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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DON HIGGINSON,

Plaintiff,

v.

XAVIER BECERRA, in his official capacity as ATTORNEY GENERAL OF CALIFORNIA; and CITY OF POWAY, CALIFORNIA,

Defendants.

Case No. 3:17-CV-02032-WQH-JLB

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE OF CALIFORNIA LEAGUE OF UNITED LATIN AMERICAN CITIZENS, JACQUELINE CONTRERAS, XAVIER FLORES, JUDY KI, AND HIRAM SOTO

Judge: William Q. Hayes
Date: December 11, 2017

No oral argument unless requested by the Court.

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INTRODUCTION

The California League of United Latin American Citizens (California LULAC), Jacqueline Contreras, Xavier Flores, Judy Ki, and Hiram Soto respectfully move to intervene as defendants in this case in order to protect their rights under the California Voting Rights Act of 2001 (CVRA), Cal. Elec. Code §§ 14025, et seq.; the California Constitution; the federal Voting Rights Act of 1965, 52 U.S.C. §§ 10301, et seq.; and the United States Constitution. Defendant Attorney General Xavier Becerra (State Defendant) does not oppose Movants' Motion to Intervene. Hulett Decl., ¶ 3.

Movants are a California civil rights organization; voters in Poway, California who support the use of district-based elections there; and voters residing in the Antelope Valley Community College District in Los Angeles County who support the use of district-based elections there and have relied on the CVRA in order to achieve them.

Plaintiff seeks to overturn the CVRA and to force the City of Poway to revert from district-based elections to at-large elections in a multimember district, substantially altering the electoral districts in which Movants are voters and constituents. This will result in denial of benefits that Movants enjoy arising from being represented in smaller districts by representatives who are accountable to fewer electors and in elimination of a right of action that Movants may rely on to secure fairer representation and greater access to elected officials in Poway. If the CVRA is invalidated, then other California jurisdictions—including the Antelope Valley Community College District—might revert to at-large elections, undoing progress that has been made across the state to achieve fairer representation. Accordingly, Movants seek intervention as of right under Fed. R. Civ. P. 24(a) or, alternatively, by permission under Fed. R. Civ. P. 24(b).

Movants have direct and personal interests in the outcome of this case that are distinct from the general and institutional interests of the State Defendant and Defendant City of Poway (City Defendant). Movants have an interest in preserving Map 133 and the use of single-member districts as Poway's electoral system for its city council in order to maintain the responsiveness of representatives elected from smaller districts. Many courts, not least the United States Supreme Court, have recognized the values that inhere in geographically and demographically smaller

districts, including among others greater access to representatives. *E.g.*, *Evenwel v. Abbott*, 136 S. Ct. 1120, 1130–32 (2016); *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969); *Garza v. Cnty. of L.A.*, 918 F.2d 763, 780–85 (9th Cir. 1990) (Kozinski, J., concurring and dissenting) (discussing the one person–one vote principle and recognizing the importance of constituents' access to their representatives and of representatives not having to serve excessive numbers of constituents). Movants have an interest also in the continued viability of the CVRA, in particular in those California jurisdictions where Movants have availed themselves of the CVRA's private right of action for converting at-large electoral systems to district-based electoral systems when voting in those jurisdictions is racially polarized as well as in those jurisdictions where conversions are underway or on the horizon. Movants have interests also in equal access to the franchise and to being represented by candidates of their choosing who will dutifully represent them and uphold the United States and California Constitutions.

Movants' interests may be protected by their timely intervention in this action, will be impaired by denial of their intervention, and may not be adequately represented by the existing parties in the case. Neither the State Defendant nor the City Defendant shares Movants' interests; nor can they, as these interests are deeply personal and rest not with the government but with individuals and the associations that they form. On the one hand, although the State Defendant may choose to defend the constitutionality of the CVRA alongside Movants, its interests are not sufficiently congruent with Movants'; Movants' interests are more numerous, more personal, and more local, and the State Defendant therefore will not adequately represent them. On the other hand, although the City Defendant may choose to defend Map 133 alongside Movants, its interests are likewise not sufficiently congruent with Movants'; as alleged in the Complaint, each member of the City Council has expressed opposition to district-based elections. Moreover, Movants' presentation of evidence and argument will assist the Court in rendering a decision on a complete factual and legal record.

In sum, Movants are particularly suited to represent their own interests in maintaining Poway's adoption of district-based Map 133 as well as the continued viability of the CVRA's private right of action, and the Court should grant their request for intervention.

