody
800 S Douglas Road
Suite 850
Coral Gables, FL 33134-2088
305-416-3135
Fax: 416-3153
Email: stcody@stephencody.com
Attorney for Plaintiffs

Randall C. Marshall
American Civil Liberties Union Foundation of Florida
4500 Biscayne Boulevard
Suite 340
Miami, FL 33137-3227
786-363-2700
Fax: 786-363-1108
Email: rmarshall@aclufl.org
Attorney for Defendant-Intervenor ACLU of Florida, Howard Simon, Susan Watson, Joyce Hamilton Henry, and Benetta Standly

Moffatt Laughlin McDonald
American Civil Liberties Union Foundation Inc
230 Peachtree Street NW
Suite 1440
Atlanta, GA 30303-1227
404-523-2721
Email: lmcdonald@aclu.org
Attorney for Defendant-Intervenor ACLU of Florida

s/ Stephen F. Rosenthal

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, Defendant, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON; BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY, Defendant-Intervenors, and LEON W. RUSSELL; PATRICIA T. SPENCER; CAROLYN H. COLLINS; EDWIN ENCISO; STEPHEN EASDALE; FLORIDA STATE CONFERENCE OF NAACP BRANCHES; and DEMOCRACIA AHORA, Defendant-Intervenors	Case No. 10-CV-23968-UNGARO

ORDER GRANTING MOTION TO APPEAR *PRO HAC VICE*, CONSENT TO DESIGNATION, AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILING

THIS CAUSE having come before the Court on the Motion to Appear *Pro Hac Vice* for Paul M. Smith, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing (the "Motion"), pursuant to the Special Rules Governing the Admission and Practice of Attorneys in the United States District Court for the Southern District of Florida and Section 2B of the CM/ECF Administrative Procedures. This Court having considered the motion and all other relevant factors, it is hereby

ORDERED AND ADJUDGED that:

The Motion is GRANTED. Paul M. Smith may appear and participate in this action on behalf of proposed Defendant-Intervenors Leon W. Russell, Patricia T. Spencer, Carolyn H. Collins,

Edwin Enciso, Stephen Easdale, the Florida NAACP, and Democracia Ahora. The Clerk shall provide electronic notification of all electronic filings to Paul M. Smith at psmith@jenner.com.
DONE AND ORDERED in Chambers at _____, Florida, this _____ day of _____.

_____
United States District Judge

Copies furnished to:
All Counsel of Record (*via electronic filing*)

SANDRA RODRIGUEZ

From: cmecfautosender@flsd.uscourts.gov
Sent: Tuesday, January 11, 2011 3:58 PM
To: flsd_cmecf_notice@flsd.uscourts.gov
Subject: Activity in Case 1:10-cv-23968-UU Brown et al v. State of Florida et al Motion for Leave to Appear

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NOTE TO PUBLIC ACCESS USERS Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.
U.S. District Court
Southern District of Florida

Notice of Electronic Filing
The following transaction was entered by Rosenthal, Stephen on 1/11/2011 3:57 PM EST and filed on 1/11/2011

Case Name: Brown et al v. State of Florida et al Case Number: 1:10-cv-23968-UU
https://ecf.flsd.uscourts.gov/cgi-bin/DktRpt.pl?367968

Filer: Florida State Conference of NAACP BranchesDemocracia AhoraLeon W RussellPatricia T SpencerCarolyn H CollinsEdwin EncisoStephen Easdale

Document Number: 25

Copy the URL address from the line below into the location bar of your Web browser to view the document: Document: https://ecf.flsd.uscourts.gov/doc1/05108848108?caseid=367968&de_seq_num=98&magic_num=10224349

Docket Text:
MOTION for Leave to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing by Carolyn H Collins, Democracia Ahora, Stephen Easdale, Edwin Enciso, Florida State Conference of NAACP Branches, Leon W Russell, Patricia T Spencer. Responses due by 1/28/2011 (Attachments: # (1) Text of Proposed Order)(Rosenthal, Stephen)

1:10-cv-23968-UU Notice has been electronically mailed to:
Moffatt Laughlin McDonald lmcdonald@aclu.org

Randall C. Marshall rmarshall@aclufl.org, randallmarshall@yahoo.com

Stephen Frederick Rosenthal
srosenthal@podhurst.com,
srodriguez@podhurst.com

Stephen Michael Cody stcody@stephencody.com

1:10-cv-23968-UU Notice has not been delivered electronically to those listed below and will be provided by other means. For further assistance, please contact our Help Desk at 1-888-318-2260.:

The following document(s) are associated with this transaction:
Document description: Main Document

Original filename: n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1105629215 [Date=1/11/2011] [FileNumber=8376745-0]
[144012d6da9564371b512519393f87267838113bac4bd120fe447c5d9db4d3680b8ee8ac87b5c3f3add538662
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Document description: Text of Proposed Order Original filename: n/a Electronic document
Stamp:
[STAMP dcecfStamp_ID=1105629215 [Date=1/11/2011] [FileNumber=8376745-1]
[26908c6cec5098ca4baf3e0cf4120ce8cf2c8948a3b1074d2405b864a8742b121fc51eb9c22d1c4231de63c8b
915e5b4329bb711656d1d5216c119fb4a2272bb]]

031

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN,

Plaintiffs,

vs.

STATE OF FLORIDA,

Defendant,

and

THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON; BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY,

Defendant-Intervenors,

and

LEON W. RUSSELL; PATRICIA T. SPENCER; CAROLYN H. COLLINS; EDWIN ENCISO; STEPHEN EASDALE; FLORIDA STATE CONFERENCE OF NAACP BRANCHES; and DEMOCRACIA AHORA,

Defendant-Intervenors.

Case No. 10-CV-23968-UNGARO

MOTION TO APPEAR *PRO HAC VICE*, CONSENT TO DESIGNATION, AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILING

In accordance with Local Rules 4(b) of the Special Rules Governing the Admission and Practice of Attorneys of the United States District Court for the Southern District of Florida, the undersigned respectfully moves for the admission *pro hac vice* of Eric R. Haren of the law firm of Jenner & Block LLP, 1099 New York Avenue, NW, Washington, DC 20001, (202) 639-6000, for purposes of appearance as co-counsel on behalf of proposed Defendant-Intervenors Leon W. Russell, Patricia T. Spencer, Carolyn H. Collins, Edwin Enciso, Stephen Easdale, the

Florida State Conference of NAACP Branches ("Florida NAACP"), and Democracia Ahora in the above-styled case only, and pursuant to Rule 2B of the CM/ECF Administrative Procedures, to permit Eric R. Haren to receive electronic filings in this case, and in support thereof states as follows:

1. Eric R. Haren is not admitted to practice in the Southern District of Florida and is a member in good standing of the Bars of the following jurisdictions: California (Bar No. 250291); District of Columbia (Bar No. 985189); the U.S. Courts of Appeals for the Sixth and Federal Circuits; and the United States Court of Federal Claims.

2. Movant, Stephen F. Rosenthal, Esquire, of the law firm of Podhurst Orseck, P.A., 25 West Flagler Street, Suite 800, Miami, FL 33130, (305) 358-2800, is a member in good standing of the Florida Bar and the United States District Court for the Southern District of Florida, maintains an office in this State for the practice of law, and is authorized to file through the Court's electronic filing system. Movant consents to be designated as a member of the Bar of this Court with whom the Court and opposing counsel may readily communicate regarding the conduct of the case, upon whom filings shall be served, who shall be required to electronically file all documents and things that may be filed electronically, and who shall be responsible for filing documents in compliance with the CM/ECF Administrative Procedures. *See* Section 2B of the CM/ECF Administrative Procedures.

3. In accordance with the local rules of this Court, Eric R. Haren has made payment of this Court's $75 admission fee. A certification in accordance with Rule 4(b) is attached hereto.

4. Eric R. Haren, by and through designated counsel and pursuant to Section 2B CM/ECF Administrative Procedures, hereby requests the Court to provide Notice of Electronic Filings to Eric R. Haren at the email address eharen@jenner.com.

WHEREFORE, Stephen F. Rosenthal, moves this Court to enter an Order permitting Eric R. Haren to appear before this Court on behalf of Defendant-Intervenors Leon W. Russell, Patricia T. Spencer, Carolyn H. Collins, Edwin Enciso, Stephen Easdale, the Florida NAACP, and Democracia Ahora for all purposes relating to the proceedings in the above-styled matter and directing the Clerk to provide notice of electronic filings to Eric R. Haren.

Date: January 7, 2011

Respectfully submitted,

/s

Stephen F. Rosenthal
Fla. Bar No. 0131458
Podhurst Orseck P.A.
25 West Flagler Street, Suite 800
Miami, FL 33130
Office (305) 358-2800
srosenthal@podhurst.com

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, Defendant, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON; BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY, Defendant-Intervenors, and LEON W. RUSSELL; PATRICIA T. SPENCER; CAROLYN H. COLLINS; EDWIN ENCISO; STEPHEN EASDALE; FLORIDA STATE CONFERENCE OF NAACP BRANCHES; and DEMOCRACIA AHORA Defendant-Intervenors	Case No. 10-CV-23968-UNGARO

CERTIFICATION OF ERIC R. HAREN

I, Eric R. Haren, Esquire, pursuant to Rule 4(b) of the Special Rules Governing the Admission and Practice of Attorneys, hereby certify that (1) I have studied the Local Rules of the United States District Court for the Southern District of Florida; and (2) I am a member in good standing of the Bars of the following jurisdictions: California (Bar No. 250291); District of Columbia (Bar No. 985189); the U.S. Courts of Appeals for the Sixth and Federal Circuits; and the United States Court of Federal Claims.

Eric R. Haren

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Appear *Pro Hac Vice*, Consent to Designation and Request to Electronically Receive Notices of Electronic Filings was served by electronic mail, on January 7, 2011 to the following counsel:

Stephen Michael Cody
Stephen Cody
800 S Douglas Road
Suite 850
Coral Gables, FL 33134-2088
305-416-3135
Fax: 416-3153
Email: stcody@stephencody.com
Attorney for Plaintiffs

Randall C. Marshall
American Civil Liberties Union Foundation of Florida
4500 Biscayne Boulevard
Suite 340
Miami, FL 33137-3227
786-363-2700
Fax: 786-363-1108
Email: rmarshall@aclufl.org
Attorney for Defendant-Intervenor ACLU of Florida, Howard Simon, Susan Watson, Joyce Hamilton Henry, and Benetta Standly

Moffatt Laughlin McDonald
American Civil Liberties Union Foundation Inc
230 Peachtree Street NW
Suite 1440
Atlanta, GA 30303-1227
404-523-2721
Email: lmcdonald@aclu.org
Attorney for Defendant-Intervenor ACLU of Florida

s/ Stephen F. Rosenthal

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, Defendant, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON; BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY, Defendant-Intervenors, and LEON W. RUSSELL; PATRICIA T. SPENCER; CAROLYN H. COLLINS; EDWIN ENCISO; STEPHEN EASDALE; FLORIDA STATE CONFERENCE OF NAACP BRANCHES; and DEMOCRACIA AHORA, Defendant-Intervenors.	Case No. 10-CV-23968-UNGARO

ORDER GRANTING MOTION TO APPEAR *PRO HAC VICE*, CONSENT TO DESIGNATION, AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILING

THIS CAUSE having come before the Court on the Motion to Appear *Pro Hac Vice* for Eric R. Haren, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing (the "Motion"), pursuant to the Special Rules Governing the Admission and Practice of Attorneys in the United States District Court for the Southern District of Florida and Section 2B of the CM/ECF Administrative Procedures. This Court having considered the motion and all other relevant factors, it is hereby

ORDERED AND ADJUDGED that:

The Motion is GRANTED. Eric R. Haren may appear and participate in this action on behalf of proposed Defendant-Intervenors Leon W. Russell, Patricia T. Spencer, Carolyn H. Collins, Edwin Enciso, Stephen Easdale, the Florida NAACP, and Democracia Ahora. The Clerk shall provide electronic notification of all electronic filings to Eric R. Haren at eharen@jenner.com.
DONE AND ORDERED in Chambers at _____, Florida, this _____ day of _____.

_____
United States District Judge

Copies furnished to:
All Counsel of Record (*via electronic filing*)

SANDRA RODRIGUEZ

From: cmecfautosender@flsd.uscourts.gov
Sent: Tuesday, January 11, 2011 3:41 PM
To: flsd_cmecf_notice@flsd.uscourts.gov
Subject: Activity in Case 1:10-cv-23968-UU Brown et al v. State of Florida et al Motion for Leave to Appear

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Southern District of Florida

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Docket Text:
MOTION for Leave to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing by Carolyn H Collins, Democracia Ahora, Stephen Easdale, Edwin Enciso, Florida State Conference of NAACP Branches, Leon W Russell, Patricia T Spencer. Responses due by 1/28/2011 (Attachments: # (1) Text of Proposed Order)(Rosenthal, Stephen)

1:10-cv-23968-UU Notice has been electronically mailed to:
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[STAMP dcecfStamp_ID=1105629215 [Date=1/11/2011] [FileNumber=8376567-0]
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Document description: Text of Proposed Order Original filename: n/a Electronic document
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[STAMP dcecfStamp_ID=1105629215 [Date=1/11/2011] [FileNumber=8376567-1]
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032

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 10-23968-CIV-UNGARO

MARIO DIAZ-BALART and
CORRINE BROWN,

Plaintiffs,

v.

STATE OF FLORIDA, *et al.*,

Defendants.
_____/

ORDER GRANTING MOTIONS TO APPEAR PRO HAC VICE

THIS CAUSE is before the Court upon the Motions to Appear Pro Hac Vice (D.E. 22, 23, 24, 25, 26, 28, 29, 30 & 31).

THE COURT has considered the Motions and the pertinent portions of the record and is otherwise fully advised in the premises. Accordingly, it is

ORDERED AND ADJUDGED that said Motions (D.E. 22, 23, 24, 25, 26, 28, 29, 30 & 31) are GRANTED.

DONE AND ORDERED in Chambers at Miami, Florida, this 14th day of January, 2011.

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

copies provided:
counsel of record

033

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN,

Plaintiffs,

- and –

THE FLORIDA HOUSE OF REPRESENTATIVES,

Proposed Intervening Plaintiff,

Case No.: 10-CV-23968-UNGARO

v.

STATE OF FLORIDA,

Defendant.
_____/

FLORIDA HOUSE OF REPRESENTATIVES' UNOPPOSED MOTION TO INTERVENE AS PLAINTIFF

Pursuant to Federal Rule of Civil Procedure 24(b), the Florida House of Representatives (the "House"), moves to intervene as a Plaintiff in this action. Plaintiffs and Defendant are unopposed to this Motion.

Plaintiffs, two members of the United States Congress, filed this action to challenge the constitutionality of a new provision of the Florida Constitution. (Doc. 3 ¶ 1.) Article III, section 20 of the state constitution (the "Amendment"), which narrowly passed in November, purports to limit the Legislature's discretion in redistricting. (*Id.* ¶ 26.) But that discretion derives directly from the United States Constitution, *see* Art. 1, § 4, U.S. Const.; *see also Vieth v. Jubelirer*, 541 U.S. 267, 275 (2004) (plurality), and a state constitution cannot take away what the federal constitution provides. Because the Amendment conflicts with the United States Constitution, it

is invalid. To protect its constitutionally provided discretion and authority, the Florida House of Representatives seeks to participate in this lawsuit.

Memorandum of Law

Federal Rule of Civil Procedure 24 provides for two types of intervention: intervention as a matter of right, and permissive intervention. *Loyd v. Alabama Dep't. of Corrections*, 176 F.3d 1336, 1339 (11th Cir. 1999). The House is entitled to intervention as a matter of right. Alternatively, this Court should allow permissive intervention.

I. THE HOUSE MAY INTERVENE AS A MATTER OF RIGHT.

To intervene as a matter of right, the moving party must demonstrate that: (1) its application to intervene is timely; (2) it has an interest relating to the property or transaction which is the subject of the action; (3) it is so situated that disposition of the action, as a practical matter, may impede or impair its ability to protect that interest; and (4) its interest is represented inadequately by the existing parties to the suit. *Id.* at 1339-40 (citing *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989)). If a moving party satisfies these four requirements, the district court must allow intervention. *Chiles*, 865 F.2d at 1213. The House satisfies each requirement.

A. The Request to Intervene is Timely.

This Motion is timely. "Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion. . . ." *NAACP v. New York*, 413 U.S. 345, 366 (1973). This case is just beginning. The Defendant has just recently responded to the operative complaint by filing its motion to dismiss. (Doc. 26.) The short time between the initiation of this case and this Motion could not and will not prejudice any party. *Cf. Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1125-26 (5th Cir. 1970) (finding timely a

motion to intervene filed more than one year after the action's commencement; even though discovery had already been completed, intervention would not cause any delay or prejudice).

B. The House Has An Undeniable Interest in the Subject of the Action.

Redistricting is a legislative function. *See League of United Latin American Citizens v. Perry,* 548 U.S. 399, 415 (2006) ("[T]he legislative branch plays the primary role in congressional redistricting . . . ."). The Florida Constitution vests the state's legislative power in the House and the Senate. Art. III, sec. 1, Fla. Const. By restricting the legislative authority of the House, the Amendment plainly impacts the House's interests.

C. The House Is So Situated That Disposition of the Action May Impede or Impair Its Ability to Protect Its Interest.

The House has a considerable interest in establishing the unconstitutionality of the Amendment. If this case proceeds without its involvement, that interest might be substantially impeded or impaired. The precedential effect of an adverse ruling could impair the House's interests in future litigation, including litigation regarding the validity of any forthcoming redistricting plan. The potential for negative precedent "may supply that practical disadvantage which warrants intervention as of right." *Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989). Under similar circumstances, the Eleventh Circuit granted intervention as a matter of right:

> Although the potential for negative *stare decisis* effects does not automatically grant plaintiffs the right to intervene, the practical impairment the plaintiffs may face here is significant. The plaintiffs are all alleging that the same First Union policy violated the ADEA and led to their injury. Consequently, 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. Although a district court would not be bound to follow any other district court's determination, the decision would have significant persuasive effects. We find that these effects are sufficiently significant to warrant intervention.

Stone v. First Union Corp., 371 F.3d 1305, 1310 (11th Cir. 2004).

D. The House's Interest May Not Be Sufficiently Aligned with the Plaintiffs' So As to Ensure Adequate Representation.

Finally, because the House's and Plaintiffs' interests may not be sufficiently aligned, Plaintiffs' prosecution of this case may not adequately protect the Legislature. The House does not doubt Plaintiffs' ability to faithfully and diligently pursue this action, but Plaintiffs' interests are considerably narrower than the Legislature's. Although Plaintiffs and the House share some common interests, "[t]he requirement of the Rule is satisfied if the applicant shows that representation of his interest '*may be*' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. UMW*, 404 U.S. 528, 538 n.10 (1972) (emphasis added). It is the Legislature—not Plaintiffs—which has the primary responsibility for redistricting. And it is the Legislature—not Plaintiffs—whose prerogative will be challenged (and potentially invalidated) under the Amendment.

* * *

For these reasons, the House satisfies the criteria for intervention as a matter of right. Furthermore, "[a]ny doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed intervenors because it allows the court to resolve all related disputes in a single action." *Federal Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993).

II. ALTERNATIVELY, THIS COURT SHOULD GRANT PERMISSIVE INTERVENTION.

If this Court denies intervention as a matter of right, it should grant permissive intervention. A district court may exercise its discretion to grant permissive intervention under Rule 24(b)(2). *Manasota-88, Inc. v. Tidwell*, 896 F.2d 1318, 1323 (11th Cir. 1990). A party seeking permissive intervention must show that: "(1) his application to intervene is timely; and

(2) his claim or defense and the main action have a question of law or fact in common." *Chiles*, 865 F.2d 1197, 1213 (11th Cir. 1989). The House easily meets these criteria. *See supra.*

Separate standing is not required to intervene under Rule 24. *Loyd v. Ala. Dep't of Corr.*, 176 F.3d 1336, 1339 (11th Cir. 1999); *Purcell v. BankAtlantic Fin. Corp.*, 85 F.3d 1508, 1512 (11th Cir. 1996). Nonetheless, the standing inquiry is helpful in determining whether a party may intervene. *Chiles*, 865 F.2d at 1213. Specifically, where a party has standing, he likewise has a significant interest in the case. *Meek v. Metropolitan Dade County*, 985 F.2d 1471, 1480 (11th Cir. 1993) ("In this circuit, a movant who shows standing is deemed to have a sufficiently substantial interest to intervene."). The House would have standing to bring this action on its own, because it is directly impacted and harmed by the Amendment. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992) (where challenger is "object of" the regulation, "there is ordinarily little question that the action or inaction caused him injury, and that a judgment preventing or requiring the action will redress it"). The Legislature and its processes are the objects of the Amendment, so the House has standing to pursue this challenge.

Finally, intervention will not prejudice any party. Indeed, neither the Plaintiffs nor the Defendant opposes it. Intervention will not lead to inefficiency or delay of the litigation. *Cf., Worlds v. Dep't of Health & Rehab. Servs.*, 929 F.2d 591, 595 (11th Cir. 1991) (denying permissive intervention after finding delay and inefficiency would result). If permitted to intervene, the House will work closely with Plaintiffs and their counsel to ensure there are no delays or duplication of efforts.

WHEREFORE, the Florida House of Representatives respectfully requests entry of an order (i) granting it status as an intervening plaintiff, (ii) deeming filed the Proposed Complaint

in Intervention, filed contemporaneously with this Motion, and (iii) granting the House such further relief as this Court deems appropriate.

CERTIFICATE OF CONFERENCE

Pursuant to Local Rule 7.1(a)(3), counsel for the House conferred with counsel for Plaintiffs and Defendant. They do not oppose the proposed intervention.

Respectfully submitted,

/s/ Allen Winsor.

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CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Allen Winsor

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Case No. 10-CV-23968-UNGARO
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034

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN,

Plaintiffs,

- and –

THE FLORIDA HOUSE OF REPRESENTATIVES,

Proposed Intervening Plaintiff,

Case No.: 10-CV-23968-UNGARO

v.

STATE OF FLORIDA,

Defendant.
_____/

FLORIDA HOUSE OF REPRESENTATIVES' PROPOSED COMPLAINT IN INTERVENTION FOR DECLARATORY RELIEF

Intervening Plaintiff, the Florida House of Representatives (the "House"), files this proposed Complaint in Intervention for Declaratory Relief.

