IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

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| LEAGUE OF WOMEN VOTERS OF FLORIDA, et al., | ) | No. 4:11-CV-628-RH/WCS |
| *Plaintiffs*, | ) | |
| v. | ) | |
| KENNETH W. DETZNER, et al., | ) | |
| *Defendants*. | ) | |

**INTERVENORS' MOTION FOR LEAVE TO FILE A REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PERMISSIVE INTERVENTION, AND SUPPORTING MEMORANDUM OF LAW**

Putative Intervenors John E. Wightman, Guillermina T. Moore, Mark E. Pionessa, and Guillermina C. Tarafa (collectively, "Intervenors"), pursuant to N.D. Fla. Loc. R. 7.1(C)(2), respectfully move this Court for leave to file a Reply Memorandum in Support of Their Motion for Permissive Intervention. Plaintiff League of Women Voters of Florida raised several new issues in its Opposition Memorandum, D.E. #73 (July 16, 2012), to which Intervenors deserve an opportunity to respond. *See, e.g.*, *id*. at 10 ("Now that the deadline to file a notice of appeal has passed, it is unclear what independent interest Proposed Intervenors have in this litigation."). Intervenors further believe it would be helpful to this Court to address the substantial changes in circumstance that have occurred since they filed their original Motion, which bolster their case for permissive intervention under Eleventh Circuit precedent. The Court, upon good cause


McDonald Hopkins LLC, Attorneys at Law
200 South Biscayne Boulevard, Suite 3130, Miami, Florida 33131 • 1.305.704.3990

shown, may grant leave to file a Reply. N.D. Fla. Loc. R. 7.1(C)(2). Intervenors' proposed Reply Memorandum is attached as Exhibit 1.

**Certification Pursuant to Rule 7.1(B)**

The undersigned counsel certifies that she has conferred with counsel for Defendants, who have advised that they take no position on this Motion, and that she has attempted to confer with counsel for Plaintiffs but has not yet received a response. Due to the possibility that this Court might rule on the Motion for Permissive Intervention at any time, Movants have filed the instant Motion at this time so that the Court may consider Movants' proposed Reply Memorandum if it so chooses prior to issuing a ruling.

Respectfully submitted,

s/ Raquel A. Rodriguez
Raquel A. Rodriguez
Fla. Bar No. 511439
rrodriguez@mcdonaldhopkins.com
McDONALD HOPKINS LLC
Southeast Financial Center
200 South Biscayne Boulevard, Suite 3130
Miami, FL 33131-2344
Tel: (305) 704-3994
Fax: (305) 704-3999
*Attorneys for Putative Intervenors*

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on July 23, 2012, a true and correct copy of the foregoing was filed with the Clerk of Court via the CM/ECF system, causing a Notice of Electronic Filing to be sent to all counsel of record.

s/ David Axelman
David Axelman

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| *Defendants*. | ) | |

**INTERVENORS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PERMISSIVE INTERVENTION**

Although private groups have played an important role in helping people register to vote throughout the State of Florida, published press accounts and court records confirm that some of these groups (not including the League of Women Voters) have perpetrated substantial voter registration fraud over the past several years, both in Florida and nationwide. Such fraud not only undermines society's general interest in ensuring that elections are conducted fairly (an interest which Intervenors lack standing to vindicate), *see Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006), but also directly threatens the individual, personal constitutional right to vote of each eligible and properly registered elector.

False voter registrations allow ineligible or unregistered individuals to illegally vote, and eligible voters to improperly cast multiple votes. The U.S. Supreme Court has held that "***each voting elector***" has a personal, individual constitutional right to have his


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200 South Biscayne Boulevard, Suite 3130, Miami, Florida 33131 • 1.305.704.3990

or her vote be "given full value and effect, without being diluted or distorted by the casting of fraudulent ballots." *Anderson v. United States*, 417 U.S. 211, 226 (1974) (emphasis added); *see also Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (holding that an individual's personal right to vote is denied "just as effectively" by "debasement or dilution of the weight of a citizen's vote . . . as by wholly prohibiting the free exercise of the franchise").

Particularly given the State's recently expressed lack of interest in continuing to defend the constitutionality of Florida's new protections against third-party voter registration fraud, *see* Fla. Stat. § 97.0575; Fla. Admin. Code R. 1S-2.042 (collectively, the "Third-Party Registration Laws"), this Court should exercise its broad discretion to allow Intervenors to protect their personal constitutional rights for themselves by obtaining a definitive adjudication from the U.S. Court of Appeals for the Eleventh Circuit on the constitutionality of those important protections. In the event Plaintiffs and the State reach a settlement, Intervenors either would consent to treating the preliminary injunction as a permanent injunction to facilitate entry of a final judgment and appeal, *see* Fed. R. Civ. P. 65(a)(2); *see also id*. R. 54(b), or seek to appeal any Consent Decree or other dispositive agreement or judgment.

