IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

STATE OF ALABAMA, and

MORRIS J. BROOKS, JR., Representative for Alabama's 5th Congressional District,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF COMMERCE; and WILBUR L. ROSS, in his official capacity as Secretary of Commerce,

BUREAU OF THE CENSUS, an agency within the United States Department of Commerce; and RON S. JARMIN, in his capacity as performing the non-exclusive functions and duties of the Director of the U.S. Census Bureau,

Defendants,

and

DIANA MARTINEZ; RAISA SEQUEIRA; SAULO CORONA; IRVING MEDINA; JOEY CARDENAS; FLORINDA P. CHAVEZ; and CHICANOS POR LA CAUSA,

Proposed Defendant-Intervenors.

Civil Action No. 2:18-cv-00772-RDP

PROPOSED DEFENDANT-INTERVENORS' MEMORANDUM OF LAW

IN SUPPORT OF THEIR MOTION FOR LEAVE TO INTERVENE

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The Proposed Defendant-Intervenors respectfully request that the Court grant them 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, grant them permissive intervention pursuant to Federal Rule of Civil Procedure 24(b)(1)(B).

Plaintiff State of Alabama has advised the Proposed Defendant-Intervenors that they oppose the motion to intervene. Plaintiff Brooks and the Department of Justice have yet to respond.

I. STATEMENT OF THE ISSUES TO BE RULED UPON BY THIS COURT.

The Proposed Defendant-Intervenors Diana Martinez, Raisa Sequeira, Saulo Corona, Irving Medina, Joey Cardenas, Florinda P. Chavez and Chicanos Por La Causa ("CPLC") include: 1) voters that will suffer representational harm and vote dilution if undocumented immigrants are excluded from the population count for congressional apportionment and electoral college votes, and 2) an organization whose mission it is to increase Latino political power and to increase the number of Latino voters, voters who are directly affected by the resolution of the claims in this case. Individual Proposed Defendant-Intervenors live in California, Florida, Arizona, and Texas and have a direct interest in ensuring that they receive adequate and fair representation in the U.S. House of Representatives and the Electoral College because they live in states with large populations, including large populations of Latinos, non-U.S. citizens, and undocumented immigrants. Organizational Proposed Defendant-Intervenor CPLC works to increase Latino political empowerment in Arizona. These unique, personal interests support their intervention. Accordingly, the Proposed Defendant-Intervenors hereby

respectfully submit the following Memorandum of Law in Support of Motion to Intervene as Defendants.

II. STATEMENT OF THE NATURE AND STAGE OF THE PROCEEDING

Plaintiffs filed this lawsuit on May 21, 2018 to challenge the Census Bureau's adoption of the Final 2020 Census Residence Criteria and Residence Situations ("2020 Census Residence Criteria"). Docket No. 1 ¶¶ 158. Plaintiffs further seek to obtain a court order vacating and setting aside the 2020 Census Residence Criteria insofar as it permits or requires the inclusion undocumented immigrants in the total population count used to apportion seats in the House of Representatives and to determine the number of electoral votes for each state. *Id*. Plaintiffs claim that use of the total population base for apportionment has in the past redistributed congressional seats and electoral college votes away from states with low numbers of undocumented immigrants to states with high numbers of undocumented immigrants, and that use of total population data in 2020 will cause a loss of Congressional seats in Alabama and Ohio, will result in no change to congressional seats in Montana, a gain of one seat each in Texas and Arizona, and will allow California to avoid losing a congressional seat. *Id.* ¶¶ 29-47, 55-58, 60-63.

