UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

STATE OF ALABAMA, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF COMMERCE, et al.,

Defendants,

DIANA MARTINEZ, et al.,

Defendant-Intervenors,

and

COUNTY OF SANTA CLARA, CALIFORNIA, et al.,

Defendant-Intervenors.

Case No.: 2:18-cv-00772-RDP

MOVANTS' REPLY SUBMISSION IN SUPPORT OF MOTION TO INTERVENE IN RESPONSE TO EXHIBIT B OF THE COURT'S ORDER

Proposed Defendant-Intervenors seek to intervene in this action to protect their representational, financial, and other interests that will be impaired if Plaintiffs succeed in setting aside the Residence Rule and compelling the exclusion of undocumented immigrants from the total population count. Doc. # 97. Plaintiffs acknowledge that with regard to at least the representational consequences of this litigation, this lawsuit presents a "zero sum proposition: Each state's gain is another state's loss." Doc. # 1 at 11, ¶ 32. Yet Plaintiffs seek to exclude from this litigation the very states whose loss of seats in Congress would allow for Alabama's gain. Plaintiffs have not cited a single case—and movants are aware of none—where a state was

denied intervention in census litigation that would concededly affect that state's representation in Congress. This should not be the first case to reach that result, and Proposed Defendant-Intervenors respectfully request that the Court grant their motion to intervene.

I. The Proposed Defendant-Intervenors should be permitted to intervene as of right under Rule 24(a)(2).

Plaintiffs argue that Proposed Defendant-Intervenors do not satisfy the timeliness and adequacy-of-representation requirements for intervention as of right under Rule 24(a)(2). *See* Doc. # 103 at 5. Because movants satisfy the showing required to meet both factors, intervention as of right should be granted.

A. The motion to intervene is timely, will not disrupt the litigation, and causes Plaintiffs no prejudice.

A motion to intervene must be "timely," Fed. R. Civ. P. 24(a), and Plaintiffs argue that this motion was not, based largely on the fact that the complaint in this lawsuit was filed fifteen months ago. Doc. #103 at 5-7. But "[t]he mere passage of time, in itself, does not render a motion [to intervene] untimely; rather, the important question concerns actual proceedings of substance on the merits." 6 Moore's Fed. Practice § 24.21[1] (3d ed. & Supp. 2019); *see also Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989) ("[T]imeliness is not a word of exactitude or of precisely measurable dimensions.") (quoting *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir. 1970)). Courts have found even post judgment motions to intervene timely where intervention would not unduly prejudice the existing parties. *See, e.g.*, *Ross v. Marshall*, 426 F.3d 745, 750-52 (5th Cir. 2005); *see also Freeh v. Lake Eugenie Land & Dev., Inc. (In re Deepwater Horizon)*, 857 F.3d 246, 252-53 (5th Cir. 2017).

The Eleventh Circuit test for timeliness does not simply examine the lapse of time since the filing of a complaint, but instead requires the Court to weigh a number of factors, including: (1) the length of time during which the movant knew of the interest in the case; (2) any prejudice

to existing parties caused by the failure to move sooner; (3) prejudice the movant will suffer if the motion is denied; and (4) any other unusual circumstances militating either for or against a determination of timeliness. *Georgia v. U.S. Army Corps of Engr's*, 302 F.3d 1242, 1259 (11th Cir. 2002) (citing *Chiles*, 865 F.2d at 1213).

Here, there is no basis to claim that Plaintiffs will be prejudiced by movants' intervention. Plaintiffs raise only the risk that intervention will "delay[] a timely resolution of Plaintiffs' claims," Doc. # 103 at 6, but the motion to dismiss was only recently denied, no scheduling order or case management order has been issued, and no discovery has been conducted. Plaintiffs' interest in timely resolution can be addressed entirely through a scheduling order that accounts for that interest, and movants have represented that they will comply with the Court's deadlines in any forthcoming scheduling order. Doc. #97 at 8.

The countervailing consideration—the prejudice Proposed Defendant-Intervenors will suffer if denied intervention—weighs overwhelmingly in favor of permitting intervention. Alabama does not contest that Proposed Defendant-Intervenors have significant interests in this action, or that those interests may be impaired by the outcome of this litigation. Doc. # 103 at 5. Nor could they contest those interests: the same interests at issue in this litigation were relied upon by the Supreme Court just two months ago as grounds for concluding that states and local governments presented concrete injuries sufficient to establish Article III standing in a separate census challenge. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565-66 (2019). Given what is at stake for movants in this litigation—including the possible loss of seats in Congress, impairment of their ability to conduct intrastate redistricting in compliance with their own state constitutions and laws, and the risk to hundreds of billions of dollars in public funds—movants would suffer extreme prejudice if forced to sit on the sidelines of this litigation.