DESCRIPTION OF MOVANTS

Movant California LULAC is a civil rights organization committed to advancing the economic condition, educational attainment, political influence, housing, health, and civil rights of Hispanic Americans through community-based programs. California LULAC and its members have advocated for local governments' use of by-district voting where at-large voting has resulted in a lack of representation for neighborhoods and in disenfranchisement of Latino residents and others. In doing so, its members have availed themselves and continue to avail themselves of the CVRA's private right of action for eliminating vote dilution. Movant California LULAC has members who reside in the City of Poway and in the Antelope Valley Community College District (AVCCD).

Movant Jacqueline Contreras, a realtor, has lived in Antelope Valley for 29 years. She is registered to vote and resides within the boundaries of the AVCCD. Movant Contreras is a founding member of the Antelope Valley Hispanic Chamber of Commerce. She supports the AVCCD Board's recent decision to adopt district-based elections after being approached by a request for compliance with the CVRA. She believes that districts will ensure fairer representation for all regions within the AVCCD while allowing elected officials to get more done for their respective regions.

Movant Xavier Flores has lived in Palmdale, California since 1989. He is a registered voter in the AVCCD. He works as a program director at an organization that provides education, health, culture, civic participation, and drug, alcohol, and tobacco prevention services for the Latino communities of the Northeast San Fernando and Antelope Valleys. MALDEF (Mexican American Legal Defense and Educational Fund) sent letters on Movant Flores's behalf to the AVCCD requesting compliance with the CVRA. He supports districts in the AVCCD, because he believes that Board members elected from them will be more responsive to their constituents and more likely to champion educational programs that serve all students.

Movant Judy Ki, a retired teacher, moved to Poway in 1996. She is a regular voter in Poway. While a Commissioner for the California Commission on Asian and Pacific Islander Affairs, she was involved in educating and registering voters in San Diego County. Movant Ki is

a resident of the southern portion of Poway, in the newly formed District 4. She supports district-based elections, because she feels that the Poway City Council has not represented the needs or interests of the southern portion of her City. She believes that district-based elections will level the playing field of democracy.

Movant Hiram Soto and his family have lived in Poway for two years. He is registered to vote. He has worked as a journalist for over 15 years and currently works as a communications director at an organization dedicated to community empowerment and civic engagement. Movant Soto is a resident of the new District 1 in western Poway. He believes that districts will better serve the younger and more diverse generation of residents growing in Poway than the at-large voting did. He values close access to elected officials and the improved opportunities in district-based electoral systems for people of all ages and economic means to participate in civic affairs.

ARGUMENT

I. MOVANTS ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

A person may intervene as of right under Federal Rule of Civil Procedure 24(a)(2) when: (1) the application to intervene is timely; (2) the applicant has "a 'significantly protectable' interest relating to the property or transaction that is the subject of the action"; (3) the applicant is so situated that the disposition of the action might impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest is not adequately represented by the existing parties to the lawsuit. *United States v. Sprint Commc'ns, Inc.*, 855 F.3d 985, 990–91 (9th Cir. 2017); *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001).

"In evaluating whether Rule 24(a)(2)'s requirements are met, [courts in the Ninth Circuit] normally follow practical and equitable considerations and construe the Rule broadly in favor of proposed intervenors." *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (internal quotation marks omitted) (citing *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002); *Sw. Ctr. for Biological Diversity*, 268 F.3d at 818); *see also Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 900 (9th Cir. 2011) ("We stress that intervention of right does not require an absolute certainty that a party's interests will be impaired or that existing parties will not adequately represent its interests."). This liberal policy in favor of

intervention "'serves both efficient resolution of issues and broadened access to the courts.'" *Wilderness Soc.*, 630 F.3d at 1179 (quoting *City of Los Angeles*, 288 F.3d at 397–98) (internal quotation marks omitted). Moreover, courts accept as true all well-pleaded, non-conclusory allegations in a motion to intervene, a proposed answer in intervention, and declarations supporting the motion. *Sw. Ctr. for Biological Diversity*, 268 F.3d at 820.

For the following reasons, Movants satisfy the test for intervention as a matter of right under Rule 24(a)(2).

A. Movants' Motion to Intervene Is Timely.

Courts in the Ninth Circuit determine the timeliness of a motion to intervene by looking to the totality of the circumstances, "with a focus on three primary factors: '(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay.'" *Smith v. L.A. Unified Sch. Dist.*, 830 F.3d 843, 854 (9th Cir. 2016) (quoting *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2011)). "In analyzing these factors, however, courts should bear in mind that '[t]he crucial date for assessing the timeliness of a motion to intervene is when proposed intervenors should have been aware that their interests would not be adequately protected by the existing parties.'" *Id.* (quoting *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999)).

