IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VIRGINIA, ILLINOIS, and NEVADA,
Plaintiffs,

v.

DAVID S. FERRIERO, in his official capacity as Archivist of the United States,
Defendant,

ALABAMA, LOUISIANA, NEBRASKA, SOUTH DAKOTA, and TENNESSEE,
[*Proposed*] *Intervenor-Defendants*,

Case No. 1:20-cv-242-RC

REPLY MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

Plaintiffs' opposition does not oppose very much. Plaintiffs agree that three Movants can likely intervene in this case (though Plaintiffs ask the Court to needlessly delay that determination). And Plaintiffs agree that all Movants satisfy virtually every requirement for intervention—their motion is timely, their need for intervention is pressing, their defenses overlap with key issues in the case, and their intervention will not delay anything or prejudice anyone. While Plaintiffs muster "two reasons" for opposing Movants' intervention, Opp. (Doc. 21) 1, neither is a cognizable reason for denying *permissive* intervention. And neither is a persuasive reason for denying intervention of any kind.

First, the Court should not sit on Movants' motion until the Archivist files an answer or a motion to dismiss. Plaintiffs lift this argument from a brief that Alabama (but not the other Movants) filed in a different case.[1] But Plaintiffs neglect to mention that the court ultimately *rejected* Alabama's

[1] The case where Alabama made this argument was different: the movants were cities and private parties (not sovereign States), the movants merely wanted to defend a federal regulation (that the government was already defending), and the government had not previously rejected the movants' arguments (like it has here). In a case much closer to this one, however, Plaintiffs Virginia and Illinois took the exact opposite position from their position now. They argued that they could intervene as defendants "before the federal Defendants file[d] a responsive pleading" because the government did "not object," because their "interests" "'may not align'" with the government's, because the government had "already" rejected their arguments in prior litigation, and because an intervenor's burden to prove inadequate representation is "'minimal.'" Doc. 67 at 3-6, *Texas v. United States*, No. 4:18-cv-167 (N.D. Tex.).

argument. *See Alabama v. U.S. Dep't of Commerce*, 2018 WL 6570879, at *3 (N.D. Ala. Dec. 13, 2018) ("[Alabama] points out that Defendants have not filed an answer and there is no way to know whether Defendants will adequately represent the Proposed Defendant-Intervenors' interests. However, the Proposed Defendant-Intervenors have provided the court with multiple examples of caselaw … rejecting similar arguments."). The wait-and-see approach to intervention has even less purchase in this case. The Court does not need to know what *arguments* the Archivist will make because—as Plaintiffs apparently concede—the Archivist and Movants have fundamentally different *interests*. Nor are the Archivist's arguments a mystery, as his lawyers have articulated them already in binding memoranda and prior litigation over the ERA. All of this easily satisfies Movants' minimal burden of proving that the Archivist may not adequately represent their interests.

Second, the Court should allow Alabama and Louisiana to intervene with the other Movants. Because Alabama and Louisiana never ratified the ERA—instead of ratifying and rescinding like Nebraska, South Dakota, and Tennessee—Plaintiffs argue that these Movants have no more interest in this case than "law professors." Opp. 9. Nothing could be further from the truth. This case is not hypothetical for Alabama and Louisiana: they already filed their own lawsuit against the Archivist, and that lawsuit recently yielded favorable concessions that Movants must now protect. Further, Movants are sovereign States who would be directly regulated by the ERA. No matter how courts ultimately interpret that amendment, the ERA's addition to the Constitution would withdraw Movants' sovereign authority, require Movants to undergo a burdensome review of their legal codes, generate massive legal uncertainty, and subject Movants to costly litigation. Nor does Rule 24 require Movants to sit on their hands while Plaintiffs try to force the Archivist to certify the ERA—an action that could prevent Movants from challenging the ERA's validity in future cases that attempt to invalidate Movants' laws. In other words, Movants have vital interests in *this* case because this case could be the *only* case where they can raise the illegality of Plaintiffs' "three state strategy."

The upshot of Plaintiffs' opposition is that, if three States try to use the courts to illegally amend the Constitution, other States can be forced to sit on the sidelines. That conclusion is untenable. The last time these important issues were litigated, the parties represented the entire spectrum of state interests: a State that ratified the ERA (Washington), a State that rejected the ERA (Arizona), and a State that rescinded its ratification (Idaho). *See Idaho v. Freeman*, 529 F. Supp. 1107, 1114 (D. Idaho 1981), *vacated for subsequent mootness*, 459 U.S. 809 (1982). This case should be no different. To ensure that all state voices are represented in this crucial action, the Court should grant Movants' motion and let them intervene as defendants.

I. Movants are entitled to intervene as of right.

The "'four elements"' of intervention under Rule 24(a) are "'timeliness, interest, impairment of interest, and adequacy of representation."' *100Reporters LLC v. DOJ*, 307 F.R.D. 269, 274 (D.D.C. 2014) (Contreras, J.). Plaintiffs "do[] not dispute" timeliness or impairment, so the Court can treat those elements as "concede[d]." *Cook v. Boorstin*, 763 F.2d 1462, 1466-67 (D.C. Cir. 1985); *see Wildearth Guardians v. Salazar*, 272 F.R.D. 4, 14 (D.D.C. 2010). While Plaintiffs do challenge adequacy of representation and interest, their arguments on those elements are unpersuasive.