Every decade the Census Bureau reviews the Residence Criteria to "ensure that the concept of usual residence is interpreted and applied, consistent with the intent of the Census Act of 1790 . . . ." Final 2020 Residence Criteria and Residence Situations, 83 Fed. Reg. 5525, 5526 (Feb. 8, 2018) (to be codified at 15 C.F.R. ch. 1). The 2020 Census Residence Criteria was published on February 8, 2018, and states that citizens of other countries living in the U.S. will be "[c]ounted at the U.S. residence where they live and sleep most of the time." *Id.* at 5533. The

2020 Census Residence Criteria makes clear that members of the diplomatic community and persons who are visiting the U.S. from other countries, such as individuals on vacation or on a business trip, are not counted in the Census. *Id.* In its response to comments received on the draft 2020 Census Residence Criteria, the Census Bureau stated that it considered "foreign citizens" to be "living" in the U.S. if "at the time of the census, they are living and sleeping most of the time at a residence in the U.S." *Id.* at 5530. The 2020 Census Residence Criteria treats all immigrants who are living in the U.S. the same, regardless of whether or not a resident respondent is undocumented.

The Census Bureau's inclusion of all immigrants who are residing in the U.S. in the 2020 Census Residence Criteria complies with the Enumeration Clause of the U.S. Constitution, which directs Congress to ensure that an "actual Enumeration" of the U.S. population is conducted by counting the "whole Number of Persons" in each state. U.S. CONST. art. I, § 2, cl. 3; *id*. amend. XIV, § 2. The U.S. Constitution further mandates that the apportionment of congressional districts be conducted on the basis of total population. *Id*. art. I, § 2, cl. 3. ("Representatives shall be apportioned among the several States, according to their respective numbers, counting the whole Number of Persons in each State . . . ."). Within one week of the opening of the next session of Congress in the new year following a Census count, the president is required to transmit to Congress a statement showing the "whole number of persons in each State . . . and the number of Representatives to which each State would be entitled . . . ." 2 U.S.C. § 2(a). Each state receives at least one member in the House and the rest of the seats are distributed using a method known as the method of equal proportions. *Id.* There are currently 435 seats in the U.S. House of Representatives, which is set by statute. *Id.* (setting the number of

Representatives to be the same number as those that existed at the time of the Eighty-second Congress).

The "method of equal proportions" allocates 435 seats to the U.S. House of Representatives based on each state's total population. One seat is automatically awarded to each state, and the remaining 385 seats are allocated through an equation that takes into account the total apportionment population of each state, and attempts to minimize the differences in the populations of the congressional districts between states. *See* Kristin D. Burnett, *Congressional Apportionment, 2010 Census Briefs*, United States Census Bureau, Nov. 2011, at 6, *available at* https://www.census.gov/content/dam/Census/library/publications/2011/dec/c2010br-08.pdf. The average size of a congressional seat in 2010 was 710,767. *Id.* at 1. However, because each state is constitutionally guaranteed at least one congressional district, and each state's total population does not neatly fit into multiples of that average size, the allocation equation results in congressional districts that vary greatly from the ideal average. For example, the state with the largest congressional district in 2010 was Montana (994,416), which has only one congressional seat, and the state with the smallest average district size was Rhode Island (527,624), which has only two seats.[1] *Id.*

The Proposed Defendant-Intervenors live in or serve individuals in states with high Latino populations, high non-U.S. citizen populations, and high undocumented populations. If the 2020 Census Residence Criteria is enjoined, and the Census Bureau is directed to exclude

[1] States are required to divide the population equally among congressional districts *within* each state. *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). Although the Supreme Court requires "'a good-faith effort to achieve precise mathematical equality' *within* each State, . . . the constraints imposed by Article I, § 2, itself make that goal illusory for the Nation as a whole." *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 463 (1992) (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969)).

undocumented persons from total population counts for purposes of apportionment, fewer congressional seats will be allocated to states with relatively higher numbers of undocumented residents, states where Proposed Defendant-Intervenors reside. Dkt. No. 1 ¶¶62-63. Proposed Defendant-Intervenors will be injured by their inclusion in unconstitutionally malapportioned districts, and their voting strength may be diluted by the reduction in the number of congressional districts in which Latino voters have a meaningful opportunity to participate in the electoral process and elect candidates of their choice.