In light of the totality of the circumstances and the factors identified by the Ninth Circuit, Movants' Motion to Intervene is timely. First, Movants seek to intervene at the earliest possible stage of the proceeding. Plaintiff filed his Complaint on October 4, 2017. Movants have filed this Motion, Declarations in support of the Motion, a Proposed Order on the Motion, a Proposed Answer, and an Opposition to Plaintiff's Motion for Preliminary Injunction on November 6, 2017. To date, only the City Defendant has filed a responsive pleading. Def. City of Poway's Answer, Dkt. 14, Oct. 25, 2017. The State Defendant has requested and been granted an extension to file their responsive pleading. Def. Att'y General's Mot. for Extension of Time to File Responsive Pleading, Dkt. 12, Oct. 20, 2017; Order Granting Def. Att'y General's Mot., Dkt. 13, Oct. 23, 2017. Moreover, Plaintiff has filed a Motion for Preliminary Injunction, and Movants seek to intervene in time to contribute to the Court's consideration of that motion. Pl.'s Mot. for

Prelim. Inj., Dkt. 11, Oct. 19, 2017. Thus, the Court itself has not had an opportunity to assess the claims and interests at issue in this litigation, and Movants seek to intervene in time for the Court to consider their arguments alongside those of the existing parties. Accordingly, this factor supports a finding that this Motion is timely.

Second, Movants' intervention will not cause prejudice to the existing parties in the case. The Ninth Circuit has held that "the only 'prejudice' that is relevant under this factor is that which flows from a prospective intervenor's failure to intervene after [it] knew, or reasonably should have known, that [its] interests were not being adequately represented—and not from the fact that including another party in the case might make resolution more 'difficult[].'" *Smith*, 830 F.3d at 857 (quoting *United States v. Oregon*, 745 F.2d 550, 552–53 (9th Cir. 1984)). Here, Movants have filed this Motion to Intervene immediately upon learning that their interests would be affected by this action and not be adequately represented by the existing parties, and the action is in the earliest stage. Because Movants have not delayed their intervention, neither Plaintiff nor Defendants will be prejudiced by the timing of Movants' intervention. Therefore this factor also supports a finding that this Motion is timely.

Third, because there has been no delay between Plaintiff filing his Complaint and Movants seeking to intervene, it is not necessary to assess reason for delay. As discussed above, Movant has not delayed but has filed this Motion to Intervene within weeks of Plaintiff filing his Complaint. Time that has elapsed between the initiation of this litigation has been spent in consultation between Movants, their counsel, and existing parties' counsel and in preparing this Motion and supporting documents. This factor also supports a finding that this Motion is timely.

In sum, Movants have filed this Motion to Intervene during the earliest stage of the case, Movants' intervention will not prejudice the existing parties to the case, and there has been no delay in Movants seeking to intervene. Therefore, Movants' Motion is timely.

B. Movants Seek to Vindicate Protectable Interests.

A person seeking to intervene has a "significant protectable interest" in an action when: (1) the applicant's asserted interest "is protected under some law"; and (2) "there is a relationship between [the applicant's] legally protected interest and the plaintiff's claims." *Sprint Commc'ns,*

Inc., 855 F.3d at 991 (alteration in original) (quoting *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998)) (internal citation and quotation marks omitted); *see also Wilderness Soc.*, 630 F.3d at 1179. But "[w]hether [a prospective intervenor] demonstrates sufficient interest in an action is a 'practical, threshold inquiry,' and '[n]o specific legal or equitable interest need be established.'" *Citizens for Balanced Use*, 647 F.3d at 897 (quoting *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996)) (internal quotation marks omitted). The "interest" test "'is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'" *Wilderness Soc.*, 630 F.3d at 1179 (quoting *Fresno Cnty. v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980)) (internal quotation marks omitted). Accordingly, the Ninth Circuit has identified as protectable, for example, such interests as "conserving and enjoying the wilderness character" of a region, *id.* at 897–98, and parents' "concern . . . for their children's welfare" and "a sound educational system" operated in accordance with law, *Johnson v. S.F. Unified Sch. Dist.*, 500 F.2d 349, 352–53 (9th Cir. 1974). Furthermore, "a prospective intervenor 'has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation.'" *Wilderness Soc.*, 630 F.3d at 1179 (quoting *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006)).

