IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELBY COUNTY, ALABAMA,
201 West College Street
Columbiana, AL 35051

Plaintiff,

vs.

ERIC H. HOLDER, JR.,
in his official capacity as
ATTORNEY GENERAL OF THE
UNITED STATES,
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Defendant,

and,

BOBBY LEE HARRIS,
112 Reese Drive
Alabaster, AL 35007

Applicant to Intervene.

Civil Action No.: 1:10-CV-651 (JDB)

REPLY MEMORANDUM IN FURTHER SUPPORT OF APPLICANT'S
MOTION TO INTERVENE AS DEFENDANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

OTHER AUTHORITIES

INTRODUCTION

Bobby Lee Harris ("Applicant") established in his Memorandum in Support of Motion to Intervene as Defendant that he is entitled to intervene as a matter of right under Rule 24(a) of the Federal Rules of Civil Procedure, and, in the alternative, under Rule 24(b) of the Federal Rules. In response, Plaintiff and Defendant both concede that permissive intervention under Rule 24(b) is appropriate. Defendant further acknowledges that intervention motions are frequently granted in cases arising under Section 5 of the Voting Rights Act both *as of right* and permissively.

Plaintiff, however, seeks to arbitrarily limit Applicant's participation in this litigation to "briefing the legal issues raised in [Plaintiff's] Motion for Summary Judgment." *See* Plaintiff's Response at 2. This request is at odds with the purposes of Rule 24 intervention because under such conditions, Applicant nominally would be allowed to intervene as a Defendant, yet would be prohibited from participating in the case as a full party should the Court deny Plaintiff's motion for summary judgment.

Plaintiff also seeks to unreasonably limit Applicant's participation by mischaracterizing this matter as presenting "a pure question of law" and incorrectly claiming that Applicant would interject "irrelevant factual issues." *Id*. Plaintiff's misguided attempt to effectively prevent Applicant (or any other party) from seeking discovery in this matter should be rejected. Foreclosing any fact discovery would be inappropriate in part because it is still a preliminary stage of the litigation. Plaintiff's own moving papers have placed a number of factual matters at issue, belying its characterization of this case as a "purely legal dispute." *Id*. Nor has the Court ruled upon the Defendant's Rule 56(f) arguments. Accordingly, targeted factual discovery is essential to the proper resolution of this case. Moreover, if Applicant's motion to

intervene is granted, Applicant will work in good faith to develop the record of admissible evidence concerning voting practices and procedures within Shelby County while avoiding any unnecessary duplication of efforts. Moreover, Applicant's unique local perspective will undoubtedly contribute to the development of a complete factual record in this litigation.

The relief sought by Plaintiff in this matter – a declaratory judgment and injunction against enforcement of Section 5 of the Voting Rights Act ("VRA") – would eviscerate one of the most important civil rights laws ever passed by Congress. Because a declaration of unconstitutionality would deprive Applicant of Section 5's prophylactic protections against potentially discriminatory voting changes, intervention as a matter of right, or in the alternative, permissive intervention, is appropriate here.

ARGUMENT

I. Applicant Is Entitled to Intervention of Right Because He Meets All of the Applicable Requirements

Applicant has demonstrated that he possesses Article III standing because he is an intended beneficiary of the statutes at issue, and facial invalidation of Section 5 would clearly cause the type of "concrete and imminent injury" that courts have held is sufficient to confer Article III standing. *See Fund for Animals v. Norton*, 322 F.3d 728, 733-34 & n.6 (D.C. Cir. 2003); *In re Vitamins Antitrust Litig.*, 215 F.3d 26, 29 (D.C. Cir. 2000) (holding that the standing test is met where prospective intervenor is "within the zone of interests to be protected or regulated by the statute"). In addition, Applicant satisfies all four factors required to intervene under Rule 24(a)(2) because: (i) his application is timely; (ii) he has a direct, cognizable interest in the subject of the action; (iii) disposition of this action may impair his ability to protect his interest; and (iv) his

interest is inadequately represented by the existing parties. *See Fund for Animals*, 322 F.3d at 731.