Introduction

1. This action challenges the constitutionality of a recently adopted provision of the Florida Constitution: Article III, Section 20 (the "Amendment"). The House seeks a declaration that the Amendment conflicts with, and therefore violates, the Elections Clause of the United States Constitution. *See* U.S. Const. art. I, § 4, cl. 1.

2. Because the Amendment purports to abridge the plenary and exclusive authority conferred on the Florida Legislature by the Elections Clause of the United States Constitution to regulate the time, place, and manner of conducting elections for Congress, it is unconstitutional.

The Parties

3. Intervening Plaintiff is the Florida House of Representatives, one of two houses of the Florida Legislature, in which "[t]he legislative power of the state shall be vested." *See* Art. III, sec. 1, Fla. Const.

4. Defendant is the State of Florida.

5. In addition, certain interest groups have moved to intervene as additional defendants.

Jurisdiction and Venue

6. This case involves a challenge based on the federal constitution. This Court has subject-matter jurisdiction of this case pursuant to 28 U.S.C. § 1331.[1]

7. This case is brought in Florida against the State of Florida; venue is proper.

8. The Court has authority to grant declaratory and prospective injunctive relief pursuant to 28 U.S.C. §§ 2201(a) and 2202.

Claim for Relief – Count I

9. The allegations contained in Paragraphs 1 through 8 above are incorporated as though restated here.

10. The Elections Clause authorizes state legislatures to regulate the time, place, and manner of holding congressional elections. It provides:

> The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Const, art. I, § 4, cl. 1.

[1] The State of Florida has asserted Eleventh Amendment immunity as a jurisdictional defense. (Doc. 26.) The House takes no position on this defense.

11. Pursuant to its authority under the Elections Clause to prescribe the manner of holding elections for the United States House of Representatives, the Florida Legislature enacts a new congressional redistricting plan after each decennial census.

12. The discretion of state legislatures, in the performance of this federal function, is not subject to constraint by state constitutional provisions. The discretionary power delegated by the Elections Clause to the Legislature is plenary and exclusive, and cannot be limited or circumscribed by the Florida Constitution.

13. By imposing state constitutional mandates on congressional redistricting, the Amendment fetters the discretionary power vested by the Elections Clause in the Florida Legislature, and it thus violates the United States Constitution.

14. This controversy is real and immediate. A prompt determination of the constitutionality of the Amendment is essential to the Legislature's ability to lay the necessary foundation for the adoption of a congressional redistricting plan in 2012.

15. No remedy at law can redress the constitutional infirmity.

16. Accordingly, the House seeks and is entitled to a declaration that the Amendment violates the Elections Clause of the United States Constitution.

WHEREFORE, the Florida House of Representatives respectfully requests the Court to:

a. Declare the Amendment facially unconstitutional under the Elections Clause of the United States Constitution; and

b. Grant such other relief as the Court may deem proper.

Dated this fourteenth day of January, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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/s/ *Allen Winsor*
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035

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10 – CV- 23968 -UNGARO

MARIO DIAZ-BALART and CORRINE BROWN,

Plaintiffs,

vs.

STATE OF FLORIDA,

Defendant.

PLAINTIFFS' RESPONSE TO FLORIDA HOUSE OF REPRESENTATIVES' MOTION TO INTERVENE

Plaintiffs Mario Diaz-Balart and Corrine Brown, by and through their undersigned counsel respond in opposition to the motion to intervene filed The Florida House of Representatives by saying that they do not object to the intervention in light of the fact that House will be called upon to implement the amendment to the Florida Constitution at issue in this case. .

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 28, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

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s/Stephen M. Cody

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036

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10 – CV- 23968 -UNGARO

MARIO DIAZ-BALART and CORRINE BROWN,

Plaintiffs,

vs.

STATE OF FLORIDA,

Defendants.

AGREED MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF AND MOTION TO EXTEND TIME TO COMPLY WITH THE COURT'S SCHEDULING ORDER

Plaintiffs MARIO DIAZ-BALART and CORRINE BROWN, by and through their undersigned counsel, move this Court for leave to file a Second Amended Complaint, and as grounds therefore would show:

1. Plaintiffs brought this action seeking a declaratory judgment that Article III, Section 20 of the Florida Constitution is unconstitutional as well as injunctive relief prohibiting the enforcement of Article III, Section 20 of the Florida Constitution.

2. In their amended complaint, Plaintiffs named the State of Florida as a party defendant.

3. The State's claim of sovereign immunity under the Eleventh Amendment is well taken and requires that individuals be sued in their official capacity, rather than the State of Florida being named as a party.

4. The proposed Second Amended Complaint is attached hereto. The State is being dropped as a formal party defendant and Govenor Rick Scott and Secretary of State Kurt S. Browning are being added as part defendants.

5. The undersigned has consulted with the Office of the Attorney General of the State of Florida and they have agreed to the entry of the relief requested. At present, no other parties have successfully intervened as parties in this matter, either as Plaintiffs or as Defendants.

6. Because the Second Amended Complaint must be served upon Governor Scott and Secretary Browing, the undersigned also requests that the Court reset the deadlines for filing of scheduling order in order to give time for service of process to be affected.

WHEREFORE, the Plaintiffs request leave from the Court to file the attached Second Amended Complaint and that the Court reset the scheduling deadlines in this case to permit service of process of the new pleading upon the Governor and the Secretary of State.

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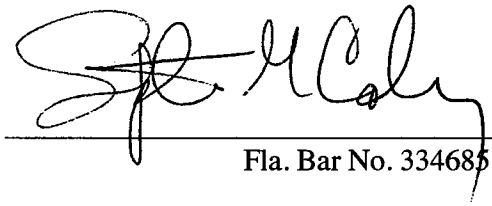

Fla. Bar No. 334685

LOCAL RULE 7.1.A.3 CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the undersigned counsel conferred with opposing counsel via phone on January 19, 2011. The parties were able to agree to the relief sought herein.

s/ Stephen M. Cody

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 20, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

s/ Stephen M. Cody

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10 – CV- 23968 -UNGARO

MARIO DIAZ-BALART and CORRINE BROWN,

Plaintiffs,

vs.

RICK SCOTT, in his official capacity as Governor of the State of Florida, and KURT S. BROWNING, in his official capacity as Secretary of State of Florida,

Defendants.

SECOND AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiffs MARIO DIAZ-BALART and CORRINE BROWN, by and through their undersigned counsel, sue Defendants. RICK SCOTT, in his official capacity as Governor of the State of Florida, and KURT S. BROWNING, in his official capacity as Secretary of State of Florida, and as grounds therefore would show:

1. Plaintiffs bring this action seeking a declaratory judgment that Article III, Section 20 of the Florida Constitution is unconstitutional as well as injunctive relief prohibiting the enforcement of Article III, Section 20 of the Florida Constitution.

2. This case is an action for declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201-2202 and Federal Rule of Civil Procedure 57.

PARTIES

3. Defendant RICK SCOTT is the Governor of the State of Florida and is sued in his official capacity as Governor. In his capacity as Governor, Defendant Scott is the ehief executive of the State and is responsible for the faithful execution of the laws of Florida, including the Florida Constitution.

4. Defendant KURT S. BROWNING is the Secretary of State of the State of Florida and is sued in his official capacity as Secretary. In his capacity as Secretary, Defendant Browning is the chief elections officer of the State.

5. Plaintiff MARIO DIAZ-BALART is a citizen of the State of Florida and is a resident of and registered to vote in Miami-Dade County. Since 2003, Diaz-Balart has represented the citizens of Congressional District 25 in the United States House of Representatives. Hispanics comprise more than 50 percent of the voting-age population in Congressional District 25. In January 2011, Plaintiff Diaz-Balart will be representing the residents of Florida District 21. Hispanics comprise more than 50 percent of the voting-age population in Congressional District 21. Plaintiff Diaz-Balart is a member of a protected language minority under the Voting Rights Act of 1965, as amended. Plaintiff Diaz-Balart intends to run for Congress in 2012.

6. Plaintiff CORRINE BROWN is a citizen of the State of Florida and is a resident of and registered to vote in Duval County. Since 1993, Brown has represented the citizens of Congressional District 3 in the United States House of Representatives. African-Americans comprise nearly half of the voting-age population in Congressional District 3. Plaintiff Brown is a member of a protected racial minority under the Voting Rights Act of 1965, as amended. Plaintiff Brown intends to run for Congress in 2012.

JURISDICTION AND VENUE

7. The Court has subject-matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1346(a)(2) because it arises under the Constitution and laws of the United States.

8. Venue is proper in this judicial district under 28 U.S.C. § 1391(b)(2), because no real property is involved in this action and the State of Florida is situated in this judicial district.

FACTS

9. On September 28, 2007, the Florida Department of State, Division of Elections, approved an initiative petition prepared by FairDistrictsFlorida.org for circulation that establishes new criteria for Congressional redistricting. The Congressional Petition obtained the necessary number of signatures and was certified for placement on the November 2010 general election ballot as Amendment 6.

10. At the general election held in Florida on November 2, 2010, Amendment 6 was approved by more than 60 percent of the voters casting ballots on the question.

11. Upon its receipt of more than 60 percent of the votes cast, Amendment 6 became Article III, section 20 of the Florida Constitution, which presently provides:

> Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES
>
> In establishing Congressional district boundaries:
>
> (1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
>
> (2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

> (3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

See, Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries, 2 So. 3d 175 (Fla. 2009) for the text of the language of Amendment 6.

12. There is an actual controversy of sufficient immediacy and concreteness relating to the legal rights and duties of the Legislature in drawing Congressional districts to warrant relief under 28 U.S.C. § 2201.

13. The harm to the citizens and voters in the State of Florida, including Plaintiffs, is sufficiently real and/or imminent to warrant the issuance of a conclusive declaratory judgment usefully clarifying the legal relations of the parties.

14. Plaintiffs have retained the undersigned counsel and have agreed to pay him a reasonable fee for his services.

COUNT I – VIOLATION OF THE SUPREMACY AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION

15. Plaintiffs repeat and realleges the allegations of paragraphs 1 through 14 as if set forth herein.

16. The Supremacy Clause of the Constitution mandates that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2.

17. The first clause of the Fourteenth Amendment to the United States Constitution provides:

> Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due*

> *process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Emphasis supplied.

18. The United States Constitution delegates the task of setting the time, place, and manner of setting Congressional elections to the Legislatures of each of the several States.

19. Article I, Section 4, Clause 1 specifically provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.

20. The authority to draw Congressional Districts falls within the ambit of "time, place and manner" authority found in Article I, Section 4, Clause 1. *See Vieth v. Jubelirer*, 541 U.S. 267, 275 (2004) (plurality opinion) ("Article I, § 4, while leaving in state legislatures the initial power to draw districts for federal elections, permitted Congress to 'make or alter' those districts if it wished.")

21. Congress has exercised the authority reserved to in Article I, Section 4, Clause 1. In The Apportionment Act of 1842, 5 Stat. 491, Congress provided that Representatives must be elected from single-member districts "composed of contiguous territory." Congress again imposed these requirements in The Apportionment Act of 1862, 12 Stat. 572, and in 1872 further required that districts "contai[n] as nearly as practicable an equal number of inhabitants," 17 Stat. 28, § 2. In The Apportionment Act of 1901, Congress imposed a compactness requirement. 31 Stat. 733. The requirements of contiguity, compactness, and equality of population were repeated in the 1911 apportionment legislation, 37 Stat. 13, but were not thereafter continued. Today, only the single member-district requirement remains. See 2 U. S. C. § 2c.

22. Article III, Section 20 of the Florida Constitution represents an impermissible effort by Florida to limit the discretion directly delegated by the United States Constitution to the Florida Legislature.

23. Under Article 1, Section 4, Clause 1, the discretion to set the time, place, and manner of holding Congressional elections belongs to the Florida Legislature. That discretion may only be limited or circumscribed by the Congress and not by way of an amendment to the Florida Constitution.

24. Article III, Section 20 may not immediately and unconditionally be enforced unless and until Congress authorizes circumscription of the Florida Legislature's power to set the time, place and manner of Congressional elections, including drawing districts.

25. Accordingly, Article III, Section 20 of the Florida Constitution violates the Supremacy Clause and is invalid.

26. A violation of the United States Constitution may be challenged pursuant to 42 U.S.C. § 1983.

COUNT II – PREEMPTION UNDER FEDERAL LAW

27. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 14 and 16 through 26 as if set forth herein.

28. Article III, Section 20 of the Florida Constitution is preempted by Article I, Section 4, Clause 1 of the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

A. Enter an order declaring that Article III, Section 20 of the Florida Constitution is unconstitutional on its face as an attempt to circumscribe the Constitutional discretion that devolves from Article I, Section 4, Clause 1 of the United States Constitution to the Florida Legislature to set the time, place, and manner of Congressional elections, including the drawing of Congressional districts, and that it is in direct contravention of the Supremacy Clause and the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution;

B. Enter an order declaring that Article III, Section 20 of the Florida Constitution is preempted by Article I, Section 4, Clause 1 of the United States Constitution;

C. Enjoin Defendants and any other agency or official acting on behalf of Defendants from enforcing Article III, Section 20 of the Florida Constitution;

D. Award Plaintiffs reasonable attorney's fees and costs pursuant to 42 U.S.C. § 1988 by and through 42 U.S.C. § 1983 and 28 U.S.C. § 1343; and

E. Grant such other relief as the Court deems just and proper.

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s/ Stephen M. Cody

Fla. Bar No. 334685

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 20, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

s/ Stephen M. Cody

037

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10 – CV- 23968 -UNGARO

MARIO DIAZ-BALART and CORRINE BROWN,

Plaintiffs,

vs.

STATE OF FLORIDA,

Defendant.

PLAINTIFFS' RESPONSE TO MOTION TO INTERVENE BY LEON W. RUSSELL, PATRICIA T. SPENCER, CAROLYN H. COLLINS, EDWIN ENCISO, STEPHEN EASDALE, and FLORIDA STATE CONFERENCE OF NAACP BRANCHES

Plaintiffs Mario Diaz-Balart and Corrine Brown, by and through their undersigned counsel respond in opposition to the motion to intervene filed by Leon W. Russell, Patricia T. Spencer, Carolyn H. Collins, Edwin Enciso, Stephen Easdale, and the Florida State Conference Of NAACP Branches. [DE 19]

Background

Plaintiffs have brought this action seeking a declaratory judgment that Article III, Section 20 of the Florida Constitution is unconstitutional as well as injunctive relief prohibiting the enforcement of Article III, Section 20 of the Florida Constitution. Leon W. Russell, Patricia T. Spencer, Carolyn H. Collins, Edwin Enciso, Stephen Easdale, and the Florida State Conference Of NAACP Branches have moved to intervene in this action pursuant to either Rule 24(a)(2) or Rules 24(b)(1)(B). Like the motion to intervene filed by the Florida chapter of the American Civil Liberties Union and some of its members [DE 11], the instant motion to intervene alleges that the individual intervenors are Florida registered

voters and are members of the NAACP. Just like the ACLU and its members, these Intervenors do not trust the State of Florida, to defend the action to their liking.[1]

Argument

I. The Motion to Intervene Under Rule 24(a)(2) Should Be Denied

This action seeks a declaration that the newly enacted amendment found in Article III, Section 20 of the Florida Constitution impermissibly conflicts with Article I, Section 4 of the United States Constitution. Like the ACLU Intervenors, the NAACP Intervenors move on the basis that they have an "interest" in the instant litigation, which is sufficient to grant them standing as party defendants. As discussed in the response to the ACLU's motion, the courts have recognized a great difference between a proposed intervenor being "interested in" a case and having "an interest" in the matter. The former may support intervention, while the latter will not.

Rule 24 of the Federal Rules of Civil Procedure contemplates two distinct species of intervention: intervention of right, under Rule 24(a), and permissive intervention under Rule 24(b). The Intervenors here seek to enter this case under either avenue. The intervention should be denied.

Rule 24(a)(2) provides:

> On timely motion, the court must permit anyone to intervene who: &
>
> (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.

Rule 24(a)(2), Fed.R.Civ.P. (emphasis supplied). The Eleventh Circuit has adopted the well-recognized four-step analysis of intervention under Rule 24(a)(2):

---

[1] The Court had granted the State of Florida an extension of time to respond to the Amended Complaint through January 11, 2011. Pam Bondi, the new Florida Attorney General, responded to the Amended Complaint with a motion to dismiss raising grounds under the Eleventh Amendment. The objection was well taken and a motion for leave to file a Second Amended Complaint has been filed which will substitute Governor Rick Scott and Secretary of State of Florida, Kurt S. Browning, into the matter as party defendants. The agreed motion is presently pending before the Court.

> Federal Rule of Civil Procedure 24(a) & "set bounds that must be observed. The original parties have an interest in the prompt disposition of their controversy and the public also has an interest in efficient disposition of court business." 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1904, at 270 (3d ed. 2007). To intervene of right under Rule 24(a)(2), a party must establish that "(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." *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989) (citing *Athens Lumber Co. v. FEC*, 690 F.2d 1364, 1366 (11th Cir. 1982)).

Fox v. Tyson Foods, Inc., 519 F.3d 1298, 1302-03 (11th Cir. 2008); *accord Stone v. First Union Corp.*, 371 F.3d 1305, 1308-09 (11th Cir. 2004). Because the Intervenors must meet all four parts of this test, failure to satisfy any one of the criteria justifies denial of its motion.

Of the four criteria set out in *Tyson Foods*, the NAACP Intervenors can only satisfy the first. Plaintiffs concede that the motion to intervene is timely. However, the Plaintiffs dispute the Intervenors' claims that they satisfy the remaining three.

The NAACP Intervenors cannot demonstrate a sufficient interest relating "to the property or transaction which is the subject of the action" in order to satisfy the second *Tyson Foods* criteria. Unlike a case where intervention is sought pursuant to Rule 24(a)(1), where party has a right to intervene set forth in federal law, a party seeking to intervene under Rule 24(a)(2) must establish a right of standing of his or her own.

The NAACP Intervenors' motion should be denied because they lack a "significant protectable interest" that may be practically impaired or impeded by the disposition of this case. *Donaldson v. United States*, 400 U.S. 517, 531 (1971). "[A]n undifferentiated, generalized interest in the outcome of an ongoing action" is insufficient. *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002) (internal quotation marks omitted). Rather, "at some fundamental level the proposed intervenor must

have a stake in the litigation." *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 946 (7th Cir. 2000) (internal quotation marks and brackets omitted).

The NAACP claims that it has an interest in this litigation because it has appeared as a party in other cases that have touched upon the right to vote. Unlike the reapportionment cases cited, there is no local perspective to be shared when it comes to issues of constitutionality. The NAACP and its members may offer insight when evaluating a reapportionment plan and whether, for instance, it splits compact and cohesive minority communities. However, whether a given state constitutional provision violates the United States Constitution does not depend on the viewpoint of any party or intervenor. Respectfully, on the issue of whether the newly enacted Article III, section 20 violates Article I, section 4 of the United States Constitution, the opinion and input of the NAACP Intervenors is indistinguishable from the thoughts of any other voter in the State.

A party has standing within the meaning of Article III when it establishes three elements: (1) injury, (2) causation, and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61. The injury must be an injury in fact, i.e., the invasion of a legally protected interest that is concrete and particularized, not conjectural or hypothetical. *Id.* at 560. "Moreover, there must be some causal connection between the asserted injury and the challenged action, and the injury must be of the type likely to be redressed by a favorable decision." *Gutherman v. 7-Eleven, Inc.*, 278 F.Supp.2d 1374, 1378 (S.D. Fla. 2003) (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985)). These three requirements have been described as "immutable," and as the "irreducible constitutional minimum" of standing under the "case or controversy" clause, *Bennett v. Spear*, 520 U.S. 154, 162 (1997), and *Defenders of Wildlife*, 504 U.S. at 560-61.

It "is not enough that an organization alleges that a particular party's conduct is against the policies or goals of that organization. It is precisely this type of broad organizational interest which the

Supreme Court rejected in *Sierra Club v. Morton*, 405 U.S. 727 (1972), since it is too abstract to represent a meaningful basis for standing." *Williams v. Adams*, 625 F.Supp. 256, 260 (N.D. Ill. 1985). Under *Sierra Club*, ACLU-FL's interest in the amendment at issue is too abstract. The only inference to drawn from the facts plead by the Intervenors is that ACLU-FL has no other stated purpose than to act as a vehicle for litigation. However, the propensity of an organization to file lawsuits, standing alone, does not anoint it with the status of one who has been injured in fact. In *Fair Housing Council of Suburban Philadelphia v. Montgomery Newspapers*, 141 F.3d 71 (3d Cir. 1998), the Third Circuit held "that the pursuit of litigation alone cannot constitute an injury sufficient to establish standing under Article III." *Id.* at 80. To find otherwise, any litigant could create injury in fact by bringing a case, and Article III would present no real limitation. *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C.Cir. 1990). What ACLU-FL seeks to assert in this case is an "abstract social interest" not cognizable as a protectable interest under Article III. *See, Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

The tenor of Intervenors' primary argument — that, as initiative supporters, they have a quasi-legislative interest in defending the measure they successfully advocated — must be rejected because they are not elected state officials or authorized by state law to represent the State's interests. In *Karcher v. May*, 484 U.S. 72, 82 (1987), the Supreme Court noted that applications of the Speaker of the General Assembly and the President of the Senate to intervene as parties-respondent on behalf of the legislature in defense of a legislative enactment was proper where New Jersey law empowered the state's legislature to defend the constitutionality of state enactments. However, the Supreme Court has never identified initiative proponents or supporters as Article III qualified defendants. In *The Don't Bankrupt Washington Committee v. Continental Illinois National Bank & Trust Co.*, 460 U.S. 1077 (1983) (mem.), the Supreme Court held that an initiative proponent lacked standing to bring an appeal. The Don't Bankrupt Washington Committee was the proponent of a Washington state initiative. *Continental*

Ill. Nat'l Bank & Trust Co. v. Washington, 696 F.2d 692, 694 (9th Cir. 1983). On a challenge to the initiative by the federal government, in which the Committee was permitted to intervene, the Ninth Circuit invalidated the initiative. *Id.* at 694, 702. The Committee appealed to the Supreme Court, but the Court dismissed the appeal because the Committee lacked standing, notwithstanding the fact that it had intervened in the case below.[2]

Here, both the Amended Complaint and the proposed Second Amended Complaint allege that the new provisions found in Article III, Section 20 of the Florida Constitution conflict with Article I, Section 4 and the Supremacy Clause of the United States Constitution. At its most primal level, the Intervenors cannot be found to have a vital interest in ensuring that a portion of state law that impinges upon duties that devolve directly from the United States Constitution to the Florida Legislature remain in effect, in spite of the command of the Supremacy Clause. If, as the Plaintiffs allege, the new amendment violates the federal Constitution, then it must give way, regardless of how many voters approved it or how fervently either the ACLU or the NAACP Intervenors advocated its passage. Their enthusiasm for the new measure and their desire to see that it remain in place when the Legislature takes up redistricting commencing in the spring of 2011 does not vest them with standing and the requisite interest to be a party defendant in this action.