A. The Court should not delay its decision on intervention until after the Archivist responds to the complaint.

Plaintiffs argue that the Archivist *might* inadequately represent Movants' interests, but the Court cannot know that for sure until the Archivist responds to Plaintiffs' complaint. *See* Opp. 4-7. Plaintiffs do not dispute that the Archivist will be inadequate if he does not raise all three of Movants' defenses. *See* Mot. (Doc. 10) 12-13. And Plaintiffs do not dispute that the Archivist will be inadequate if he raises any procedural defenses—for example, if he challenges Plaintiffs' standing or argues that they do not meet the special requirements for mandamus. *See* Mot. 13. Instead, Plaintiffs simply urge the Court to wait and see what the Archivist says because, on the off chance he makes all of Movants' arguments and raises no procedural defenses, he would be an adequate representative.

Plaintiffs are mistaken. Courts routinely grant motions to intervene before the government responds to the complaint. *See, e.g.*, *Wash. All. of Tech. Workers v. DHS*, 395 F. Supp. 3d 1, 19 (D.D.C. 2019) ("the Government has not yet filed an answer to the Complaint"); *Int'l Bhd. of Teamsters v. Nat'l Mediation Bd.*, 2015 WL 13668721, at *2 (D.D.C. Aug. 25, 2015) ("well before an answer was due from Defendant"); *Mayo v. Jarvis* (*Mayo II*), 2015 WL 13700484, at *2 (D.D.C. Jan. 21, 2015) (Contreras, J.) ("the parties have yet to file dispositive motions"). Courts do not wait because, although the government's refusal to raise certain arguments would be sufficient to prove inadequate representation, it is not necessary. Rule 24(a) asks whether the parties will represent the movant's "interest," not whether they will raise the movant's arguments. Fed. R. Civ. P. 24(a)(2). And the movant "need only show that representation of his interest 'may be' inadequate, not that representation will in fact be inadequate." *Dimond v. Dist. of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986). This "'showing should be treated as minimal.'" *NRDC v. Costle*, 561 F.2d 904, 911 (D.C. Cir. 1977).

When the parties and the movant have different interests, courts do not care what arguments the parties make; the divergence of interests alone is enough to show inadequate representation. In *Fund for Animals*, for example, a foreign agency who "agree[d]" that the challenged "rules and practices are lawful" moved to intervene "before the [federal] defendants filed an answer." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735-36 (D.C. Cir. 2003). The D.C. Circuit found the government a "plainly" inadequate representative because the government "represent[s] the interests of the American people," not other countries; "[i]t is, therefore, not hard to imagine how" the government and the foreign agency "might diverge during the course of litigation." *Id.* at 736. Because the government's interests are usually much broader than other litigants, the D.C. Circuit "often conclude[s] that governmental entities do not adequately represent the interests of aspiring intervenors." *Id.*; *accord Costle*, 561 F.2d at 912 (although the movants had a "shared general agreement" with the EPA and the court "[could]not

predict" how they might disagree, the court found the government an inadequate representative given "the differing scope of EPA and [movants'] interests").

Similarly, in *Mayo*, this Court granted Wyoming's motion to intervene even though "the parties ha[d] not yet filed dispositive motions." *Mayo v. Jarvis* (*Mayo I*), 2014 WL 12804733, at *2 (D.D.C. Nov. 12, 2014) (Contreras, J.). While "Wyoming appear[ed] to share the [federal d]efendants' view that the [challenged] measures are lawful," this Court found the government an inadequate representative "because Wyoming's sovereign interest … is distinguishable from the general interests of the federal defendants." *Id.* at *3. "The applicant's burden here is *de minimis*," the Court explained, "and extends only to showing that there is a possibility that its interests may not be adequately represented." *Id.* Because it was "not difficult to conceive of potential points of divergence," the Court granted Wyoming's motion. *Id.*; *accord Connecticut v. DOI*, 344 F. Supp. 3d 279, 305 (D.D.C. 2018) (Contreras, J.) (finding the government an inadequate representative, even though it and the movant "'presently agree on a litigation posture,'" because the government's different interests "'could lead to different positions in litigating this case'" and the government "'remain[ed] free to change [its] strategy during the course of litigation'").

Here, too, Movants have fundamentally different interests that justify intervention, no matter how the Archivist responds to Plaintiffs' complaint. Most obviously, Movants are sovereign States. *See* Mot. 13. "Several previous cases have permitted intervention by states when the federal government was already a party." *WildEarth Guardians v. Jewell*, 320 F.R.D. 1, 4 (D.D.C. 2017) (Contreras, J.). "While the Federal Defendants' duty runs to the interests of the American people as a whole, the state-intervenors will primarily consider the interests of their own citizens." *Id.* at 5. "It is thus straightforward to conclude" that "Federal Defendants' representation of [States] 'may be' inadequate." *Id.*; *accord Guardians v. U.S. Bureau of Land Mgmt.*, 2012 WL 12870488, at *2 (D.D.C. June 7, 2012) (Wyoming could intervene alongside federal defendants); *Cayuga Nation v. Zinke*, 324 F.R.D.

277, 283 (D.D.C. 2018) (Indian tribe could intervene alongside federal defendants). The Archivist does not represent—and would "'shirk[]'" his duties if he tried to represent—the interests, laws, resources, and concerns of particular States. *Cayuga Nation*, 324 F.R.D. at 283. "Although [he] has an interest in defending the decisions [he] has made that are challenged in this case," "alignment of this nature is insufficient to conclude that the government is an adequate representative." *Id.*; *Teamsters*, 2015 WL 13668721, at *2. As Plaintiffs explained in another case, "[e]ven assuming the Federal Defendants do share the same ultimate objective," States "have unique sovereign and public interests owed to their own residents and not shared by other litigants, including the federal government." Doc. 97 at 23, *Dep't of Commerce*, No. 2:18-cv-772 (N.D. Ala.).