A. Applicant Has a Direct, Protectable Interest Which May Be Impaired by Disposition of this Case

Plaintiff downplays the injury that Applicant would suffer if Section 5 were invalidated as "hypothetical" and asserts that such injury "would not be traceable to the termination of coverage or the elimination of preclearance." Plaintiff's Response at 3. In actual fact, a judgment in favor of Plaintiff would have a direct impact on Applicant's voting rights. The removal of Section 5 review would instantly "shift the advantage of time and inertia from the perpetrators of the evil to its victims." *South Carolina v Katzenbach*, 383 U.S. 301, 328 (1966). The absence of mandatory federal review for voting changes would – in a county whose recent history includes violations of both the procedural and substantive provisions of Section 5 – place the burden on Mr. Harris and other members of the minority community to detect and attempt to correct racially discriminatory voting changes *after* they have already been implemented.

Facial invalidation of Section 5 would enable Shelby County and every other presently covered jurisdiction to enact potentially harmful changes to voting procedures. Moreover, the fact that "millions of citizens living in non-covered jurisdictions" have no such "right" to Section 5's prophylactic protections is immaterial; Section 5 was enacted and reauthorized in order to protect individuals like Mr. Harris who reside in jurisdictions with a history of "flagrant" voting discrimination. *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997); *see also City of Rome*, 446 U.S. 156, 177 (1980) (holding that Section 5 was properly enacted "because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination").

Plaintiff's further suggestion that any "future hypothetical" injury to Applicant could be adequately remedied under Section 2 of the VRA is directly at odds with the underlying purpose of Section 5. Congress' enactment and recent reauthorization of Section 5 deliberately places the burden on covered jurisdictions to show that election and voting changes do not have a discriminatory purpose or adverse effect on minority voters. *See, e.g.*, *Lopez v. Monterey County*, 519 U.S. 9, 23 (1996) ("Congress designed the preclearance procedure to forestall the danger that local decisions to modify voting practices will impair minority access to the electoral process.") (internal quotations and citations omitted). However, the elimination of Section 5's protections would shift the burden to Applicant and other minority voters to challenge each retrogressive change or enactment on a case-by-case basis under Section 2 of the VRA. *See, e.g.*, *Morse v. Republican Party of Virginia*, 517 U.S. 186, 225-26 (1996) (noting that litigation of every objectionable voting change on a "case-by-case" basis would result in the imposition of the "very burden [Section] 5 was designed to relieve"). Bringing a private action under Section 2 to address retrogressive voting or electoral changes would be burdensome, time-consuming, and costly. *See, e.g.*, THE FUTURE OF THE VOTING RIGHTS ACT xiii (David L. Epstein, et al., eds., 2006) ("[S]ection 2 operates through the ordinary legal system, . . . a voter must bring a lawsuit to challenge a voting practice, the practice can go into effect immediately unless a court enjoins it, and the voter bears the burden of proving that a law violates the act. Section 2 is therefore more costly more time consuming, and substantively more difficult for those challenging a voting practice than is section 5."). In light of such burdens and costs, Applicant has a direct and concrete

interest in preserving the protections of Section 5 and would clearly be harmed were Plaintiff to prevail on its claims.