Moreover, the State's successful assertion of the Eleventh Amendment in its motion to dismiss should be taken as proof that the State will adequately represent their interests. The Eleventh Circuit has stated that courts should "presume adequate representation when an existing party seeks the same objectives as the would-be interveners." *Clark v. Putnam County*, 168 F.3d 458, 461 (11th Cir. 1999). Although this presumption is "weak," it imposes on the proposed intervener "the burden of coming

[2] That dismissal was a decision on the merits that is binding on lower courts on the issues presented and necessarily decided. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (*per curiam*).

forward with some evidence to the contrary." *Id.* (emphasis added). Here, the NAACP Intervenors have failed to make any factual showing.

Accordingly, the Intervenor's motion to intervene as a matter of right must be denied.

II. The Motion to Intervene Under Rule 24(b) Should Also Be Denied

As an alternative to intervention as a matter of right, the Intervenors request that they be granted leave to enter the case under Rule 24(b). Rule 24(b) provides:

> (b) Permissive Intervention.
>
> (1) In General.
>
> On timely motion, the court may permit anyone to intervene who:
>
> (A) is given a conditional right to intervene by a federal statute; or
>
> (B) has a claim or defense that shares with the main action a common question of law or fact.

The Eleventh Circuit in *In re Ford Motor Co.*, 471 F.3d 1233, 1246 (11th Cir., 2006) noted:

> If a nonparty lacks the right to intervene, Rule 24(b) allows the court to grant it permission to do so "when a statute of the United States confers a conditional right to intervene," or "when [the] applicant's claim or defense and the main action have a question of law or fact in common." Fed.R.Civ.P. 24(b); see also *Chiles* [*v. Thornburgh*, 865 F.2d 1197 (11th Cir.1989)] at 1213. "[I]t is wholly discretionary with the court whether to allow intervention under Rule 24(b) and even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied, the court may refuse to allow intervention." *Worlds v. Dep't of Health and Rehabilitative Servs.*, 929 F.2d 591, 595 (11th Cir.1991) (quoting 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure, § 1913, at 376-77 (2d ed.1986)).

In the instant case, the proposed answer offered by the Intervenors shows that they offer nothing unique to the case. The Intervenors admit some of the facts alleged in the Amended Complaint and deny others. They assert five affirmative defenses. The first, sovereign immunity, is a defense personal

to the State of Florida and may not be asserted by these parties.[3] The second defense, that the State of Florida is not a proper party, is also a defense that belongs to the State and cannot be raised by these Intervenors. The third defense, that the Amended Complaint fails to state a cause of action, is a generic defense that does not need the presence of the Intervenors to be evaluated by the Court. The fourth defense is that the claim is unripe. (The defense fails to allege any factual basis for this lack of ripeness.). Finally, the fifth defense is that the Plaintiffs lack standing. The first three defenses were copied verbatim from the proposed answer of the ACLU. The last two defenses were utterances of boilerplate.

In short, the Intervenors bring nothing of substance to the case. The fact that they are merely "interested in" the outcome of this case does not give them standing to participate in this matter. The Amended Complaint seeks declaratory and injunctive relief against the State of Florida. Whether that relief is granted or denied, the decision of the Court will not affect the Intervenors to a greater degree than the millions of voters who cast ballots in the November 2010 election either in support or opposition to the amendment in question. The Intervenors's desire to affect the outcome of this case or, at the very least, to have their voices heard does not create a "defense that shares with the main action a common question of law or fact" as contemplated by Rule 24(b).

"[B]ecause an intervenor participates on equal footing with the original parties to a suit, a movant for leave to intervene ... must satisfy the same Article III standing requirements as original parties." *Building and Constr. Trades Dept., AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir.1994) (citations omitted). As the Eighth Circuit held:

> [A]n Article III case or controversy, once joined by intervenors who lack standing, is – put bluntly – no longer an Article III case or controversy. An Article III case or controversy is one where all parties have standing, and a

[3] As discussed previously, the Plaintiffs have moved for leave to file a Second Amended Complaint which does not name the State as a defendant.

> would-be intervenor, because he seeks to participate as a party must have standing as well. The Supreme Court has made it very clear that "[those] who do not possess Art. III standing may not litigate as suitors in the courts of the United States."

Mausolf v. Babbit, 85 F.3d 1295, 1300 (8th Cir.).

The best gloss that can be put on the Intervenors' motion is that are interested bystanders. However, no matter how hard they press their case, they cannot demonstrate that they have a interest which is any different from the millions of voters who voted for the measure or the thousands who actively campaigned for it and urged their friends and neighbors to support it. In the end, the Intervenors should be left where they are, on the sidelines, free to observe this case, but not free to participate as an equal party.

Conclusion

Plaintiffs respectfully request that the Court deny the motion to intervene filed by Leon W. Russell, Patricia T. Spencer, Carolyn H. Collins, Edwin Enciso, Stephen Easdale, and the Florida State Conference Of NAACP Branches.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 20, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

s/Stephen M. Cody

038

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 10-23968-UNGARO

MARIO DIAZ-BALART and
CORRINE BROWN

Plaintiff,

v.

STATE OF FLORIDA,

Defendant.
_____/

ORDER ON DEFENDANT'S MOTION TO DISMISS AND PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT.

THIS CAUSE is before the Court upon Defendant's Motion to Dismiss (D.E. 26) and Plaintiffs' Agreed Motion for Leave to File Second Amended Complaint (D.E. 36).

THE COURT has considered the Motions, the pertinent portions of the record, and is otherwise fully advised in the premises. Defendant moves to dismiss Plaintiffs' First Amended Complaint. Plaintiffs move for leave to file a Second Amended Complaint adding Governor Rick Scott and Secretary of State Kurt S. Browning as defendants. Plaintiffs also request that the Court reset the scheduling deadlines to allow for the Second Amended Complaint to be served upon the new defendants. It is hereby

ORDERED AND ADJUDGED that the Motion for Leave to File Second Amended Complaint (D.E. 36) is GRANTED. The Second Amended Complaint SHALL be deemed filed as of the below signature date. It is further

ORDERED AND ADJUDGED that the Motion to Dismiss (D.E. 26) is DENIED AS MOOT. The Court will separately enter an order re-setting the relevant scheduling deadlines.

DONE AND ORDERED in Chambers, in Miami, Florida this 31st day of January, 2011.

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

cc: counsel of record

039

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 10-23968-UNGARO

MARIO DIAZ-BALART and
CORRINE BROWN

Plaintiff,

v.

STATE OF FLORIDA,

Defendant.
_____/

ORDER RESETTING PLANNING AND SCHEDULING CONFERENCE

THIS CAUSE is before this Court upon a *sua sponte* review of the record.

THE COURT has considered the pertinent portions of the record and is otherwise fully advised in the premises. It is

ORDERED AND ADJUDGED that the Planning and Scheduling Conference currently scheduled for 11:00 a.m. on February 4, 2011 is rescheduled for **April 8, 2011 at 10:00 a.m.** It is further

ORDERED AND ADJUDGED that the parties must submit a Joint Planning and Scheduling Report no later than **April 1, 2011**.

DONE AND ORDERED in Chambers at Miami, Florida, this 31st day of January, 2011.

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

copies provided:
counsel of record

040

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 10-23968-UNGARO

MARIO DIAZ-BALART and
CORRINE BROWN

Plaintiff,

v.

STATE OF FLORIDA,

Defendant.
_____/

ORDER TO SHOW CAUSE

THIS CAUSE came before the Court upon a *sua sponte* review of the record.

THE COURT has considered the pertinent portions of the record and is otherwise fully advised in the premises. It is hereby

ORDERED AND ADJUDGED that Plaintiffs SHALL show cause in writing, not to exceed five pages, on or before **February 11, 2011**, why this Court has subject jurisdiction over this case. **Failure to comply with this Order will result in dismissal without further notice.**

DONE AND ORDERED in Chambers at Miami, Florida, this _31st__ day of January, 2011.

_____

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

copies provided to: Counsel of Record

041

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. STATE OF FLORIDA, RICK SCOTT, and KURT BROWNING, Defendants, and THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; HOWARD SIMON; BENETTA M. STANDLY, SUSAN WATSON, and JOYCE HAMILTON HENRY, Defendant-Intervenors, and FLORIDA STATE CONFERENCE OF NAACP BRANCHES; DEMOCRACIA AHORA; LEON W. RUSSELL; PATRICIA T. SPENCER; CAROLYN H. COLLINS; EDWIN ENCISO; and STEPHEN EASDALE, Defendant-Intervenors.	)	Case No. 10-CV-23968-UNGARO

REPLY IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AS DEFENDANTS FILED BY FLORIDA STATE CONFERENCE OF NAACP BRANCHES, DEMOCRACIA AHORA, LEON W. RUSSELL, PATRICIA T. SPENCER, CAROLYN H. COLLINS, EDWIN ENCISO, AND STEPHEN EASDALE

INTRODUCTION

In their opposition brief, Plaintiffs contend that Movants must have Article III standing to intervene and that they lack such standing because they do not have an interest in the outcome of the litigation.[1] According to Plaintiffs, Movants are merely "interested in" the case as if Movants were spectators on the sidelines of a sporting event. Plaintiffs are wrong on both the law and the facts. The Eleventh Circuit has made it crystal clear that intervenors *do not* need Article III standing. And, even if it were required, Movants clearly have standing and possess the requisite interest in the outcome of the case to warrant their intervention. Put simply, Plaintiffs – themselves entrenched incumbent members of Congress – want to extinguish Movants' new state constitutional rights to protection from political gerrymandering and redistricting done with the intent or result of abridging racial or language minority voters' equal opportunity to participate in the political process. *See* Fl. Const. Art. III, § 20(a) ("[D]istricts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice") ("Amendment 6"). As racial and language minority voters, and organizations representing them, Movants' interest in preserving their own voting rights protected by Amendment 6 and ensuring that that Plaintiffs do not succeed in rendering them unenforceable is far from vague, undifferentiated and generalized. It is real, immediate, particularized and intensely personal.

Plaintiffs are equally wrong in suggesting that Movants' interest will be adequately represented by Governor Scott[2] or Secretary Browning. Mr. Browning was the very public leader of the opposition to Amendment 6 and chaired the political action committee whose sole

[1] Plaintiffs do not appear to oppose the intervention of Democracia Ahora.
[2] Governor Scott can veto any congressional redistricting plan the Legislature passes.

purpose was to lobby for its defeat at the polls. Two days after taking office, Defendant Governor Scott appointed Browning Secretary of State – the officer primarily responsible for running the electoral processes in Florida. And, true to form, one day after Secretary Browning took office, the State retracted its previously filed petition for preclearance of the Amendments under the Voting Rights Act. The idea that Defendants will aggressively protect Movants' interests in preserving their rights under Amendment 6 is ludicrous. Unless Movants are permitted to intervene, the incumbent officials whose power Amendment 6 curbs will be alone in standing for and against its validity – freezing out the nearly 65% of Florida's electorate who approved it. Movants are entitled to intervene, and their motion must be granted.

I. MINORITY VOTERS' INTERESTS ARE UNDER ACUTE THREAT FROM PLAINTIFFS' SUIT, WHICH NOW IS DEFENDED ONLY BY OFFICIALS WHO OPPOSE AMENDMENT 6.

Plaintiffs concede that Movants' motion to intervene was timely filed. Accordingly, Movants must show only that they have an interest in the underlying "property or transaction which is the subject of the action," that disposition of the case could impair that interest, and that existing parties may not adequately represent that interest. *See Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989). Movants easily satisfy each of these requirements, and Plaintiffs have put forth no credible arguments to the contrary.

A. Plaintiffs' Reliance on Article III Standing Requirements Is Wholly Misplaced.

As they did in their opposition to the ACLU's motion to intervene, Plaintiffs advance the mistaken notion that "a party seeking to intervene under Rule 24(a)(2) must establish a right of standing of his or her own." Opp., at 3-4 (listing standing requirements from *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Clear Eleventh Circuit law is directly contrary. "[A] party seeking to intervene ***need not demonstrate that he has standing*** in addition to meeting the

requirements of Rule 24," as long as there is an Article III case or controversy between the existing parties. *See Chiles*, 865 F.2d at 1213 (emphasis added); *Loyd v. Alabama Dep't of Corrections*, 176 F.3d 1336, 1339 (11th Cir. 1999); *Cox Cable Communications, Inc. v. United States*, 992 F.2d 1178, 1181 (11th Cir. 1993); *Diamond v. Charles*, 476 U.S. 54, 64 (1986).[3]

Article III standing requirements are imposed on ***plaintiffs*** who affirmatively ***invoke*** a federal court's power to remedy an existing or imminent legal wrong. As the Supreme Court has explained, "[t]he standing inquiry . . . turns on the alleged inquiry that prompted ***the plaintiff to invoke*** the court's jurisdiction in the first place." *Salazar v. Buono*, 130 S.Ct. 1803, 1815 (2010) (emphasis added); *see also Raines v. Byrd*, 521 U.S. 811, 818-19 (1997) ("[a] ***plaintiff*** must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.") (emphasis added). Imposing those requirements on a potential intervenor-defendant, who did not seek to invoke the federal judicial power to remedy an existing wrong, makes little sense. "Requiring standing of someone who seeks to intervene as a defendant . . . runs into the doctrine that the standing inquiry is directed at those who invoke the court's jurisdiction." *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2004). Recognizing that sensible principle, it is clear that, in the Eleventh Circuit, as elsewhere, potential intervenors need not have Article III standing to intervene, as long as there exists an Article III case or controversy between the existing parties. *Chiles*, 865 F.2d at 1213.

Plaintiffs do not address the binding Eleventh Circuit precedent. Instead, they rely on cases from other circuits, cases that are clearly distinguishable (such as *Donaldson v. United States*, which is about taxpayer standing), cases that have nothing to do with intervention (such

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[3] Other circuits have reached the same conclusion. *See, e.g., City of Colorado Springs v. Climax Molybdenum Co.*, 587 F.3d 1071, 1079 (10th Cir. 2009); *Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998); *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir. 1994); *U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978).

as *Lujan*), or cases that actually support Movants' position. For example, the one-line order in *The Don't Bankrupt Washington Committee v. Continental Illinois Nat'l Bank & Trust Co.*, 460 U.S. 1077 (1983), is of no help to Plaintiffs. In that case, the Supreme Court dismissed the intervenors' petition for certiorari where, on the facts of that case, the only named defendants with whom there had been a case or controversy below were no longer in the case. Even those intervenors, however, who were the proponents of a challenged state initiative, were permitted to intervene in the lower courts, just as Movants are seeking to do here. *See Continental Illinois Nat'l Bank & Trust Co. v. Washington*, 696 F.2d 692, 694 (9th Cir. 1983). Nothing about the Supreme Court's one-line denial of certiorari suggests that the proponents' intervention below had been improper. Similarly, Plaintiffs rely on *Mausolf v. Babbitt*, 85 F.3d 1295 (8th Cir. 1996), in which (contrary to Eleventh Circuit law) the Eighth Circuit held that standing is required for a defendant-intervenor. In *Mausolf*, however, an environmental interest group moved to intervene alongside the United States to defend against a suit by snowmobilers challenging environmental regulations. The Eighth Circuit *reversed* the district court's denial of intervention, holding that the association had standing to intervene because of its members' interest in enforcement of the regulations, and that the association's interests were not adequately represented by the governmental defendants. *Id.* at 1304. The same result follows here.

B. Plaintiffs' Action Threatens a Concrete, Serious Injury to Florida's Minority Voters that Can Be Redressed by Permitting Movants to Intervene to Defeat Plaintiffs' Suit.

Regardless of whether the Court applies the Rule 24 standard (which Eleventh Circuit law requires) or that for Article III standing (which Eleventh Circuit law rejects), Movants possess the requisite interest to meet either standard. Here, a judgment in Plaintiffs' favor would cause acute and particularized harm to Movants, and Movants thus must be permitted to participate in preventing those harms.

In their opposition, Plaintiffs attack only superficial caricatures of Movants' interest in the outcome of this case. They suggest that Movants' interest is having appeared as a party in other voting rights cases, *see* Pls.' Opp. at 4, that the action is merely against the organizational Movants' policies or goals, *id.*, that the interest is somehow found in Movants' "propensity... to file lawsuits," *id.* at 5, or that Movants' claim a "quasi-legislative" interest because they supported the Amendment at the polls and worked for its passage, *id.* Though the Florida NAACP and Democracia Ahora did work very hard for the Amendment's passage and did participate in litigation aimed at keeping it off the ballot, Movants have not relied on these as the primary interests justifying their intervention.

Indeed, the same goes for Plaintiffs. As members of Congress, they have no personalized interest in the legal substance of their claim – that the alleged exclusive domain of the Florida Legislature not be circumscribed. Rather, as incumbents, their obvious interest here is to nullify Amendment 6's proscription against incumbent favoritism. And, they claim to have been harmed by Amendment 6 as "citizens and voters." Second Am. Compl. ¶ 3. It necessarily follows that if Plaintiffs have standing to challenge Amendment 6 as "citizens and voters," Movants have standing to defend it. Nor is it remotely relevant whether Movants have a unique interest in the substantive legal ground on which Plaintiffs challenge Amendment 6, that being the Supremacy Clause and Article I, Section 4 of the U.S. Constitution. *See* Pls.' Opp. at 6. *No* case stands for the proposition that a potential intervenor's interest in the action must turn on the substantive legal grounds raised by the plaintiff (which are always subject to change through amending the complaint as Plaintiffs have done here and may continue to try to do).

By virtue of Amendment 6, Florida's minority voters, including Movants, now posses critically important rights and protections that state law did not previously guarantee before the

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Amendment's passage. Among other protections afforded by the Amendment, the Florida Legislature is constitutionally barred from drawing congressional districts "with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice." Fl. Const. Art. III, § 20(a). As a corollary, Amendment 6 likewise bars the Legislature from drawing districts with the intent to favor an incumbent, a boon to historically underrepresented voters like Movants. Plaintiffs' lawsuit, if successful, will extinguish those rights and protections under the Florida Constitution. Indeed, nullifying Amendment 6 and preventing its enforcement is the only relief sought and apparently is Plaintiffs' solitary purpose.

In other words, if Plaintiffs lose this case, Movants keep the protections of their voting rights under state law. If Plaintiffs prevail, Movants lose them. What is at stake here really is that stark, and Movants' personal interest in this action really is that plain. Put in terms of Rule 24, Movants clearly have an interest in the "property or transaction which is the subject of the action" – that being the rights and protections secured by Amendment 6 – and, if Plaintiffs' prevail, the disposition of the action most certainly will impair or impede their ability to protect that interest. *See* Fed. R. Civ. P. 24(a)(2). The same interest constitutes the "'significant protectable interest' that may be practically impaired or impeded by the disposition of this case" that Plaintiffs insist is necessary to satisfy Article III standing. (Pls.' Opp. at 3-4).

As several controlling decisions recognize, minority voters and organizations representing them are uniquely positioned to defend against efforts to nullify minorities' legal protections. In *Northwest Austin Utility Dist. No. One v. Holder* ("*NAMUDNO*"), 129 S. Ct. 2504, 2508-09 (2009), for example, minority voters and organizations properly intervened to defend against a suit seeking to strike down Section 5 of the Voting Rights Act. *See Northwest*

Austin Mun. Utility Dist. No. One v. Mukasey, 572 F. Supp. 2d 221, 230 (D.D.C. 2008) (three-judge court). As in *NAMUDNO*, Plaintiffs seek to strip minority voters of critical legal protections, and minority voters and organizations seek intervention to stop them from doing so. Similarly, in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), the Supreme Court affirmed a three-judge court decision to allow African-American voters to intervene in a Section 5 preclearance action. *Id.* at 474, 476. The same result is required here. Likewise, in *Clark v. Putnam County*, 168 F.3d 458, 461-62 (11th Cir. 1999), a single-member district voting system intended to benefit minority voters was under threat from a legal challenge. The Court held that "black voters" were "entitle[d] . . . to intervene." *Id.* And the Florida NAACP and Democracia Ahora are entitled to intervene because Plaintiffs' suit jeopardizes their members' interests. *See Borrero v. United Healthcare of New York, Inc.*, 610 F.3d 1296 (11th Cir. 2010).[4]

C. **The State Defendants Do Not Adequately Represent Movants' Interests.**

Plaintiffs barely dispute that Movants have shown that existing parties' representation of their interests "may be inadequate." Pls.' Opp. at 9-11. It is a "minimal" showing, *see Clark*, 168 F.3d at 460, and "any doubt" must be resolved in Movants' favor, *Fed. Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993). Movants already have shown in their opening memorandum the many reasons courts have recognized in holding that state officials do not adequately represent the interests of private litigants. *See* Movants'

[4] *See also, e.g., East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636, 637 (1976) ("Respondent Marshall was permitted to intervene on behalf of himself and all other black voters in East Carroll."); *Republican Party of North Carolina v. Martin*, 865 F.2d 1259 (4th Cir. 1988) (table) (reversing denial of intervention motion brought by association of black lawyers in case challenging residency requirement); *County Council of Sumter County, S.C. v. United States*, 555 F. Supp. 694, 696-97 & n.2 (D.D.C. 1983) (citing the "long line of cases in which this Court has routinely allowed intervention by" minority voters); *NAACP, Inc. v. Fla. Bd. of Regents*, 863 So.2d 294, 300 (Fla. 2003) ("[I]t ma[kes] little sense to . . . deny standing to an association that was formed to protect the rights of minorities and is composed substantially of minorities, when policy concerning the admission of minorities to state universities [is] changed.").

Opening Mem. at 10-11 (citing cases). Indeed, "it is normal practice in reapportionment controversies to allow intervention of voters supporting a position that could theoretically be adequately represented by public officials" because such officials "may represent only part of the electorate." *Clark*, 168 F.3d at 462. The reason is simple: "like all elected officials," such defendants have an "interest in remaining politically popular and effective leaders." *Id.*; *Chiles*, 865 F.2d at 1214-15 ("The fact that the interests are similar does not mean that approaches to litigation will be the same."). That interest undeniably separates Movants from Defendants. As one article explains: "The people loved the notion of doing away with blatant gerrymandering, but the politicians who depend on the redistricting process to solidify their hold on their seats for term after term hated it." *Contemptible Pols Thwart We the People*, Ocala Bus. J., Jan. 30, 2011 (attached as Exhibit J).