Even assuming mere passage of time *were* the appropriate benchmark for determining timeliness under Rule 24, Proposed Defendant-Intervenors filed their motion only weeks after the United States Attorney General announced that the federal government was still studying the issue of "whether illegal aliens can be included for apportionment purposes." Attorney General William P. Barr, Remarks on Census Citizenship Question (July 11, 2019), https://www.justice.gov/opa/speech/remarks-attorney-general-william-p-barr-census-citizenship-question. That announcement is a significant intervening development that goes directly to the Eleventh Circuit's first timeliness factor. *See Georgia*, 302 F.3d at 1259 (directing courts to consider, *inter alia*, "the length of time during which the proposed intervenor knew or reasonably should have known of the interest").

Plaintiffs contend that the Attorney General's pronouncement is not a sufficiently new development because the existing intervenors sought intervention based on even earlier comments in 2018 from Department of Justice leadership that "refused to reject Alabama's theory." Doc. # 103 at 6. But in opposing the earlier motions to intervene, Plaintiffs took the position that the Justice Department's prior comments "do not mean that . . . the United States Department of Justice will not zealously represent the position of the officials and agencies that conduct the census." Doc. # 16 at 4; *see also* Order Granting Intervention, Doc. # 53 at 4 ("The State of Alabama attempts to argue that the Motions to Intervene are untimely . . . because they were filed too early."). It cannot be the case that the 2018 comments from Justice Department leadership rendered the current intervenors' motions "too early," yet those same comments from Justice Department leadership now render this motion to intervene too late.

Bearing in mind the Eleventh Circuit's guidance that "[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*, 865 F.2d at 1213 (quoting *McDonald*, 430 F.2d 1074), the Court should exercise its discretion to conclude that Proposed Defendant-Intervenors' motion to intervene is timely.

B. The existing parties do not fully represent the Proposed Defendant-Intervenors' interests.

Movants for intervention of right must also establish that no existing party adequately represents their interests. *See* Fed. R. Civ. P. 24(a)(2). Plaintiffs argue that either or both the Martinez Intervenors and the Local Government Intervenors adequately represent the interests of Proposed Defendant-Intervenors, because they "seek[] the same objective that movants seek." Doc. #103 at 7.

But the Supreme Court has made clear that the burden of meeting the inadequacy-of-representation requirement is "minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). And even when existing parties seek the same objective as movants for intervention, the Eleventh Circuit has held that the standard to show inadequacy of representation imposes a burden no greater than "merely . . . coming forward with *some evidence*." *Clark v. Putnam Cty.*, 168 F.3d 458, 461 (11th Cir. 1999) (emphasis added). Proposed Defendant-Intervenors have plainly come forward with "some evidence" that the existing intervenors—while sharing the same objective—do not represent all of the same interests. Most consequentially, no existing party to this case is a state that stands to lose the seats in Congress that Alabama seeks to gain. Proposed Defendant-Intervenors, by contrast, include the State of California—which Alabama pleads in its own complaint would lose congressional representation if Alabama prevails, *see* Doc. # 1 at 16, ¶ 63—as well as the States of New York and New Jersey, which are likewise at risk of losing seats in Congress.

Indeed, it is routine in litigation challenging census procedures or the census count for states whose interest in congressional apportionment would be affected by that litigation to be allowed to participate as intervenors to protect their interest. *See, e.g.*, *Utah v. Evans*, 536 U.S. 452, 459 (2002) (noting North Carolina's intervention in Utah's challenge to the 2000 census, where Utah lost one congressional representative to North Carolina); *U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, 79 n.1 (D.D.C. 1998) (three-judge court) (noting that the court granted motions to intervene by four distinct groups of intervenors, which included the State of New Mexico), *aff'd sub nom. Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999); *City of New York v. U.S. Dep't of Commerce*, 822 F. Supp. 906 (E.D.N.Y. 1993) (Wisconsin and Oklahoma intervened as defendants in lawsuit challenging the Commerce Secretary's decision not to statistically adjust decennial census numbers), *overruled on other grounds by Wisconsin v. City of New York*, 517 U.S. 1 (1996). Movants have not identified a single case—and Plaintiffs have cited none—where a state was denied intervention in census litigation that affected that state's interest in congressional apportionment.

Movants respectfully request that the Court conclude that they have met the required showing to be granted intervention as of right.