Notably, courts have often held that intervention is proper for parties seeking to protect their interests in political access cases. *See, e.g.*, *Georgia v. Ashcroft*, 539 U.S. 461, 476 (2003) (holding that private litigants may intervene in judicial preclearance proceedings under the federal Voting Rights Act); *Nw. Austin Utility Dist. No. One v. Mukasey*, 573 F.Supp.2d 221 (D.D.C. 2008) (granting intervention to numerous parties seeking to defend the constitutionality of the federal Voting Rights Act's preclearance requirement), *rev'd on other grounds sub nom. Nw. Austin Utility Dist. No. One v. Holder*, 557 U.S. 193 (2009); *King v. Ill. State Bd. of Elections*, 410 F.3d 404, 409 & n.3 (7th Cir. 2005) (noting successful intervention into redistricting challenge by voters and constituents whose interests would not be adequately represented by government parties); *Meek v. Metro. Dade Cnty., Fla.*, 985 F.2d 1471, 1478, 1480 (11th Cir. 1993) (reversing a denial of intervention where intervenors "sought to advance their own interests

in achieving the greatest possible participation in the political process," whereas the government defendant "was required to balance a range of interests likely to diverge from those of the intervenors"), *abrogated on other grounds sub nom. Dillard v. Chilton Cnty. Comm'n*, 495 F.3d 1324 (11th Cir. 2007); *Shaw v. Hunt*, 861 F.Supp. 408, 420 (E.D.N.C. 1994) (noting successful intervention by "twenty-two persons registered to vote in North Carolina, both African-American and white . . . in support of the [redistricting] Plan" and by "eleven persons registered to vote as Republicans in North Carolina . . . [challenging] the Plan").

Movants have numerous significant protectable interests in this litigation. Like intervenors in other political access cases who sought to defend their political rights, Movants' interests in political access and representation are real, protected under California and federal law, and at risk of being compromised in this case. In particular, Movants have an interest in maintaining in Poway Map 133 and the district-based electoral system that it establishes. Courts have on numerous occasions recognized the benefits that inhere in single-member districts, for example that they provide constituents with readily identifiable and more accessible representatives, that they augment representatives' accountability to their constituents by linking their electoral success to their service for a smaller electorate with more specific needs, that their electoral campaigns tend to be less expensive than campaigns for at-large seats, and that they ensure regional representation. *See, e.g.*, *Evenwel*, 136 S. Ct. at 1130–32 (recognizing that citizens have fundamental interests in equal representation); *Kirkpatrick v. Preisler*, 394 U.S. at 531 ("Equal representation . . . is a principle designed to prevent debasement of voting power and diminution of access to elected representatives."); *Garza*, 918 F.2d at 774–75 (recognizing that "[r]esidents of . . . more populous districts . . . have less access to their elected representative" and that "[i]nterference with individuals' free access to elected representatives impermissibly burdens their right to petition the government" (citing *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961))); *Garza*, 918 F.2d at 781 (Kozinski, J., concurring and dissenting) (recognizing that, in smaller districts, "no official has a disproportionately large number of constituents to satisfy"); *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1570 (11th Cir. 1984) (recognizing that campaigning for an at-large position can be expensive

and thus prohibitive for those with fewer economic means). Movants have direct and personal interests in preserving an electoral system that realizes these benefits. District-based elections will improve representation for historically underserved areas of Poway and bolster both the responsiveness of representatives elected from each district and the ability of political newcomers and people with fewer economic means to run effective campaigns.

Movants have interests also in the continued viability of the CVRA, specifically in availing themselves of the private right of action provided by the Act, under which private persons may enforce the Act's provisions and obtain fairer political representation where there is still racially polarized voting. Cal. Elec. Code § 14032. Movants' interests in the continued viability of the CVRA extend to the improved access to and participation in the political process that they enjoy in part because of the CVRA. *See id.* § 14027 (providing right to members of protected classes against the use of at-large elections in a manner that impairs their ability to elect candidates of their choice); *id.* §§ 14029 (providing right to district-based elections as a possible judicial remedy). Some of Movant LULAC's members have employed the private right of action provided by the CVRA to seek judicial relief for violations of their political rights and to secure fairer representation in local government. Movants have also benefited in these ways from others making use of the CVRA's private right of action in the jurisdictions where they reside. Movants should be able to rely on the CVRA to secure these interests in the future and to ensure that their jurisdictions do not simply abandon the use of district-based elections if the CVRA is invalidated.