**A. <u>The League's History of Intervention in Election-Related Litigation</u>**

Plaintiff League of Women Voters of Florida ("the League") argues that voters who contend that the Third-Party Registration Laws are necessary to protect their fundamental constitutional right to vote should be excluded from this lawsuit, yet League of Women Voters groups throughout the nation have made a cottage industry of


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200 South Biscayne Boulevard, Suite 3130, Miami, Florida 33131 • 1.305.704.3990

intervening in election-related litigation, including intervening in support of state and local governments to defend campaign finance restrictions, *see, e.g.*, *Landell v. Sorell*, 382 F.3d 91, 102 (2d Cir. 2002), *rev'd sub nom. Randall v. Sorrell*, 548 U.S. 230 (2006),[1] prohibitions on corporate expenditures for ballot initiatives, *see, e.g.*, *Mont. Chamber of Comm. v. Argenbright*, 226 F.3d 1049, 1052 & n.1 (9th Cir. 2000), the conduct of local school board elections, *see Corning v. Donohue*, 323 N.Y.S.2d 206 (App. Div. 1971), and even a state's refusal to accept an initiative petition, *see Cohen v. Att'y Gen.*, 237 N.E.2d 657, 658 (Mass. 1968).

The League likewise has intervened in support of the federal Government to defend its refusal to grant preclearance to state election laws under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c(a), *see, e.g.*, *Florida v. United States*, 820 F. Supp. 2d 85, 86 (D.D.C. 2011); as well as in litigation relating to redistricting and reapportionment, *see, e.g.*, *Thigpen v. Meyers*, 231 F. Supp. 938 (W.D. Wash. 1964),[2] and other types of civil rights cases, *see, e.g.*, *Oliver v. Sch. Dist.*, 448 F.2d 635, 636 (6th Cir. 1971) (granting League's motion to intervene in desegregation case). The League therefore is not well-positioned to ask this Court to exercise its discretion to exclude voters from participating in this case.

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[1] *See also Vt. Right to Life Comm. v. Sorrell*, 221 F.3d 376, 379 (2d Cir. 2000); *Buckley v. Valeo*, 519 F.2d 821, 834 n.5 (D.C. Cir. 1975), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976); *Vannatta v. Kiesling*, 899 F. Supp. 488, 491 (D. Or. 1995).

[2] *See also Moss v. Burkhart*, 207 F. Supp. 885 (W.D. Okla. 1962) (per curiam); *Republican Party v. Elections Bd.*, 585 F. Supp. 603 (E.D. Wis. 1984), *rev'd* 469 U.S. 1081 (1984); *Franklin v. Krause*, 371 N.Y.S.2d 757 (Sup. Ct. 1975); *Abate v. Mundt*, 300 N.Y.S.2d 447, 450 (Sup. Ct. 1969).


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### B. Fundamental Fairness Further Counsels in Favor of Allowing Permissive Intervention

The League's opposition to allowing Intervenors to participate in this lawsuit is even more unseemly given the overwhelming advantage Plaintiffs have enjoyed in this case. Plaintiffs amassed a legal team of a dozen attorneys from some of this nation's best-known legal institutions to litigate this matter, including the international law firm Paul, Weiss; the Brennan Center for Justice; the American Civil Liberties Union; and a Miami law firm. *See* Plaintiffs' Memorandum in Opposition to Motion for Permissive Intervention, D.E. #73, at 17-18 (July 16, 2012) (hereafter, "Opp.") (containing more than one page of signature blocks for Plaintiffs' counsel). With their legal team enjoying a commanding four-to-one advantage over counsel for the State, Plaintiffs cannot credibly complain of undue prejudice from this Court allowing an additional attorney or two to join in—if not altogether assume—the defense of the Third-Party Registration Laws.

### C. The Impact of Recent Developments on Intervenors' Request for Permissive Intervention

After this Court entered its preliminary injunction of the Third-Party Registration Laws, *see* Order Granting Preliminary Injunction, D.E. #58 (May 31, 2012), Intervenors moved to participate in this lawsuit primarily to appeal that ruling to the Eleventh Circuit, *see* Bipartisan Group of Voters' Motion for Permissive Intervention, D.E. #63 (June 27, 2012). Shortly after Intervenors filed that Motion, the State filed a Notice of Appeal. *See* Notice of Appeal, D.E. #68 (July 2, 2012).

