IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELBY COUNTY, ALABAMA 201 West College Street Columbiana, AL 35051 Plaintiffs, vs. ERIC H. HOLDER, JR., in his official capacity as ATTORNEY GENERAL OF THE UNITED STATES, U.S. Department of Justice 950 Pennsylvania Ave., NW Washington, D.C. 20530 Defendant, and, BOBBY PIERSON, WILLIE GOLDSMITH, SR., MARY PAXTON-LEE, KENNETH DUKES, and ALABAMA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC. Applicants for Intervention.	) No.: 1:10-cv-00651 (JDB)

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AS DEFENDANTS

I. Introduction

This action was brought by Shelby County, Alabama, seeking a declaration that Section 4(b) and Section 5 of the Voting Rights Act, 42 U.S.C. §§ 1973b(b) & 1973c, are unconstitutional and an injunction against their enforcement. Applicants Bobby Pierson, Kenneth Dukes, Mary Paxton-Lee and Willie Goldsmith, Sr. are residents and registered voters of Shelby County. Additionally, applicants Bobby Pierson, Kenneth Dukes, and Willie Goldsmith, Sr. are African American residents

of Montevallo, Alabama located in Shelby County. Mr. Willie Goldsmith, Sr. is a city councilman, representing District 2 on the Montevallo City Council. Mary Paxton-Lee is a Caucasian resident and registered voter of Sterrett, Alabama, also located in Shelby County.

The National Association for the Advancement of Colored People ("NAACP") was founded in 1909 and is the nation's oldest, largest and most widely recognized grassroots-based civil rights organization. The mission of the NAACP is to ensure the political, educational, social and economic equality of all citizens; to achieve equality of rights and eliminate race prejudice among citizens of the United States; to remove all barriers of racial discrimination through democratic processes; and to seek the enactment, enforcement and the proper construction of federal, state and local laws securing civil rights. The purpose of applicant the Alabama State Conference of the NAACP ("Alabama NAACP") is to implement the mission of the NAACP within Alabama. The NAACP has worked to protect voting rights through litigation, advocacy, legislation and communications, including work to promote voter registration, voter education, get out the vote efforts, election protection, census participation and redistricting. The Alabama NAACP has approximately 2700 members who are residents of the state of Alabama.

All applicants have moved the Court for leave to intervene as of right and for permissive intervention pursuant to Rules 24(a)(1) and (2) and (b)(1) (A) and (B), F.R.Civ.P. The Supreme Court has held that "[p]rivate parties may intervene in §5 actions," and that such intervention is controlled by Rule 24. *Georgia v. Ashcroft*, 539 U.S. 461, 477 (2003); *accord NAACP v. New York*, 413 U.S. 345, 367 (1973).

II. Intervention As of Right Is Warranted

Rule 24(a) provides:

> On timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

As an initial matter, the application for intervention is timely. Plaintiff filed its Complaint on April 27, 2010. The Attorney General's answer has not yet been filed. Plaintiff filed its Motion for Summary Judgment on June 8, 2010, before the Defendant filed an answer or responsive pleading. Plaintiff also has requested oral argument on its Motion for Summary Judgment, which has not yet been scheduled. No status conference has been held, no discovery has been undertaken, no dispositive orders have been entered in the case, and no trial has been set or held. Granting intervention would not, therefore, cause any delay in the trial of the case nor prejudice the rights of any existing party. *See Bossier Parish School Board v. Reno*, 157 F.R.D. 133, 135 (D.D.C. 1994) (intervention granted as timely where motion was filed on the same day the court held its first status conference).

The most important factor in determining whether intervention is timely is whether any delay in seeking intervention will prejudice the existing parties to the case. *See, e.g.*, *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1073 (5th Cir. 1970) ("[i]n fact, this may well be the *only* significant consideration when the proposed intervenor seeks intervention of right").[1] Where intervention will

[1]Prejudice should not, of course, be confused with the convenience of the parties. *See McDonald v. E.J. Lavino Co.*, 430 F.2d at 1073 ("mere inconvenience is not in itself a sufficient reason to reject as untimely a motion to intervene as of right"); *Clark v. Putnam County*, 168 F.3d 458, 462 (11th Cir. 1999) (same).

not delay resolution of the litigation, intervention should be allowed, provided that the proposed intervenor satisfies the criteria of Rule 24(a). *Texas v. United States*, 802 F. Supp. 481, 482 n.1 (D.D.C. 1992) (affirming the propriety of granting intervention); *Cummings v. United States*, 704 F.2d 437, 441 (9th Cir. 1983) (it was an abuse of discretion for the trial court to deny intervention in the absence of a showing of prejudice to the government).