Plaintiffs respond that "the NAACP Intervenors have failed to make any factual showing," and sarcastically claim that Movants "do not trust [Governor Scott or Secretary Browning] to defend the action to their liking." Pls.' Opp. at 2. The reality, however, is that Plaintiffs and Defendant Browning colluded in working tirelessly to kill Amendment 6. The result is that the chief opponents of core minority protections and redistricting reform are now on both sides of this case, creating a perfect storm of troubling circumstances requiring intervention.

Before his appointment, Mr. Browning chaired "Protect Your Vote," a political committee started by Plaintiffs with the *sole purpose* of preventing the passage of Amendments 5 and 6. *See* Exhibit A (Florida Department of State political committee lookup for "Protect Your Vote, Inc."). Mr. Browning literally stood with Plaintiffs in that effort. *See* Mary Ellen Klas, *Corrine Brown and Mario DB: Side by Side to Protect Districts*, Naked Politics: The Miami Herald Blog, Sept. 20, 2010 (attached as Exhibit B) (describing joint press conference). As one

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article said: "Joining Diaz-Balart atop [Protect Your Vote] are Democratic Rep. Corrine Brown and recently retired Florida Secretary of State Kurt Browning." Brent Batten, *Fair Fight Gets Fairer with Cash Infusion,* Naples Daily News, Oct. 10, 2010 (attached as Exhibit C).

Mr. Browning repeatedly championed the Amendments' defeat, raising and spending millions of dollars to defeat them and personally advocating against them. For example:

- Appearing at a press conference with Plaintiffs, Mr. Browning stated that the Protect Your Vote "committee is ready to raise and spend 'at least $4 [million] maybe more' to defeat Amendments 5 and 6." See Klas, Exhibit B.
- Plaintiffs and Mr. Browning together argued "to kill the constitutional amendments." See The Hotline, Sept. 24, 2010, at 3 (attached as Exhibit D).
- On a radio show on October 22, 2010, Mr. Browning derided the Amendments as "nothing but a pure power grab by the liberal interests." Transcript (attached as Exhibit E), at 4.

Governor Scott's appointment of Mr. Browning confirms his own opposition to the Amendments. Indeed, it was not lost on the media that Mr. Browning's public leadership of the anti-Amendments effort was followed in short order by his appointment. As one article is titled: "Scott Appoints 'Fair Districts' Foe to Run 2012 Elections." Cooper Levey-Baker, Florida Independent, Jan. 6, 2011 (attached as Exhibit F). Governor Scott's choice of "Browning [to] oversee Florida's 2012 elections, the first . . . that will be required to adhere to the 'Fair Districts' standards," *id.*, speaks volumes about his own animosity toward Amendment 6.

Nothing more starkly illustrates Defendants' conflict of interest here than their first official action concerning the Amendments. Section 5 of the federal Voting Rights Act requires "covered jurisdictions" to preclear with the Attorney General or the D.C. District Court even minor changes in election law before they can be implemented. *Purcell v. Gonzalez*, 549 U.S. 1, 2 (2006); *Allen v. State Bd. of Elec.*, 393 U.S. 544, 566 (1969). Because five Florida counties are "covered jurisdictions," *see DeGrandy v. Wetherell*, 815 F. Supp. 1550, 1574 (N.D. Fla. 1992), the State properly submitted an application for preclearance to the Department of Justice on

December 10, 2010. *See* Cover Letter to Application, Dec. 10, 2010 (attached as Exhibit G). On January 7, 2011, however – only three days after Governor Scott was inaugurated, and two days after he appointed Secretary Browning – the State inexplicably withdrew the application at the direction of Governor Scott. *See* Notice of Withdrawal, Jan. 7, 2011 (attached as Exhibit H); *Scott Pulls Back Fla. Redistricting Amendments*, Miami Herald, Jan. 26, 2011 ("A spokesman for Gov. Rick Scott has confirmed he quietly pulled back a request for federal approval of two new redistricting amendments to the Florida Constitution.") (attached as Exhibit I). Defendants' abrupt withdrawal of Florida's already-filed preclearance application appears calculated to delay and possibly thwart implementation of the Amendments.

For all of these reasons, Movants are entitled to intervene as of right.

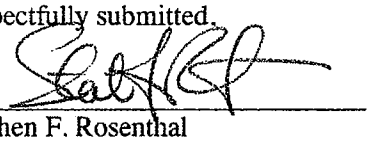
II. PERMISSIVE INTERVENTION LIKEWISE SHOULD BE GRANTED

Should the Court deny Movants' request for intervention as of right, the Court should permit Movants to intervene permissively. Rule 24(b)(1)(B) permits intervention for parties who have a "a claim or defense that shares with the main action a common question of law or fact." Plaintiffs do not dispute that Movants' meet this standard. Further, all of the considerations that support granting Movants' motion to intervene of right support permitting them to intervene permissively. As Plaintiffs do not contest, Movants have filed a timely motion that causes no prejudice to existing parties. Movants have a compelling interest in retaining the state constitutional minority protections Plaintiffs seek to annul and in ensuring that other such protections survive. And Defendants – themselves opponents of Amendment 6 – will not adequately defend Movants' interests.

CONCLUSION

For the reasons above, and those in Movants' earlier filings, Movants must be permitted to intervene in this action.

Respectfully submitted,

s/ 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this 31st day of January, 2011, I served the foregoing document with the Clerk of the Court using CM/ECF. I also certify on this date the foregoing document is being served on all parties identified below in the manner specified either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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Stephen F. Rosenthal

EXHIBIT A

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Division of Elections

Committee Tracking System

Protect Your Vote, Inc.

Type: Political Committee

Status: Closed

Address: 610 South Boulevard
Tampa, FL 33606

Phone: (813)254-3369

Chairperson: Kurt S. Browning

Treasurer: Nancy Watkins
610 South Boulevard
Tampa, FL 336060000

Registered Agent: Richard E. Coates
115 East Park Avenue, Suite 1
Tallahassee, FL 323010000

Purpose:

Affiliates:

Campaign Finance Activity

Campaign Documents

EXHIBIT B

NAKED POLITICS
The raw truth about power and ambition in Florida

« Down in polls, Charlie Crist goes after Marco Rubio | Main | Lincoln Diaz-Balart joins David Rivera to woo Colombian-American vote »

Corrine Brown and Mario DB: side by side to protect districts

Flanked by the two business groups that have endorsed an all-Republican ticket, Democrat U.S. Rep. **Corrine Brown** and Republican U.S. Rep. Mario **Diaz Balart** launched an organization Monday to fight the redistricting amendments on the November ballot.

The Protect Your Vote campaign has enlisted the help of former Crist Secretary of State **Kurt Browning**, hired the public relations firm of **Ron Sachs** Communications, and employed a video production team. The committee is ready to raise and spend "at least $4 [million] maybe more" to defeat Amendments 5 and 6, Browning said, and will place ads on television. Associated Industries of Florida and the Florida Chamber of Commerce have lined up in support.

Brown said she's convinced the redistricting standards imposed by the Fair Districts amendments organization will lead to fewer minorities elected to Congress, which now include three African Americans and three Hispanics among the 25 representatives. Diaz Balart is abandoning his congressional district to move to the more politically secure seat now held by his brother, **Lincoln Diaz Balart** who is retiring.

"These amendments will have the effect of bleaching the state of Florida as it was before 1992 when minorities did not have the ability to elect candidates of their choice," Diaz Balart said. "It's unworkable. It will have a devastating effect on minorities across the state."

Brad Ashwell of Florida Public Interest Research Group said the two congressmen are less interested in minorities than protecting themselves. "Their opposition is in self interest," he said.

The proposed amendments will do more to increase competition in Florida's politically manipulated districts and will result in more minorities elected to office, not less, he said, because it expressly prohibits legislators from drawing districts with the intent of diminishing minority seats.

All but two of the state's black state legislators endorse the amendments, which will require the legislature follow a set of standards when crafting new congressional and legislative districts. The NAACP and the ACLU also endorse the amendments.

"It's inherently political," Ashwell said. "Reforming the redistricting process is an aggressive assault on whatever party is in power. It's going to radically affect their ability to retain their power. What we want is more competitive elections, more accountability."

Posted by Mary Ellen Klas on September 20, 2010 in 2010 election , Redistricting | Permalink

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The REAL reason they are against FAIR Redistricting is because they are trying to Protect their OWN Seats. Republicans have controlled the Florida Legislature for years because of their tailor made districts which favor them, but not the interests of the electorate.
There needs to be contiguous continuity to FL Legislative districts. Minorities will be better represented by having more Democrats in office who actually support issues important to them.
http://www.fairdistrictsflorida.org/home.php

Posted by: Seth Platt | September 20, 2010 at 04:19 PM

See who REALLY supports Amendments 5 & 6 (Hint: ONE OF THEM IS ACORN!!!)

http://nix5and6.com/why4.shtml

Posted by: Concerned Floridian | September 20, 2010 at 05:09 PM

The unintended consequence of these amendments, which require "compact" districts, will be the election of more Republicans, not less. Democrats in Florida live in urban areas while Republicans are more suburban and rural. A compact district that is required to follow municipal boundaries will pen Democrats in. Plus, with the Supreme Court's recent reinterpretation of the Voting Rights Act, minority access seats, like the one that elected Brown and Alcee Hastings will be a thing of the past.

Posted by: Steve | September 21, 2010 at 09:06 AM

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Florida Governor
Florida Governor's Race
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Florida Voters
Food and Drink
Games
George LeMieux
Holly Benson
Ileana Ros-Lehtinen
Immigration
Insurance Special Session
Jeb Bush
Jeff Atwater
Jeff Greene
Jeff Kottkamp
Joe Garcia
John Thrasher
Kendrick Meek
Lincoln Diaz-Balart
Loranne Ausley
Marco Rubio
Mario Diaz-Balart
Mel Martinez
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Religion
Republican National Convention
Republican Party of Florida
Rick Scott
Robert Wexler
Ron Klein
Science
Scott Maddox
Sports
Swing Voters
Tax and Budget Reform
Television
Travel
U.S. Senate
Voting Issues
Weblogs

Naked Politics On The Road

So long New Hampshire
On the air in New Hampshire, on the ground in Florida
Obama taps beer, support in Portsmouth

(URLs automatically linked.)

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Post Preview

MiamiHerald.com: Politics

Gov. Rick Scott live on Twitter at 7 p.m.
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More states join Florida lawsuit against healthcare law
New DCF chief's résumé mirrors Gov. Rick Scott's
Scott's media limits upset journalists

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EXHIBIT C

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Naples Daily News (Florida)

October 10, 2010 Sunday
Naples Daily News Edition

SECTION: A; Pg. 3

LENGTH: 648 words

HEADLINE: Fair fight gets fairer with cash infusion

BODY:

It looks like we're in for a Fair fight.

Opponents of two ballot measures that would change the way lines for congressional and state legislative districts are drawn in Florida have started airing ads highlighting the partisan nature of the effort.

Amendments 5 and 6, which will appear on the Nov. 2 ballot, would require districts to be compact and to follow existing municipal boundaries when possible. They would also prevent lines from being drawn with the intent to favor or disfavor any politician or party.

For months, Republican Rep. Mario Diaz-Balart has been telling anyone who will listen that the proposed amendments are self-contradictory, unworkable and mean fewer blacks and Hispanics will be able to successfully run for office.

Now he has help.

A political action committee, Protect Your Vote, has formed for the purpose of defeating Amendments 5 and 6. Joining Diaz-Balart atop the organization are Democratic Rep. Corrine Brown and recently retired Florida Secretary of State Kurt Browning, a Republican.

As of last week, the group had raised $275,000, all but $25,000 of it coming from the Florida Association of Realtors Advocacy Fund. TECO Energy Inc. contributed the remainder.

The figure is dwarfed by the more than $4 million raised by Fair Districts Florida, the group pushing for the amendments' passage.

The bulk of Fair Districts Florida's contributions come from individuals and groups traditionally aligned with Democratic Party causes.

Major contributors include Acorn, the Service Employees International Union, the National Education Association, trial lawyers and conservation groups such as the Washington, D.C.-based League of Conservation Voters.

Predictably, the first radio ads aired by Protect Your Vote attack the motives of Fair Districts Florida, pointing out the left-leaning agendas of the groups financing it.

Less predictably, perhaps, Protect Your Vote has assembled a noteworthy array of prominent Democrats and leaders in the minority community in support of its effort. In addition to Brown, whose district sprawls from Jacksonville to Orlando and is cited as the poster-child for gerrymandered districts, Democratic state senators Al Lawson and Gary Siplin, both black, are supporting Protect Your Vote.

Also on board are T. Willard Fair, president of the Urban League of Greater Miami and Barbara Howard, chairwoman of the Congress of Racial Equality in Florida. All five serve on what the group calls its "African-American Steering Committee," emphasizing the argument that, if passed, Amendments 5 and 6 would decrease the number of minority members serving in the state and national legislatures.

The laws and processes surrounding district configuration in Florida are complex, but the two sides can be summed up fairly simply.

Fair Districts Florida, which has the support of the NAACP, argues that the political party controlling the state Legislature - that's been the Republican Party for the last

20 years - draws districts to maximize its majority and for the benefit of its incumbent members. Instead of voters picking their representatives, representatives pick their voters, argues Ellen Frieden, the Fair Districts campaign manager.

Diaz-Balart, Brown and others respond by saying courts have ordered some districts to be drawn in such as way as to concentrate minority population centers together to increase the likelihood that a person of color will be elected to office. Splitting heavily Democratic minority population centers into other districts may tilt the balance of power in those districts toward the Democrats, but will have the effect of excluding minority candidates from winning, they contend.

Now, with an organization up and running and at least a modest amount of money to work with, they can make that contention to a broader audience.

Connect with Brent Batten at www.naplesnews.com/staff/brent_batten

LOAD-DATE: October 10, 2010

EXHIBIT D

19 of 52 DOCUMENTS

The Hotline

September 24, 2010

LENGTH: 2019 words

HEADLINE: Back To The Drawing Board

BODY:

MAYORS: Total Recall

"The narrative of" DC Mayor Adrian Fenty's "rise and fall" could "also describe the political arc of" Newark Mayor Cory Booker, Philadelphia Mayor Michael Nutter and Detroit Mayor David Bing.

Experts "see a paradox in the fact that these African-American mayors are facing such difficulties in the years after a black man has become president. But (Pres) Barack Obama's election may have implanted an overly simplified view of racial politics, particularly in big cities. Fenty's race, for instance, was entangled in racial politics despite the fact that his opponent" DC Council Chair Vincent Gray "was also an African-American."

These 4 mayors were "technocrats" who went about "forging alliances with corporate interests and prosperous suburbs, encouraging gentrification, hiring outsiders to fill key jobs, inviting in private foundations that see the inner cities as testing grounds for their ideas." But "some of the things that have brought today's technocratic mayors acclaim from outside their communities engendered suspicion within them."

Dem pollster and ex-Obama adviser Cornell Belcher: "Ethnic politics is still very much alive and well in big-city politics. Can you bridge the ethnic politics, or at least not trigger them in a negative way? Yes. But you have to be strategically cognitive of it. You can't pretend that race doesn't matter, because we are somehow post-racial" (Tumulty/Bacon, Washington Post, 9/23).

"The throw-the-rascals-out mood is so strong... that some voters are not even waiting until Election Day -- they are mounting recall campaigns to oust mayors in the middle of their terms."

"Over the last two years, failed recall" camps "have sought the ouster of mayors in" Akron, OH; Chattanooga, TN; Flint, MI; Kansas City, MO; Portland, OR; and Toledo, OH, among other cities. "Next month the voters of North Pole," AK "will vote on whether to recall their mayor."

"Recalls rarely get on the ballot, let alone succeed, but they are bringing the era of permanent, acrimonious campaigning to city halls." US Conference of Mayors exec. dir. Tom Cochran "said the rash of recent attempts had inspired him to start making a video to teach mayors about the risk of recall."

"Tea Party leaders in several states have tried to recall mayors. ... Tellingly, many recent recall campaigns have been spurred not by accusations of corruption, but by anger over higher taxes or reduced services" (Cooper, New York Times, 9/22)

ARIZONA: Out Out, Third Parties

A measure on the Nov. ballot "could keep minor party candidates from every becoming" AZ Gov. Prop 111 "renames the position of" Sec/state to LG, but the measure "also would amend" the state constitution "to say that each party's nominee for" GOV and LG would "run as a ticket" after winning the primary. The "idea is to ensure that if a" Gov. quits, dies or is impeached "his or her successor would be of the same party."

But the measure "has no provision for what happens to the gubernatorial candidate if no one from that person's party wants to run for" LG "and that could leave a legitimately nominated minor party candidate for" GOV "unable to seek votes." GOV nominee Barry Hess (L): "If we don't have a candidate there, that would squash any attempt to go for the other office" (Fischer, Arizona Daily Star, 9/20))

AZ is also "about to embark on its second round of drawing new boundaries for its legislative and" Cong. "districts under the direction of an independent group" and "certain interests are already maneuvering for representation on the panel that will do the work." The Legislative Latino Caucus "is already laying the groundwork to get a Hispanic seated." State Sen. Richard Miranda: "I think we need to force the issue."

There was "no Hispanic representation" on the 1st commission (Grado, Arizona Capitol Times, 9/20).

CALIFORNIA: Power Line

The '12 CA ballot "isn't just a list of traditional ballot initiatives and propositions" but rather "it's a toe-to-toe slugfest between the state Legislature and anyone standing in its way." The "recurring theme" of initiatives "is of the" Dem-controlled legislature "fighting to expand its authority, while outsiders seek to curtail it." One initiative "would change the requirement for passing a state budget from a" 2/3rds vote to a "simple majority" allowing Dems to pass a budget without any GOP support. But another "would restrict the Legislature's ability to raise revenue by borrowing from the state's transportation fund or by increasing fees and levies"

Yet another would "eliminate" an "independent commission" that voters gave the authority to redistrict the state in '12, giving the power back to the legislature, but a competing measure would "expand the redistricting commission's authority." In theory, voters could "decide to expand the commission's authority" and "abolish it at the same time" (Richardson, Washington Times, 9/23).

Developer Rick Caruso said 9/22 "he would consider running for" LA mayor.

Caruso, on running when Mayor Antonio Villaraigosa is termed out of office in '13: "Honestly, it is something I would like to do."

Caruso "had considered a similar run" in '08, but "eventually decided against it," citing "the potential burden of public life on his family." Caruso "said he would not spend" over $100M "on his own campaign" (Kisliuk, "L.A. Now," Los Angeles Times, 9/22).

COLORADO: Extreme Makeover: CO Edition

"In a state known for strict constitutional limits on taxation, even" CO GOPers are "alarmed" by three ballot measure "that would -- of all things -- cut taxes."

"The measures -- which would lower property, income and sales taxes; limit government borrowing; and reduce vehicle registration fees -- are widely seen as too extreme" by Dems and GOPers alike.

State Sen. Greg Brophy (R): "I don't see them as good policy. It's like losing your job and getting sick at the same time. I'm for limited government, but not no government."

"If the measures pass," CO would lose $2.1B in revenue and "would be forced to increase school spending" by $1.6B "to make up the shortfall created."

"Meanwhile, the question of who gathered the thousands of signatures" has been a "mystery" (Frosch, New York Times, 9/20).

FLORIDA: Black And White Issue

2 Reps. and an ex-FL Sec/State said 9/20 that "the Fair District Florida proposals will backfire on minority voters." The proposals "wound forbid state legislators to favor or handicap any candidate or party in drawing the boundaries of" Cong. districts following the '10 census. Districts "would have to be as compact and contiguous as possible." Rep. Corrine Brown (D-03), Rep. Mario Diaz-Balart (R-25), and ex-state Sec/State Kurt Browning (R) argued at a 9/20 event "to kill the constitutional amendments."

Brown: "Passing Amendments 5 and 6 would return Florida to the days when there was no African-American representation in Congress" (Cotterell, Florida Capital News, 9/21).

Diaz-Balart: "Those who are supporting this initiative know that their initiative will have the effect of diluting minority representation both Hispanic and African-American throughout this great state."

Browning: "There will be chaos, and I believe there will be chaos like we've never seen before if these amendments passed in 2010 as we approach 2012" (Larrabee, Florida Times Union, 9/20).

ILLINOIS: Madiganistan Man Of Mystery

Chicago Tribune's Kass writes, "In their long for a political champion deep in the heart of Madiganistan," IL GOPers "may have found their man."

Chicago Dept. of Streets and Sanitation worker Patrick John Ryan (R) is "facing off against the powerful and terrifying state" Dem "boss" IL House Speaker Michael Madigan.

There's "one little problem." The GOPers "have never met the mysterious Ryan." IL GOP chair Pat Brady: "He's so little-know that we don't even know him. I mean, no one has seen him. ... Actually, it's more than a little strange."

"So isn't it possible that the elusive Ryan is just another Madigan patsy?" Brady: "I can't believe you'd even think in such terms. He's got the, ah -- what did Blagojevich call it? -- the intestinal fortitude to challenge Boss Madigan." Ryan neighbor Mary Jo Bardan: "What? He's running? Running for what?" (9/23).

MASSASSCHUSETTS: Brownie Points

A GOP write-in candidate for AG "who wants to do what" Sen. Scott Brown (R) did -- beat '10 MA SEN nominee/MA AG Martha Coakley (D) -- is off to a "pretty substantial" start, Brown said.

Brown "suggested" 9/17 that a "repeat of his own come-from-behind win by former prosecutor James McKenna of Millbury is possible."

McKenna "won at least" 10K write-in votes 9/14 "to win a place" on the Nov. ballot. McKenna "claimed" 9/17 "when the tally is complete, he'll have at least" 20K.

Coakley "insisted" that "she won't be caught flat-footed again" (Heslam, Boston Herald, 9/18).

NEVADA: Do The Chachas

'10 SEN candidate/Wall Street banker John Chachas (R) said 9/20 "he may run against" Sen. John Ensign (R) in '12. "Chachas said he is spending about half his time" in NV and "half" in NYC. Chachas "is smart, has money and knows the issues. The questions are, will he stay a Nevadan and will he spend the money in two years that he didn't spend this year?" (Ralston, Las Vegas Sun, 9/21).

