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

FLORIDA RISING TOGETHER., *et al.*, Plaintiffs, v. LAUREL M. LEE, *et al.*, Defendants, and REPUBLICAN NATIONAL COMMITTEE, *et al.*, Intervenor-Defendants.	Case No. 4:21-cv-201-MW-MAF

MOTION TO INTERVENE

Defendant, Secretary of State Lee, in her official capacity, hereby moves to intervene as defendant with respect to all claims raised by Plaintiffs. Attached hereto is a memorandum of law explaining why intervention as of right or, alternatively, permissive intervention is appropriate under Federal Rule of Civil Procedure 24(a) and/or 24(b). For the reasons contained within the attached memorandum of support, Defendant Lee respectfully requests intervention be granted.

Dated: November 30, 2021 Respectfully submitted by:

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NORTHERN DISTRICT OF FLORIDA
LOCAL RULE 7.1 CERTIFICATION

The Secretary has sought the position of Plaintiffs. The League Plaintiffs, NAACP Plaintiffs, and FRT Plaintiffs oppose the motion to intervene, and plan to file expedited responses by the end of this week. The Intervenor-Defendants consent to this motion.

/s/ Mohammad Jazil
Attorney for Defendant Secretary of State

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served to all counsel of record through the Court's CM/ECF system on the 30th of November, 2021.

/s/ Mohammad Jazil
Attorney for Defendant Secretary of State

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FLORIDA RISING TOGETHER., *et al.*,

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SECRETARY OF STATE LAUREL M. LEE'S MEMORANDUM IN SUPPORT OF HER MOTION TO INTERVENE TO DEFEND ALL PROVISIONS OF FLORIDA STATE LAW

While the Secretary of State remains a defendant in the case, this Court's November 23, 2021, Order to Show Cause crystalized for the first time to the Secretary that she will not be allowed to present the State's interest at the summary judgment and trial stage without intervention as to the vote-by-mail request and non-solicitation provisions at issue. In an abundance of caution, and to ensure that this Court can consider, weigh, and judge the sufficiency of the State's interests against the alleged burdens on voting rights, the Secretary submits a motion to intervene. Specifically, the Secretary moves to intervene so that she may defend all statutory provisions being challenged before this Court. She moves as of right under Federal Rule of Civil Procedure 24(a) as the State official charged with presenting the State's interests in election-related statutory provisions and, in the alternative, she moves for permissive intervention under Rule 24(b).

I. INTERESTS OF THE FLORIDA SECRETARY OF STATE

Separate and aside from the causation and redressability analysis for Article III standing, the Secretary retains a distinct interest in election-related litigation. The Secretary of State is Florida's "chief election officer." *See* Fla. Stat. § 97.012 *et seq*. The Secretary of State is the head of the Florida Department of State, which contains multiple divisions including, particularly, the Division of Elections. Fla. Stat. § 20.10. The Secretary is appointed by the Governor and confirmed by the Florida Senate. *Id*. Several of the Secretary's statutory duties directly implicate the issues in

this election, irrespective of whether the Secretary is a necessary party to redress Plaintiffs' injuries for standing purposes. For example, the Secretary has the responsibility to "[o]btain and maintain uniformity in the interpretation and implementation of the election laws." Fla. Stat. § 97.012(1). The Secretary also provides several services to the various county Supervisors of Elections, such as providing: "technical assistance" related to voter education and voting systems; training on signature matching, and "written direction and opinions" on "the performance of [the Supervisors'] official duties." Fla. Stat. § 97.012(4), (5), (16), and (17). Finally, the Secretary is permitted to "[b]ring and maintain such actions at law or in equity by mandamus or injunction to enforce the performance of any duties . . . with respect to chapters 97 through 102 and 105, or to enforce compliance with" a Department of State rule. Fla. Stat. § 97.012 (14).

Importantly, the Eleventh Circuit recognized that the Secretary is the proper *Ex parte Young* defendant for challenges to election-related statutory provisions, even the ones that the supervisors of elections administer. *See Jacobson v. Florida Secretary of State*, 974 F.3d 1236, 1256 (11th Cir. 2020) ("In *Lee*, a motions panel of this Court ruled that the Florida Secretary of State was a proper defendant under *Ex parte Young*, in an action challenging an election procedure administered by the county Supervisors of Elections.") (citing *Dem. Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1318 (11th Cir. 2019)).

Thus, separate and apart from the law of standing, the Secretary is a proper party to assert the State's interests in the State-election provisions being challenged before this Court—all of the provisions.