The Archivist also does not represent Movants' interest in having this case decided on the merits. *See* Mot. 13. The Archivist "merely seeks to defend the present suit and would accept a procedural victory"—say, a holding that Plaintiffs lack Article III standing or a holding that Plaintiffs do not satisfy the prerequisites for mandamus. *Wal-Mart Stores, Inc. v. Tex, Alcoholic Beverage Comm'n*, 834 F.3d 562, 569 (5th Cir. 2016); *accord Nuesse v. Camp*, 385 F.2d 694, 703 (D.C. Cir. 1967) (distinguishing the interests of a litigant who "seeks an adjudication" on the merits and a ltiigant who seeks victory "by whatever technique possible"). The Archivist would accept a procedural victory because he views his role in this process as "ministerial." 44 O.L.C. Op. __, __ n.5 (Jan. 6, 2020), bit.ly/2UqCYWZ (OLC); *Freeman*, 529 F. Supp. at 1121. He wants to comply with the law governing constitutional amendments, not defeat the ERA. That is why, the last time States challenged the ERA's ratification process, the Archivist's predecessor raised a bevy of procedural defenses. *See Freeman*, 529 F. Supp. at 1115-46 (discussing standing, ripeness, and the political-question doctrine). But a procedural victory would not vindicate Movants' interests. Dismissing this suit for lack of standing, for example, would leave future Archivists free to certify the ERA.

While Plaintiffs posit that the Archivist might make all of Movants' *arguments*, they never refute that the Archivist will not represent all of Movants' *interests*, which is what matters most. But even focusing exclusively on Movants' arguments, Plaintiffs ignore that the D.C. Circuit has "described [the inadequate-representation] requirement for intervention as 'not onerous' or 'low,' and that a movant ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation." *Crossroads GPS v. FEC*, 788 F.3d 312, 321 (D.C. Cir. 2015) (cleaned up). "[T]he burden is on those opposing intervention to show that representation for the [movant] will be adequate." *United States v. AT&T Co.*, 642 F.2d 1285, 1293 (D.C. Cir. 1980); *accord Smuck v. Hobson*, 408 F.2d 175, 181 (D.C. Cir. 1969); *Nuesse*, 385 F.2d at 702. In terms of the parties' arguments, the Archivist is inadequate unless he will "'undoubtably make' all of the arguments that [Movants] would." *Klamath Irrigation Dist. v. U.S. Bur. of Reclamation*, 2019 WL 5788303, at *3 (D. Or. Nov. 6, 2019). Yet there are several reasons to doubt the Archivist will. *See* Mot. 12-13.

Most notably, the Archivist "takes no position" on Movants' intervention under Rule 24(a). Mot. 1 n.*. When a government defendant "tak[es] no position" on intervention as of right, its "silence on any intent to defend [the movant's] special interests is deafening." *Conservation Law Found. of N.E., Inc. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992); *accord Utahns for Better Transp. v. DOT*, 295 F.3d 1111, 1117 (10th Cir. 2002) (same); *U.S. House of Representatives v. Price*, 2017 WL 3271445, at *2 (D.C. Cir. Aug. 1, 2017) ("[T]he Department nowhere argues in its intervention papers that it will adequately protect the States' interests," so "the States have raised sufficient doubt concerning the adequacy of the Department's representation of their interests"). Plaintiffs do not cite any case that found the government an adequate representative when the government itself made no argument to that effect (either explicitly in its opposition, or implicitly by objecting to intervention).

The arguments that the Archivist will make in this case, moreover, are already a matter of public record. In in its existing memoranda and opinions, OLC rejects Movants' arguments that States

can rescind their prior ratifications and that Article V itself limits the period for ratification. *See* Mot. 5-6. True, OLC opinions are subject to change. But the opinion that OLC *just* issued on the issues in *this* case expressly *declined* to revisit its existing opinions on these questions. *See* OLC 18 n.17, 36-37. Plaintiffs are simply wrong to suggest that the Archivist (or his Justice Department attorneys) can make arguments that OLC's existing opinions reject. *See CREW v. DOJ*, 922 F.3d 480, 484 (D.C. Cir. 2019) (for the executive branch, OLC's published opinions and memoranda are "'controlling,'" "'authoritative,'" and "'binding by custom and practice"); *Casa De Md. v. DHS*, 924 F.3d 684, 692 n.1 (4th Cir. 2019) ("OLC opinions reflect the legal position of the executive branch and are generally viewed as providing binding interpretive guidance for executive agencies." (cleaned up)). Indeed, like his predecessor in *Freeman*, the Archivist "defers to DOJ on [the ERA] and will abide by the OLC opinion." *Press Statement on the Equal Rights Amendment*, Nat'l Archives (Jan. 8, 2020), bit.ly/39ejGIi. That the executive branch currently rejects two of Movants' defenses and has tried to defeat them in prior litigation is certainly enough to conclude that it "may be" an inadequate representative. *See Alaska v. Lubchenco*, 2011 WL 13151984, at *4 (D. Alaska Mar. 9, 2011) ("the Court cannot say that the Federal Defendants would 'undoubtedly' make the same arguments" because "the Federal Defendants have not always shared [the proposed intervenors'] views" and has "litigat[ed] against" them in the past).