Even putting aside for the moment the logistical nightmare that the Census Bureau would experience if it tried to collect immigration status information about non-U.S. citizen residents, information that it has never before collected, any such attempt would likely cause higher non-response rates and a disparate undercount in Latino and other population groups with higher numbers of immigrants than the population as a whole. Recently, the Census Bureau announced its intent to include a citizenship question in the decennial Census, a question which does not even ask whether or not a non-U.S. citizen is documented, but simply whether or not a respondent is a U.S. citizen. Defendant Ron S. Jarmin declared in Congressional testimony that "we do expect that if there is a negative impact it would be largely felt in various sub-groups, in immigrant populations, [and] Hispanic populations."[2] Common sense dictates that a far more intrusive and risk-laden inquiry regarding whether a Census respondent is *undocumented* would likely have an even greater disproportionate impact in those communities. The resulting disproportionate undercount would cause Proposed Defendant-Intervenors decreased access to

[2] *Fiscal 2019 Budget Request for the Census Bureau: Hearing Before the House Appropriations Subcomm. on Commerce, Justice, Science and Related Agencies* , 115th Cong. (2018) (statement of Ron Jarmin).

their congressional representatives, vote dilution in districts with larger populations, and the loss of majority Latino districts that afford Proposed Defendant-Intervenors an equal opportunity to elect their candidate of choice.

Proposed Defendant-Intervenor Diana Martinez is a resident of Ventura County, California. She is a longtime registered voter and lives in the City of Santa Paula, born and raised in California. According to American Community Survey ("ACS") data, Santa Paula is 79.4 percent Latino and 21.1 percent non-U.S. citizen.

Proposed Defendant-Intervenor Raisa Sequeira is a resident of Miami-Dade County in Florida. She is a registered voter and lives in the City of Miami. According to ACS data, Miami is 71.2 percent Latino and 30.7 percent non-U.S. citizen.

Proposed Defendant-Intervenor Saulo Corona is a resident of Maricopa County, Arizona. He lives and is registered to vote in the City of Tempe. According to ACS data, Maricopa County is 30.3 percent Latino and 9.1 percent non-U.S. citizen.

Proposed Defendant-Intervenors Irving Medina and Florinda P. Chavez are residents of Travis County, Texas. They both live and are registered to vote in Austin. According to ACS data, Austin is 34.5 percent Latino and 12.5 percent non-U.S. citizen.

Proposed Defendant-Intervenor Joey Cardenas is a resident of Wharton County, Texas. He is a longtime registered voter and lives in Louise, a census-designated place. According to ACS data, Wharton County is 39.5 percent Latino and 8.3 percent non-U.S. citizen.

Proposed Defendant-Intervenor CPLC is a nonprofit organization founded in 1969. CPLC's mission is to drive economic and electoral empowerment in Arizona, and in Nevada and New Mexico through its subsidiary organizations. To achieve its mission, CPLC provides a range of direct services to communities in Arizona in the areas of health and human services,

housing, education, and economic development, with a focus on individuals and families with low to moderate income levels. CPLC serves Latinos, U.S. citizens and non-U.S. citizens, including undocumented immigrants.

CPLC is headquartered in Phoenix, Arizona and serves individuals who primarily reside in Coconino, Cochise, Maricopa, Pima, and Yuma Counties. CPLC serves individuals who live in neighborhoods, cities, counties, and voting districts with relatively larger Latino and non-U.S. citizen populations when compared to Arizona and the United States. For example, according to ACS data, Yuma County is 62 percent Latino and 15.7 percent non-U.S. citizen, while Phoenix is 41.8 percent Latino and 13.6 percent non-U.S. citizen.

III. SUMMARY OF THE ARGUMENT

As set forth below, Plaintiffs' requested injunctive relief, if granted, would substantially impair the interests of the Proposed Defendant-Intervenors, who are Latino voters that live, and a civic organization that is headquartered, in states with high Latino and non-U.S. citizen populations, including large populations of undocumented immigrants. Defendants' attorneys cannot adequately represent the Proposed Defendant-Intervenors' interests because the Department of Justice is not expected to take a position on this question. Acting Assistant Attorney General John Gore of the Civil Rights Division of the U.S. Department of Justice ("DOJ") testified before a House Oversight Committee that the DOJ takes no position on whether citizenship, let alone immigration status, should bear on whether a person is counted in the total population for apportionment purposes.[3] That is the precise question raised by this lawsuit, and that may be adjudicated at its conclusion.