II. Alternatively, Proposed Defendant-Intervenors should be allowed to intervene by permission.

In the alternative, Proposed Defendant-Intervenors ask that the Court grant permissive intervention as authorized by Rule 24(b). Plaintiffs oppose on the ground that, in light of the intervention to date by other intervenors, movants' participation will "add[] little to this case." Doc. # 103 at 9. But this circumstance, if correct, hardly constitutes prejudice, *see* Fed. R. Civ.

P. 24(b)(3); and in any event movants have already demonstrated that they seek to assert unique public and sovereign interests in the action that no other party represents. Doc. # 97 at 14-18.

Plaintiffs also contend that permissive intervention is unwarranted because their lawsuit is "a narrow legal challenge to Defendants' proposed action." Doc. # 103 at 9. Plaintiffs have presented a quite different description of the stakes of this litigation in other venues, where they have argued that the Residence Rule "plainly undermines the rule of law"[1] and that "this lawsuit will have significant and enduring effects" because, "[f]undamentally, the issue is fair and equal representation for United States citizens."[2] And there is nothing narrow about a lawsuit that seeks to recalculate the distribution of seats in Congress among the states, in a departure from the uninterrupted practice of every decennial census since 1790.

Proposed Defendant-Intervenors therefore respectfully ask that the Court grant permissive intervention.

III. Plaintiffs' decision to narrow their suit does not bear on the Court's decision regarding intervention.

Finally, Plaintiffs stipulate that they will "seek relief related only to their representational injuries for the remainder of this case," and Plaintiffs contend that this stipulation "further militates against intervention." Doc. # 103 at 10. Plaintiffs' contention is incorrect.

First, Proposed Defendant-Intervenors have protectable interests in this suit unrelated to the distribution of federal funds, as Plaintiffs do not contest. Doc. # 103 at 5 (opposing intervention only on timeliness and adequacy-of-representation grounds); *id.* at 11. Those

[1] Press Release, *Attorney General Steve Marshall Takes Alabama's Lawsuit Challenging Census Count of Illegal Aliens for Congressional Apportionment to Capitol Hill* (June 8, 2018), https://ago.alabama.gov/documents/news/AG%20Marshall%20Census%20Testimony.pdf.

[2] Press Release, *Alabama Attorney General Steve Marshall and U.S. Representative Mo Brooks File Lawsuit Against Federal Government over Inclusion of Illegal Aliens in 2020 Census Apportionment Count* (May 22, 2018), https://ago.alabama.gov/documents/news/AG%20Marshall%20Census%20Lawsuit.pdf.

interests—which include representational harms and the risk of injury to intrastate redistricting—themselves weigh strongly in favor of permitting intervention. *See Utah*, 536 U.S. at 459; *Dep't of Commerce*, 525 U.S. at 333-34 (recognizing the protectable interests of state and local governments based "on the basis of the expected effects [of a challenged census practice] on intrastate redistricting").

Second, the loss of representation alone would harm movants' financial interests regardless of whether Plaintiffs press their challenge to the inclusion of undocumented immigrants "in the resident population counts that determine how Census-based funds are distributed to states and local governments," Doc. # 103 at 10. Political science literature establishes that states that lose seats in Congress typically see a decrease in their share of federal outlays in subsequent years due to the reduction in their voting power in Congress. *See, e.g.*, Roy Elis, Neil Malhotra, & Marc Meredith, *Apportionment Cycles as Natural Experiments*, Political Analysis 358-76 (2009). And movant the State of Colorado will retain a significant financial interest in this litigation despite Plaintiffs' stipulation for the separate reason that Colorado's own state constitution limits year-on-year increases in expenditures to a function of the state's population growth as determined by federal census data, benchmarked to the decennial census. Colo. Const. art. X, § 20(7)(a); Colo. Rev. Stat. § 24-77-103(2)(a)(III) (imposing limit on spending based on census absent statewide voter approval).

Plaintiffs' stipulation to narrow the relief they seek in this litigation therefore does not undermine Proposed Defendant-Intervenors' interest in intervention.

CONCLUSION

For the foregoing reasons, the Proposed Defendant-Intervenors respectfully request that the Court grant their motion to intervene in this action.