II. ARGUMENT

A. The Secretary is entitled to intervene as of right.

Under Rule 24(a), intervention as of right should be granted if the following four criteria are met: (1) the motion is timely; (2) the movant has a legally protected interest in the action; (3) the action may impair that interest; and (4) no existing party adequately represents the movant's interest. *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989). All four criteria are met here. Furthermore, the intervention rules found in Rule 24 are "construed liberally" with any "doubts resolved in favor of the proposed intervenor." *Adams Offshore, Ltd. v. Con-Dive, LLC*, 2009 WL 2971103, at *1 (S.D. Ala. 2009). And "a party seeking to intervene need not demonstrate that [s]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." *Chiles*, 865 F.2d at 1213.

i. The Secretary's motion is timely.

Whether a motion to intervene is timely is analyzed using the following four factors: (1) any delay in filing after which the Secretary knew or should have known of her interest in the case; (2) the extent of prejudice to the existing parties as a result

of the Secretary's failure to move to intervene sooner; (3) the extent of prejudice to the Secretary if the motion is denied; and (4) the existence of unusual circumstances "militating either for or against a determination that" her motion was timely. *Chiles*, 865 F.2d at 1213. All four factors favor the Secretary, and her motion is timely.

Specifically, only after this Court issued its second Order to Show Cause on November 23rd, just seven days ago, did the necessity of the Secretary's intervention to participate in the defense of State law fully crystalize. For instance, in this Court's October 8th Order on Defendant Supervisors' Active Participation in the Case, the Court indicated that even though Defendant Supervisors are the only proper parties before this Court with respect to some of Plaintiffs' claims, that fact does not mean "they cannot *coordinate their defense* of the law with the Secretary of State or even hire the same lawyers as the Secretary." *See, e.g.*, Case No. 186 (ECF 273 at 4) (emphasis added). No reference was made to the Secretary's earlier request that her response to this Court's First Order to Show Cause be treated, in the alternative, as a motion to intervene. *See, e.g.*, Case No. 186 (ECF 163 at 14 n.17). And so, the Secretary proceeded with putting forth the State's perspective.

In light of the Second Order to Show Cause, however, and to present the State's perspective, the Secretary files this motion to intervene on the same day as the response to the order. Indeed, the Secretary files this motion only months after

the initial complaint and in even less time after Plaintiffs' filed their now-operative complaint.

In any event, the Secretary was and remains a defendant in the case. Convenience of the parties is thus not a factor in allowing her to continue in that posture. *See Clark v. Putnam County*, 168 F.3d 458, 462 (11th Cir. 1999). There cannot be any prejudice to the existing parties in an action where the Secretary has been an active participant from the beginning. No deadlines will need to be moved, nor discovery re-opened. The only affirmative act required by the Secretary's intervention is the Court's consideration of her arguments in defense of State law. That is it.

On the other hand, the prejudice to the Secretary, the State of Florida, and the people of Florida will be severe should the Secretary not be heard in defense of Florida law. The State's perspective remains paramount in defense of State law, and the Secretary has zealously defended State law since the inception of this case. *Cf. Hand v. Scott*, 888 F.3d 1206, 1214 (11th Cir. 2018) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.").

Finally, there is a unusual circumstance at play here: a State official, who is already a party defendant, is seeking to intervene in a case where she is already a defendant so that she can present the State's perspective.

ii. The Secretary has a legally protected interest, which will, as a practical matter, be impaired absent intervention.

As Florida's Chief Elections Officer, the Secretary necessarily has a "direct, substantial, legally protectible interest in this proceeding." *Chiles*, 865 F.2d at 1213-14. Importantly, the State of Florida, whose interests the Secretary of State represents in election-related matters, "clearly has a legitimate interest in the continued enforceability of its own statutes." *Maine v. Taylor*, 477 U.S. 131, 137 (1986).[1] Passing judgment on State laws without any State-level official presenting the State's interests does the State a great disservice. As such, the Secretary is "so situated that disposing of [this] action may as a practical matter impair or impede [her] ability to protect [the State's and her] interest[s]" because the State's interests in State law will be judged without the State having a voice. Fed. R. Civ. P. 24(a)(2).

iii. The existing parties do not adequately represent the Secretary's interests.

It is unquestionable that the remaining defendants do not adequately represent the Secretary's interest. The standard for this prong of the intervention analysis is less rigorous and is satisfied "if the [Secretary] shows that the representation of h[er] interest *may be* inadequate." *Chiles*, 865 F.2d at 1214 (quotations omitted; emphasis added). "[T]he burden of making that showing should be treated as minimal."

[1] The Secretary's interests—the State's interests—are also different than those of party-committee intervenors focused on the interests of a subset of the electorate.