NORTH DAKOTA: A Fan Of Ecclesiastes

'00 GOV nominee/ex-AG Heidi Heitkamp "says she has been encouraged to run" for gov. in '12 "but won't decide until after this fall's election."

Heitkamp: "To everything there is a season. ... A lot of the things I cared about deeply when I ran in 2000 are still issues today. That always motivates me. It's work that I've always wanted to do. Do I still want to be governor? That still remains to be seen" (Schmidt, Fargo Forum, 9/21).

OKLAHOMA: Indies Rock

Indies "now make up" 11.3% of registered voters -- "an all-time high percentage" in the state. Indie registrations have also "been growing faster" than either the GOP's or Dem's since Jan. '10. The number of Dem voters shrunk by .17% in that same period.

"Among new registered voters, excluding existing voters who moved within the state or switch their political affiliation, independents accounted for" 26% "of all voters this year."

Dems" still hold a plurality in the state... accounting for" 48.4% of all voters. Though, "some political experts predict the state GOP will overtake" Dems "within the next decade" (Killman, Tulsa World, 9/20).

SOUTH DAKOTA: Secrets, Secrets Are No Fun

SD's "labor unions and business organizations are squaring off on" state constitution "Amendment K, which would guarantee the right to vote by secret ballot in... efforts to organize labor unions."

The amendment is supported by the state Chamber of Commerce, while the State Federation of Labor is organizing a campaign to oppose it. SFL pres.**Mark Anderson**"said (the amendment) is intended to undermine works' rights to form unions."

But Senate GOP Leader Dave Knudson " said a secret ballot in a vote on whether to form a union would protect workers from intimidation by both union organizers and company management."

"Proposals similar to" Amendment K "are on ballots in several other states" (AP, 9/20).

UTAH: Close The Hatch!

Even as Tea Partier Rep. Jason Chaffetz (R-03) "said he is considering challenging" Sen. Orrin Hatch (R) in '12, Hatch said he supported the Tea Party.

Hatch: "I'll stand up for the tea party every time. These people are angry -- justifiably angry. They're taking a part in the process. They're making a difference" (Burr, Salt Lake Tribune, 9/22).

VIRGINIA: Party On, Dudes

VA will hold its first Tea Party convention 10/8 to 10/9. The convention will feature Gov. Bob McDonnell (R)

along with LG Bill Boiling (R), AG Ken Cuccinelli (R) and ex-Gov./ex-Sen. George Allen (R).

"About 3,000 people are expected to attend" the Federation of Tea Party Patriots' event, which "will include seminars on history, public policy and grass-roots activism, as well as a presidential straw poll and a" cong. "town hall meeting for each" VA district.

"Other confirmed speakers include radio host Lou Dobbs, conservative commentator Dick Morris" and Reps. Ron Paul (R-TX) and Steve King (R-IA) (Kumar, Washington Post, 9/21).

LOAD-DATE: September 24, 2010

EXHIBIT E

Patriot Room Radio: Friday, October 22, 2010

Episode #99: "Redistricting Florida, another fraud brought to you by Soros, SEIU, and America's Teachers' Union; plus Arkady from Right Condition"

Starting @ 01:12:40:

Host Clyde Middleton: All right folks. On the line now is Kurt Browning. Kurt is the former Florida Secretary of State. He was appointed by then-Governor Charlie Crist. Before that, he served for twenty-six years as the Supervisor of Elections for Pasco County, Florida. He's focused right now, as a matter of fact, he is the president of an organization called Protect Your Vote. The focus here seems to be – well, maybe I'm gonna learn perhaps a little different, but my initial take – is that the focus here is an end- run around, by organizations like what used to be ACORN, SEIU, and all of that, against, surprisingly, a Supreme Court case that came down in 2009. And we're gonna talk a little bit more about that, but the bottom line here is redistricting. And the Supreme Court came down in a case called *Strickland* – it was a plurality decision, 5-4 actually, but there was a few twists and turns in there that made it a plurality. And the Supreme Court wound up telling us that you could not draw a district to favor a minority group if that minority group had less than 50% of the population within there. And you couldn't go counting people that would usually vote for a minority group – it had to be the minority group itself – which is in fact a majority group within a district. So now, what has happened, is we have got millions of dollars poured into Florida – and Florida's important remember, because as a result of the 2010 census, the current estimate right now is that Florida will pick up 2 more electorial [sic] votes. There's going to be heavy redistricting down there. And instead of going through the state legislature, which is going to have its own conflict with the SCOTUS ruling, what Soros and SEIU and NEA, the whole list of usual culprits, are investing millions of dollars down there to actually amend the Florida constitution – that's the way to get around a SCOTUS case, if you will, of claiming dominion within that state. The proposed language is brutal. We're going to go through it in some detail. It's one of those things that looks good on the outside but once you start implementing it, it's an invitation for wide-open lawsuits that are just going to go on and on and on. It's brutal. Ok with that introduction, Kurt Browning, welcome to Patriot Room Radio.
Kurt Browning: Well thank you, and thanks for your time and allowing me to have a little bit of time today to talk to your listeners.
Middleton: Certainly. Now, let's start off with this. We're talking about Amendments Five and Six. I've got what I hope is a short question that you'll be able to answer. I've read the text of Amendment Five and I've read the text of Amendment Six, and they're identical. Why are there two amendments?
Browning: Well the first amendment, Amendment Five, deals with legislative redistricting, which is the Florida Senate and the Florida House. If you look at Amendment Six, there is a word or two changed which deals with congressional, and I think it inserts the word "congressional." Other than that, those amendments are the same. What Fair Districts Florida has chosen to do is to do two separate amendments, one dealing with the Florida House and Senate and the other one dealing with congressional district redistricting.
Middleton: Great, I do see that now. It's actually the very first word that's different. In Amendment Six it reads "congressional" and in Amendment Five it reads "legislative." Now, with that said, just let me read one of the amendments, because it's pretty short. [Reading from

proposed amendments.] "Legislative or congressional districts or districting plans may not be drawn to favor or disfavor an incumbent or political party." That's Point One. Point Two: "Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice." Point Three: "Districts must be contiguous." Point Four: "Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible, must make use of existing city, county and geographical boundaries." [Finishes reading.] Now, I called that Points One through Four. It's not called out that way, it's just one paragraph. But as I look at this, Kurt, and I'm an attorney, I see the barn doors wide open there. It almost seems to contradict itself – that if you're drawing a district line, you can satisfy perhaps one of those points, but almost by definition you're going to violate, if you will, another point. Is that an accurate observation?

Browning: Clyde, you hit the nail right on the head, and that's what we're trying to get out to Florida voters. As you read these limits, you will see that they are contradictory. What Fair Districts Florida has done – and Fair Districts Florida is the organization that was formed to put these two initiatives on the ballot – what they've done – is they are introducing, and want our voters to insert in our constitution, these very contradictory, unworkable standards that they know that the legislature will not be able to meet. Your listeners may be asking, why would they do that? Well, I think what's happened is that they know that they cannot gain political power through the normal course of elections, so they're better served by what I believe will be the eventual drawing of Florida Senate or House lines done by an appointed court – whether that's the Florida Supreme Court of whether that's a federal court. [Inaudible, but something like : In our republic, we elect those who represent us.] It's not a perfect system. And nowhere in this campaign have I said – and I have said, that we need to have reforms to the system. But these are not the reforms that we need. Once those standards, those contradictory standards, go into our constitution, they will be there forever. They will be there in 2012, they will be there in 2022, 2030, and on and on. And this doesn't just affect us every ten years, it will affect us every election year, because of those men and women who will be elected from those districts. I think Fair Districts Florida has sold Florida voters a bill of goods. When you look at the title of the amendment, or when you look at the group that is supporting the amendments, it's called Fair Districts Florida, well who wouldn't be for fair districts? I'm for fair districts. Absolutely. But certainly there's nothing fair about it. They are making it an end- run to control the state house, the state senate, as well as Congress. And you're absolutely right Clyde, when you look at these standards that they put in there, they know the legislature cannot meet them. As a matter of fact, in the spring, during a legislative session, representatives from Fair Districts appeared before the Senate Reapportionment Committee, and when asked to draw a map using their standards, or even one district, using their standards, they either wouldn't, or they couldn't. And I think that is a telling sign that these standards are just not meet-able.

Middleton: When we take a look specifically at the holding in *Bartlett v. Strickland*, it is telling us that the Voting Rights Act Section 2, specifically, cannot be invoked unless this minority group constituted a numerical majority. If the Voting Rights Act is invoked and right now – and this is a whole separate discussion and battle going on in Washington, as a matter of fact, I forget who introduced it over the last month or so, but it was a Republican in the House, who sought to strip the US Department of Justice, Holder's gang, from enforcing the Voting Rights Act, because it was intended to be a temporary act, I believe back in 1965 for the first time under President Johnson, and it was just extended piecemeal and piecemeal and piecemeal and Congress reauthorized it, and now we're looking to unauthorize it, which doesn't mean that we

don't care about minorities, either by skin color, if you will, or language-driven, which was a subsequent modification to the act. But, we go back to the 1965 mentality, which is to say that the states can't be trusted at this time, because the Civil Rights Act of '64, you know, had a little bit of push-back and so on, and what we're saying, by taking away DOJ's rights under the Voting Rights Act, is to say, the states can police themselves. Because otherwise, you have the strong arm of the Feds coming down. So now when we take a look again at the language of Amendments Five and Six, "Districts shall not be drawn to deny racial minorities or language minorities the equal opportunity to participate in the political process and elect representatives" – that almost flies right in the face of *Strickland.*

Browning: It does. And I'm not sure if Fair Districts Florida folks have read *Strickland.* But you're correct. What that ruling says was that states that wish to draw crossover districts, or what we call minority access districts – and those are the districts that have 50% less voting age population of being the minority – they are free to do so. States can do that. And then it says, "where no other prohibition exists." And guess what that prohibition is? That prohibition is Amendments Five and Six. And therefore, what they've done, is they have said that those minority access districts are not entitled to Voting Rights Act protection. Which means that when the legislature convenes in the 2012 session to start drawing lines, those minority access districts that we have in Florida cannot be drawn, because a prohibition exists. And we're making the assumption that Five and Six are going to go in the constitution, but if they go in, then those minority districts are going to disappear. The interesting thing to me about it is, Clyde, that you have the NAACP, who is supporting Five and Six. Yet at the same time, they're the ones that are going to be impacted significantly by these amendments because they're going to lose representation or the potential for representation in Congress, in the state senate, and the state house. It makes no sense to me why they would be supporting this. Now, there are those within the NAACP, Mr. Chavis, the former National Executive Director and CEO of the NAACP, he has come out and said this is a bad deal for Florida. This is a bad deal for Florida. We have – Protect your Vote has established an African-American steering committee, as well as a Hispanic steering committee, and they are trying to get the word out to their constituents that this is not good for Florida. I've said this before: Florida's population is diverse. And we need to ensure – it's just the right thing to do, I'm telling you it's just the right thing to do – we need to ensure that our population, the diversity of our population, is represented in Congress, the state senate, and the state house. Fair Districts Florida does away with that and really takes us back to pre-1992 representation in those three chambers.

Middleton: I'm really glad that you brought that up, because we do the census every ten years, and we're just doing it now. It's completed now in 2010. But really the first time it will be used, the redistricting results of it, will be 2012. And so we go back to the 1990 census, and the first time that those new districts was used was 1992. That's a twenty year window that we can look at. And it's not as if we have a substantive due process issue here. Since 1992, African-Americans and Hispanics have done very well in the state and federal legislatures representing Florida, in terms of numbers. They've grown, so what's the issue here? What are they trying to achieve?

Browning: I'm not quite sure, because it's almost contradictory in and of itself. I'm not sure, I go back to my original statement, I'm not sure why the NAACP would be supporting amendments to our constitution that would diminish minority representation. I don't understand it. I have no answer for you. I wish I did.

Middleton: Well one thing that I find interesting, looking at the list of contributors to, the backers of Five and Six, the very first name, the gentleman who gave half a million dollars, Christopher Feinladter. Christopher Feinladter founded a website where he made his bones, made his money. He sits there leading, it's pronounced Wyo-File. It's a short name for Wyoming File. They claim to be an independent, non-profit news service focusing on the people, places, and policy of Wyoming. Now I come from the days when the NEA hadn't quite destroyed public education, so I walked out of grammar school with some understanding of geography, and I've kept it. Florida and Wyoming are worlds apart. What is this guy doing donating half a million dollars to a redistricting plan in Florida?
Browning: This is the point that has aggravated me personally. You have all these folks from outside of our state that are wanting to tinker, wanting to amend, our state's constitution. Now what would be their interest in our state's constitution? Well I'll tell you what the interest is. It's power. It's control. It's being able to elect Democrats to Congress and to the state house and to the state senate. It's so the policies of the liberal-leaning groups will become the law of the land. And Clyde, one of the things that I failed to mention at the beginning of the call was that for the past thirty-five years I've been an elections administrator, and I have been right down the middle of the road. There were some people who did not know what my party affiliation was, because that's the way that I wanted it, simply because I didn't want the Ds and the Rs to even think that their elections were subject to my political whims. But when I retired in April of this year, and I started reading these amendments, I just realized that I could not sit on the sidelines anymore. And so my comment may sound somewhat political, but my point in this piece is that I don't care if you're Democrat or Republican, this is not the right thing to do, and it's nothing but a pure power grab by the liberal interests. The Democrats have drawn lines in Florida for the past 100-plus years, and there's never been any problems. Nobody ever complained about it – the Democrats never complained about the way the lines were drawn. The Republicans get a crack at it in 2002, and the world's coming to an end as we know it. As I've said before, this process is not a perfect process. What Fair Districts will tell you is that these amendments will end all gerrymandering. It will end all the political games and remove politics from redistricting. And that is nothing but a lie. Listen, this process is inherently political. It has been and it will continue to be. And my point is why shouldn't it be political? It draws a political process. So I make no apologies when it comes to the whole idea of saying it's not going to end gerrymandering. It's not going to end the political games. The Democrats would be doing it if they were drawing the lines, I know that for a fact. One of the things that Fair Districts Florida likes to beat us up on, beat the legislature up on, is Federal District Three as the poster child of why we don't need to let the legislature to continue to draw lines in Florida. Federal District Three, which is a minority access district, that if these amendments pass, will go away. But incidentally enough, they continue to beat up the legislature on drawing this district, when it wasn't even the legislature that drew Congressional District Three. It was the federal courts. But they won't tell you that. They're playing loose with the facts. When they start talking about fair districts, fair districts, fair districts, it appeals to voters. And I'm hopeful that as voters, now that they've started going to the polls already, in Florida they're already voting, they've already started voting absentee ballot, and of course on November 2, Election Day, I hope that between now and the time that they mark their ballot, they take the time to read these amendments and understand what the impact is.
Middleton: Now I'm looking at your website, which is nix5and6.com –
Browning: You can also get to it at protectyourvote.com.

Middleton: Excellent. Thank you. And I'm struck by two things. First of all, the people that are in your steering committees, honorary chairman, and so on -- and I don't want to sound racist or anything – and I look at all the names and then I Google a handful as well. These are the minority leaders within the state, and I can't even use an adjective like conservative, because one of your honorary chairs is Corrine Brown, who is a Congresswoman, a Democrat. You've got people from both sides of the aisle backing this. Do you have any polling data that's come out?
Browning: I have not seen any polling data on this issue. I have been so busy just fighting the fight I haven't even kept up with that. I will tell you, just going back to your other point, that Fair Districts Florida has on their website that they are a non-partisan group. Clyde, they are anything but non-partisan. You look at the contributors funding this movement, these amendments. You look at Protect Your Vote, the organization that I'm chairing, and we are bi-partisan. We have Democrats, Republicans, Independents. We have folks who are just looking out for our constitution and don't want it messed with these unworkable, chaotic standards that are about to be put in there.
Middleton: The other thing that strikes me about your website, and from a legal standpoint you're going to have to tell me if it's required – I don't think it is – but you actually have links where I can see what your contributions are, that is, who's contributing to you, and where you're spending your money. Is that legally required of you?
Browning: Not on our website, it is not required. We are required to report contributions and expenditures to the state's division of elections on a regular basis – there's a set schedule on which those reports are supposed to be filed. But we want to be transparent. And we have put those contributions and those expenditures on our website. I don't think you can find that on the Fair District Florida website, simply because I don't think they want people to understand that they are being bankrolled by the Democrats and the liberal interest groups.
Middleton: Right, exactly.. And you won't find it because I've looked. That is very typical, because from that standpoint, as you say, there is reporting requirements, but junkies like me, I know how to get to those reports. Most folks, if it's not there, it's out of sight out of mind. Ok so now in summary, Kurt, the bottom line as I see it is that when the *Strickland* case came along, the Supreme Court of the United States gave us a standard for minority districts. And we basically couldn't favor a minority or draw a district for a minority unless they were a majority within that geographical area. So since it's a SCOTUS decision, the only way around that is a constitutional amendment at the state level. That is what's being pushed here, and ironically, if this gets pushed, number one, the minority districts that we currently have are going to lose their protections. And number two, the amendments are being written in such a way that they are self-contradictory. There's so many different standards, about six different standards through there – with one of them even having three different levels going down, that it's inviting – it's wholesale litigation. And we all know what happens when you get litigation: either nothing gets done or you're compromised. That's the only way that SEIU and Soros and all these folks that want to lock in Florida's representation at the state and federal level, and their electorial [sic] votes, perhaps even, in a presidential election. That's the only tow-hold they can get, and they've put almost five million dollars in trying to achieve it. Good summary?
Browning: Yes, absolutely. It's a great summary. Fair Districts Florida spent a little less than 4 million dollars just getting these two issues on the ballot. They paid a firm almost 4 million dollars to solicit signatures from 1.7 million Florida voters. We have in Florida what we call the Citizen Initiative Process, that's what it's called. That's where the citizens can amend their constitution. What they've done, is they've abused the process – they've gone out and paid

groups to solicit these signatures. There's nothing citizen-initiated about these amendments. And then what they've done is they've continued to collect large sums of money from liberal-leaning groups and individuals that have come out for the campaign to convince Florida voters to put these amendments in their constitution. It's going to be an interesting next couple of days until November 2, and we're hopeful when all the votes are counted, we will know –that they have not achieved the 60% required vote in order to amend our constitution.

Middleton: Ah, thank you. I wanted to ask that and it slipped my mind. It's actually a super-majority vote, it's 60% required?

Browning: Yes, as a matter of fact our constitution was just changed to require the 60%, just within the last two to four years. So they must meet the 60% threshold, which is a hard thing to do. But you know what, it's not impossible.

Middleton: Look, I've got one unfair question that I've got to ask you, but any final words on this, or are we all set?

Browning: No I'm all set – I just appreciate your time today, more than you'll ever know.

Middleton: I appreciate the time you've given us as well. You ready? Here's the unfair question: you were promoted up to the local county level up to the state level by then Governor Charlie Crist. Charlie Crist saw the handwriting on the wall in the Republican primary against Micheal Rubio, decided he could not win that and so he stepped down and is running as an independent. The Democrat, Meeks, is fading in the polls, he's now a non-issue. And Rubio has been several points ahead of Crist, it tightens up a bit, but I do think that polls can get a little bit off towards the end. What's your feeling on the Florida Senate race?

Browning: Based on the last numbers that I have seen, Michael Rubio has held a pretty commanding lead throughout all of this, even when the Governor was a registered Republican running against Michael Rubio in the primary. It still showed Michael Rubio leading the Governor. Maybe within a point or two, but then it would spread it back out. So then, again, I think that when all the votes are counted on November 2, I think that Michael Rubio will end up being our junior member of the Senate.

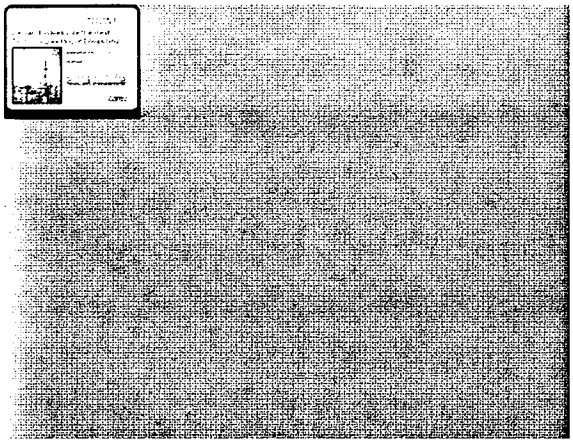
Middleton: I appreciate you not demurring on that question.

Browning: I'm not demurring on anything these days.

Middleton: All right, Kurt Browning, from the organization known as Protect Your Vote. He's the former Secretary of State, he has a professional interest in this, he's devoted his career to ensuring that Floridians get to vote and have their votes counted. And right now he's fighting a tough battle against well-monied Soros and SEIU and all those other organizations trying to change Florida's constitution, to override a 2009 SCOTUS decision on the very same topic. Kurt, thank you for your time.

Browning: Thank you for your time.

EXHIBIT F



Scott appoints 'Fair Districts' foe to run 2012 elections

By Cooper Levey-Baker | *01.06.11* | *9:18 am*

Gov. Rick Scott yesterday announced his appointment of Kurt Browning as Florida's secretary of state, a position filled by Browning from 2006 till April 2010. After resigning, Browning led Protect Your Vote, a political committee largely bankrolled by the Republican Party of Florida that sought to defeat Florida's so-called "Fair Districts" amendments.

The Florida Independent's Bianca Fortis investigated Browning's tenure as secretary of state last year:

> [Browning] came under fire in 2008 when he enforced Florida's Voter Registration Verification Law — which was nicknamed "No Match, No Vote." The law, first approved by the Florida legislature in 2005, requires new voters to submit an identifying number, usually a driver's license number or the last four digits of a Social Security number, so the state can confirm an applicant's identity. #
>
> If a match could not be found, the applicant was considered ineligible to vote.
>
> The state was releasing lists of unmatched names as late as a week before the Nov. 4, 2008 election. "African-Americans and Hispanics combined account for 55 percent of would-be voters on the latest list [released Oct. 28, 2008], which includes 6,194 Democrats and 1,440 Republicans," reported the *Times*. The law is still in effect today.