Plaintiffs state, "Now that the deadline to file a notice of appeal has passed, it is unclear what independent interest Proposed Intervenors have in this litigation." Opp. at 10. Despite filing its Notice of Appeal, the State recently has made it clear that it wishes to drop its challenge to this Court's preliminary injunction, enter into a settlement with Plaintiffs, and cease its defense of the enjoined provisions (and perhaps others) of the Third-Party Registration Laws. *See Florida v. United States*, No. 1:11-CV-01428 (D.D.C.), Notice Regarding Appeal of Preliminary Injunction in *LWVF v. Browning* 1 (July 3, 2012) ("[T]he parties to *League of Women Voters of Florida v. Browning* have reached an agreement in principle . . . . Although Florida has appealed the preliminary injunction issued in that action to preserve its rights, the parties are working expeditiously to formalize their agreement."). Plaintiffs themselves acknowledge that they are on the "eve of settlement" with the State. Opp. at 6; *see also id*. at 11 (stating that the parties "intend shortly" to settle this case).

Although Plaintiffs emphasize that several months have passed since they first filed this lawsuit, *see* Opp. at 4-6, the State only recently has signaled that it will be abrogating its responsibility to defend the constitutionality of the Third-Party Registration Laws, thus leaving Intervenors' interests undefended in this lawsuit. *Cf.* Opp. at 2 (arguing that Intervenors' interests have "been adequately represented by[] Defendants"). The Eleventh Circuit has held that a government entity's willingness to enter into a settlement agreement is persuasive evidence that the entity no longer is adequately representing the interests of the private parties that had been relying on it. *See Clark*, 168 F.3d at 462 (holding that "the suggestion of settlement . . . shows yet another divergence



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200 South Biscayne Boulevard, Suite 3130, Miami, Florida 33131 • 1.305.704.3990

of interests" between the government official defendants and private parties seeking to intervene as defendants). In light of the State's settlement discussions with the League, "the proposed interveners intend to pursue their favored result with greater zeal than the [State]. A greater willingness to compromise can impede a party from adequately representing the interests of a nonparty." *Id*.

Numerous other considerations bolster this point. For example, the State "represents the interests of all [of its] citizens," including the members of Plaintiff League. *Clark*, 168 F.3d at 461. Thus, the State necessarily "represents interests adverse to the proposed intervenors; after all, both the [League's members] and the proposed defendant-intervenors are [Florida] citizens." *Id*. The State "cannot adequately represent the proposed [intervenors] while simultaneously representing the plaintiffs' interests." *Id*.

Likewise, in representing what it perceives to be the general public interest, the State necessarily must "balance a range of interests likely to diverge from those of the Intervenors," including "the overall fairness of the election system . . . and the social and political divisiveness of the election issue." *Meek v. Metro. Dade Cnty.*, 985 F.2d 1471, 1478 (11th Cir. 1993), *overruled in part on other grounds*, *Dillard v. Chilton Cnty. Comm'n*, 495 F.3d 1324, 1335-36 (11th Cir. 2007).

Furthermore, the State presently is involved in a substantial amount of litigation relating to the upcoming election. *See, e.g.*, *Arcia v. Detzner*, No. 1:12-CV-22282-WJZ (S.D. Fla. filed June 19, 2012) (challenging Florida's decision to remove ineligible non-citizens from its voter registration rolls under § 2 of the Voting Rights Act and the


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National Voter Registration Act (NVRA)).[3] As the Eleventh Circuit has noted, the State has "a duty to consider the expense" of litigating all of these lawsuits, and therefore cannot focus on protecting Intervenors' interests. *Clark*, 168 F.3d at 461-62; *see also Meek*, 985 F.2d at 1478 (allowing intervention in part because the governmental litigant was required to "consider . . . the expense of litigation," which would limit its ability to adequately represent the interests of private putative intervenors).

Additionally, the Attorney General and Governor "are undisputedly elected officials, and like all elected officials they have an interest in remaining politically popular and effective leaders." *Clark*, 168 F.3d at 462 (quotation marks omitted); *accord Meek*, 985 F.2d at 1478. And the Secretary of State is appointed by the Governor. Their judgment regarding this case therefore is likely to be guided by political and public relations considerations beyond its merits and Intervenors' interests. *Id*. Thus, this Court should exercise its broad discretion to allow Intervenors to participate in this lawsuit to ensure that the critical constitutional issues implicated in this Court's ruling are fully and fairly litigated before the U.S. Court of Appeals for the Eleventh Circuit.

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[3] *See also United States v. Detzner*, No. 4:12-CV-00285-RH-CAS (N.D. Fla. filed June 12, 2012) (challenging Florida's decision to remove ineligible non-citizens from its voter registration rolls under the NVRA); *Florida Dep't of State v. Dep't of Homeland Security*, No. 1:12-CV-00960-JDB (D.D.C. filed June 11, 2012) (regarding DHS's refusal to grant the State of Florida access to its alien registration database to confirm the citizenship of people on Florida's voter registration rolls); *Mi Familia Vota Education Fund v. Detzner*, No. 8:12-CV-01294-JDW-MAP (M.D. Fla. filed June 8, 2012) (challenging Florida's decision to remove ineligible non-citizens from its voter registration rolls in its five covered jurisdictions under § 5 of the Voting Rights Act); *Florida v. United States*, No. 1:11-CV-01428-CKK-MG-ESH (D.D.C. filed Aug. 1, 2011) (regarding DOJ's refusal to grant preclearance of changes in Florida's third-party voter registration statute).