Movants' interests are protected under the very law challenged by Plaintiff, the CVRA. These interests are also protected under the California Constitution, the equal protection and fundamental rights guarantees of which more rigorously advance the rights and liberties of persons in California than do the United States Constitution's, and accordingly impose on the State and local governments more stringent requirements in their dealings with constituents. *E.g.*, *Butt v. California*, 842 P.2d 1240, 1249–52 (Cal. 1992); *Darces v. Woods*, 679 P.2d 458, 469 & n.19 (Cal. 1984); *Serrano v. Priest*, 557 P.2d 929, 950 (Cal. 1976). The CVRA was enacted to implement California's robust commitments to the fundamental right to vote and to equal protection of the laws. Cal. Elec. Code § 14031; *Jauregui v. City of Palmdale*, 172 Cal.Rptr.3d

333, 339 (Cal. Ct. App. 2014). Movants' interests in equal access to and participation in the political process are also protected under the federal Voting Rights Act and the United States Constitution.

These interests, protectable under California and federal law, are directly related to Plaintiff's claims in this case. Through this litigation, Plaintiff seeks to force the City of Poway to abandon Map 133 and its implementation of district-based elections and to revert to at-large elections. The current plan benefits Movants by providing them with districts from which they are assured to elect a member of the City Council who hails from their part of the City and will better understand the needs and interests of their neighborhoods. In particular, some of Movants reside in Poway's District 4, which encompasses the southern part of Poway, and District 1, which lies in western Poway. Defendant-Intervenors allege that the neighborhoods included in District 4 have not been fairly represented by the members of the City Council. *See* Ex. D, Ki Decl., at ¶ 7; *see also* J. Harry Jones, *Poway grudgingly moving to district elections*, San Diego Union-Tribune (July 19, 2017), https://www.sandiegouniontribune.com/communities/north-county/sd-no-poway-elections-20170719-story.html ("Over the decades there has been a feeling in the city that southern Poway, which has more of a working class demographic, has been under-represented and some have expressed hope that will change with the new district requirements."). If Plaintiff is successful, then Movants' interests in being represented by someone more familiar with their neighborhoods and having greater access to that representative will be compromised just after they have been realized in Poway's adoption of Map 133 and district-based elections. Plaintiff seeks also to have the CVRA declared unconstitutional, including the private right of action codified at Cal. Elec. Code § 14032. *See* Complaint, Dkt. 1 at ¶¶ 59, 62–63. If Plaintiff is successful, then Movants will lose the ability to avail themselves of this mechanism for securing greater and fairer political representation in jurisdictions across California. Thus there is a direct, indeed adverse, relationship between Plaintiff's claims and Movants' protectable interests.

Because Movants have significant protectable interests in this litigation and those interests are directly related to Plaintiff's claims, the Court should grant Movants intervention as of right so that they may protect these interests.

C. Movants' Interests Will Be Impaired If Intervention Is Denied.

Intervention is proper where prospective intervenors "are so situated that the disposition of the action without [them] may as a practical matter impair or impede their ability to safeguard their protectable interest." *Smith*, 830 F.3d at 862. "The question of whether protectable interests will be impaired by litigation 'must be put in practical terms rather than in legal terms.'" *Akina v. Hawaii*, 835 F.3d 1003, 1011–12 (9th Cir. 2016) (quoting 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1908.2 (3d ed. 2007)). Along these lines, intervention as of right "does not require an absolute certainty" as to impairment of a prospective intervenor's interest. *Citizens for Balanced Use*, 647 F.3d at 900. The advisory committee notes to Rule 24(a) are also instructive: "[i]f 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 Comm. Note to 1966 Amend.

As mentioned above, Plaintiff's goals in this litigation are adverse to Movants' interests. Plaintiff seeks to have Map 133 invalidated and the City of Poway forced to revert to at-large elections. This would vitiate the interests of some Movants, who prefer that Poway has by-district voting rather than at-large voting. *See* Ex. D, Ki Decl., at ¶¶ 7–8; Ex. E, Soto Decl., at ¶ 10. Plaintiff seeks also to have the CVRA declared unconstitutional, eliminating the private right of action codified at Cal. Elec. Code § 14032, of which Movants could avail themselves to seek greater and fairer representation in jurisdictions across California. Complaint, Dkt. 1 at ¶¶ 59, 62–63. Consequently, a victory by Plaintiff will result in the invalidation of the private right of action of which Movants may avail themselves to seek redress for voting rights violations under California law. *See* Ex. B, Contreras Decl., at ¶ 11; Ex. C, Flores Decl., at ¶ 11; Ex. F, Rodriguez Decl., ¶¶ 6–7. These results will curtail Movants' rights under the California law, with the practical effects of negatively affecting Movants' political strength, the quality of their political representation, and their access to elected representatives that are responsive to their concerns. Absent intervention, Movants will lack the opportunity to protect their substantial personal interests and will be relegated to the sidelines in a case in which their interests will be determined

by other parties and the outcome of which will bear more heavily on Movants as California constituents, voters, and elected officials.