A. Intervention under Rule 24(a)(1)

A statute of the United States, 42 U.S.C. § 1973b(a)(4), provides that "[a]ny aggrieved party may as of right intervene at any stage in such action [to bailout from Section 5 coverage]." Since Shelby County is seeking a declaration that Section 5 is unconstitutional, which is the functional equivalent of bail out, intervention in this action should be granted of right. Granting intervention would also serve the underlying purpose of § 1973b(a)(4) of providing an "aggrieved party" the opportunity to be heard when a jurisdiction is seeking to terminate Section 5 coverage.

B. Intervention under Rule 24(a)(2)

Movants also meet the standards for intervention of right under Rule 24(a)(2).

1. Applicants Have a Direct Interest in Bailout and the Constitutionality of Section 5

As racial minorities protected by Section 5 of the Voting Rights Act, and as registered voters who reside in Shelby County, applicants plainly have a direct, substantial, and legally protectable interest in the "transaction that is the subject of the action," Rule 24(a)(2), *i.e.*, the constitutionality of, and whether the plaintiff should be excluded from, Section 5 coverage. Because of the importance of that interest, intervention in Section 5 cases is favored and the courts have routinely allowed it. *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 573 F. Supp. 2d 221, 230 (D.D.C. 2008) (granting multiple motions to intervene presented by African-American, Latino and other

minority voters in case seeking bailout under Section 4(a) of the VRA and challenging the constitutionality of Section 5 of theVRA); *Georgia v. Ashcroft*, 539 U.S. at 477; *Busbee v. Smith*, 549 F.Supp. 494 (D.D.C. 1982); *City of Lockhart v. United States*, 460 U.S. 125, 129 (1983); *City of Port Arthur, Texas v. United States*, 517 F.Supp. 987, 991 n.2 (D.D.C. 1981); *New York State v. United States*, 65 F.R.D. 10, 12 (D.D.C. 1974); *City of Richmond, Virginia v. United States*, 376 F.Supp. 1344, 1349 n.23 (D.D.C. 1974); *Beer v. United States*, 374 F.Supp. 363, 367 n.5 (D.D.C. 1974); *Commonwealth of Virginia v. United States*, 386 F.Supp. 1319, 1321 (D.D.C. 1974); *City of Petersburg, Virginia v. United States*, 354 F.Supp. 1021, 1024 (D.D.C. 1972).[2] *See also Clark v. Putnam County*, 168 F.3d 458, 462 (11th Cir. 1999) ("black voters had a right to intervene" in action challenging county redistricting, and listing recent voting cases allowing intervention); *Burton v. Sheheen*, 793 F.Supp 1329, 1338 (D.S.C. 1992); *Brooks v. State Board of Elections*, 838 F.Supp. 601, 604 (S.D. Ga. 1993); *Johnson v. Mortham*, 915 F.Supp. 1529, 1536 (D.C. Fla. 1995) (registered voters had "a sufficiently substantial interest to intervene" in a suit challenging congressional redistricting); *Baker v. Regional High School District No. 5*, 432 F.Supp. 535, 537 (D. Conn. 1977) (residents of school district had an interest in method of electing school board that entitled them to intervene in apportionment challenge).

The Eleventh Circuit, in reversing a district court denial of intervention to county residents in a voting rights case, articulated the substantial, legally protected interests of voters in their election system:

[2]In some of the cases cited above intervenors played not merely an important but a crucial role. In *City of Lockhart*, for example, the intervenors presented the sole argument in the Supreme Court on behalf of the appellees. No argument was presented on behalf of the United States. *See* 460 U.S. at 130.