[3] *2020 Census Progress Report: Hearing Before the House Oversight and Government Reform Committee*, 115th Cong. (2018) (statement of John Gore).

Defendants' attorneys also cannot adequately represent the Proposed Defendant-Intervenors' interests because they are responsible for representing a broad range of public interests and are not subject to the consequences of excluding undocumented immigrants from the population count for congressional apportionment and electoral college votes. Allowing Proposed Defendant-Intervenors to participate as intervenors will ensure that their direct, immediate interests are adequately protected and will provide them with the opportunity to offer evidence and argument that will assist the Court in rendering a decision in this important case. Because Proposed Defendant-Intervenors meet all requirements for intervention under Rule 24(a)(2), they respectfully request that their motion to intervene be granted.

IV. THE PROPOSED DEFENDANT-INTERVENORS ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT

Federal Rule of Civil Procedure 24(a)(2) requires a court to permit anyone to intervene who, on a timely motion, "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). A person may intervene as of right under Rule 24(a)(2) when: (1) the application to intervene is timely; (2) the proposed intervenor has an interest in the subject matter of the suit; (3) the proposed intervenor's "ability to protect that interest may be impaired by the disposition of the suit;" and (4) the "existing parties in the suit cannot adequately protect that interest." *Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1250 (11th Cir. 2002).

A. The Proposed Defendant-Intervenors' Motion to Intervene Is Timely.

To determine whether a motion to intervene is timely under Rule 24(a)(2), the Court considers: (1) the length of time between the potential intervenor's learning that its interest is no longer protected by the existing parties and its filing of a motion to intervene; (2) the extent of prejudice to the existing parties from allowing late intervention; (3) the extent of prejudice to the potential intervenor if the motion is denied; and (4) the existence of unusual circumstances. *See Georgia*, 302 F.3d at 1259 (citing *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989)). When considering timeliness, "courts should view it flexibly toward both the courts and the litigants in the interest of justice." *Brown v. Bush*, 194 F. App'x 879, 882 (11th Cir. 2006) (citing *Chiles*, 865 F.2d at 1213).

The Proposed Defendant-Intervenors' Motion to Intervene comes within a reasonable time frame after they became aware of their interest in this case. In moving to intervene, "[t]he would-be intervenor must act promptly in protecting its interest." *QBE Ins. Corp. v. Austin Co.*, 23 So. 3d 1127, 1132 (Ala. 2009). In this case, Plaintiffs filed their Complaint on May 21, 2018, approximately seven weeks before the date of this motion. *See* Dkt. No. 1. At this early juncture, Defendants have yet to file their answer, no motions have been heard, no discovery has been conducted, no scheduling order has been issued, and no trial date set. The litigation is currently in its earliest stages, and the timing of this motion poses no prospect of prejudicing the parties.

Proposed Defendant-Intervenors' intervention will cause no prejudice to the existing parties. "The most important consideration in determining timeliness is whether any existing party to the litigation will be harmed or prejudiced by the proposed intervenor's delay in moving

to intervene." *McDonald v. E. J. Lavino Co.*, 430 F.2d 1065, 1073 (5th Cir. 1970) (citing *Diaz v. S. Drilling Corp.*, 427 F.2d 1118, 1125 (5th Cir. 1970)). To reject a motion to intervene as of right due to untimeliness, this harm must consist of more than a "mere inconvenience." *Id.* For example, in the Eleventh Circuit, the possible prejudicial effect of intervention on discovery is a significant factor in determining the timeliness of intervention. *See QBE Ins. Corp.*, 23 So. 3d at 1133 (citing *Chiles*, 865 F.2d at 1213). As already noted, no discovery has begun, and no subsequent pleadings or motions have been filed beyond the initial Complaint. *See Defs. of Wildlife v. Bureau of Ocean Energy Mgmt.*, No. 10-0254-WS-C, 2010 U.S. Dist. LEXIS 130581, at *7 (S.D. Ala. Dec. 9, 2010) (finding Chevron's Rule 24 Motion to Intervene would not prejudice the parties, "given that it was filed just three months after this lawsuit began, before the commencement of discovery, and before the federal defendants had even filed a responsive pleading").