Movants' protectable interests will be impaired by this litigation proceeding without it, especially in the event that Plaintiff's claims are victorious. Therefore, the Court should grant intervention so that Movants may prevent such impairment.

D. The Existing Defendants May Not Adequately Represent Movants' Interests.

Courts in the Ninth Circuit determine whether a prospective intervenor's interest is adequately represented by the existing parties by considering: (1) whether an existing party "'will undoubtedly make all the intervenor's arguments'"; (2) whether an existing party "'is capable and willing to make such arguments'"; and (3) whether the prospective intervenor "'would offer any necessary elements to the proceedings that other parties would neglect.'" *Sw. Ctr. for Biological Diversity*, 268 F.3d at 822 (quoting *Nw. Forest Res. Council*, 82 F.3d at 838). "However, the burden of showing inadequacy is 'minimal,' and the applicant need only show that representation of its interests by existing parties 'may be' inadequate." *Id.* (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)); *see also Citizens for Balanced Use*, 647 F.3d at 900 (stressing that intervention as of right "does not require an absolute certainty" as to inadequate representation).

Courts grant intervention where a prospective intervenor and the existing parties "do not have sufficiently congruent interests." *E.g., Sw. Ctr. for Biological Diversity*, 268 F.3d at 823; *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998) (upholding intervention of an association of teamsters to defend a California wage regulation where the association's interests "were potentially more narrow and parochial than the interests of the public at large" such that the state agencies charged with enforcing the regulation might not provide adequate representation); *Cal. Dump Truck Owners Ass'n v. Nichols*, 275 F.R.D. 303, 307–08 (E.D. Cal. 2011) (granting intervention to a nonprofit to defend a California environmental regulation where the state agency charged with enforcing the regulation was an existing party, in part because the nonprofit, unlike the agency, was "not required to balance any economic impact against its own considerations pertaining to health and environmental

protections"); *C.S. ex rel. Struble v. Cal. Dep't of Educ.*, No. 08-CV-0226, 2008 WL 2337372, at *5 (S.D. Cal. Apr. 8, 2008) (granting intervention to the Office of Administrative Hearings (OAH) in a civil rights action against the California Department of Education (CDE), in part because the OAH had an interest in renewing its contract with CDE to conduct hearings whereas CDE had an interest in retaining federal funding by contracting with any qualified agency); *see also Brumfield v. Dodd*, 749 F.3d 339, 346 (5th Cir. 2014) ("[A] lack of unity in all objectives, combined with real and legitimate additional or contrary arguments, is sufficient to demonstrate that the representation *may* be inadequate.") (emphasis in original). In the limited circumstance where a prospective intervenor and an existing party, including the government, share "the same ultimate objective," a presumption of adequate representation arises, and a prospective intervenor may rebut that presumption with a compelling showing that representation is nonetheless inadequate. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003).

"'Inadequate representation is most likely to be found when the applicant asserts a personal interest that does not belong to the general public.'" *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1498 (9th Cir. 1995) (quoting 3B James Wm. Moore Et Al., Moore's Federal Practice ¶ 24.07[4] (2d ed. 1995)). Accordingly, courts have often recognized that governmental representation of private, non-governmental intervenors' interests may be inadequate. In *Johnson v. San Francisco Unified School District*, for example, the Ninth Circuit held that parents of Chinese-American students could intervene in a school desegregation suit, because the school district otherwise "charged with the representation of all parents within the district" and having "authored the very plan which [the prospective intervenors] claim impairs their interest" did not adequately represent their interest. *Johnson*, 500 F2d. at 353–54; *see also, e.g.*, *Georgia v. Ashcroft*, 539 U.S. at 476 (holding that private litigants may intervene in judicial preclearance proceedings under the federal Voting Rights Act, because their interests are not necessarily represented by state defendants); *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 326 (1980) (holding that an individual aggrieved party may intervene in a Title VII enforcement action order to protect their personal interests, which might at times conflict with those of the EEOC, and reasoning that the existence of a private right of action means that the

EEOC is not merely a proxy for victims of discrimination); *Texas v. United States*, 805 F.3d 653, 661–64 (5th Cir. 2015) (holding that immigrant parents could intervene as of right to defend the constitutionality of a federal deferred action program for undocumented immigrant parents, in part because their interests in remaining in the United States with their children diverged from the federal government's interests in seeking expansive executive authority and maintaining relationships with the states); *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (observing that an insurer's motion to intervene "[fell] squarely within the relatively large class of cases in this circuit recognizing the inadequacy of governmental representation of the interests of private parties in certain circumstances").