Trbovich v. United Mine Workers of America, 404 U.S. 528, 538 n. 10 (1972); *see also Chiles*, 865 F.2d at 1214. Any presumption in favor of adequate representation is "weak." *Stone v. First Union Corp.,* 371 F.3d 1305, 1312 (11th Cir. 2004). Further, all the Secretary must do is show "[s]ome evidence" of inadequacy of representation, which can include a "difference in interests," *id.,* and different "approaches to litigation," *Chiles*, 865 F.2d at 1214-15 (citing *Trbovich*, 404 U.S. at 539).

Here, as the Eleventh Circuit has recognized, the Secretary is uniquely situated to present the State's interests. *See supra*. Consistent with that unique position, the Secretary is the only defendant who moved to dismiss a significant portion of Plaintiffs' claims across all related cases. *See, e.g.*, Case 186 (ECF No. 175). And the Secretary remains the only State-level official who has presented the State's interests at the summary judgment stage across all four related cases, working with the Attorney General and two supervisors in drafting and presenting those arguments where appropriate. *See, e.g.*, Case No. 186 (ECF No. 321). She respectfully requests that she be allowed to continue presenting the State's interests.

The Supervisors do not adequately represent the Secretary's interest. First, nearly all of the supervisors are on record as not wanting to pursue the defense of Chapter 2021-11, Laws of Florida, relying instead on the Secretary, Attorney General, or Intervenors for the defense. *See, e.g.*, Case No. 186 (ECF No. 114). Second, after the Court's "default or defend" order, *see, e.g.,* Case No. 186 (ECF

No. 273), only two of the State's 67 Supervisors together moved with the Secretary for summary judgment and, as of this writing, only two Supervisors will join in response to Plaintiffs' motions for summary judgment. Of the remaining 65 Supervisors, only two others took any position at summary judgment. One took a position only with respect to any as-applied challenge by Plaintiffs, *see, e.g.*, Case No. 186 (ECF No. 314), and the other joined that Supervisor's motion, *see, e.g.*, Case No. 186 (ECF No. 326). Therefore, at least 63 Supervisors are taking no action to defend State law.[2] Only the Secretary is offering a full-throated defense of the entirety of Florida election law. As such, there is no party that is adequately representing the interests of the Secretary to vigorously defend Florida law in its entirety.

B. In the alternative, the Court should permit the Secretary to intervene permissively.

Fed. R. Civ. P. 24(b)(1) provides that "[o]n timely motion, the court may permit anyone to intervene who: . . . (B) has a claim or defense that shares with the main action a common question of law or fact." The Court may also permit intervention by a State government officer "if a party's claim or defense is based on: (A) a statute . . . administered by the officer or agency; or (B) any regulation, order,

[2] Supervisor White, in her joinder of Supervisor Latimer's motion for summary judgment, "defers to the defenses raised by the Secretary of State as to any facial challenge to SB 90's drop box restrictions, vote-by-mail application restrictions, and 'line warming' ban." *See, e.g.*, Case No. 186 (ECF No. 326).

requirement, or agreement issued or made under the statute." Fed. R. Civ. P. 24(b)(2). The Secretary qualifies for permissive intervention under both standards.[3]

As an existing party defendant, the Secretary has multiple defenses that share common questions of law or fact with the litigation as a whole. This Court has acknowledged as much in the order on the Secretary's motion to dismiss when it found the Secretary had standing to defend against several of the claims brought by Plaintiffs. Therefore, intervention under Rule 24(b)(1) is proper.

Finally, as the Chief Election Officer of the State, the Secretary reiterates her abiding interest in the defense of the State's election-related statutes.. She has a duty to "[o]btain and maintain uniformity in the interpretation and implementation of the election laws." Fla. Stat. § 97.012(1). She "[p]rovide[s] written direction and opinions to the supervisors of elections on the performance of their official duties with respect to the Florida Election Code or rules adopted by the Department of State." Fla.. Stat. § 97.012(16). She promulgates rules concerning the election code. *See, e.g.*, Fla. Stat. § 97.0575(5); *see also* Fla. Stat. § 120.54; Fla. Stat. § 97.012(16). Thus, she asks to intervene pursuant to Rule 24(b)(2) to provide the State's perspective as to all the provisions at issue here, including the vote-by-mail request and non-solicitation provisions.

[3] As timeliness is addressed above, the Secretary incorporates those arguments by reference herein.

Respectfully submitted,

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NORTHERN DISTRICT OF FLORIDA
LOCAL RULE CERTIFICATION

The foregoing complies with the size and font requirements of the local rules. It contains 2,248 words.

/s/ Mohammad Jazil
Attorney for Defendant Secretary of State

CERTIFICATES OF SERVICE

I certify that on November 30, 2021, I served the foregoing on all counsel of record through this Court's CM/ECF system.

/s/ Mohammad Jazil