DATED: August 23, 2019

Respectfully submitted,

LETITIA JAMES
Attorney General of the State of New York

By: */s/ Matthew Colangelo*
Matthew Colangelo
Chief Counsel for Federal Initiatives
Elena Goldstein, *Senior Trial Counsel*
Elizabeth Morgan, *Assistant Attorney General*
Ajay Saini, *Assistant Attorney General*
Office of the New York State Attorney General
28 Liberty Street
New York, NY 10005
Phone: (212) 416-6057
Matthew.Colangelo@ag.ny.gov

Attorneys for the State of New York

/s/ Joyce White Vance
Joyce White Vance
101 Paul W. Bryant Drive
Tuscaloosa, AL 35487
jvance@law.ua.edu

/s/ Barry A. Ragsdale
Barry A. Ragsdale
SIROTE & PERMUTT, PC
2311 Highland Avenue South
Birmingham, AL 35205
Phone: (205) 930-5100
Fax: (205) 930-5101
bragsdale@sirote.com

XAVIER BECERRA
Attorney General of California

/s/ Gabrielle D. Boutin
Gabrielle D. Boutin
Deputy Attorney General
Anthony R. Hakl
Supervising Deputy Attorney General
R. Matthew Wise
Deputy Attorney General
California Department of Justice
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Phone: (916) 210-6053
Gabrielle.Boutin@doj.ca.gov

Attorneys for the State of California

PHILIP J. WEISER
Attorney General of the State of Colorado

Eric R. Olson, *Solicitor General*
1300 Broadway, 10th Floor
Denver, CO 80203
Phone: (720) 508-6548
eric.olson@coag.gov

Attorneys for the State of Colorado

WILLIAM TONG
Attorney General of Connecticut

Mark F. Kohler, *Assistant Attorney General*
Office of the Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06106
Phone: (860) 808-5020
Mark.Kohler@ct.gov

Attorneys for the State of Connecticut

KARL A. RACINE
Attorney General for the District of Columbia

Valerie M. Nannery
Assistant Attorney General
Public Advocacy Division
Office of the Attorney General for
the District of Columbia
441 4th Street, N.W., Suite 630 South
Washington, DC 20001
Phone: (202) 724-6610
valerie.nannery@dc.gov

Attorneys for the District of Columbia

KWAME RAOUL
Attorney General of the State of Illinois

Jeff VanDam, *Public Interest Counsel*
Office of the Illinois Attorney General
100 West Randolph Street, 12th Floor
Chicago, IL 60601
Phone: (312) 814-1188
JVanDam@atg.state.il.us

Attorneys for the State of Illinois

MAURA HEALEY
Attorney General of the Commonwealth of Massachusetts

By: /s/ *Ann E. Lynch*
Ann E. Lynch, *Assistant Attorney General*
Miranda Cover, *Assistant Attorney General*
Public Protection & Advocacy Bureau
Massachusetts Attorney General's Office
One Ashburton Place
Boston, MA 02108
Phone: (617) 727-2200
ann.lynch@mass.gov

Attorneys for the Commonwealth of Massachusetts

KEITH ELLISON
Attorney General of the State of Minnesota

Jacob Campion, *Assistant Attorney General*
Office of the Minnesota Attorney General
445 Minnesota Street, Suite 1100
St. Paul, MN 55101-2128
Phone: (651) 757-1459
jacob.campion@ag.state.mn.us

Attorneys for the State of Minnesota

AARON D. FORD
Attorney General of the State of Nevada

Heidi Parry Stern, *Solicitor General*
Office of the Nevada Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
Phone: (775) 684-1100
HStern@ag.nv.gov

Attorneys for the State of Nevada

GURBIR S. GREWAL
Attorney General of the State of New Jersey

Glenn J. Moramarco
Assistant Attorney General
Katherine A. Gregory
Deputy Attorney General
Office of the Attorney General
Richard J. Hughes Justice Complex
25 Market Street, 8th Floor, West Wing
Trenton, NJ 08625-0080
Phone: (609) 292-4925
Glenn.Moramarco@law.njoag.gov

Attorneys for the State of New Jersey

HECTOR BALDERAS
Attorney General of New Mexico

Tania Maestas
Chief Deputy Attorney General
Nicholas M. Sydow, *Civil Appellate Chief*
Jennie Lusk
Bureau Chief, Civil Rights Bureau
408 Galisteo Street
Santa Fe, NM 87501
Phone: (505) 490-4060
tmaestas@nmag.gov

Attorneys for the State of New Mexico

ELLEN F. ROSENBLUM
Attorney General of the State of Oregon

Nicole deFever
Scott Kaplan
Senior Assistant Attorney General
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301
Phone: (971) 673-1800
Nicole.defever@doj.state.or.us

Attorneys for the State of Oregon

PETER F. NERONHA
Attorney General of the State of Rhode Island

Justin Sullivan
Special Assistant Attorney General
150 South Main Street
Providence, RI 02903
Phone: (401) 274-4400
jjsullivan@riag.ri.gov