In this litigation, Defendants may not adequately represent Movants' interests. Defendants will not "undoubtedly make" all of Movants' arguments, nor are Defendants necessarily "capable and willing to make" Movants' arguments, and Movants will offer argument and evidence to the proceedings that will be distinct from each existing party's and that Defendants in particular might neglect.

First, Movants' interests may not be adequately represented by the State Defendant, because their interests are not "sufficiently congruent." *Sw. Ctr. for Biological Diversity*, 268 F.3d at 823. Although the State Defendant may be charged with enforcing laws duly enacted by the California Legislature, the State Defendant does not and cannot share Movant's interests in preserving Map 133 and Poway's adoption of district-based elections. The State Defendant is neither a voter in nor a resident of Poway; and the State Defendant thus will not be affected either by Poway's transition to district-based elections or by potential invalidation of Poway's duly adopted single-member districts. In contrast, Movants have specific personal interests in the benefits that inhere in district-based elections, as adopted in Map 133. *See supra* § I.B. Indeed, Movants' ability to live and vote in a system that provides fair political representation depends on their ability to defend the challenged electoral system. The State Defendant will not undoubtedly make or even be capable and willing to make Movants' arguments in favor of maintaining single-member districts. Indeed, in advancing other interests, the State Defendant might well make arguments that are adverse to Movants' interest in maintaining single-member districts in Poway.

Movants' interests thus diverge from the State Defendant's broader interests, and the State Defendant may not adequately represent Movants' interests.

Nor are the State Defendant's and Movants' interests with respect to the CVRA necessarily aligned. The CVRA's private right of action, which Plaintiff seeks to invalidate, lies with such individuals as Movants, not with the government. Because the CVRA is enforced more regularly by individuals availing themselves of the CVRA's private right of action than by the Attorney General of California, Movants are particularly suited to defend their interest in that private right of action. Moreover, the Attorney General of California has in the past declined to defend controversial laws and is not alone in having done so. *E.g.*, *Perry v. Schwarzenegger*, 591 F.3d 1147, 1152 (9th Cir. 2010) (noting that the Attorney General of California declined to defend the constitutionality of a law affecting marriage rights); *see also Karcher v. May*, 484 U.S. 72, 75 (1987) (noting that the Attorney General of New Jersey declined to defend the constitutionality of a law affecting First Amendment rights). Whether the State Defendant defends the CVRA in a manner that secures "the full panoply of rights [that] Californians have come to expect as their due" is thus not certain. *See People v. Longwill*, 538 P.2d 753, 758 n.4 (Cal. 1975).

Second, Movants' interests may not be adequately represented by the City Defendant. According to the Complaint, the City Council does not support Poway's conversion from at-large elections to district-based elections. "Each member of the City Council . . . expressed his strong disapproval of the changes" urged by Mr. Shenkman's June 7, 2017 letter. Complaint, Dkt. 1 at ¶ 41. Each member of the City Council allegedly cited the potential lawsuit or litigation costs as the reason for supporting single-member districts, not the prospect of ensuring better representation for all Poway residents, not least Movants or others who would benefit from neighborhood-based districts. *Id.* ¶¶ 42–46. Also according to the Complaint, even the City Attorney advised the City Council to adopt district-based elections not for the purpose of ensuring better representation for all Poway residents but for the purpose of "'avoid[ing] significant attorneys' fees and cost award[s].'" *Id.* ¶ 36. Ultimately, the City of Poway allegedly "would not have switched from at-large elections to single-district elections" in order to serve the

participative and representational interests of all of its residents, including Movants. *Id.* ¶ 52. Indeed, there is debate in the general public as to whether Plaintiff, a former mayor of Poway, and the City Defendant actually disagree about either the constitutionality of the CVRA or the appropriateness of single-member districts in Poway. *See, e.g.*, J. Harry Jones, *Ex-Poway mayor sues over voting rights act*, San Diego Union-Tribune (Oct. 4, 2017), http://www.sandiegouniontribune.com/communities/north-county/sd-no-cvra-challenge-20171004-story.html ("Higginson is suing the State of California and the City of Poway, though the action against the city is only procedural."). As a result, the City Defendant will not undoubtedly make or even be capable and willing to make Movants' arguments in favor of maintaining district-based elections.