Proposed Defendant-Intervenors, however, would be severely prejudiced if this Court denies this motion to intervene. When considering potential prejudice to the would-be intervenors, "the thrust of the inquiry must be the extent to which a final judgment in the case may bind the movant even though he is not adequately represented by an existing party." *United States v. Jefferson Cnty.*, 720 F.2d 1511, 1517 (11th Cir. 1983). The Eleventh Circuit has considered this factor only in situations where "(a) the judge cannot anticipate the extent to which a final judgment will bind the movant, or (b) the judge finds that although the movant has an identical interest with a party, he has a sufficiently greater stake than the party that the party's representation may be inadequate to protect the movant's interest." *Id.* In addition, "the potential *stare decisis* effect may supply that practical disadvantage which warrants intervention

as of right." *Chiles*, 865 F.2d at 1214 (citing *Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 829 (5th Cir. 1967)).

In this case, Plaintiffs seek to vacate and set aside the 2020 Census Residence Criteria "insofar as it permits or requires the Census Bureau to include illegal aliens in the population figures utilized to conduct the apportionment of the House of Representatives and the Electoral College among the states . . . ." Dkt. No. 1 ¶ 158. Proposed Defendant-Intervenors have a direct and personal stake in the outcome of this case if the 2020 Census Residence Criteria are changed to exclude undocumented immigrants from the total population count used to apportion congressional seats. Proposed Defendant-Intervenors' voting strength and representation in the House of Representatives and the electoral college would be directly affected if this Court enjoins the 2020 Census Residence Criteria. As nonparties, the Proposed Defendant-Intervenors will be directly affected by any court-ordered remedy, but will not be able to participate in presenting evidence and argument in support of their positions or to appeal the ruling.

Finally, no unusual circumstances are present that would prevent the Proposed Defendant-Intervenors from a timely intervention. As the Proposed Defendant-Intervenors seek to intervene at such an early stage of litigation, there is no outstanding circumstance that would lend cause to object to this intervention. Considering each of the factors listed above, the motion for intervention is timely because: (1) the Proposed Defendant-Intervenors promptly filed this motion; (2) the existing parties will not be prejudiced if this Court permits intervention at this early stage of litigation; (3) the Proposed Defendant-Intervenors would be severely prejudiced should this motion be denied because they will not be able to protect their interests before this

Court; and (4) there are no unusual circumstances that weigh against a determination that the motion is timely.

B. The Proposed Defendant-Intervenors Seek to Vindicate Protectable Interests.

Proposed Defendant-Intervenors have a direct, substantial, and legally protectable interest in the subject matter of this suit. The Eleventh Circuit defines a protectable interest for the purpose of intervention as a "significantly protectable interest," meaning one that is "direct, substantial, [and] legally protectable . . . ." *Midwest Emplrs. Cas. Co. v. E. Ala. Health Care*, 170 F.R.D. 195, 197-98 (M.D. Ala. 1996) (internal quotations omitted). "The . . . interest need not, however, 'be of a legal nature identical to that of the claims asserted in the main action.'" *Chiles*, 865 F.2d at 1214 (quoting *Diaz*, 427 F.2d at 1124). "[A] legally protectable interest is an interest that derives from a legal right." *Skinner Pile Driving, Inc. v. Atl. Specialty Ins. Co.*, No. 14-00329-N, 2015 U.S. Dist. LEXIS 41417, at *8-9 (S.D. Ala. Mar. 31, 2015) (citing *Mt. Hawley Ins. Co. v. Sandy Lake Props., Inc.*, 425 F.3d 1308, 1311 (11th Cir. 2005)).