For all these reasons, this Court has no basis to postpone its decision on Movants' intervention until the Archivist files an answer or a motion to dismiss. While that delay might seem harmless, Plaintiffs' "'wait and see' approach" would have real costs. *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 974 (3d Cir. 1998). "[I]ntervenors and the public interest in efficient handling of litigation are better served by prompt action on an intervention motion," since "[t]he early presence of intervenors may serve to prevent errors from creeping into the proceedings, clarify some issues," and prevent "inefficiency." *Id.* Here, for example, the Archivist's response to the complaint is not due until April 20. *See* Doc. 20. If Movants are granted intervention now, their dispositive motion could be briefed,

argued, and decided on roughly the same schedule as the Archivist's. But under Plaintiffs' proposal, the Court would wait for the Archivist's answer or dispositive motion; the parties would then submit *another* round of briefs on intervention, *see* Opp. 8; the Court would resolve Movants' motion to intervene; and, if the Court grants intervention, the parties would conduct a separate round of briefing on Movants' dispositive motion. That's the height of inefficiency, especially in a case like this one that could be decided with only one round of briefing.

Adopting Plaintiffs' wait-and-see approach would also send the wrong message to litigants. "[B]oth Rule 24(a) and Rule 24(b) require a *timely* motion to intervene." *100Reporters*, 307 F.R.D. at 280 n.2 (emphasis added). As this Court has explained, Plaintiffs' approach tells would-be intervenors to "monitor the DOJ's litigation posture from the sidelines" and then move to intervene when they "disagree[] with a decision by the agency." *Id.* at 280. This approach "is inefficient and impractical; indeed, [movants] likely would have limited, if any, insight into the DOJ's strategy during the litigation, and once [they] did learn of a hypothetical shift in the DOJ's position, … it might be too late." *Id.* Courts, after all, penalize would-be intervenors who do not file their motions as soon as they know that a case will threaten their interests. *See, e.g.*, *Stotts v. Memphis Fire Dep't*, 679 F.2d 579, 584 n.3 (6th Cir. 1982) (denying intervention because movants "should have attempted to intervene when they first became aware of the action, rather than adopting a 'wait-and-see' approach"). Instead of trapping future litigants in this catch-22, the Court should grant intervention as soon as Movants satisfy the requirements of Rule 24(a)—i.e., now.

B. Like Nebraska, South Dakota, and Tennessee, Alabama and Louisiana have important interests at stake in this case.

Plaintiffs apparently agree that the three Movants who *rescinded* their ratifications of the ERA (Nebraska, South Dakota, and Tennessee) satisfy the "interest" element of Rule 24(a). As Movants explained, Plaintiffs' suit threatens to misuse these States' ratification documents and falsely list them as having ratified the ERA. *See* Mot. 8-9. Plaintiffs never argue otherwise.

Plaintiffs instead challenge the interests of Alabama and Louisiana—the two Movants who never ratified the ERA.[2] Plaintiffs minimize the interests of these sovereign States as a "generalized disdain for the Equal Rights Amendment … as a matter of policy." Opp. 3-4.[3] That is not a remotely accurate description of the interests that Movants identified in their motion. *See* Mot. 8-10. And it is even less accurate now.

Alabama and Louisiana are not mere spectators with only hypothetical interests in this dispute; they actually *filed a lawsuit* to stop the Archivist from doing exactly what Plaintiffs are trying to compel now. *See* Doc. 1, *Ferriero*, No. 7:19-cv-02032 (N.D. Ala.). And their lawsuit was successful. Because of their suit, the Archivist agreed not to take any action on the ERA until he received "guidance from the Department of Justice's Office of Legal Counsel." *Statement on Equal Rights Amendment Debate*, Nat'l Archives (Dec. 19, 2019), bit.ly/2TUycjE. When OLC opined that the ERA cannot be ratified, the Archivist stated that he "will abide by the OLC opinion." *Press Statement*, bit.ly/39ejGIi. Eight days after Movants filed their motion to intervene in this case (and twelve days before Plaintiffs filed their opposition), Alabama and Louisiana amicably resolved their lawsuit against the Archivist. *See* Doc. 23,

[2] Plaintiffs say it's "not clear" whether Alabama actually "rejected" the ERA, since the Alabama House of Representatives never voted on the measure. Opp. 8 n.3. But Alabama has a *bi*cameral legislature and, as Plaintiffs note, the ERA was "defeated on the floor of the Senate in Alabama." Opp. 8 n.3. In all events, the Alabama legislature did not ratify the ERA within the amendment's seven-year deadline. Only under Plaintiffs' bizarre reading of the Constitution—where deadlines can be ignored and amendments can be ratified forever—could there be a difference between "rejecting" an amendment and not approving it before the deadline.

[3] Plaintiffs' "disdain" rhetoric is unhelpful. Movants unequivocally support women's equality. They oppose the ERA not because it would prohibit sex discrimination (something that state law and the Equal Protection Clause already prohibit), but because the ERA would be misused to invalidate legitimate laws that *promote* women's equality. *See* Doc. 1 ¶¶53-73, *Alabama v. Ferriero*, No. 7:19-cv-02032 (N.D. Ala.). People of good faith can disagree about whether the ERA ultimately helps or hurts women. *See* Linton, *State Equal Rights Amendments: Making a Difference or Making a Statement?*, 70 Temp. L. Rev. 907, 940-41 (1997) (documenting that the vast majority of cases under state equal rights amendments involve male litigants trying to take away benefits for women). And people of good faith can disagree about Plaintiffs' anti-constitutional strategy to add the ERA to the Constitution. *See* Mot. 3, 5 (quoting criticisms from Justice Ginsburg).