B. Plaintiff Raises Material Factual Issues that Warrant Discovery of Shelby County's History and Record of Voting and Election Practices

Plaintiff mischaracterizes this action as a "purely legal dispute" and argues that Applicant should be limited to "briefing the legal issues raised in [Plaintiff's] Motion for Summary Judgment." Plaintiff's Response at 2. In particular, Plaintiff seeks to shield "the factual history and record of Shelby County" from discovery in this matter by constricting the Court's factual inquiry to the legislative record before Congress at the time of the 2006 reauthorization of Section 5. *See* Plaintiff's Response at 4. At the same time, Plaintiff argues that conditions have changed so significantly in Shelby County and in the state of Alabama that the "burden" of seeking preclearance under Section 5 is no longer warranted. *See* Plaintiff's Memorandum in Support of Motion for Summary Judgment, (Docket #5) at pp. 17 n.2, 25-30; Complaint ¶¶ 30-35. This opens at least two distinct lines of factual inquiry: first, the extent to which changed conditions have eliminated the possibility of racially discriminatory voting changes in Shelby County, and second, the nature of the burden allegedly suffered by Shelby County. It would be impossible to fairly evaluate the factual and legal issues raised by Plaintiff without permitting discovery into local conditions and practices. *See* Memorandum in Support of Attorney General's Opposition, (Docket #9-1) at 9 ("The history in Shelby County of voting discrimination and compliance with federal voting rights laws, past and current, relates directly to the Plaintiff's claim that Section 5 is no longer appropriate based on current needs.").

Plaintiff seeks to further limit Applicant's participation by asserting that Applicant's "knowledge and experiences are immaterial" to this litigation. Plaintiff's Response at 4. To the contrary, Applicant's unique perspective on local politics and his particularized interest in defending the voting rights of minority voters in Shelby County are indeed relevant to Plaintiff's claims. *See, e.g.*, *Johnson v. Mortham*, 915 F. Supp. 1529, 1538-39 (N.D.Fla. 1995) (holding that the NAACP should be permitted to intervene because the organization's unique perspective and expertise would aid the court's constitutional inquiry); *Miller v. Silbermann*, 832 F. Supp. 663, 674 (S.D.N.Y. 1993) (permitting intervention where applicant's "knowledge and concern" would "greatly contribute to the court's understanding"); *County Council of Sumter County v. United States*, 555 F. Supp. 694, 697 (D.D.C. 1983) (permitting intervention in light of African-American intervenors' "local perspective on the current and historical facts at issue"); Attorney General's Response at 3 (confirming that Applicant "possesses relevant knowledge" of facts "that will arise in this litigation"). Indeed, Applicant can offer a unique perspective both on the history of discrimination in Alabama and the ways in which Section 5 has prevented further discrimination in Shelby County and throughout the state.

Moreover, the decision as to whether to invalidate one of the core provisions of the Voting Rights Act should only be made upon a full and comprehensive record. Congressional enactments are analyzed by courts under a deferential standard and should be accorded a "presumption of constitutionality." *United States v. Morrison*, 529 U.S. 598, 607 (2000); *see also Nw. Austin Mun. Utility Dist. No. v. Holder* ("*NAMUDNO*"),

129 S. Ct. 2504, 2513 (2009) (evaluating an act of Congress is "the gravest and most delicate duty that this Court is called on to perform").

C. Under the Liberal Standard for Intervention Applied by Courts in this District, Intervention by Applicant is Appropriate

Courts in this Circuit have consistently advocated a liberal approach to intervention that favors the involvement of "as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse v. Camp,* 385 F.2d 694, 700 (D.C. Cir. 1967); *see also id*. at 701-02 (noting that the changes to Rule 24 reflect a "need for a liberal application in favor of permitting intervention"); *Am. Horse Prot. Ass'n, Inc. v. Veneman,* 200 F.R.D. 153, 157 (D.D.C. 2001) (underscoring that the standard for intervention under Rule 24 is a "liberal and forgiving" one); *Wilderness Soc'y v. Babbitt*, 104 F. Supp. 2d 10, 12, 18 (D.D.C.2000) (noting this Circuit's "liberal approach to intervention"), *Textile Workers Union of America, CIO v. Allendale Co*., 226 F.2d 765, 768 (D.C. Cir. 1955) (en banc) ("[F]ailure to come within the precise bounds of Rule 24's provisions does not necessarily bar intervention if there is a sound reason to allow it.").