In April 2010, Browning resigned to avoid violating the legislature's new "double dipping" rules, which #

> "narrowed a loophole that allowed highly paid state workers to retire and return to their old jobs and draw two salaries," in the words of the St. Pete *Times*. The law forced Browning to retire before it took effect on July 1, 2010 — denying him a chance to oversee the 2010 elections. #

After resigning, Browning spent the remainder of 2010 leading Protect Your Vote, a political action committee largely bankrolled by the Republican Party of Florida that agitated for the defeat of

Amendments 5 and 6, the so-called "Fair Districts" amendments that limit the legislature's ability to draw district lines to protect incumbents and ensure one-party control. #

Now named secretary of state for a second time, Browning will oversee Florida's 2012 elections, the first races that will take place in the newly drawn districts that will be required to adhere to the "Fair Districts" standards.

In a YouTube clip posted before the election that has since been yanked, Browning said that Amendments 5 and 6 would create impossible standards for the legislature to follow in the redistricting process and that there is no doubt the battle over district lines will end in litigation.

"The last thing that Florida needs is another election season filled with litigation," Browning said. "I believe it's just not good for Florida."

Of course, the first legal action taken as a result of the passage of Amendments 5 and 6 came from Reps. Corrine Brown, D-Jacksonville, and Mario Diaz-Balart, R-Miami, who filed suit the day after both amendments passed.

Both Brown and Diaz-Balart served as "honorary national chairs" for Browning's Protect Your Vote.

Categories & Tags: Civil Rights| Government Accountability/Reform| Politics| Amendment 5 | Amendment 6 | Corrine Brown | Fair Districts Florida | Kurt Browning | Mario Diaz-Balart | Protect Your Vote |

EXHIBIT G

FLORIDA DEPARTMENT of STATE

CHARLIE CRIST
Governor

DAWN K. ROBERTS
Interim Secretary of State

December 10, 2010
(*via expedited courier*)

Chris Herren
Chief, Voting Section
Civil Rights Division
Room 7254–NWB
United States Department of Justice
1800 G Street, N.W.
Washington, DC 20006

SECTION 5 SUBMISSION
NO. 2010-4467

Re: Preclearance of recently adopted state constitutional amendments

Dear Mr. Herren:

Pursuant to section 5 of the Voting Rights Act of 1965, as amended, the Florida Department of State, Division of Elections, submits for preclearance two recently adopted amendments to Florida's Constitution. These amendments appeared on the 2010 general election ballot as Amendment 5, "Standards for Legislature to Follow in Legislative Redistricting," and Amendment 6, "Standards for Legislature to Follow in Congressional Redistricting." Upon passage, these amendments became law and are now found in Article III sections 20 (Amendment 6) and 21 (Amendment 5) of the Florida Constitution.

The submission accompanying this letter follows the format of 28 C.F.R. section 51.27. We respectfully request that any correspondence to the Florida Department of State regarding this submission include the record file number assigned by the Department of Justice in order for us to better track these files.

Sincerely,

Maria I. Matthews
Assistant General Counsel

Enclosures

2010 DEC 13 AM 11:33
CIVIL RIGHTS DIVISION

EXHIBIT H

Stafford, Suzanne (CRT)

From: Money, Betty A. [BAMoney@dos.state.fl.us]
Sent: Friday, January 07, 2011 1:09 PM
To: vot1973c (CRT)
Cc: Wheeler, Charlotte A.
Subject: Submission Under Section 5 of the Voting Act--Withdrawal of DOJ Submission 2010-4467
Attachments: Notice of Withdrawal Amendments 5 & 6.pdf

Please see attached Notice of Withdrawal.

Betty Money
Executive Assistant to
Ashley Davis, Assistant General Counsel
Ernest Reddick, Assistant General Counsel
Office of General Counsel
Florida Department of State
500 South Bronough Street, First Floor
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Phone: 850.245.6536
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FLORIDA DEPARTMENT of STATE

RICK SCOTT
Governor

JENNIFER KENNEDY
Acting Secretary of State

January 7, 2011
(via FedEx Express and e-mail)

Chris Herren
Chief, Voting Section
Civil Rights Division
United States Department of Justice
Room 7254-NWB
1800 G Street, N.W.
Washington, DC 20006
vot1973c@usdoj.gov

RE: DOJ Submission 2010-4467

Mr. Herren:

Pursuant to 28 C.F.R. § 51.25, the Florida Department of State withdraws the above-referenced submission made under Section 5 of the Voting Rights Act.

Sincerely,

C.B. Upton
General Counsel

R. A. Gray Building • 500 South Bronough Street • Tallahassee, Florida 32399-0250
Telephone: (850) 245-6536 • Facsimile: (850) 245-6127
www.dos.state.fl.us

EXHIBIT I

The Miami Herald
Posted on Tue, Jan. 25, 2011

Scott pulls back Fla. redistricting amendments

The Associated Press

A spokesman for Gov. Rick Scott has confirmed he quietly pulled back a request for federal approval of two new redistricting amendments to the Florida Constitution.

Brian Huges on Tuesday said the new Republican governor acted just days after taking office Jan. 4 as part of his freeze on new state rules pending review by the new administration.

The Justice Department must approve election law changes to ensure they are not discriminatory.

Supporters of the Fair Districts amendments, which voters adopted in November, cried foul. Florida Democratic Party Chairman Rod Smith said the withdrawal was "shameful."

Huges, though, said there will be plenty of time to get the amendments approved before redistricting is completed next year.

EXHIBIT J

IN OUR OPINION

Contemptible pols thwart we the people

Published: Sunday, January 30, 2011 at 10:17 p.m.

In an amazing display of contempt toward "We the People," our elected officials in Tallahassee are doing everything in their power to thwart the public will, not to mention the Florida Constitution.

Last November, 63 percent of Floridians approved two state constitutional amendments — Amendments 5 and 6 — intended to stop state legislators from rigging congressional and legislative districts to suit their own personal ambitions and keep their political party in power. The idea was to take the power to draw legislative and congressional district lines out of the hands of incumbent politicians and put it in the hands of a less self-serving, objective group.

The people loved the notion of doing away with blatant gerrymandering, but the politicians who depend on the redistricting process to solidify their hold on their seats for term after term hated it.

Since the election, two members of Congress and the Florida House have sued to have the amendments thrown out, and Gov. Rick Scott has withdrawn the amendments from a required U.S. Justice Department review.

In other words, the political power structure in Tallahassee that depends on gerrymandering to hang on to political power couldn't care less about the fair districting "mandate" handed them by Florida voters. Their contempt for the will of the people is palpable and inexcusable.

Given the open hostility displayed by our elected officials toward these citizen-initiated constitutional amendments, it now falls to the courts to ensure that these mandates are followed.

"We will do whatever it takes to see to it that the new standards are implemented," vows Pamela Goodman, president of FairDistricts Now.

This is an outrage. Floridians are used to their legislators thumbing their noses at us from the ivory-colored tower called the Florida Capitol. But this exceeds even the normal disregard for the people the Legislature too often exhibits. This is a shameless power grab.

Make no mistake, there isn't a ghost of a chance that our Legislature is going to produce a fair reapportionment plan until it is forced to do so by court order. That's why Amendments 5 and 6 passed in the first place, because the people know all to well how our politicians work and whose interests they are ultimately concerned about.

So, see you in court, pols.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-cv-23968-UU

MARIO DIAZ-BALART and CORINNE BROWN,

Plaintiffs,

v.

RICK SCOTT, in his official capacity as Governor of the State of Florida and KURT BROWNING, in his official capacity as Secretary of State of Florida

Defendants.

RESPONSE TO ORDER TO SHOW CAUSE ON JURISDICTIONAL ISSUE

This Court has directed the Plaintiffs to state why the Court has jurisdiction to hear this matter. The Second Amended Complaint in this action alleges that the newly enacted Article V, Section 20 of the Florida Constitution, restricting the discretion of the Florida Legislature in drawing Congressional districts impermissibly conflicts with the direct delegation of authority found in Article I, Section 4 of the United States Constitution. The suit names Governor Rick Scott and Florida Secretary of State Kurt Browning, both in their official capacity, as party defendants as brought pursuant to the Article I, Section 4, the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution, and 42 U.S.C. § 1983.

Article III, section 2 of the United States Constitution provides in relevant part:

> *The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution*, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States;

> between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The "case or controversy" clause of the Constitution was modified by the Eleventh Amendment, which provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Supreme Court held in *Seminole Tribe Florida v. Florida*, 517 U.S. 44 (1996) as follows:

> Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779, 111 S.Ct. 2578, 2581, 115 L.Ed.2d 686 (1991). That presupposition, first observed over a century ago in *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), has two parts: first, that each State is a sovereign entity in our federal system; and second, that " '[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.' " *Id.*, at 13, 10 S.Ct., at 506 (emphasis deleted), quoting The Federalist No. 81, p. 487 (C. Rossiter ed. 1961) (A. Hamilton). *See also Puerto Rico Aqueduct and Sewer Authority, supra*, at 146 ("The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity"). For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States." *Hans, supra*, at 15, 10 S.Ct., at 507.7

In *Seminole Tribe*, the Indian tribe sued the State of Florida, naming it directly as a party, under the Indian Gaming Act. The Court ruled that because there was no language abrogating sovereign immunity in the Indian Gaming Act and that since the State did not waive sovereign immunity, the District Court lacked jurisdiction to hear the case.

In the instant case, neither Governor Scott nor Secretary Browning have yet to appear, so the question of whether they will interpose Eleventh Amendment immunity is an open question and one, respectfully, which is not ripe for adjudication at the moment.

Parenthetically, even if the Governor and Secretary do not expressly waive sovereign immunity, the Court would still have jurisdiction to hear the case. The Supreme Court noted in Seminole Tribe that

> Thus our inquiry into whether Congress has the power to abrogate unilaterally the States' immunity from suit is narrowly focused on one question: Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate? *See, e.g., Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-456, 96 S.Ct. 2666, 2669-2671, 49 L.Ed.2d 614 (1976). Previously, in conducting that inquiry, we have found authority to abrogate under only two provisions of the Constitution. In *Fitzpatrick*, we recognized that the Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution. *Id.*, at 455, 96 S.Ct., at 2671. We noted that § 1 of the Fourteenth Amendment contained prohibitions expressly directed at the States and that § 5 of the Amendment expressly provided that "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." *See id.*, at 453, 96 S.Ct., at 2670 (internal quotation marks omitted). We held that through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment.

517 U.S. at ___. In the instant case, the Plaintiffs seek relief under the Due Process Clause of the Fourteenth Amendment. In accordance with the holding in *Seminole Tribe*, this Court has jurisdiction to hear the instant case.

However, because the Fourteenth Amendment is not self-executing and because a claim may not be brought simply alleging that constitutional provision, a complaint seeking to vindicate a federal constitutional right must have a statutory underpinning. Here, the Second

Amended Complaint brings this case under Section 1983 of Title 42 of the United States Code.[1] Section 1983 does not provide substantive rights, but merely serves to provide a remedy for violations of the Constitution or substantive statutes. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979).

The new pleading does not seek to raise a claim against the State of Florida, but rather asserts a cause of action against both thee Governor and the Secretary of State, in their official capacity, to keep them from enforcing the new amendment to the Florida Constitution. The new amendment will clearly require them to act "under color" of Florida law to enforce Article III, Section 20 of the Florida Constitution, which it is alleged that will deprive the Plaintiffs of their rights, privileges and immunities secured by the United States Constitution.

In order to state a claim for relief under § 1983, the plaintiff need only allege that the defendant deprived him or her under color of state law of a right secured by the Constitution and the laws of the United States. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980)(" By the plain terms of § 1983, two—and only two—allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of

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[1] Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

state or territorial law. *See Monroe v. Pape*, 365 U.S. 167, 171, 81 S.Ct. 473, 475, 5 L.Ed.2d 492 (1961). The instant Second Amended Complaint meets this pleading requirement.

In short, this Court has jurisdiction to hear the claim raised by Plaintiffs in the Second Amended Complaint.

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Attorney for Plaintiffs
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s/ Stephen M. Cody

Florida Bar No. 334685

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy was served on all parties eligible to receive service via CM/ECF and upon all persons not eligible by U.S. Mail.

s/ Stephen M. Cody

043

044

045

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. RICK SCOTT, in his official capacity as Governor of the State of Florida, and KURT S. BROWNING, in his official capacity as Secretary of the State of Florida, Defendants, and ARTHENIA L. JOYNER, JANET CRUZ, LUIS R. GARCIA, JR., JOSEPH A. GIBBONS, and PERRY E. THURSTON, JR., Defendant-Intervenors.	)	Case No. 10-CV-23968-UNGARO

THE STATE LEGISLATORS'
MOTION FOR LEAVE TO INTERVENE AS DEFENDANTS

Senator Arthenia L. Joyner, Representative Janet Cruz, Representative Luis R. Garcia, Jr., Representative Joseph A. Gibbons, and Representative Perry E. Thurston, Jr. (together the "State Legislators") move the Court for leave to intervene as defendants in this action as of right pursuant to Federal Rule of Civil Procedure 24(a)(2) or, in the alternative, to intervene permissibly pursuant to Federal Rule of Civil Procedure 24(b)(1)(B). The State Legislators are members of the Florida Senate or the Florida House of Representatives. Each legislator is a potential candidate for Congress under the apportionment plan that will be drawn according to the Florida lawmaking process. If

they run for Congress, they will be subjected to the Congressional redistricting legislation developed during the 2011-2012 state legislative session.

The grounds for intervention are set forth in the Memorandum in Support of this Motion, which the State Legislators incorporate herein by reference. Attached hereto is the State Legislators' Proposed Answer. The attached Proposed Answer sets forth the defenses for which intervention is sought.

WHEREFORE, the State Legislators request that the Court grant their Motion for Leave to Intervene as Defendants.

CERTIFICATE OF GOOD FAITH CONFERENCE

I hereby certify that counsel for the State Legislators has conferred with all parties and all potential intervenors in a good faith effort to resolve the issues raised in the motion and states Plaintiffs oppose the Motion whereas proposed Defendant-Intervenors NAACP parties and the ACLU parties do not oppose the Motion. Proposed Plaintiff-Intervenor The Florida House of Representatives was unable to provide its position on the Motion prior to filing.

Respectfully submitted,

s/Carl E. Goldfarb

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Attorneys for the State Legislators

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2011, I electronically filed the foregoing Motion For Leave To Intervene As Defendants with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/Carl E. Goldfarb
Carl E. Goldfarb

SERVICE LIST
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Case No. 10-CV-23968-UNGARO
United States District Court, Southern District of Florida

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. RICK SCOTT, in his official capacity as Governor of the State of Florida, and KURT S. BROWNING, in his official capacity as Secretary of the State of Florida, Defendants, and ARTHENIA L. JOYNER, JANET CRUZ, LUIS R. GARCIA, JR., JOSEPH A. GIBBONS, and PERRY E. THURSTON, JR., Defendant-Intervenors.	)	Case No. 10-CV-23968-UNGARO

THE STATE LEGISLATORS' PROPOSED ANSWER

Senator Arthenia L. Joyner, Representative Janet Cruz, Representative Luis R. Garcia, Jr., Representative Joseph A. Gibbons, and Representative Perry E. Thurston, Jr. (together the "State Legislators") respectfully submit this answer to the Second Amended Complaint for Injunctive and Declaratory Relief ("Second Amended Complaint") as follows:

1. The State Legislators deny that Plaintiffs have stated a valid cause of action or are entitled to the relief referenced in the allegations of Paragraph 1 of the Second Amended Complaint.

2. The State Legislators deny that Plaintiffs have stated a valid cause of action or are entitled to the relief referenced in the allegations of Paragraph 2 of the Second Amended Complaint.

PARTIES

3. The State Legislators admit the allegations of Paragraph 3 of the Second Amended Complaint.

4. The State Legislators admit the allegations of Paragraph 4 of the Second Amended Complaint.

5. The State Legislators admit that Plaintiff Diaz-Balart is a citizen of the State of Florida and is a resident of, and registered to vote in, Miami-Dade County. The State Legislators admit further that Plaintiff Diaz-Balart served for one term as U.S. Representative for Florida's 23rd congressional district, and that Plaintiff Diaz-Balart serves in the 112th Congress as U.S. Representative for Florida's 21st congressional district. The State Legislators are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 5 of the Second Amended Complaint and, therefore, deny the same.

6. The State Legislators are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 5 of the Second Amended Complaint regarding Plaintiff Corrine Brown's intent to run for Congress and, therefore, deny the same. The State Legislators admit the remaining allegations of Paragraph 6 of the Second Amended Complaint.

JURISDICTION AND VENUE

7. The State Legislators deny that Plaintiffs have stated a valid cause of action that arises under the Constitution and laws of the United States. The State Legislators further deny that this Court has subject matter jurisdiction over Plaintiffs' alleged cause of action.

8. The State Legislators admit the allegations of Paragraph 8 of the Second Amended Complaint.

FACTS

9. The State Legislators are informed and believe the Florida Department of State approved an initiative petition sponsored by FairDistrictsFlorida.org on or about September 28, 2007, which sets forth standards for the Legislature to follow in congressional redistricting, and that such petition was placed on the November 2010 general election ballot as Amendment 6. As such, the State Legislators admit the same.

10. The State Legislators admit the allegations of Paragraph 10 of the Second Amended Complaint.

11. The State Legislators admit the allegations of Paragraph 11 of the Second Amended Complaint.

12. The State Legislators deny the allegations of Paragraph 12 of the Second Amended Complaint.

13. The State Legislators deny the allegations of Paragraph 13 of the Second Amended Complaint.

14. The State Legislators are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 14 of the Second Amended Complaint and, therefore, deny the same.

COUNT I – VIOLATION OF THE SUPREMACY AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION

15. The State Legislators restate, reallege, and incorporate by reference their responses to Paragraphs 1 through 14 of the Second Amended Complaint as if fully set forth herein.

16. The State Legislators admit that the Supremacy Clause provides that "[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

17. The State Legislators admit the allegations of Paragraph 17 of the Second Amended Complaint.

18. The State Legislators deny the allegations of Paragraph 18 of the Second Amended Complaint.

19. The State Legislators admit the allegations of Paragraph 19 of the Second Amended Complaint.

20. The State Legislators admit the allegations of Paragraph 20 of the Second Amended Complaint.

21. The State Legislators admit that the provisions of Chapter 1, Title 2 of the U.S. Code regulate the election of U.S. Representatives. In all other respects, the State

Legislators are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 21 of the Second Amended Complaint and, therefore, deny the same.

22. The State Legislators deny the allegations of Paragraph 22 of the Second Amended Complaint.

23. The State Legislators deny the allegations of Paragraph 23 of the Second Amended Complaint.

24. The State Legislators deny the allegations of Paragraph 24 of the Second Amended Complaint.

25. The State Legislators deny the allegations of Paragraph 25 of the Second Amended Complaint.

26. The State Legislators deny that Plaintiffs have stated a valid cause of action as implied by the allegations of Paragraph 26 of the Second Amended Complaint.

COUNT II – PREEMPTION UNDER FEDERAL LAW

27. The State Legislators restate, reallege, and incorporate by reference their responses to Paragraphs 1 through 14 and Paragraphs 16 through 26 of the Second Amended Complaint as if fully set forth herein.

28. The State Legislators deny the allegations of Paragraph 25 of the Second Amended Complaint.

PRAYER FOR RELIEF

The State Legislators deny that Plaintiffs are entitled to the relief requested in Paragraphs A through E of the unnumbered WHEREFORE paragraph, or any relief whatsoever.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Plaintiffs Second Amended Complaint, and each count thereof, fails to state a cause of action upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

This Court lacks subject matter jurisdiction over Plaintiffs' Second Amended Complaint, and each count thereof, because Plaintiffs' claims do not "aris[e] under the Constitution, laws, or treaties of the United States," as that phrase is used in 28 U.S.C. § 1331, and because 28 U.S.C. § 1346(a)(2) is inapplicable to this action.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs lack standing to bring the Second Amended Complaint, and each count thereof.

FOURTH AFFIRMATIVE DEFENSE

The claims of Plaintiffs' Second Amended Complaint are not ripe and, therefore, are not justiciable.

FIFTH AFFIRMATIVE DEFENSE

The claims of Plaintiffs' Second Amended Complaint raise political questions which are not justiciable.

Respectfully submitted,

s/Carl E. Goldfarb

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Attorneys for the State Legislators

046

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. RICK SCOTT, in his official capacity as Governor of the State of Florida, and KURT S. BROWNING, in his official capacity as Secretary of the State of Florida, Defendants, and ARTHENIA L. JOYNER, JANET CRUZ, LUIS R. GARCIA, JR., JOSEPH A. GIBBONS, and PERRY E. THURSTON, JR., Defendant-Intervenors.	)	Case No. 10-CV-23968-UNGARO

MEMORANDUM IN SUPPORT OF THE STATE LEGISLATORS' MOTION FOR LEAVE TO INTERVENE AS DEFENDANTS

Senator Arthenia L. Joyner, Representative Janet Cruz, Representative Luis R. Garcia, Jr., Representative Joseph A. Gibbons, and Representative Perry E. Thurston, Jr. (each a "State Legislator," and together the "State Legislators") respectfully submit this memorandum in support of their motion to intervene as of right in this action wherein Plaintiffs claim Article III, Section 20 of the Florida Constitution violates the United States Constitution. The State Legislators, elected officials who have sworn to uphold the Florida Constitution, seek to enforce the will of the people and ensure that Florida's redistricting process complies with Article III, Section 20 of the Florida Constitution. In

the alternative, the State Legislators move for permissive intervention pursuant to Federal Rule of Civil Procedure 24(b).

I. THE STATE LEGISLATORS ARE ENTITLED TO INTERVENE IN THIS ACTION AS A MATTER OF RIGHT.

On a timely motion,[1] Federal Rule of Civil Procedure 24(a)(2) provides intervention as of right for one who:

> 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.

The State Legislators satisfy these requirements.

A. The State Legislators Have a Substantial Interest in the Transaction.

The State Legislators, who seek to join this action as Intervenor-Defendants, "need not demonstrate . . . standing in addition to meeting the requirements of Rule 24." *Chiles v. Thornburgh*, 856 F.2d 1197, 1213 (11th Cir. 1989); *see also Dillard v. Chilton County Comm'n*, 495 F.3d 1324, 1337 (11th Cir. 2007) (noting "an intervenor need not make an independent showing that he or she meets the standing condition of Article III."); *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2004) ("Requiring standing of someone who seeks to intervene as a defendant runs into the doctrine that the standing inquiry is directed at those who invoke the court's jurisdiction."