Ferriero, No. 7:19-cv-02032 (N.D. Ala.). In a joint stipulation filed on the docket and signed by all parties, the Archivist verified OLC's conclusion that the ERA cannot be ratified, confirmed that he will abide by OLC's opinion, and promised that, if OLC ever changes its position, he will wait 45 days before certifying the ERA (absent a contrary court order). *Id.* ¶¶1-3. Alabama and Louisiana are thus protected from the possibility that the current administration will certify the ERA, and the possibility that a future administration will certify the ERA before Movants can seek emergency judicial relief.

Alabama and Louisiana have an interest in protecting this "favorable" result. *Crossroads*, 788 F.3d at 317. By securing an OLC opinion (which binds the Justice Department) and a joint stipulation (which binds the Archivist), Alabama and Louisiana obtained a "significant benefit" from the executive branch. *Id.* at 318. They now have "no further exposure" to the problem that prompted them to sue the Archivist: the risk that he would certify the ERA as part of the Constitution—and arguably moot any challenges to the legality of the ratification process, *see* Mot. 10—before Movants could be heard in court. *Crossroads*, 788 F.3d at 318. "Losing the favorable" result that Alabama and Louisiana achieved in their lawsuit "would be a significant injury in fact," regardless of their "possibility of prevailing" in that suit or a future suit. *Id.* Because Plaintiffs' success here would mean that Movants' "victory would be lost" and they "would return to the position" they were in before they sued, Alabama and Louisiana have a "concrete" interest that warrants intervention. *Id.* at 316-17; *accord Salazar*, 272 F.R.D. at 14-15 (granting intervention to a movant who persuaded the government to accept bids on certain land because the government's decision "was favorable" to the movant and the plaintiffs' suit was "a direct attack on that decision"); *Mayo II*, 2015 WL 13700484, at *2-3 (granting intervention where plaintiffs sought to "return to the administrative decision-making process a decision favorable to [movant]").

Even before Alabama and Louisiana favorably resolved their lawsuit, they had vitally important interests in this case. Most fundamentally, this case directly threatens Movants' sovereign

interests in preventing illegal changes to the Constitution. Alabama and Louisiana are not "law professors, defense attorneys, prosecutors, advocates, [or] other groups" who merely want to "discuss[]" the ERA, Opp. 9; they are two of the fifty "States" that Article V charges with "ratif[ying]" constitutional amendments. U.S. Const., Art. V. Article V's "amendment provision" is one crucial way that the States, when they joined the union, "retained 'a residuary and inviolable sovereignty.'" *Printz v. United States*, 521 U.S. 898, 919 (1997); *accord Alden v. Maine*, 527 U.S. 706, 713 (1999) (explaining that "Art[icle] V" assumes "the States' continued existence and active participation in the fundamental processes of governance"). The States, after all, "entered the Union 'with their sovereignty intact.'" *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002). They formed "a union of states, equal in power, dignity, and authority"—"each competent to exert that residuum of sovereignty" not expressly withdrawn "'by the plan of the Convention or certain constitutional Amendments.'" *Coyle v. Smith*, 221 U.S. 559, 567 (1911); *Franchise Tax Bd. of Calif. v. Hyatt*, 139 S. Ct. 1485, 1494-95 (2019).

Plaintiffs' suit directly threatens Movants' sovereign interests. Plaintiffs are attempting to change the Constitution—the foundational compact that binds the States together—without following the "terms" established by Article V. *Alfred L. Snapp & Son, Inc. v. P.R. ex rel. Barez*, 458 U.S. 592, 608 (1982). As two members of the "union of states" who assented to the Constitution, *Coyle*, 221 U.S. at 567, Alabama and Louisiana have an interest in preventing other States from unilaterally (and illegally) altering that fundamental charter. *See Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 327 F. Supp. 2d 995, 1000-01 (W.D. Wis. 2004) ("As the other party to the compact, the state has an obvious interest in this lawsuit" because "[i]f one part is changed … the entire contract is changed"), *aff'd*, 422 F.3d 490 (7th Cir. 2005).

This threat is magnified by the fact that the ERA is one of those "'certain constitutional Amendments'" that would "'alter[]'" the state-federal balance and diminish the States' "retained … sovereignty." *Hyatt*, 139 S. Ct. at 1494-95. The ERA would directly regulate "any State" and would

give "Congress" new "power" to enact "legislation." H.J. Res. 208 (1972). However the ERA is ultimately interpreted, then, Alabama and Louisiana have an immediate interest in preventing this direct diminution of their sovereign authority. *See Jewell*, 320 F.R.D. at 4 (explaining that States can intervene to protect their "regulatory" authority); *Cty. of San Miguel v. MacDonald*, 244 F.R.D. 36, 44-46 (D.D.C. 2007) (granting intervention where the movant was "an object of the … forgone action[] at issue'"); *Sierra Club v. EPA*, 995 F.2d 1478, 1485 (9th Cir. 1993) (reversing the district court for denying intervention "where the statute directly regulates [movant]"); *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997) (similar); *Conservation Law Found.*, 966 F.2d at 43 (reversing the district court for denying intervention where the movants would be "the subjects of the regulatory plan" that the plaintiff sought to compel).