Movants' interest in the preservation of single-member districts in Poway might well go unrepresented in Defendants' efforts to dispose of the case against them. The State and City Defendants have institutional interests in balancing the cost to taxpayers of defending Map 133 against the institutional harms associated with losing or settling the case. Defendants face strong pressure from groups and constituents that might have ideological objections to Map 133 and to the CVRA. Even assuming Defendants' best intentions, Defendants might hesitate to advance relevant arguments for district-based elections because it would expose them to severe public scrutiny and criticism. This is particularly true for the City Defendant, given Plaintiff's allegations that the City of Poway and members of its city council have consistently voiced opposition to the use of single-member districts. Defendants might also ultimately settle with Plaintiff on an electoral system that does not employ single-member districts or that uses single-member districts in a manner that dilutes Movants' political power or representation. Upon intervention, furthermore, Movants would offer to the litigation a perspective through argument and evidence that the existing parties might neglect or not be able to provide. Movants' focused evidence and argument on the constitutional and voting rights law issues and on the particulars of the challenged redistricting plan, among others, will assist the Court in rendering a decision in accordance with well-established precedent and based on a full record developed by all parties. Whereas Plaintiff purports to speak on behalf of all Poway residents and Californians, Movants

will provide the perspective of those community members who disagree that Map 133 and the CVRA violate their rights to vote.

In sum, neither Defendant shares Movants' interests in maintaining district-based elections and single-member districts in Poway, and thus neither will adequately represent Movants' interests in this litigation. Therefore, the Court should grant intervention so that Movants may protect their own interests under California and federal law.

For these reasons, Movants seek to participate in this case as defendant-intervenors and respectfully request that the Court grant them intervention as a matter of right.

II. MOVANTS ARE ENTITLED TO PERMISSIVE INTERVENTION.

Should the Court determine that Movants are not entitled to intervene as a matter of right, Movants urge the Court to exercise its broad discretion and allow intervention under Federal Rule of Civil Procedure 24(b). Courts in the Ninth Circuit may grant intervention under Rule 24(b) when: (1) a prospective intervenor's claim or defense "shares a common question of law or fact with the main action"; (2) the prospective intervenor's motion "is timely"; and (3) "the court has an independent basis for jurisdiction over the [prospective intervenor's] claims." *Donnelly*, 159 F.3d at 412. 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 with intervention as of right under Rule 24(a), permissive intervention under Rule 24(b) is to be granted liberally. *See* 7C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1904 (3d ed. 2007).

Movants meet the standard for permissive intervention, and the Court should grant Movants' Motion so that they may protect their substantial interests in this litigation. First, Movants' defenses will share many questions of law and fact with the action as a whole. Movants seek to maintain the very district-based elections and single-member districts that Plaintiff seeks to enjoin and to defend the constitutionality of the CVRA, which Plaintiff attacks. In doing so, Movants will draw on the same law and facts as the existing parties in presenting its defenses to the Court, though they will introduce evidence in accordance with their unique positions as local constituents supporting Poway's and other jurisdictions' adoption of district-based elections and

single-member districts. Second, Movants' Motion is timely. As discussed above, Movants seek to intervene during the earliest possible stage of this litigation. *See supra* § I.A. Third, the Court has an independent basis for jurisdiction. Movants reside in the judicial district in which the Court sits, and thus the Court has personal jurisdiction over them; and to the extent that the Court has subject-matter jurisdiction over Plaintiff's claims, it will likewise have subject-matter jurisdiction over Movants' defenses, which share many common questions of law and fact with the action as a whole. Lastly, intervention by Movants will not create delay or prejudice the existing parties. As discussed above, Movants have not tarried before seeking intervention in this case, which was only just filed, and thus there will be no harm to the existing parties by Movants intervening now. *See supra* § I.A. Adding Movants as defendant-intervenors at this stage of the lawsuit will not needlessly increase cost, delay disposition of the litigation, or prejudice the existing parties.

In light of the foregoing reasons, Movants ask the Court at a minimum to exercise its broad discretion and grant them permissive intervention.

CONCLUSION

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

Dated: November 6, 2017

Respectfully submitted,

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

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