[1] The State Legislators' motion to intervene is timely under the four-factor test articulated by the Eleventh Circuit in *United States v. Jefferson County*, 720 F.2d 1511, 1516 (11th Cir. 1983). This action is still in it nascent stages. The effective date of the operative complaint is January 31, 2011. Defendants have not yet answered or otherwise responded to the operative complaint. There has been no discovery, and the Court has not yet held a Case Scheduling and Management Conference. Further, motions to intervene from several parties are pending before the Court. Thus, there has been no delay. No party will be prejudiced by the State Legislators' intervention. Lastly, the State Legislators' interests will be impacted significantly by the outcome of this action, and they will be greatly prejudiced if this motion is denied.

(citations omitted)). Rather, the State Legislators need demonstrate only an interest in the implementation of Article III, Section 20 of the Florida Constitution, the "transaction that is the subject of the action." Fed. R. Civ. P. 24(a)(2).

There can be no doubt that, as elected members of the Florida Legislature, sworn to uphold Florida's Constitution and the Constitution of the United States, the State Legislators have a plain and direct interest in ensuring compliance with Article III, Section 20 of the Florida Constitution. Likewise, the State Legislators have "a plain, direct and adequate interest in maintaining the effectiveness of their votes" in the Florida Legislature. *Chiles*, 856 F.2d at 1205 (quoting *Coleman v. Miller*, 307 U.S. 433, 438 (1939)). As legislators, they have an "expectation that certain procedures will be followed in the legislative process." *Id.* at 1206. When such procedures are not followed, a legislator's loss of effectiveness is a legally cognizable injury. *Id.*

Here, the State Legislators participation in the legislative process resulting in – and the efficacy of their votes regarding – Congressional redistricting legislation is directly impacted by Plaintiffs' claim that the Florida Legislature is not bound by Article III, Section 20 of the Florida Constitution. The Florida Legislature must follow the lawmaking process set forth in the Florida Constitution, including the standards set forth in Article III, Section 20, while crafting Congressional redistricting legislation. Plaintiffs' and the Florida House of Representatives, however, represent to this Court that the Florida Legislature is free to ignore the procedures and standards set forth in the Florida Constitution. Plaintiffs and the Florida House of Representatives are wrong and, if they succeed in this action, will subject the State Legislators to a flawed legislative

process. The State Legislators have a direct interest in ensuring the integrity of the legislative process in which they participate.

Further, each State Legislator is a potential candidate for Congress under the apportionment plan that will be drawn according to the Florida lawmaking process. Each has a direct interest in having the districts drawn lawfully under the Florida Constitution. Thus, as prospective Congressional candidates, the State Legislators possess an actual, concrete and particularized interest in the outcome of this action. *See, e.g.*, *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 109-10 (1st Cir. 1999) (holding prospective candidates for office may intervene, and have a concrete stake in the outcome of, an action challenging a state electioneering statute).

B. The State Legislators' Ability to Protect Their Interests Will Be Impaired or Impeded if Intervention is Denied.

The resolution of this action will directly affect the State Legislators' ability to protect their interests. If this Court grants the relief requested by Plaintiffs, the Florida Legislature may proceed with the Congressional redistricting process without complying with the provisions of Article III, Section 20. Movants would be participants in a legislative process that ignores the provisions of the Florida Constitution as well as the will of over 60 percent of the Florida electorate. As such, this requirement of Rule 24(a)(2) is clearly satisfied. *See, e.g.*, *Chiles*, 865 F.2d at 1214 ("Where a party seeking to intervene in an action claims an interest in the very property and very transaction that is the subject of the main action, the potential *stare decisis* effect may supply that practical disadvantage which warrants intervention as of right.").

C. The State Legislators' Interests Cannot be Adequately Represented by the Existing Parties.

The burden of showing that the existing parties cannot adequately represent an intervenor's interests is minimal, *Georgia v. U.S. Army Corps of Engineers*, 302 F.3d 1242, 1255-56 (11th Cir. 2002), and any doubt on the matter is resolved in the intervenor's favor, *Fed. Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing District*, 983 F.2d 211, 216 (11th Cir. 1993). This "adequate representation" requirement of Rule 24(a)(2) is satisfied in two ways.

First, the named Defendants cannot adequately represent the interests of the State Legislators. The State Legislators seek to faithfully apply Article III, Section 20 of the Florida Constitution. As presented by the NAACP parties,[2] the Court has before it evidence that Governor Scott and Secretary Browning have worked, both before and after the 2010 election, to undermine and defeat the reforms found in Article III, Section 20 of the Florida Constitution. Such evidence is sufficient to show that the interests of the State Legislators diverge from that of Defendants, satisfying this requirement. *See, e.g.*, *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1254 (10th Cir. 2001) ("The possibility that the interests of the applicant and the parties may diverge 'need not be great' in order to satisfy" the adequacy of representation requirement of Rule 24(a)(2).).

Second, Defendants cannot adequately represent the State Legislators' interests because Governor Scott and Secretary Browning have different roles in the lawmaking process that is the subject of this action. Defendants have different inputs in that process.

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[2] The State Legislators see no need to repeat the arguments of the NAACP parties and submit duplicative evidence to the Court. Rather, movants rely on the materials and articles submitted to the Court by the NAACP parties at Docket Entry No. 41. If the Court requires additional argument on that topic, or prefers that the State Legislators submit such materials in support of their Motion, the State Legislators respectfully request that the Court permit the State Legislators to submit a supplemental memorandum.

They have different constituencies as well, and different political goals and aspirations. Put simply, Governor Scott and Secretary Browning are not similarly-situated with the State Legislators in Florida's lawmaking process and, therefore, cannot adequately represent the interests of the State Legislators.

II. THE STATE LEGISLATORS SHOULD BE ALLOWED TO INTERVENE PURSUANT TO RULE 24(b).

If this Court determines that intervention of right is not appropriate, the State Legislators request that the Court grant permissive intervention under Rule 24(b)(1). That Rule permits intervention for parties who have a "claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). This "common interest" requirement is liberally construed. *Stallworth v. Monsanto Co.*, 558 F.2d 257, 269 (5th Cir. 1979).

Here, the State Legislators seek to demonstrate that the United States Constitution does not permit the Florida Legislature to ignore the will of Florida's people as expressed in the Florida Constitution. Further, because it is clear that legal issues affecting all of the parties – including the State Legislators – will dominate this action, intervention will provide "little strain on the court's time and no prejudice to the litigants" if the Court grants this motion. *See id.* at 270 (finding no abuse of discretion in a case involving predominantly legal issues where the district court granted permission to intervene to a group of workers in an action brought by another group of workers against the same defendant). Intervention will also provide this Court with the uniquely-situated perspective of the State Legislators, who are members of the party in the minority in the Florida Legislature.

III. CONCLUSION

For the foregoing reasons, this Court should grant the State Legislators intervention of right under Rule 24(a)(2) or, in the alternative, permissive intervention under Rule 24(b).

Respectfully submitted,

s/Carl E. Goldfarb

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s/Carl E. Goldfarb
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047

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN,

Plaintiffs,

vs.

RICK SCOTT, in his official capacity as Governor of the State of Florida, and KURT S. BROWNING, in his official capacity as Secretary of the State of Florida,

Defendants,

and

ARTHENIA L. JOYNER, JANET CRUZ, LUIS R. GARCIA, JR., JOSEPH A. GIBBONS, and PERRY E. THURSTON, JR.,

Defendant-Intervenors.

Case No. 10-CV-23968-UNGARO

MOTION TO APPEAR *PRO HAC VICE*, CONSENT TO DESIGNATION, AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILING

In accordance with Rule 4(b) of the Court's Special Rules Governing the Admission and Practice of Attorneys, the undersigned respectfully moves for the admission *pro hac vice* of Jon L. Mills of Boies, Schiller, and Flexner LLP, 100 S.E. Second Street, Suite 2800, Miami, Florida 33131, (305) 539-8400, for purposes of appearance as co-counsel on behalf of Defendant-Intervenors (the "State Legislators") in the instant action, and pursuant to Rule 2B of the Court's CM/ECF Administrative Procedures, to permit Jon L. Mills to receive electric filings in this case, and in support thereof states as follows.

1. Jon L. Mills is a member in good standing of The Florida Bar and the U.S. Court of Appeals for the Eleventh Circuit. He is not admitted to practice in the U.S. District Court for the Southern District of Florida.

2. Movant, Carl E. Goldfarb of Boies, Schiller & Flexner LLP, 401 East Las Olas Boulevard, Suite 1200, Fort Lauderdale, Florida 33301, (954) 356-0011, is a member in good standing of The Florida Bar and the U.S. District Court of the Southern District of Florida, maintains an office in this State for the practice of law, and is authorized to file through the Court's electronic filing system. Movant consents to be designated as a member of the Bar of this Court with whom the Court and opposing counsel may readily communicate regarding the conduct of the case, upon whom filings shall be served, who shall be required to electronically file all documents and things that may be filed electronically, and who shall be responsible for filing documents in compliance with the CM/ECF Administrative Procedures.

3. Jon L. Mills has made payment of this Court's $75 fee. A certification in accordance with Rule 4(b) of the Court's Special Rules Governing the Admission and Practice of Attorneys is attached hereto.

4. Jon L. Mills, by and through designated counsel and pursuant to Section 2B of this Court's CM/ECF Administrative Procedures, hereby requests the Court to provide Notice of Electronic Filings to Jon L. Mills at email address: jmills@bsfllp.com.

WHEREFORE, Carl E. Goldfarb moves this Court to enter an Order permitting Jon L. Mills to appear before this Court on behalf of the State Legislators for all purposes relating to the proceedings in this action and directing the Clerk to provide notice of electronic filings to Jon L. Mills.

CERTIFICATE OF GOOD FAITH CONFERENCE

I hereby certify that counsel for the State Legislators has conferred with all parties and all potential intervenors in a good faith effort to resolve the issues raised in the motion and states that Plaintiffs, proposed Defendant-Intervenors NAACP parties, proposed Defendant-Intervenors ACLU parties, and proposed Plaintiff-Intervenor the Florida House of Representatives, do not object to the Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion To Appear Pro Hac Vice, Consent To Designation, And Request To Electronically Receive Notices Of Electronic Filing was served by electronic and first class mail to the counsel identified on the attached Service List on March 2, 2011.

Carl E. Goldfarb

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Diaz-Balart and Brown v. State of Florida

Case No. 10-CV-23968-UNGARO

United States District Court, Southern District of Florida

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. RICK SCOTT, in his official capacity as Governor of the State of Florida, and KURT S. BROWNING, in his official capacity as Secretary of the State of Florida, Defendants, and ARTHENIA L. JOYNER, JANET CRUZ, LUIS R. GARCIA, JR., JOSEPH A. GIBBONS, and PERRY E. THURSTON, JR., Defendant-Intervenors.	)	Case No. 10-CV-23968-UNGARO

CERTIFICATION OF JON L. MILLS

Jon L. Mills, Esquire, pursuant to Rule 4(b) of the Court's Special Rules Governing the Admission and Practice of Attorneys, hereby certifies that (1) I have studied the Local Rules of the U.S. District Court for the Southern District of Florida; and (2) I am a member in good standing of The Florida Bar and the U.S. Court of Appeals for the Eleventh Circuit.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MARIO DIAZ-BALART and CORRINE BROWN, Plaintiffs, vs. RICK SCOTT, in his official capacity as Governor of the State of Florida, and KURT S. BROWNING, in his official capacity as Secretary of the State of Florida, Defendants, and ARTHENIA L. JOYNER, JANET CRUZ, LUIS R. GARCIA, JR., JOSEPH A. GIBBONS, and PERRY E. THURSTON, JR., Defendant-Intervenors.	)	Case No. 10-CV-23968-UNGARO

ORDER GRANTING MOTION TO APPEAR *PRO HAC VICE*, CONSENT TO DESIGNATION, AND REQUEST TO ELECTRONICALLY RECEIVE NOTICES OF ELECTRONIC FILING

THIS CAUSE having come before the Court on the Motion To Appear Pro Hac Vice for Jon L. Mills, Consent To Designation, And Request To Electronically Receive Notices Of Electronic Filing (the "Motion"), pursuant to the Special Rules Governing the Admission and Practice of Attorneys in the U.S. District Court for the Southern District of Florida and Section 2B of the CM/ECF Administrative Procedures. This Court having considered the Motion and all other relevant factors, it is hereby

ORDERED AND ADJUDGED that:

The Motion is GRANTED. Jon L. Mills may appear and participate in this action on behalf of proposed Defendant-Intevenors Arthenia L. Joyner, Janet Cruz, Luis R. Garcia, Jr., Joseph A. Gibbons, and Perry E. Thurston, Jr. The Clerk shall provide electronic notification of all electronic filings to Jon L. Mills at jmills@bsfllp.com.

DONE AND ORDERED in Chambers at _____, Florida, this ___ day of _____.

_____
United States District Judge

Copies furnished to:
All Counsel of Record (via electronic filing)

048

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 10-23968-CIV-UNGARO

MARIO DIAZ-BALART and
CORRINE BROWN,

Plaintiffs,

v.

STATE OF FLORIDA, *et al.*,

Defendants.
_____/

ORDER GRANTING MOTIONS TO APPEAR PRO HAC VICE

THIS CAUSE is before the Court upon the Motion to Appear Pro Hac Vice (D.E. 47).

THE COURT has considered the Motions and the pertinent portions of the record and is otherwise fully advised in the premises. Accordingly, it is

ORDERED AND ADJUDGED that said Motion (D.E. 47) is GRANTED.

DONE AND ORDERED in Chambers at Miami, Florida, this _7th__ day of March, 2011.

Ursula Ungaro

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

copies provided:
counsel of record

049

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10 – CV- 23968 -UNGARO

MARIO DIAZ-BALART and CORRINE BROWN,

Plaintiffs,

vs.

RICK SCOTT, in his official capacity as Governor of the State of Florida, et al.,

Defendants.

PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiffs Mario Diaz-Balart and Corrine Brown, by and through their undersigned counsel submits the attached opinion of the Eleventh Circuit Court of Appeal in *Grizzle v. Kemp, -- F.3d --*, Case No. 10-12176 (11th Cir. Ct. of App., March 8, 2011) as supplemental authority to their brief in response to the Court's Order to Show Cause related to jurisdiction.

In *Grizzle*, the court held that

> Pursuant to the Eleventh Amendment, a state may not be sued in federal court unless it waives its sovereign immunity or its immunity is abrogated by an act of Congress under section 5 of the Fourteenth Amendment. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55-57 (1996); *Hans v. Louisiana*, 134 U.S. 1 (1890). Under the doctrine enunciated in *Ex Parte Young*, 209 U.S. 123, however, a suit alleging a violation of the federal constitution against a state official in his official capacity for injunctive relief on a prospective basis is not a suit against the state, and, accordingly, does not violate the Eleventh Amendment. *Id.* at 168; *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004).
>
> A state official is subject to suit in his official capacity when his office imbues him with the responsibility to enforce the law or laws at issue in the suit. *See Young*, 209 U.S. at 161. In *Ex Parte Young*, the Supreme Court held that, as the duties of the attorney general of Minnesota under both common law and statute included "the right and the power to enforce

> the statutes of the state, including . . . the act in question," the attorney general was a proper party. *Id.*

Grizzle at 9. In the instant case, the Second Amended Complaint has been brought against the Governor of the State of Florida and the Secretary of State, both of whom have official duties with regard to elections in the State of Florida.

Because the Eleventh Circuit released its opinion in Grizzle on March 8, 2011, it was impossible to include in the Plaintiffs' prior filed memorandum in response to the Order to Show Case.

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s/Stephen M. Cody

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 8, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

s/Stephen M. Cody

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MARCH 8, 2011
JOHN LEY
CLERK

No. 10-12176

D. C. Docket No. 4:10-cv-0007-HLM

LAMAR GRIZZLE,
KELVIN SIMMONS,

Plaintiffs-Appellees,

versus

HONORABLE BRIAN KEMP,
in his official capacity as Secretary of State of Georgia
and Chairperson of the Georgia State Election Board,

Defendant-Appellant,

THE STATE ELECTION BOARD OF THE STATE OF GEORGIA, et al.

Defendants.

Appeal from the United States District Court
for the Northern District of Georgia

(March 8, 2011)

Before TJOFLAT, ANDERSON and ALARCÓN,* Circuit Judges.

ALARCÓN, Circuit Judge:

In this appeal, we must determine whether the District Court erred in applying the strict scrutiny standard in reviewing the Plaintiffs' claims under the First and Fourteenth Amendments in issuing a preliminarily injunction against the Honorable Brian Kemp, the Secretary of State of Georgia (the "Secretary of State"), in his official capacity, and the County Executive Committee of the Bartow County Republican Party (the "Republican Party"), enjoining the enforcement or application of the portion of Georgia Code Ann. § 20-2-51(c)(2) (2009) that precludes relatives of certain employees of a school system from serving as members of that district's board of education. We must also decide whether the District Court erred in holding that a case or controversy exists with regard to the Secretary of State.

We reverse the order granting a preliminary injunction because we conclude that the District Court erred in reviewing the Plaintiffs' First and Fourteenth Amendment claims under the strict scrutiny standard. As the Secretary of State is the chairperson of the State Election Board and the State Election Board is charged with enforcing Georgia's election code under state law, we conclude that the

*Honorable Arthur L. Alarcón, United States Circuit Judge for the Ninth Circuit, sitting by designation.

Secretary of State is a proper party in this action for injunctive and declaratory relief pursuant to *Ex Parte Young*, 209 U.S. 123 (1908).

I

A

The facts in this matter are undisputed. Plaintiffs Lamar Grizzle and Kelvin Simmons are both Georgia residents who served on school boards in their respective communities at the time this action was filed. Grizzle is a member and currently Chairman of the Board of Education of Bartow County, Georgia, a position to which he was first elected in November 2002 and re-elected in 2006.[2] Grizzle's daughter is an assistant principal at Pine Log Elementary School, which is located within the Bartow County school district.

Simmons was a member of the Board of Education of the City of Gainsville, Georgia from 1991 through 2009. His wife is an assistant principal at Gainsville Middle School. Although he intended to run for re-election in November 2009, he was disqualified due to the passage of 2009 Georgia Laws 164 ("HB 251").

[2]In compliance with the District Court's preliminary injunction in this matter, Grizzle was permitted to qualify for the Republican primary during the fourth week of April 2010. He was re-elected in November 2010.

HB 251 was enacted by the State of Georgia and went into effect on May 5, 2009. HB 251 amended Georgia Code Ann. § 20-2-51 by adding the following as subsection (c)(2):

> No person who has an immediate family member sitting on a local board of education or serving as the local school superintendent or as a principal, assistant principal, or system administrative staff in the local school system shall be eligible to serve as a member of such local board of education. As used in this paragraph, the term "immediate family member" means a spouse, child, sibling, or parent or the spouse of a child, sibling, or parent. This paragraph shall apply only to local board of education members elected or appointed on or after July 1, 2009. Nothing in this Code section shall affect the employment of any person who is employed by a local school system on or before July 1, 2009, or who is employed by a local school system when an immediate family member becomes a local board of education member for that school system.

Ga. Code Ann. § 20-2-51(c)(2) (2009), *amended by* Act of May 25, 2010, 2010 Ga. Laws 468.[3]

B

On January 11, 2009, the Plaintiffs filed an action in the District Court for the Northern District of Georgia against the Honorable Brian Kemp, Secretary of

[3]Plaintiffs in this litigation contest the version of Georgia Code Ann. § 20-2-51(c)(2) amended by HB 251 but prior to the amendments of May 25, 2010. For ease, this opinion refers to the statute at issue as "section 20-2-51(c)(2)."

State of Georgia, in his official capacity,[4] the Election Board of the State of Georgia,[5] and the County Executive Committee of the Bartow County Republican Party,[6] alleging, *inter alia*, that the "nepotism provision" of section 20-2-51(c)(2), as applied and on its face, violates the equal protection guarantee of the Fourteenth Amendment. They additionally alleged that that provision violates their right of free association, both as voters and as candidates for office, under the First Amendment. Plaintiffs requested, *inter alia*, that the court declare section 20-2-51(c)(2) unconstitutional; that it grant a preliminary injunction against enforcement of that section prior to the fourth week of April 2010, the deadline for candidate qualification for party primary elections; and that the Court also grant a permanent injunction against the section's enforcement.

---

[4]"There is created a state board to be known as the State Election Board, to be composed of the Secretary of State, an elector to be elected by a majority vote of the Senate of the General Assembly at its regular session held in each odd-numbered year, an elector to be elected by a majority vote of the House of Representatives of the General Assembly at its regular session held in each odd-numbered year, and a member of each political party to be nominated and appointed in the manner provided in this Code section. . . ." Ga. Code Ann. § 21-2-30(a). "The Secretary of State shall be the chairperson of the board. . . ." *Id.* at (b).

[5]"The State Election Board is vested with the power to issue orders . . . directing compliance with [Chapter 2 of the Georgia Code] or prohibiting the actual or threatened commission of any conduct constituting a violation [of that Chapter] . . . ." Ga. Code Ann. § 21-2-33.1(a).

[6]Under Georgia law, county executive committees of the respective political parties are charged with certifying to the Secretary of State those candidates who have qualified for the primary elections. Ga. Code Ann. § 21-2-154(a).

On January 30, 2010, Plaintiffs requested that the District Court enter an Order to Show Cause scheduling a hearing for a preliminary injunction. The Court denied their request on January 21, 2010. On the same day, the Plaintiffs filed a motion for a preliminary injunction and requested a hearing on their motion prior to the candidate qualifying period of April 26 to 30, 2010.

The Republican Party, on February 5, 2010, filed a motion to be excused from the case. It indicated that it would "abide by the statute as written or by any injunction entered by the Court." Mot. to be Excused at 2. The District Court granted the Republican Party's motion on February 12, 2010.

On February 12, 2010, the Secretary of State and the State Election Board jointly filed a motion to dismiss them from this action. In an order issued on March 15, 2010, the District Court granted the State Election Board's motion to be dismissed from this action, and denied the motion to dismiss the Secretary of State as a party.

The Secretary of State filed an answer to the complaint on March 29, 2010. On April 21, 2010, the District Court issued an Order granting in part and denying in part Plaintiffs' motion for a preliminary injunction. The District Court preliminarily enjoined the Secretary of State and the Republican Party "from enforcing or applying the portion of [Georgia Code Ann.] § 20-2-51(c)(2) that

precludes relatives of certain employees of a school system from running for election to the school board governing that system, and from precluding Plaintiff Grizzle or any other otherwise qualified individual from running for election to a school board position within Georgia." *Id.* at 60-61. It denied relief as to Plaintiffs' other claims, not pertinent to this appeal, and again rejected the Secretary of State's contention that he is not a proper party in this action.

The Secretary of State timely appealed from the District Court's April 21 order. This Court has jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1).