Attorneys for the State of Rhode Island

THOMAS J. DONOVAN, JR.
Attorney General of the State of Vermont

Benjamin D. Battles, *Solicitor General*
Julio A. Thompson
Assistant Attorney General, Civil Rights Unit
Office of the Vermont Attorney General
109 State Street
Montpelier, VT 05609-1001
Phone: (802) 828-5500
Benjamin.Battles@vermont.gov

Attorneys for the State of Vermont

MARK R. HERRING
Attorney General of the Commonwealth of Virginia

Michelle S. Kallen, *Deputy Solicitor General*
Toby J. Heytens, *Solicitor General*
Martine E. Cicconi, *Deputy Solicitor General*
Brittany M. Jones, *John Marshall Fellow*
Office of the Attorney General
202 North Ninth Street
Richmond, VA 23219
Phone: (804) 786-7240
SolicitorGeneral@oag.state.va.us

Attorneys for the Commonwealth of Virginia

ROBERT W. FERGUSON
Attorney General of the State of Washington

Laura K. Clinton, *Assistant Attorney General*
Andrew R. W. Hughes
Assistant Attorney General
Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
Phone: (206) 233-3383
LauraC5@atg.wa.gov

Attorneys for the State of Washington

MATTHEW JERZYK
City Solicitor for the City of Central Falls
City of Central Falls
580 Broad Street
Central Falls, RI 02863
Phone: (401) 727-7422
MJerzyk@CentralFallsRI.us

Attorney for the City of Central Falls

MARK A. FLESSNER
Corporation Counsel of the City of Chicago

Stephen Kane, *Deputy Corporation Counsel*
Rebecca Hirsch, *Assistant Corporation Counsel*
City of Chicago Law Department
Affirmative Litigation Division
121 N. LaSalle Street, Room 600
Chicago, IL 60602
Phone: (312) 744-6934
Stephen.kane@cityofchicago.org

Attorneys for the City of Chicago

ZACHARY W. CARTER
Corporation Counsel of the City of New York

Tonya Jenerette
Deputy Chief for Strategic Litigation
100 Church Street
New York, NY 10007
Phone: (212) 356-4055
tjeneret@law.nyc.gov

Attorneys for the City of New York

MARCEL S. PRATT
City Solicitor of the City of Philadelphia

Benjamin H. Field
Divisional Deputy City Solicitor
City of Philadelphia Law Department
1515 Arch Street, 17th Floor
Philadelphia, PA 19102
Phone: (215) 683-5003
marcel.pratt@phila.gov

Attorneys for the City of Philadelphia

JEFFREY DANA
City Solicitor of the City of Providence
City of Providence
444 Westminster Street
Providence, RI 02903
Phone: (401) 680-5333
Jdana@providdenceri.gov

Attorney for the City of Providence

PETER S. HOLMES
Seattle City Attorney

Gary T. Smith, *Assistant City Attorney*
Erica R. Franklin, *Assistant City Attorney*
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7097
Phone: (206) 684-8200
Gary.Smith@seattle.gov

Attorneys for the City of Seattle

ROLANDO L. RIOS
Special Counsel for Cameron and Hidalgo Counties
110 Broadway, Suite 355
San Antonio, TX 78205
Phone: (210) 222-2102
rrios@rolandorioslaw.com

Attorney for Cameron County, Texas and Hidalgo County, Texas

CHARLES J. McKEE
Monterey County Counsel

William M. Litt, *Deputy County Counsel*
Office of the County Counsel
County of Monterey
168 West Alisal Street, 3rd Floor
Salinas, CA 93901
Phone: (831) 755-5045
McKeeCJ@co.monterey.ca.us

Attorneys for Monterey County

UNITED STATES CONFERENCE OF MAYORS

John Daniel Reaves, *General Counsel*
U.S. Conference of Mayors
1750 K Street NW, 11th Floor
Washington, DC 20006
Phone: (202) 887-1100
jdreavesoffice@gmail.com

Attorney for the U.S. Conference of Mayors

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of August, 2019, I electronically filed the foregoing **Reply Submission in Support of Motion to Intervene in Response to Exhibit B of the Court's Order** with the Clerk of the District Court using the CM/ECF system, which will send notification of such filing to all counsel of record in this proceeding.

I also hereby certify that I have caused to be mailed by First Class Mail the document to the following non-CM/ECF participant:

Representative Morris J. Brooks, Jr.
2101 W. Clinton Ave.
Suite 302
Huntsville, AL 35805

DATED: August 23, 2019

/s/ Barry A. Ragsdale
Barry A. Ragsdale
SIROTE & PERMUTT, PC
2311 Highland Avenue South
Birmingham, AL 35205
Phone: (205) 930-5100
Fax: (205) 930-5101
bragsdale@sirote.com