These sovereign interests are an independent basis to grant Movants' motion to intervene. If an advocacy group who merely *supports* the ERA has a sufficient interest for intervention, *see Idaho v. Freeman*, 625 F.2d 886, 887 (9th Cir. 1980) (holding that the National Organization of Women was entitled to intervene as of right to defend the ERA), then a sovereign State who will be *regulated* by the ERA does too. Movants identified these compelling sovereign interests in their motion, *see* Mot. 8, but Plaintiffs ignored them in their opposition (probably because Plaintiffs know that they, too, will invoke sovereignty-based interests to prove their Article III standing in this case).

Plaintiffs instead zero in on just one of Movants' interests: the risk that their duly enacted laws will be invalidated by the ERA. *See* Mot. 9-10. Plaintiffs contend that this interest turns on "speculation about how the Equal Rights Amendment might someday be interpreted." Opp. 8. That's not true. Nor could uncertainty about how courts will interpret the ERA justify shutting Movants out of this case, which could be the *only* case where the legality of Plaintiffs' ratifications will be litigated.

That the ERA will injure Movants requires no speculation. No matter how the amendment is ultimately interpreted, Movants will *certainly* face new lawsuits if Plaintiffs win this case. *See* Mot. 10.

Litigants have filed countless lawsuits challenging a wide range of laws in jurisdictions that already have an equal rights amendment in their state constitution. *See* Mot. 9-10 (collecting cases from Connecticut, Massachusetts, and New Mexico); Linton, 70 Temp. L. Rev. 907 (documenting challenges to, among other things, rape laws, prostitution laws, prison regulations, bans on abortion funding, alimony and child-support obligations, single-sex sports, single-sex scholarships, paternity laws, and adoption regulations). Activists will file similar lawsuits under a federal ERA. *See, e.g.*, *The Equal Rights Amendment (ERA*), U.S. Conf. of Catholic Bishops (Jan. 31, 2020), bit.ly/3ad2VhF (collecting quotes from pro-ERA groups). These lawsuits will inevitably "require [States] to expend additional time and resources, with the ultimate outcome uncertain." *Salazar*, 272 F.R.D. at 19.

Further, if Plaintiffs prevail here, Movants must undergo a costly review of their laws to ensure they comply with the ERA and will face "'substantial pressure … to change'" the laws that arguably don't. Mot. 10 (quoting *Texas v. United States*, 809 F.3d 134, 153 (5th Cir. 2015)). That States will need to "update [their] laws" is precisely why Congress included a "two-year" compliance period in the ERA. Ginsburg, *The Equal Rights Amendment Is the Way*, 1 Harv. Women's L.J. 19, 23 (1978). Plaintiffs' suit thus presents Movants with the "'forced choice between incurring costs and changing [their] laws'"—a real "'injury'" that warrants intervention. *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 615 (S.D.N.Y.) (quoting *Texas v. United States*, 787 F.3d 733, 749 (5th Cir. 2015)), *aff'd in relevant part*, 139 S. Ct. 2551 (2019).

Rather than addressing these immediate, nonspeculative injuries that Movants will suffer even if they never lose a case under the ERA, Plaintiffs focus entirely on whether Movants' laws will be invalidated under the ERA. But the liberal intervention rules do not require movants to prove "that their interests *will* be impaired," "only that the disposition of the action 'may' impair or impede their ability to protect their interests." *Brumfield v. Dodd*, 749 F.3d 339, 344 (5th Cir. 2014). The fact that courts already *have* invalidated similar laws under state equal rights amendments surely is enough to

clear that low hurdle. Further, "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." *Nuesse*, 385 F.2d at 700. Practicality and due process require that Movants be allowed to protect their interests by intervening in this suit.

This case may be Movants' only opportunity to protect their "legitimate interest in the continued enforceability of [their] own statutes" by proving the illegality of the ERA's supposed ratification process. *Maine v. Taylor*, 477 U.S. 131, 137 (1986). Ruling for Plaintiffs in this case will force the Archivist to add the ERA to the Constitution. There is a serious argument that, once the Archivist certifies an amendment as part of the Constitution, litigants can no longer challenge the legality of the amendment's ratification process. *See* Mot. 10. Plaintiffs do not deny that they, other litigants, and the government will make this argument once the ERA is certified. *E.g.*, *Constitutional Amendment Process*, Nat'l Archives, bit.ly/397gGx6 ("[I]t has been established that the Archivist's certification … is final and conclusive."). Thus, Plaintiffs' position puts Movants in an impossible bind: they cannot raise their defenses in this case (because their interest in protecting their laws is too remote) and they cannot raise their defenses in future cases (because the Archivist's certification will be final and conclusive).

Plaintiffs' "now-is-too-early, later-is-too-late argument" is self-defeating. *Clark Cty. v. FAA*, 522 F.3d 437, 441 (D.C. Cir. 2008) (Kavanaugh, J.). If Plaintiffs' success makes it impossible for Movants to challenge the ERA later, then they certainly have a "ripe" interest in intervening now to "stop the [ERA] before it gets underway." *Id.*; *Conservation Law Found.*, 966 F.2d at 44. Even if Plaintiffs' success only makes it more "difficult and burdensome" for Movants to challenge the ERA later, those "'practical consequences'" also justify intervention. *Fund for Animals*, 322 F.3d at 735; *see* Fed. R. Civ. P. 24, advisory committee's note to the 1966 amendment ("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.").