> intervenors sought to vindicate important personal interest in maintaining the election system that governed their exercise of political power . . . . As such, they alleged a tangible actual or prospective injury.

Meek v. Metropolitan Dade County, 985 F.2d 1471, 1480 (11th Cir. 1993).

Intervention is particularly appropriate in this case because applicants, unlike the defendant, include residents and voters of Shelby County and a civil rights organization that engages in voter registration and education whose constituents and members include residents and voters of Shelby County and the state of Alabama and are therefore in a special position to provide the Court with a local appraisal of the facts and circumstances involved in the litigation. In *County Council of Sumter County v. United States*, 555 F.Supp. 694, 697 (D.D.C. 1983), the court allowed African American citizens to intervene in a Section 5 preclearance action in part specifically because of their "local perspective on the current and historical facts at issue."

Applicants have an interest in the subject matter of this action sufficient to warrant intervention. Indeed, as voters of Shelby County, no individuals or entity could have a greater interest in the subject matter of the litigation.

2. Applicants' Ability to Protect Their Interests Will Be Impaired or Impeded if Intervention Is Denied

The outcome of this action may, as both a legal and practical matter, impair or impede applicants' ability to protect their interests, thus satisfying Rule 24(a)(2). If Section 5 is found to be unconstitutional, or if plaintiff is allowed to escape Section 5 coverage in the future, intervenors would be denied the protection of preclearance. Shelby County and the state of Alabama would then be free to enact changes in their voting practices and procedures without first showing that the changes did not have the purpose or effect of discriminating on the basis of race or color or membership in a language minority.

3. Applicants' Interests Cannot Be Adequately Represented by the Existing Parties

Applicants can satisfy Rule 24(a)(2)'s inadequate representation requirement by showing merely that representation of their interests "'*may be*' inadequate" and "the burden of making this showing should be treated as 'minimal.'" *United Guaranty Residential Insurance Co. v. Philadelphia Sav. Fund*, 819 F.2d 473, 475 (4th Cir. 1987) (quoting *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n. 10 (1972)) (emphasis by the *United Guaranty* court) ; *see also In re Sierra Club*, 945 F.2d 776, 779 (4th Cir. 1991) (same). This Court has held that Rule 24 "underscores both the burden of those opposing intervention to show the adequacy of the existing representation and the need for a liberal application in favor of permitting intervention." *Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967); *see also Smuck v. Hobson*, 408 F.2d 175, 181 (D.C. Cir. 1969) (same).

Although the Attorney General and the applicants for intervention "may share some objectives" with respect to bail out and the constitutionality of Section 5, *In re Sierra Club*, 945 F.2d at 780, that does not mean that the Attorney General's interests and applicants' interests are identical or that their approaches to litigation would be the same. As *City of Lockhart* demonstrates, the government and minorities have sometimes disagreed on the proper application of the Voting Rights Act and what constitutes adequate protection of voting rights. *See also Blanding v. DuBose*, 454 U.S. 393, 398-399 (1982) (minority plaintiffs, but not the United States, appealed and prevailed in the Supreme Court in voting rights case); *County Council of Sumter County*, 555 F.Supp. at 696 (United States and minority intervenors took opposite positions regarding the application of Section 2 to Section 5 preclearance).

The Supreme Court has "recognized that when a party to an existing suit is obligated to serve two distinct interests, which, although related, are not identical, another with one of those interests should be entitled to intervene." *United Guaranty Residential Insurance*, 819 F.2d at 475 (referring to *Trbovich*, 404 U.S. at 538-539). In *Trbovich*, the Supreme Court allowed a union member to intervene in an action brought by the Secretary of Labor to set aside union elections for violation of the Labor-Management Reporting and Disclosure Act of 1959, even though the Secretary was broadly charged with protecting the public interest. The Court reasoned that the Secretary of Labor could not adequately represent the union member because the Secretary had a "duty to serve two distinct interests," 404 U.S. at 539, a duty to protect both the public interest and the rights of union members.