In particular, the test under the final prong of Rule 24(a)(2), which requires Applicant to show that existing representation "may be" inadequate to protect his interest, is not an "onerous" one. *Dimond v. Dist. of Columbia*, 792 F.2d 179, 193 (D.C. Cir. 1986); *see also Trbovich v. United Mine Workers,* 404 U.S. 528, 538 n.10 (1972) (describing the burden of making such showing as "minimal"); *Fund For Animals*, 322 F.3d at 736 (noting that courts in this Circuit have "often concluded that governmental entities do not adequately represent the interests of aspiring intervenors"); *id*. at 736 n.9 (citing cases).

Thus, it is not necessarily the case that a federal agency tasked with enforcing challenged regulations or statutes will adequately defend another party's "special and distinct interests." *Nat'l Res. Def. Council v. Costle,* 561 F.2d 904, 912-13 (D.C.Cir.1977). Similar to the applicants in *Natural Resource Defense Council*, Mr. Harris' "more narrowly focused" interest and his relevant "experience and expertise" would serve as a "vigorous and helpful supplement" to the Attorney General's defense in this litigation. *Id*. Accordingly, the fact that Applicant and Defendant may agree as to Section 5's constitutionality in no way diminishes Applicant's intervention rights under Rule 24(a)(2). Indeed, as Defendant recognizes, courts have frequently granted intervention motions in VRA cases. *See* Attorney General's Response at 2, n.1 (citing no less than *twenty-six* cases in which applicants were permitted to intervene in Section 5 cases).

Plaintiff nonetheless contends that, because the Attorney General "vigorously defended the constitutionality of *these* statutory provisions" in the recent *NAMUDNO* case, Applicant's interests are already adequately represented and his participation in this case would be purely "duplicative." Plaintiff's Response at 6. Plaintiff's reasoning is flawed in light of the fact that multiple intervention motions filed by minority voters were granted in the *NAMUDNO* case and intervenors participated in all aspects of litigation, including discovery and oral arguments. *See Nw. Austin Mun. Util. Dist. No. One v. Holder,* No. 08-322 (April 3, 2009) (granting portion of oral argument time to defendant intervenors), *available at* http://www.supremecourt.gov/orders/courtorders/040309zr.pdf.

Finally, Plaintiff's suggestion that Applicant's participation should be limited to that of *amicus curiae* (or, in the alternative, that this Court impose conditions restricting

Applicant's participation) is inappropriate because Applicant's interest in the outcome of this litigation is direct, substantial, and legally protectable. *See, e.g. Diamond v. Charles*, 476 U.S. 54, 75 (1986) (requiring intervenor to demonstrate a "direct and concrete interest that is accorded some degree of legal protection"); *Meek v. Metro. Dade County*, 985 F.2d 1471, 1478 (11th Cir. 1993) (noting the appropriateness of intervention where applicant's goal in intervening was to protect a distinct interest). Only intervention as a party will allow Applicant to fully defend his core constitutional voting rights; in contrast, participation as *amicus* would prevent Applicant from partaking in discovery in this case and foreclose even the possibility of his participation in oral argument.

II. In the Alternative, This Court Should Grant Permissive Intervention Under Rule 24(b)(1)

Neither party opposes Applicant's intervention under Rule 24(b), and Applicant clearly meets the liberal standard for intervention under the Rule. *See, e.g., EEOC v. Nat'l Children's Ctr., Inc*., 146 F.3d 1042, 1045 (D.C. Cir. 1995) (noting application of Rule 24(b) requires a "flexible approach"). In addition, as noted above, courts in this District have "routinely" allowed intervention by minority voters in voting rights cases. *See* Attorney General's Response at 2, n.1. Thus, even if this Court determines that Applicant is not entitled to intervention as a matter of right, it should exercise its discretion to grant intervention pursuant to Fed. R. Civ. P. 24(b)(1) because Applicant proposes to defend Section 5's constitutionality by raising factual arguments and legal defenses in common with those on which the named Defendant will likely rely.