Proposed Defendant-Intervenors seek to intervene to defend their right to participate equally in the electoral process, their right to fair representation in the House of Representatives, and their right to a fair share of electoral college votes. The Proposed Defendant-Intervenors have a direct and personal interest in ensuring that they do not receive fewer representatives and electors in states where the total population is expected to grow significantly, that their representational interests are not diminished by their inclusion in unconstitutionally malapportioned districts, and that their voting strength is not diluted by the reduction in the number of legislative districts in which Latino voters have a meaningful opportunity to participate in the electoral process and elect candidates of their choice.

Proposed Defendant-Intervenor CPLC has an interest in this lawsuit because the relief that Plaintiffs request will result in malapportioned districts in the counties that CPLC serves, which will negatively impact CPLC's core mission of driving economic and political empowerment of individuals in Arizona. If the Census attempted to collect immigration status information about non-U.S. citizen residents, CPLC would have to divert resources from its other programs and its general Census outreach to educate other non-profits and community members about these questions. Finally, if the Census attempted to collect immigration status information about non-U.S. citizen residents, any such attempt would likely cause higher non-response rates and a disparate undercount of residents in Arizona and the majority of counties CPLC serves.

Courts have granted intervention for parties seeking to defend their interests in political access and equal representation cases. *See Nw. Austin Mun. Utility Dist. No. One v. Holder,* 129 S. Ct. 1695 (2009) (registered voters' motions to intervene granted by the district court in Dkt. No. 33); *Georgia v. Ashcroft*, 539 U.S. 461, 477 (2003) (holding that private parties may intervene in actions concerning § 5 of the Voting Rights Act of 1965 "to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise"); *Brown v. Sec'y of State of Florida*, 668 F.3d 1271, 1274 (11th Cir. 2012) (registered voters and non-profit organizations intervened as defendants in challenge to a state constitutional provision establishing standards for congressional districting); *Clark v. Putnam Cnty.*, 168 F.3d 458, 462 (11th Cir. 1999) (granting black voters intervention in challenge to single-member districts for county commissioners); *see also Shaw v. Hunt*, 861 F. Supp. 408, 420 (E.D.N.C. 1994) (noting intervention of "twenty-two persons registered to vote in North Carolina, both African-American

and white . . . in support of the [redistricting] Plan," and "eleven persons registered to vote as Republicans in North Carolina . . . challeng[ing] [] the Plan").

By seeking to exclude undocumented immigrants from the apportionment base, Plaintiffs unfairly target both state and local communities with large Latino and minority populations where substantial concentrations of undocumented immigrants reside. Under Plaintiffs' proposal, California, Florida, Texas, and Arizona will be at risk of losing seats in the House of Representatives and the Electoral College, despite the fact that their populations are anticipated to grow or remain stable. As a result, congressional members and electors in these states would be forced to represent a number of constituents that is not an accurate reflection of the *actual* total population, thereby harming the overall quality of the Proposed Defendant-Intervenors' political representation. *See Whitcomb v. Chavis*, 403 U.S. 124, 141 (1971) (finding that "apportionment schemes which give the same number of representatives to unequal numbers of constituents unconstitutionally dilute the value of the votes in the larger districts.") (internal quotations omitted); *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (recognizing that "equal representation for equal numbers of people [is] the fundamental goal for the House of Representatives"); *Calvin v. Jefferson Cnty. Bd. of Comm'rs*, 172 F. Supp. 3d 1292, 1303 (N.D. Fla. 2016) ("[T]here is the interest in being represented on an equal footing with one's neighbors."); *see also Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969) ("Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives."); *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) ("an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of

the State."). The Proposed Defendant-Intervenors have a legally protectable interest in the outcome of this case, and respectfully ask the Court to provide them with the opportunity to defend their interest in preserving the quality of their political representation.

C. The Proposed Defendant-Intervenors' Interests Will Be Impaired if Intervention is Denied.

The Proposed Defendant-Intervenors are "so situated that disposing of the action may as a practical matter impair or impede [their] ability to protect [their] interest . . . ." Fed. R. Civ. P. 24(a) (2). As the advisory committee notes state: "If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." Fed. R. Civ. P. 24 advisory committee note to 1966 Amendment. To demonstrate "impairment," a prospective intervenor "must show only that impairment of its substantial legal interest is possible if intervention is denied." *Grutter v. Bollinger*, 188 F.3d 394, 399 (6th Cir. 1999) (citing *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997)). This burden is minimal. *See id.* (rejecting the notion that Rule 24(a)(2) requires a specific legal or equitable interest).