In the event Plaintiffs and the State reach a settlement, Intervenors either would consent to entry of a final judgment to facilitate appeal by treating the preliminary injunction as a permanent injunction, *see* Fed. R. Civ. P. 65(a)(2); *see also id*. R. 54(b), or seek to appeal any Consent Decree or other dispositive agreement or judgment. Petitioners would have standing to appeal, *see* Opp. at 10-11, because the Third-Party Registration Laws at issue help protect against fraudulent voter registrations which facilitate the unconstitutional dilution of Intervenors' votes. *Anderson*, 417 U.S. at 226; *Reynolds*, 377 U.S. at 555.

Plaintiffs maintain that Intervenors would lack standing to defend the constitutionality of the Third-Party Registration Laws in the Eleventh Circuit, because they have only a "generalized concern" about those statutes, rather than a direct and substantial interest in them. Opp. at 11 (*citing Lance v. Coffman*, 549 U.S. 437, 439 (2007)). Plaintiffs' reliance on the U.S. Supreme Court's ruling in *Lance*, however, simply underscores Intervenors' point. The Eleventh Circuit discussed that case throughout its ruling in *Dillard v. Chilton Cnty. Comm'n*, 495 F.3d 1324, 1333 (11th Cir. 2007) (per curiam) (emphasis added), in which it expressly distinguished between litigants such as Intervenors who "allege concrete and ***personalized*** injuries in the form . . . of ***vote dilution***" on the one hand, and those who wish to pursue "mere generalized grievances" on the other. The court held that the putative intervenors in *Dillard* lacked standing to intervene precisely because "they expressly disclaim[ed] any injury based on vote dilution" or other "concrete harms." *Id*. at 1335. Thus, under binding Eleventh

Circuit precedent, Intervenors' constitutional claims are "concrete and personalized," rather than "mere generalized grievances." *Id*.

**D. The Timing of the Motion to Intervene Will Not Prejudice Plaintiffs**

Plaintiffs also argue that this Court should deny Intervenors' motion to participate in this lawsuit because Intervenors filed that motion only recently, after the lawsuit had been pending for several months. Opp. at 2. As Plaintiffs acknowledge, the central focus of the timeliness inquiry is whether allowing intervention at a particular point in time will unduly prejudice the existing parties to the lawsuit. Opp. at 4; *see also* Fed. R. Civ. P. 24(c) ("[T]he court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.").

Plaintiffs contend that they would be "substantially prejudiced by intervention at this late date." Opp. at 2. They fail to identify any particular way in which they would be any worse off, however, by the Court allowing Intervenors to join this case now, rather than at its outset. Under either scenario, Plaintiffs would have been free to negotiate and attempt to settle their claims against the State. Although Intervenors' participation will frustrate Plaintiffs' attempts to secure victory without allowing the Eleventh Circuit to consider their arguments and theories, that does not constitute prejudice arising from the allegedly late ***timing*** of intervention; Intervenors would have sought such appellate review, even had they intervened at the outset of this case. Thus, that consideration is irrelevant to this Court's intervention ruling. *See Stallworth v. Monsanto*, 558 F.2d 257,

265 (5th Cir. 1977)[4] ("[T]he prejudice to the original parties to the litigation that is relevant to the question of timeliness is ***only*** that prejudice which would result from the would-be intervenor's failure to request intervention as soon as he knew or reasonably should have known about his interest in the action.") (emphasis added); *accord Meek*, 985 F.2d at 1479. Furthermore, if this Court grants this Motion for permissive intervention, the focus of future proceedings is likely to be at the appellate level, where this case has not yet commenced in earnest. Thus, this Court should not deny intervention on timeliness grounds.

## CONCLUSION

For these reasons, Intervenors respectfully request that this Court grant their Motion for Permissive Intervention.

Respectfully submitted,

s/ Raquel A. Rodriguez
Raquel A. Rodriguez
Fla. Bar No. 511439
rrodriguez@mcdonaldhopkins.com
MCDONALD HOPKINS LLC
Southeast Financial Center
200 South Biscayne Boulevard, Suite 3130
Miami, FL 33131-2344
Tel: (305) 704-3994
Fax: (305) 704-3999
*Attorneys for Putative Intervenors*

[4] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on July 23, 2012, a true and correct copy of the foregoing was filed with the Clerk of Court via the CM/ECF system, causing a Notice of Electronic Filing to be sent to all counsel of record.

s/ David Axelman
David Axelman