In a similar case, the Fourth Circuit allowed an environmental group to intervene as a party defendant in an action where the South Carolina Department of Health and Environmental Control (DHEC) was defending the constitutionality of a state regulation governing the issuance of permits for hazardous waste facilities. The court reasoned that DHEC could not adequately represent the environmental group because "in theory, [DHEC] should represent all of the citizens of the state, including the interests of those citizens who may be . . . proponents of new hazardous waste facilities," *In re Sierra Club*, 945 F.2d at 780, while the environmental group "on the other hand, appears to represent only a subset of citizens concerned with hazardous waste—those who would prefer that few or no new hazardous waste facilities receive permits." *Id*.

Applicants' interests in this litigation are, in like fashion, sufficiently different from those of the United States to justify intervention. The United States must represent the interests of its citizenry generally - including the interests of the plaintiff. *Trbovich*, 404 U.S. at 538-39; *In re*

Sierra Club, 945 F.2d at 780. Where a party represents such dual interests in litigation, the "test" of whether that party will adequately represent the interests of potential intervenors is "whether each of the dual interests [of the party] may 'always dictate precisely the same approach to the conduct of the litigation.' 404 U.S. 539." *United Guaranty Residential Insurance Co.*, 819 F.2d at 475 (holding that the largest mortgage holder could intervene of right in case brought after collapse of real estate firm because the trustee could not adequately protect the interests of such holder given the trustee's duty to represent all holders with equal vigor). Consequently, even if the United States vigorously performs its duty to represent its citizenry, representation of applicants' distinct interests may still be inadequate because defendant United States must balance the competing interests presented by the proposed intervenors as well as those individuals or entities, like the plaintiffs, who oppose it. While the interests of the United States and applicants may converge on issues such as the constitutionality of Section 5, they may diverge when it comes to arguments to be made and deciding to appeal any adverse decisions. For other decisions holding that government parties could not adequately represent the interests of a subset of the general public, *see Chiles v. Thornburgh*, 865 F.2d 1197, 1214-15 (11th Cir. 1989) (federal prison detainees' interests may not be adequately represented by county); *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (private party seeking to protect narrow financial interest allowed to intervene despite presence of government which represented general public interest); *Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency*, 99 F.R.D. 607, 610 n.5 (D.D.C. 1983) (pesticide manufacturers and industry representatives allowed to intervene even though EPA was a party); *New York Public Interest Research Group, Inc. v. Regents of the University of the State of New York*, 516 F.2d 350, 352 (2nd Cir. 1975) (pharmacists and pharmacy association allowed to intervene

where "there is a likelihood that the pharmacists will make a more vigorous presentation of the economic side of the argument than would" the state Regents); *Associated General Contractors of Connecticut, Inc. v. City of New Haven*, 130 F.R.D. 4, 11-12 (D. Conn. 1990) (minority contractors allowed to intervene because "its interest in the set-aside is compelling economically and thus distinct from that of the City").

Applicants therefore meet the standards for intervention as of right, and their motion should be granted.

III. Permissive Intervention Is Also Appropriate

Even if this Court should determine that applicants do not satisfy the requirements for intervention of right, it should grant permissive intervention under Rules 24(b)(1)(A) and(B). As noted above, 42 U.S.C. § 1973b(a)(4) provides that any aggrieved party may intervene at any stage of an action to bail out from Section 5 coverage.

Rule 24(b)(1)(B) also permits intervention upon timely application by anyone who "has a claim or defense that shares with the main action a common question of law or fact." As discussed above, applicants seek to defend the constitutionality of Section 5, which claim and defense shares common factual and legal questions with the main action. Also as discussed above, intervention will not "unduly delay or prejudice the adjudication of the original parties' rights" Rule 24(b)(3).

In *Arizona v. California*, 460 U.S. 605 (1983), Indian tribes were permitted to intervene in a water rights action between states, despite intervention by the United States on behalf of the tribes. The Court reasoned that "the Indians' participation in litigation critical to their welfare should not be discouraged." *Id*. at 615. The pending litigation is no less critical to movant's welfare, and accordingly intervention should be granted.

Conclusion

For the above and foregoing reasons, the Court should permit the applicants to intervene in this action as party defendants.

Respectfully submitted,

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