Plaintiffs are seeking relief that would severely harm the ability of the Proposed Defendant-Intervenors to access fair political representation. Plaintiffs explicitly seek to diminish the number of representatives and electors apportioned to the states in which the Proposed Defendant-Intervenors reside, are registered to vote, and are politically active. These effects will be especially harmful to the Proposed Defendant-Intervenors, as they reside in communities with high populations of non-U.S. citizens that include undocumented immigrants who will not be counted towards the apportionment base if Plaintiffs prevail. The Proposed Defendant-Intervenors will therefore have less voting strength in malapportioned districts, less access to their elected representatives, and a reduced voice on the national political stage as the

amount of representatives and electors apportioned to these states will no longer accurately reflect the total population.

D. The Proposed Defendant-Intervenors' Interests Cannot be Adequately Represented by the Existing Parties.

The Proposed Defendant-Intervenors are entitled to intervene as a matter of right because their interests are not adequately represented by the existing parties. The requirement imposed by Rule 24(a)'s adequate-representation prong is satisfied if the Proposed Defendant-Intervenors demonstrate that "representation of [their] interests '*may be*' inadequate; and the burden of making that showing is minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n. 10 (1972) (emphasis added); *see also Georgia*, 302 F.3d at 1255 (requirement is "treated as minimal") (internal quotations omitted). Conforming to the "minimal" nature of the requirement, the Eleventh Circuit has indicated that any doubt as to the propriety of intervention "should be resolved in favor of the proposed intervenors . . . ." *Fed. Sav. and Loan Ins. Corp. v. Falls Chase Spec. Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993). The Proposed Defendant-Intervenors satisfy this burden because their interests are distinct from the government Defendants.

Courts have held that prospective intervenors with personal interests in suits against government defendants meet this "light burden" under Rule 24(a) because, while the federal defendants may seek to defend their decision-making process, proposed intervenors seek to defend private interests. *See Georgia*, 302 F.3d at 1259; *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003) (stating that parties with "more narrow and focused" interests are not adequately represented by government defendants). Courts in the Eleventh Circuit have

acknowledged that representation "may be inadequate" when the movant and the representative party assert "qualitatively different" interests due to one representing a private interest while the other represented the public interest. *See, e.g.*, *Huff v. Comm'r of IRS*, 743 F3d. 790, 800 (11th Cir. 2014) (finding intervention by the Virgin Islands was proper because they held a sovereign interest whereas the taxpayer defendants held a private pecuniary interest); *Est. of Steward v. McCay*, No. 5:15-CV-00653-AKK, 2015 WL 12765996, at *3 (N.D. Ala. Dec. 8, 2015) (granting the Tennessee Valley Authority's motion to intervene and finding that there was inadequate representation when the representative party held private interests and intervenors had a public interest); *Jennifer D. Alley & Real Time Med. v. United States HHS*, No. CV-07-BE-0096-E, 2008 U.S. Dist. LEXIS 130388 at *12-13 (N.D. Ala. Nov. 19, 2008) (allowing intervention and finding that the American Medical Association ("AMA") overcame the "weak" presumption of adequate representation despite the Department of Health and Human Services raising the private privacy interests of AMA members); *see also Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 326 (1980) (stating that an aggrieved individual may intervene in a suit brought by the Equal Employment Opportunity Commission ("EEOC"), as the EEOC represents the unified public interests while the individual seeks to advance private interests).