Last, the Court should reject Plaintiffs' suggestion that Alabama and Louisiana can participate in this case only as amici. Opp. 10. This argument is circular: every would-be intervenor *could* be an amicus, but the question is whether the movant "satisfies the requirements of Federal Rule of Civil Procedure 24(a)." *Mayo II*, 2015 WL 13700484, at *4. Because Movants do, "the Court *must* permit [them] to intervene." *Id.* (emphasis added); *accord Nuesse*, 385 F.2d at 704 (explaining that a movant who satisfies Rule 24 "is entitled to participate as a party and not merely as a friend of court"). "[R]elegat[ion] to the status of amicus curiae," moreover, "is not an adequate substitute for participation as a party." *Nuesse*, 385 F.2d at 704 & n.10. Amici cannot file motions, take appeals, or even raise defenses that the government refuses to litigate. *See id.*; *Huerta v. Ducote*, 792 F.3d 144, 151 (D.C. Cir. 2015). Because Movants satisfy every requirement for intervention as of right, they should be defendants in this case—not amici.

II. Movants are entitled to permissive intervention.

Plaintiffs' "two reasons" for opposing Movants' intervention, Opp. 1, are not persuasive reasons to deny intervention as of right, as just explained. But these arguments are not even *cognizable* reasons to deny permissive intervention. Movants easily satisfy the actual criteria for permissive intervention, and Plaintiffs make no developed arguments to the contrary. Perhaps the simplest way to resolve this motion, then, is to allow Movants to intervene under Rule 24(b)—especially given the D.C. Circuit's "hospitable approach" to "governmental application[s]" for permissive intervention. *Nuesse*, 385 F.2d at 705.

While permissive intervention is discretionary, "discretion does not mean … whim." *Mich. State AFL-CIO*, 103 F.3d at 1248; *accord EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1048 (D.C. Cir. 1998). Rule 24(b), after all, contains specific requirements that courts "must consider" and that differ from the requirements of Rule 24(a). *See* Fed. R. Civ. P. 24(b)(1)(B), (3). "In exercising [their]

discretion," then, "courts weigh three factors set out by Rule 24(b): (1) whether the motion to intervene is timely; (2) whether the applicant's claim shares a question of law or fact in common with the main action; and (3) whether intervention will unduly delay or prejudice adjudication of the original parties' rights." *Stellar IT Sols., Inc. v. USCIS*, 2019 WL 3430746, at *3 (D.D.C. July 30, 2019) (Contreras, J.).

All three factors weigh in favor of Movants. *See* Mot. 14-15. Plaintiffs do not even contest the first and second factors. They make a passing reference to the third factor, suggesting that Movants will "prejudic[e] the adjudication of this action by inviting conjecture about how the [ERA] will affect prohibitions on the public funding of abortion, support for women-only prisons and shelters, and school athletic programs." Opp. 7 (cleaned up). But that's not true. Movants identified the ERA's possible consequences to help prove their *interest* in this case for purposes of *intervention*. Movants agree that these consequences are not relevant to the *merits* of the case, which is why Movants' answer does not raise them as defenses. *See* Answer (Doc. 10-1) 9. These briefs are the first and last time that Movants will discuss "public funding of abortion, support for women-only prisons and shelters, and school athletic programs." Plaintiffs' baseless assertion that Movants will continue pressing these issues, even after they are no longer relevant, is not a reason to deny intervention. *See 100Reporters*, 307 F.R.D. at 285 n.10.[4]

[4] Plaintiffs do not seem to really believe their "prejudice" point anyway. It is not one of the "two reasons" they identify for opposing intervention. Opp. 1. And their concession that Movants can participate as amici, *see* Opp. 10, belies their supposed concern that Movants will "inject[] culturally divisive topics" into this case, Opp. 9; *see Mich. State AFL-CIO*, 103 F.3d at 1248 ("In light of the district court's decision permitting the [movant] to participate in briefing and oral argument as an amicus curiae, it is difficult to see how granting intervention would have materially increased either delay or prejudice.").

As for the "two reasons" that Plaintiffs actually develop in their opposition, Opp. 1, neither is relevant under Rule 24(b). Plaintiffs make no argument, and cite no cases, suggesting that these reasons are justifications for denying *permissive* intervention (as opposed to intervention as of right).

For permissive intervention, this Court has no reason to wait and see what arguments the Archivist raises in his answer or motion to dismiss. *Cf.* Opp. 4-8. As this Court has explained, Plaintiffs' concern that Movants "will present 'cumulative arguments'" goes to "the adequate representation prong of intervention as a matter of right under Rule 24(a), not permissive intervention under Rule 24(b)." *100Reporters*, 307 F.R.D. at 286 n.12. Tellingly, Plaintiffs do not cite a single case where a court denied permissive intervention on the ground that the defendant had not yet responded to the complaint. One of Plaintiffs' lead authorities explains why that reasoning would make little sense: "Unlike intervention as of right, evaluating Putative Intervenors' request for permissive intervention does not center on whether their interests are adequately represented by the existing parties, and therefore can be resolved before Defendants file their answer." *Franciscan All., Inc. v. Burwell*, 2017 WL 2964088, at *4 (N.D. Tex. Jan. 24, 2017).