Applicant further requests that it be allowed to participate in this litigation without the stringent conditions that Plaintiff seeks to impose. Plaintiff has articulated no basis for its assertion that Applicant's participation will cause this litigation to be "sidetracked

by costly, time-consuming, and needless procedural skirmishes." Pl. Mot. at 2.[1] In fact, despite the participation of multiple defendant-intervenors in the *NAMUDNO* litigation, the case was nonetheless able to proceed on an expeditious timetable. *See* Memorandum in Support of Attorney General's Opposition at 13 (attaching Scheduling Orders from the *NAMUDNO* litigation requiring parties to complete discovery and briefing on dispositive motions in under seven months). Applicant has already stated that he intends to comply with the schedule set by the existing parties, and he has no intention of delaying these proceedings or otherwise wasting this Court's resources. Likewise, Applicant will coordinate proceedings with the Defendant and avoid unnecessary duplication of efforts to the extent possible.[2]

Thus, there is no justification for imposing conditions on Applicant's ability to participate in this litigation at this extremely preliminary stage, given that no discovery has taken place and no hearings have been scheduled. As a matter of fact, Applicant's participation is likely to enhance the Court's understanding of the factual and legal context necessary to properly dispose of the merits of this case without causing any unnecessary delay or undue burden. Plaintiff's limiting requests at this stage are premature; if at a later point in this litigation the Court has any concerns regarding a duplication of efforts by the parties, it can revisit Plaintiff's requests at such time.

[1] The cases cited by Plaintiff in support of its contention that conditions should be imposed on Applicant have no bearing on this litigation. In *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co*., 974 F.2d 450, 470 (4th Cir. 1992), the appellate court held that the conditions imposed by the district court were improper where intervention was of right, and intervenors should have been permitted to take discovery. The court's imposition of conditions in *Beauregard, Inc. v. Sword Services LLC*, 107 F.3d 351, 352 (5th Cir. 1997), requiring intervenor to share in the seizure of the vessel and the costs of its maintenance, was limited to admiralty *in rem* actions.

[2] Rule 26(b)(2)(C) of the Federal Rules of Civil Procedure, which permits courts to limit discovery that is "unreasonably cumulative or duplicative," provides more than ample protection against Plaintiff's concerns over "needless and costly expenditure of time and resources." *See* Plaintiff's Response at 2.

CONCLUSION

For the reasons stated herein, this Court should grant Applicant's motion to intervene as a matter of right under Fed. R. Civ. P. 24(a)(2); in the alternative, this Court should permit Applicant to intervene under Fed. R. Civ. P. 24(b)(1).

Dated: July 21, 2010

Respectfully submitted,

/s/ Mark A. Posner
Jon Greenbaum (D.C. Bar No. 489887)
Marcia Johnson-Blanco
Robert A. Kengle
Mark A. Posner (D.C. Bar No. 457833)
David Cooper
jgreenbaum@lawyerscommittee.org
mblanco@lawyerscommittee.org
bkengle@lawyerscommittee.org
mposner@lawyerscommittee.org
dcooper@lawyerscommittee.org
LAWYER'S COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Avenue, NW
Suite 400
Washington, D.C. 20005
(202) 662-8389 (phone)
(202) 628-2858 (fax)
Washington, D.C. 20006
Tel. (202) 663-6000
Fax (202) 663-6363

/s/ John Nonna
John Nonna
Autumn Katz
Daniel Stabile
Wendy Walker
jnonna@deweyleboeuf.com
akatz@deweyleboeuf.com
dstabile@deweyleboeuf.com
wwalker@deweyleboeuf.com
DEWEY & LEBOEUF LLP
1301 Avenue of the Americas
New York, NY 10019
Tel. (212) 259-8311
Fax (212) 649-9461

Attorneys for Applicant-Intervenor