Here, the Proposed Defendant-Intervenors will not be adequately represented by the government Defendants because their interests differ significantly from those of Defendants. Defendants are charged with representing varied public and administrative interests, whereas the Proposed Defendant-Intervenors' foremost interests are their private interests in political access and representation. Defendants must balance the cost associated with losing or settling the case against the cost to taxpayers for defending the 2020 Census Residence Criteria. If Plaintiffs are

successful in obtaining their requested relief, Defendants will be required possibly to formulate a new apportionment rule given the outcome. By contrast, the Proposed Defendant-Intervenors have a direct and personal interest in the apportionment as voters in states set to lose political representation and seek to protect that individual interest. At a minimum, Defendants' broader interests may result in divergent approaches to defending the 2020 Census Residence Criteria from the Proposed Defendant-Intervenors. The potential for a difference in litigation strategy supports the Proposed Defendant-Intervenors' motion for intervention. *See CSX Transp. Inc. v. Georgia Pub. Serv. Commn.*, 944 F. Supp. 1573, 1578 (N.D. Ga. 1996) (holding that a difference in interests between a government agency from a private intervenor were sufficient to meet the "minimal" standard for inadequate representation).

Moreover, the Proposed Defendant-Intervenors and Defendants hold different objectives. Defendants have no specific incentive to defend the use of a particular population base for apportionment; their stake in the litigation is limited to defending the 2020 Census Residence Criteria promulgated by the Census Bureau and the procedures used in that promulgation. In comparison, the Proposed Defendant-Intervenors have a personal interest in defending the apportionment standard that underlies the rule. Indeed, the Proposed Defendant-Intervenors' personal political access and representation depend on the apportionment plan being adequately defended. Defendants' objective and interests in the outcome of this case do not match the Proposed Defendant-Intervenors' direct interest in maintaining the use of total population for congressional apportionment and electoral college votes.

The Proposed Defendant-Intervenors would bear the greatest cost in the event of a favorable ruling for Plaintiffs. Such a decision will substantially alter the political climate in

which the Proposed Defendant-Intervenors live, vote, and are represented. The ability of the Proposed Defendant-Intervenors to represent their interests in this case will assist the Court in rendering a decision in accordance with well-established precedent, and based on a full record which includes the interests of those who will be most directly affected. For these reasons, Proposed Defendant-Intervenors respectfully request that the Court grant them intervention as a matter of right.

V. THE PROPOSED DEFENDANT-INTERVENORS ARE ENTITLED TO PERMISSIVE INTERVENTION.

Should the Court determine that the Proposed Defendant-Intervenors are not entitled to intervene as a matter of right, it should exercise its broad discretion and grant permissive intervention under Federal Rule of Civil Procedure 24(b). Courts in the Eleventh Circuit grant intervention under Rule 24(b) when: (1) the application is timely; and (2) the claims or defenses and the main action have a question of law or fact in common. *Chiles*, 865 F.2d. at 1213 (citing *Sellers v. United States*, 709 F.2d 1469, 1471 (11th Cir. 1983). In exercising their discretion, courts also consider "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

As a threshold matter, the Proposed Defendant-Intervenors' motion to intervene is timely. *See supra* Section IV.A. Second, the Proposed Defendant-Intervenors will draw on the same law and facts as the existing parties in presenting their defenses to the Court. As registered voters from the states listed in Plaintiffs' Complaint, the Proposed Defendant-Intervenors seek to preserve the ability for their states—which have large Latino and non-U.S. citizen populations—to maintain the 2020 Census Residence Criteria, consistent with the long upheld use of total

population as the basis for congressional apportionment and Electoral College votes. Third, intervention by the Proposed Defendant-Intervenors will not create delay or prejudice the existing parties. Adding the Proposed Defendant-Intervenors as parties at this stage of the lawsuit will not needlessly increase cost, delay disposition of the litigation, or prejudice the existing parties.

Importantly, the Proposed Defendant-Intervenors will introduce evidence and argument from the perspective of those who have a direct and personal stake in the outcome of this case: voters from the states that will lose congressional seats if undocumented immigrants are eliminated from the apportionment base. Therefore, the Proposed Defendant-Intervenors ask the Court to exercise its broad discretion and grant them permissive intervention.

VI. CONCLUSION

For the foregoing reasons, the Proposed Defendant-Intervenors respectfully request that this Court grant their motion to intervene, and enter their proposed Answer, which is attached as Exhibit A to this motion.

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Respectfully submitted,

/s/ Edward Still

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