If anything, the fact that the Archivist has not responded to the complaint weighs in favor of granting permissive intervention. Rule 24(b) asks whether permissive intervention will "unduly prejudice or delay" the original action. Fed. R. Civ. P. 24(b)(3). That risk is "especially" low "when the intervenors have timely moved to join this litigation at such a nascent stage—before … the actual filing of the dispositive motions." *100Reporters*, 307 F.R.D. at 286-87; *accord Aziz v. Trump*, 231 F. Supp. 3d 23, 29 (E.D. Va. 2017) (agreeing with Virginia that prejudice "is usually minimal early in the litigation process" and is nonexistent when "less than a week had passed since the [case] was filed"). Rule 24(b) also asks whether the permissive intervenor has a "defense that *shares* with the main action a *common* question of law or fact." Fed. R. Civ. P. 24(b)(1)(B) (emphases added). Permissive intervention thus treats overlapping defenses as a plus, not a problem to be avoided. *See, e.g.*, *100Reporters*, 307

F.R.D. at 286 (granting permissive intervention because movants "'hold identical legal positions'" that are "'fully encompassed'" by the government's position and "the strength of the [government's] position will be enhanced by the assistance of [the movant]"); *Nuesse*, 385 F.2d at 704 (deeming permissive intervention appropriate because "the legal issues" presented by the movants and the parties "are the same"); *Dep't of Commerce*, 2018 WL 6570879, at *3 (granting permissive intervention because "the defenses the Proposed Defendant-Intervenors intend to submit share *identical* questions of fact and law with the main action" and "they are entitled to a secondary voice in the action").

Plaintiffs' second reason for opposing intervention—that Alabama and Louisiana lack a sufficient "interest" in this litigation, Opp. 8-10—is "especially inappropriate" under Rule 24(b). Wright & Miller, 7C Fed. Prac. & Proc. Civ. §1911 (3d ed.). "[T]he requirement of a legally protectable interest applies only to intervention as of right under Rule 24(a), not permissive intervention under Rule 24(b)." *Employee Staffing Servs., Inc. v. Aubry*, 20 F.3d 1038, 1042 (9th Cir. 1994). Rule 24(b), in noted contrast to the neighboring Rule 24(a), "makes no mention of interest." 7C Fed. Prac. & Proc. Civ. §1911. "'[P]ermissive intervention'" thus "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation." *SEC v. U.S. Realty & Imp. Co.*, 310 U.S. 434, 459 (1940). It is satisfied when the intervenor has any interest, including "a public one," that is furthered by a "'defense'" that shares "a question of law in common with the main proceeding." *Id.* at 460; *accord Nuesse*, 385 F.2d at 706. Movants concededly have that. In fact, their three defenses are mirror images of the three key legal questions in Plaintiffs' complaint. *Compare* Compl. (Doc. 5) 13-16, *with* Answer 9; *see Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1111 (9th Cir. 2002) (granting permissive intervention because the movants "assert 'defenses' of the government [conduct] that squarely respond to the challenges made by plaintiffs in the main action").

Lacking any cognizable objection to Movants' permissive intervention, Plaintiffs ask this Court to condition "permissive intervention" on Movants only raising "nonduplicative defenses." Opp. 10.[5] Plaintiffs confusingly assert that Movants have "only one unique defense" in this case, Opp. 10, but Movants have at least two: their argument that the ERA expired by force of the Constitution (irrespective of the congressional deadline), and their argument that five States validly rescinded their ratifications. *See* Answer 9 (second and third defenses). The Court should not limit Movants to these two defenses.

Coercive conditions are unnecessary here because Movants have already agreed to "focus their briefs and arguments on their own unique defenses, rather than duplicating defenses and arguments that the Archivist raises himself." Mot. 15. "Given [their] expressed willingness to avoid duplicative briefing," this Court can be "confident that the intervenors will be able to confer and to guard against redundancy in their filings without requiring [Plaintiffs'] onerous limitation." *Mayo II*, 2015 WL 13700484, at *4. Because Plaintiffs "fail[] to offer any concrete or realistic consequences to this litigation … that might require the Court to impose a limitation on the scope of the defenses that [Movants] may raise [in] this case, which still is in its infancy," Plaintiffs' proposed limitation "would be 'arbitrary and unnecessarily punitive.'" *100Reporters*, 307 F.R.D. at 285. Movants should be granted intervention "'without limitation.'" *Id.*

Instead of conditioning Movants' intervention, this Court should follow its normal practice of simply instructing intervenors to "confer with [the government] to avoid duplicative arguments." *Connecticut*, 344 F. Supp. 3d at 306; *see also Jewell*, 320 F.R.D. at 6 (directing three States to "confer with

[5] Plaintiffs do not ask the Court to impose this condition if Movants are granted intervention *as of right*. For good reason. Under Rule 24(a), an intervenor generally "'participates on equal footing with the original parties'" and courts "'should not be allowed to limit the intervenor in the assertion of … new claims.'" *Am. Great Lakes Ports Ass'n v. Zukunft*, 2016 WL 8608457, at *5 (D.D.C. Aug. 26, 2016) (Contreras, J.) (quoting *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1146 (D.C. Cir. 2009), and Wright & Miller, 7C Fed. Prac. & Proc. Civ. §1922).

one another to consolidate their briefing and avoid duplicative arguments to the extent practical"). Such an instruction "strike[s] the appropriate balance between ensuring the expedient resolution of this action while preserving a space for the intervening party to articulate its positions and defend its interests." *Cayuga Nation*, 324 F.R.D. at 284. And it ensures that, should the executive branch's position change as this case winds its way through the courts, Movants will not have to return to this Court and ask it to lift any conditions on their intervention.

CONCLUSION

For all these reasons, the Court should grant Movants' motion and let them fully intervene as defendants under Rule 24(a) and Rule 24(b).

Dated: March 24, 2020

Respectfully submitted,

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I filed this reply with the Court via ECF, which will notify Plaintiffs' counsel. I also emailed this reply to the following counsel for Defendant:

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