II

The Secretary of State contends the District Court erred in holding that he is a proper party in this action, and, accordingly, in entering a preliminary injunction against him. He additionally argues that the District Court erred in applying strict scrutiny to the Plaintiffs' claims under the First and Fourteenth Amendments in its assessment of the Plaintiffs' Motion for Preliminary Injunction. Because the case-or-controversy requirement is jurisdictional in nature, we address that issue first.

A

The Secretary of State asserts that, because he cannot qualify, challenge or certify candidates for local boards of education under Georgia's election code, he

is not a proper party in this lawsuit. He maintains that, under Georgia's election code, in partisan elections such as those for local boards of education,[7] a candidate's party is charged with determining the qualifications of aspirants for office. Ga. Code Ann. § 21-2-153.1(a).[8] Challenges to candidates to local office may be mounted only by electors or the elections superintendent. § 21-2-6(b).[9] The elections superintendent then certifies the election results to the Secretary of State as well as to the State School Superintendent. § 20-2-53.[10]

The Secretary of State contends that, "[b]ecause he must accept, and cannot alter, the qualifications and certification of Grizzle and Simmons [under Georgia's

---

[7]The court accepts the parties' concession that elections to local boards of education in Georgia are partisan. *See* Appellees' Br. 6 (stating that the Bartow County school board election is partisan); *see* Appellant's Br. 4 ("The facts of this case . . . are not in dispute.").

[8]"Unless otherwise provided by law, all candidates for party nomination in a municipal primary shall qualify as such candidates in accordance with the rules of their party." § 21-2-153.1(a).

[9]"The superintendent upon his or her own motion may challenge the qualifications of any [county or municipal] candidate [certified by the county or municipal executive committee, respectively, of a political party or who files a notice of candidacy] at any time prior to the election of such candidate. Within two weeks after the deadline for qualifying, any elector who is eligible to vote for any such candidate may challenge the qualifications of the candidate by filing a written complaint with the superintendent giving the reasons why the elector believes the candidate is not qualified to seek and hold the public office for which the candidate is offering. . . ." § 21-2-6(b).

[10]"[I]t shall be the duty of the elections superintendent of each system or other political subdivision to transmit to the Secretary of State and to the State School Superintendent a certified statement of the election of members of a local board of education. . . ." § 20-2-53.

election code], he cannot be sued over a statute designed to prevent such occurrence." Appellant's Br. 11.

Pursuant to the Eleventh Amendment, a state may not be sued in federal court unless it waives its sovereign immunity or its immunity is abrogated by an act of Congress under section 5 of the Fourteenth Amendment. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55-57 (1996); *Hans v. Louisiana*, 134 U.S. 1 (1890). Under the doctrine enunciated in *Ex Parte Young*, 209 U.S. 123, however, a suit alleging a violation of the federal constitution against a state official in his official capacity for injunctive relief on a prospective basis is not a suit against the state, and, accordingly, does not violate the Eleventh Amendment. *Id.* at 168; *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004).

A state official is subject to suit in his official capacity when his office imbues him with the responsibility to enforce the law or laws at issue in the suit. *See Young*, 209 U.S. at 161. In *Ex Parte Young*, the Supreme Court held that, as the duties of the attorney general of Minnesota under both common law and statute included "the right and the power to enforce the statutes of the state, including . . . the act in question," the attorney general was a proper party. *Id.*

In this matter, the Secretary of State is, by statute, a member and the chairperson of the State Election Board. Ga. Code Ann. § 21-2-30(a) & (d). Under Georgia law, "[t]he State Election Board is vested with the power to issue orders . . . directing compliance with [Chapter 2 of Georgia's election code] or prohibiting the actual or threatened commission of any conduct constituting a violation [of Chapter 2] . . . ." § 21-2-33.1(a). Partisan primary elections, including those for local boards of education, fall within Chapter 2 of the state election code. *See* Ga. Stat. tit. 21, ch. 2 (governing "Elections and Primaries Generally").

Plaintiffs here seek prospective injunctive relief against the Secretary of State in his official capacity. Because their suit falls within the *Ex Parte Young* exception, the Eleventh Amendment does not bar their suit. Although the Secretary of State cannot directly qualify or challenge candidates for local boards of education or certify the results of those elections, as a member and the chairperson of the State Election Board, he has both the power and the duty to ensure that the entities charged with those responsibilities comply with Georgia's election code in carrying out those tasks. Pursuant to *Ex Parte Young*, "[h]is power by virtue of his office sufficiently connect[s] him with the duty of enforcement to make him a proper party to a suit of the nature of the one now

before" this Court. 209 U.S. at 161. The District Court therefore did not err in holding that the Secretary of State is a proper party in this action.

B

1

The Secretary of State also contends the District Court erred in determining that the strict scrutiny standard applies to the Plaintiffs' claims under the First and Fourteenth Amendments. He argues that, due to this error, the issuance of a preliminary injunction was improper.

"Although we review the district court's entry of a preliminary injunction under a deferential abuse-of-discretion standard, the legal conclusions upon which an injunction is based are subject to more exacting *de novo* review." *Bank of Am. Nat. Ass'n v. Colonial Bank*, 604 F.3d 1239, 1242-43 (11th Cir. 2010).

The moving party must demonstrate the following in order for the District Court to grant its motion for a preliminary injunction: "(1) a substantial likelihood of success on the merits of the underlying case, (2) the movant will suffer irreparable harm in the absence of an injunction, (3) the harm suffered by the movant in the absence of an injunction would exceed the harm suffered by the opposing party if the injunction issued, and (4) an injunction would not disserve the public interest." *N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211,

1217 (11th Cir. 2008). The Secretary of State maintains that, because the District Court applied the incorrect standard of review to Plaintiffs' constitutional claims, Plaintiffs have not demonstrated a likelihood of success on the merits. Our inquiry thus begins and ends with this first prong of the test.

2

In its analysis of the standard it should apply in determining whether section 20-2-51(c)(2) violates the Equal Protection Clause of the Fourteenth Amendment, the District Court stated that "the right to seek and hold public office is not a fundamental right protected by the Constitution." April 21 Order at 34 (internal citations omitted). Nonetheless, it found that section 20-2-51(c)(2)

> entirely precludes Plaintiffs from appearing on the ballot as candidates for their respective local school boards, and, consequently, its effect on Plaintiffs is extreme. Moreover, it is extremely likely that [Georgia Code Ann. § 20-2-51(c)(2)] will severely burden the rights of numerous Georgia voters, as it likely will bar individuals across the State from running as candidates for their local school boards, thereby depriving voters of the right to vote for the candidates of their choice.

Id. at 37-38. Holding that section 20-2-51(c)(2) thus severely impacted "ballot access" and "the right of association," the District Court applied strict scrutiny to Plaintiffs' claims. *Id.*

The District Court assumed, for purposes of its review, that the Secretary of State's proposed interest–the prevention of nepotism–is a compelling state interest. It stated that

> the statute . . . is not narrowly tailored to serve that purpose. Specifically, the statute is overly broad, because it simply excludes certain relatives from office, rather than addressing the real problem of nepotism–possible biased decisions of school board members. The statute, by the same token, is also too narrow, because it fails to address other family relationships that might cause biased decisions on the part of a school board member.

April 21 Order at 39. Additionally, the District Court noted,

> Georgia already has statutes in place that address many nepotism concerns, including: (1) [Georgia Code Ann.] § 20-2-58.1, which precludes school board members from voting on employment decisions for relatives; (2) [Georgia Code Ann.] § 45-10-3, which sets forth a code of ethics for school boards members and includes a provision that members must "[n]ever discriminate by the dispensing of special favors or privileges to anyone, whether or not for remuneration;" and (3) [Georgia Code Ann.] § 45-10-4, which permits the Governor to remove an official who breaches the provisions of [Georgia Code Ann.] § 45-10-3.

Id. at 39-40 (quoting Ga. Code Ann. § 45-10-3).

The District Court stated that, "[a]pplying strict scrutiny, [Georgia Code Ann.] § 20-2-51(c)(2) fails to pass muster." *Id.* at 38. It thus held that the Plaintiffs had shown a substantial likelihood of success on the merits at trial and

granted their motion for a preliminary injunction.

In support of the District Court's conclusion, Plaintiffs maintain that the nepotism provision violates their right to equal protection under the Fourteenth Amendment because it treats them differently from similarly situated persons, namely, individuals desiring to run for the school board who do not have family members employed in certain positions in the relevant school system. With regard to their claims under the First Amendment, Plaintiffs assert that the provision violates their right to free association because it affects their right to seek office as school board members as well as the right of voters to vote for them. They argue that the District Court did not err in applying strict scrutiny because section 20-2-51(c)(2) *completely* bars them from running for office, and thus constitutes a "severe restriction" on their right to be candidates as well as on voters' ballot access rights. They additionally note that the restriction is imposed based on matters over which they have no control.

The Secretary of State contends that "the district court erred in holding [Georgia Code Ann.] § 20-2-51(c)(2) unconstitutional [because] [t]here is no severe burden on Grizzle's and Simmons [sic] First and Fourteenth Amendment [r]ights." Appellant's Br. 24. He argues that this case is analogous to those in which courts have held that statutes requiring an individual to resign from office in

order to appear on the ballot for a different office ("resign-to-run" statutes) warrant only rational basis review.

3

The Supreme Court has not "attached such fundamental status to candidacy as to invoke a rigorous standard of review." *Bullock v. Carter*, 405 U.S. 134, 142-43 (1972). Recognizing, however, that the right to vote is fundamental, the Court has noted that "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Id.* at 143. But "[n]ot all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *see also Bullock*, 405 U.S. at 143 ("not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review."). A restriction on candidacy implicates a fundamental right only if "the challenged restriction unfairly or unnecessarily burdens the 'availability of political opportunity.'" *Anderson*, 460 U.S. at 793 (quoting *Clements v. Fashing*, 457 U.S. 957, 964 (1982) (plurality opinion)); *see also Morial v. Judiciary Comm'n of Louisiana*, 565 F.2d 295, 301 (11th Cir. 1977) (Candidacy is "an important, if not constitutionally

'fundamental,' right.").

In reviewing challenges to restrictions on candidacy and ballot access under the First and Fourteenth Amendments, we "must first consider 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the [candidate] seeks to vindicate.'" *Swanson v. Worley*, 490 F.3d 894, 902 (11th Cir. 2007) (quoting *Anderson*, 460 U.S. at 789). When the plaintiffs' rights are subject to "severe" restrictions, those restrictions survive only if they are "'narrowly tailored and advance[] a compelling state interest.'" *Id.* at 903 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)); *see Burdick v. Takushi*, 504 U.S. 428, 434 (1992) ("severe" regulation must be "'narrowly drawn to advance a state interest of compelling importance.'") (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). By contrast, "a State's important regulatory interests" are generally sufficient to justify a state election law which burdens the First and Fourteenth Amendment rights of candidates and voters with restrictions which are "reasonable" and "nondiscriminatory." *Swanson*, 490 F.3d at 903 (citing *Burdick*, 504 U.S. at 434). "Lesser burdens . . . trigger less exacting review . . . ." *Id.* Thus, in order to assess whether, on the current record, strict scrutiny applies to the Plaintiffs' claims under the First and Fourteenth Amendments, we must determine whether the restriction imposed by section

20-2-51(c)(2) is "severe" based on the "character and magnitude" of Plaintiffs' asserted harm.

In *Morial v. Judiciary Commission of Louisiana*, 565 F.2d 295 (5th Cir. 1977),[11] the former Fifth Circuit considered whether a Louisiana statute and canon of judicial conduct requiring judges to resign from their current office before running for a non-judicial position comported with the plaintiffs' rights to free speech and freedom of association under the First Amendment and their right to equal protection of the laws under the Fourteenth Amendment. *Id.* at 299-307. The Fifth Circuit stated that, although Judge Morial had a "substantial" First Amendment interest in becoming a candidate, "in order to judge the substantiality of the impairment," that interest must be weighed in light of his interests left unaffected by the Louisiana statute. *Id.* at 301. The Court noted that

> Louisiana's resign-to-run requirement does not burden [Judge Morial's] right to vote for the candidate of his choice or to make statements regarding his private opinions on public issues outside a campaign context; nor does it penalize his belief in any particular idea. These are core first amendment values.

Id.; *see also Clements*, 457 U.S. at 972 (no first amendment violation where state constitutional provisions "in no way restrict appellees' ability to participate in the

[11]Decisions of the Fifth Circuit rendered prior to October 1, 1981 are binding precedent of this Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981).

political campaigns of third parties. They limit neither political contributions nor expenditures. They do not preclude appellees from holding an office in a political party. . . . [A]ppellees may distribute campaign literature and may make speeches on behalf of a candidate.") The Fifth Circuit also stated that "[t]he impact of the resign-to-run requirement upon voters is even less substantial[,]" as it did not exclude candidates based on their viewpoint, or their membership in an identifiable group, such as the poor or minority parties. *Morial*, 565 F.2d at 301-02 (citations omitted).

In addressing the level of scrutiny appropriate to review the plaintiffs' challenge to the Louisiana statute under the First Amendment, the Court stated in *Morial*,

> The impairment of the plaintiffs' interests in free expression and political association stemming from enforcement of the resignation rule is thus not sufficiently grievous to require the strictest constitutional scrutiny. Neither is the impairment insubstantial or innocuous; a level of scrutiny which guarded against only those measures offending logic would be a gratuitous insult to the seriousness of the interests involved in becoming or supporting a candidate for public office. Instead, we should employ a level of scrutiny which requires the state to show a reasonable necessity for requiring judges to resign before becoming candidates for elective judicial office.

Id. at 302 (internal citations omitted).

The Supreme Court considered the equal protection question at length in *Clements v. Fashing*, 457 U.S. 957 (1982). The plaintiffs in *Clements* brought both First Amendment and Fourteenth Amendment challenges to Article III, § 19 and Article XVI, § 65 of the Texas Constitution. *Id.* Article III, § 19 stated that

> [n]o judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the [state] Legislature.

Id. at 960. Article XVI, § 65 provided for the automatic resignation of certain state officers upon the announcement of their candidacy "in any General, Special or Primary Election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one (1) year[.]" *Id.* The Court noted that it had "departed from traditional equal protection analysis" in cases involving classifications based on economic status and in those burdening emerging, smaller, or independent political parties or candidates. *Id.* at 964-65 (citations omitted).

The Supreme Court also stated in *Clements* that the concerns underlying those cases–filing fees, invidious discrimination, and discrimination based on viewpoint or political affiliation–did not apply to the matter before it. *Id.* at 964. Addressing Article III, § 19, it held that the classification was not invidious,

arbitrary, or irrational and that the burden imposed on a Justice of the Peace by that section–effectively, a maximum two-year waiting period between the end of his current term in office and announcing his candidacy for the state legislature–was *de minimis*. *Id.* at 967 (citing *Storer v. Brown*, 415 U.S. 724, 733-37 (1974) (no constitutional violation where individual was disqualified from running in party primary if he had been registered or affiliated with a different party within the preceding twelve months)). "[T]his sort of insignificant interference with access to the ballot need only rest on a rational predicate in order to survive a challenge under the Equal Protection Clause." *Id.* at 968.

The Supreme Court further stated in *Clements* that, pursuant to *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973), the singling out of particular officeholders for this restriction did not offended equal protection. *Id.* at 969. "'[T]he legislature must have some leeway in determining which of its employment positions require restrictions on partisan political activities and which may be left unregulated.'" *Id.* (quoting *Broadrick*, 413 U.S. at 607 n.5.). The state may, consistent with equal protection, regulate "one step at a time, addressing itself to the phase of the problem which seems most acute." *Id.* at 970.

The Supreme Court likewise reviewed the classification behind Article XVI, § 65, the "resign-to-run" provision, for a "rational predicate." *Id.* Noting that there

was no apparent "invidious purpose" behind the provision, it held that the legislature's "one step at a time" approach was permissible under equal protection. *Id.* at 970-71.

Reviewing the plaintiffs' First Amendment claims, the Supreme Court held that they failed for the same reasons the plaintiffs' equal protection claims failed–because the burden on their interests in candidacy was *de minimis* rather than "severe." *Id.* It remarked that those claims additionally failed due to the limited nature of the challenged restrictions on political activity. *Id.*

The Second Circuit, too, has confronted the constitutionality of "resign-to-run" provisions, in *Fletcher v. Marino*, 882 F.2d 605 (2d Cir. 1989). In that case, plaintiffs, who were members of a community school board, argued that a New York statute making current community school board members ineligible for employment by any community school board or city board, and making certain public officials ineligible for membership on community school boards violated, *inter alia*, their right to freedom of association under the First Amendment. *Id.* at 608-10. The Second Circuit applied a lesser standard of scrutiny in its review of the plaintiffs' claims. *See id.* at 613. The law, it stated, "does no more than prohibit certain municipal employees, political party office holders and elected officials from being community school board members. It does not stop anyone

from running for any office." *Id.*

The Second Circuit in *Fletcher* also evaluated the plaintiffs' First Amendment claim as to infringement on the voters' right to choose a candidate under a lesser standard of review. *Id.* at 614. The New York legislature, it held, "has not prevented people with certain ideas from becoming candidates. It has not prevented people from certain protected backgrounds from becoming candidates. It has only prevented people holding certain jobs or certain party leadership positions from becoming members of community school boards." *Id.*

The Plaintiffs here attempt to distinguish this case from *Morial*, *Clements*, and *Fletcher* on two bases. We are not persuaded.

Plaintiffs first maintain that section 20-2-51(c)(2) "enacts a *total ban* from elective office for the thousands of close relatives of existing school board members, superintendents, principles [sic], assistant principals and 'system administrative staff.'" Appellees' Br. 21. Plaintiffs overstate the point. Section 20-2-51(c)(2) prohibits them, and like individuals, only from running for the school board governing the system in which certain family members are employed. Plaintiffs may run for any other elected office; they may vote, distribute campaign literature, voice their political opinions, and participate in and hold office in their political party of choice. Under the balancing test articulated by this Court in

Swanson, the Plaintiffs' injury under the First Amendment is not so "severe" as to require strict scrutiny.

Additionally, Plaintiffs suggest that the type of restriction at issue in this matter–nepotism–warrants closer scrutiny than that afforded in the "resign-to-run" cases. They argue that the plaintiffs in those cases were faced with a choice as to whether to step down from their current posts in order to run for office under the challenged law. Here, Plaintiffs have no control over their eligibility as candidates for the desired school boards; their eligibility is entirely based on the employment of their "immediate family member[s]." *See* Ga. Code Ann. § 20-2-51(c)(2).

This Court had occasion to consider the standard of review applicable to anti-nepotism provisions specifically in *Parks v. City of Warner Robins*, 43 F.3d 609 (11th Cir. 1995). There, the plaintiff argued that a Georgia statute which prohibited a city employee from working in the same department as a relative in a supervisory position violated her right of intimate association under the First Amendment, her substantive due process right to marry under the Fourteenth Amendment, and her right to equal protection under the Fourteenth Amendment due to its disparate impact on women. *Id.* at 612. In determining whether the ordinance warranted strict scrutiny, this Court reviewed the effect of the restriction under each constitutional provision, rather than considering a specific standard

generally applicable to anti-nepotism provisions. *Id.* Because the provision at issue did not require a heightened standard of review, this Court analyzed the plaintiffs' claims under the rational basis standard. *Id.* at 614-15. That section 20-2-51(c)(2) combats nepotism therefore does not, in itself, subject it to strict scrutiny review.

In asserting that equal protection analysis of section 20-2-51(c)(2) demands strict scrutiny, the Plaintiffs charge both that it is too narrow and that it is overbroad. Plaintiffs argue that the statute's failure to address potential nepotism by grandparents, aunts, uncles, cousins, and the like demonstrates that "this statute was not drafted with 'nepotism' as the purpose[,]" "but rather was intended to cost someone elective office." Appellees' Br. 22-23. On this record, we cannot say that the statute was enacted with an invidious purpose; pursuant to *Clements*, the State may regulate one step at a time in order to address what it deems the most pressing issues. Plaintiffs' overbreadth argument similarly fails; that the statute does not prevent nepotism in all its possible forms does not heighten the severity of the restriction to necessitate strict scrutiny.

In addition, Plaintiffs argue that "the issue of nepotism can better be addressed by specific rules relating to decisions regarding relatives . . . ." Appellees' Br. 26. They note that Georgia already has statutes in place that

regulate school board members with respect to decisions affecting relatives employed by the school system, including ethics provisions that subject a board member to removal for breach. However, whether nepotism is "better" addressed in one manner or another is irrelevant to our inquiry here; the standard of review we apply in assessing the statute at hand is not measured by reference to alternative measures. *See, e.g.*, *Morial*, 565 F.2d at 301-03 (determining the appropriate level of scrutiny prior to analyzing whether the restriction at issue "[met] the test of reasonable necessity"). The Plaintiffs' argument in this regard thus goes to the question of whether Georgia Code Ann § 20-2-51(c)(2) is reasonably necessary to combat nepotism. Because we hold here that the District Court erred in applying strict scrutiny, we do not reach this issue.

Conclusion

"Candidacy for office is one of the ultimate forms of political expression in our society." *Morial*, 565 F.2d at 301. However, "[f]ar from recognizing candidacy as a 'fundamental right,'" the Supreme Court has stated "that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny.'" *Clements*, 457 U.S. at 963 (quoting *Bullock*, 405 U.S. at 143). Likewise, although "[v]oting is of the most fundamental significance under our constitutional structure[,] [i]t does not follow . . . that the right to vote in any

manner and the right to associate for political purposes through the ballot are absolute." *Burdick*, 504 U.S. at 433 (internal citations and quotations omitted). Only where candidacy or ballot access regulations severely burden the availability of political opportunity do we apply strict scrutiny.

On the current record, the District Court erred in reviewing Plaintiffs' constitutional claims under the strict scrutiny standard. Because the application of strict scrutiny on review of the Plaintiffs' constitutional claims was error, Plaintiffs have not demonstrated a likelihood of success on the merits, as required to obtain a preliminary injunction. We note that, although the Republican Party has been excused from appearing in this matter, our decision reversing the grant of a preliminary injunction applies to both the Secretary of State and the Republican Party. We express no view as to the merits of any other theory of liability Plaintiffs may wish to assert at any further proceedings before the District Court.

Pursuant to *Ex Parte Young*, 209 U.S. 123, the Secretary of State has the duty and the power to enforce the State's election code. The District Court did not err in holding that the Secretary of State is a proper party in this action.

AFFIRMED in part, and **REVERSED** in part.