IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELBY COUNTY, ALABAMA Plaintiff, v. ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States of America Defendant, EARL CUNNINGHAM, HARRY JONES, ALBERT JONES, ERNEST MONTGOMERY, ANTHONY VINES and WILLIAM WALKER Proposed Intervenors.	Civil Action No. 1:10-CV-651 (JDB)

CONSOLIDATED REPLY BRIEF IN SUPPORT OF
PROPOSED INTERVENORS' MOTION TO INTERVENE

Proposed Intervenors Earl Cunningham, Harry Jones, Albert Jones, Ernest Montgomery, Anthony Vines and William Walker (collectively, "Proposed Intervenors" or "Movants"), by their undersigned counsel, respectfully submit this Consolidated Reply to Plaintiff's and Defendant's respective Responses to their Motion to Intervene ("Motion").

PRELIMINARY STATEMENT

Both of the briefs filed by the parties in response to Proposed Intervenors' Motion to Intervene recognize the appropriateness of Movants' participation in this challenge to the constitutionality of Sections 4(b) and 5 of the VRA. Of course, the intervention determination remains in the sound discretion of this Court. The only difference between the parties on the issue, however, centers on the form that Proposed Intervenors' participation should take. Attorney General

Holder's analysis is limited to a discussion about which section of Rule 24 this Court should invoke in order to grant intervention, and cites a wealth of authorities granting intervention, including both permissively and as of right. Plaintiff seeks to limit Proposed Intervenors' participation to *amicus* status or as permissive intervenors with constraints, on the theory that its desire for a swift summary disposition of the constitutional challenge at issue supersedes the purposes of the intervention rule and the practice commonly followed before this Court. Rule 24 and the precedents strongly support intervention.

The essence of Proposed Intervenors' interest in this matter is that a judgment in favor of the Plaintiff would strip the Proposed Intervenors, and other minority voters residing in covered jurisdictions generally, of the substantial protections afforded by Sections 4(b) and 5 of the Voting Rights Act of 1965, as amended (VRA). 42 U.S.C. § 1973. These critical protections were specifically designed to safeguard the voting rights of the Proposed Intervenors and other minority residents who live in jurisdictions that fall under the Section 4(b) scope of coverage provision and, therefore, covered by Section 5 of the VRA. Indeed, the Supreme Court recently observed that "racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions." *Bartlett v. Strickland*, 129 S. Ct. 1231, 1249 (2009). The experience of the Proposed Intervenors in combating racial discrimination in Alabama is a testament to this reality. *See Riley v. Kennedy*, 128 S. Ct. 1970, 1993 (2008) (Stevens, J., dissenting) (detailing over a century of "obstacles to African-American voting" in Alabama).

A court of this district, just three years ago, granted multiple intervention motions in a similar challenge to the constitutionality of Section 5. *See Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 230 (D.D.C. 2008). As Defendant here acknowledges, courts in this

district have "routinely allowed intervention by persons situated similarly" to Proposed Intervenors in declaratory judgment actions brought by covered jurisdictions against the Attorney General under the Voting Rights Act. *County Council of Sumter County v. United States*, 555 F. Supp. 694, 696 (D.D.C. 1983). *See* Def.'s Mem. at 1-2 n.1 (citing cases). This recognition, taken together with the substantial number of authorities from this Court, and others cited by Proposed Intervenors and Defendant, dramatically undermine Plaintiff's naked assertion that "the governing decisional law strongly suggests that allowing Applicants to participate as amicus curiae is the better course." *See* Pl.'s. Mem. at 2. Indeed, the role of *amici curiae* is very limited in scope, a role clearly distinguished from that of the parties and one that does not allow for the kind of legal advocacy necessary to secure constitutionally-protected rights that may be at stake in the litigation, as here. The great weight of authorities in voting cases weigh in favor of granting intervenors full status as parties to the litigation Plaintiff's subjective preference to substantively and materially limit proposed intervenors' participation, conceding as it must the appropriateness of that participation, does not displace the precedents or long practice in this Court.

As explained below, Proposed Intervenors are aggrieved individuals within the meaning of the governing statutes and cases, with a direct and substantial stake in this legal challenge, who stand to lose the prophylactic protection of their right to vote afforded by Sections 4(b) and 5 of the VRA, if Plaintiff prevails on its claims. Proposed Intervenors assert four distinct bases for intervention and will bring a unique local perspective to this action, which is sufficient to satisfy the lenient standards governing intervention as of right under Rule 24(a)(2). In the alternative, Proposed Intervenors request that permissive intervention should be granted under Rule 24(b)(1), which neither Party opposes.

ARGUMENT

A. Proposed Intervenors Have Direct, Substantial, and Legally Protectable Interests at Stake, Which May Be Impaired by the Disposition of this Litigation

Plaintiff asserts that any injury to Proposed Intervenors would be merely "hypothetical," and that Proposed Intervenors can address any future danger of voting discrimination by filing a complex and costly Section 2 lawsuit, presumably after a discriminatory voting change goes into effect. *See* Pl.'s Mem. at 4. A judgment in favor of the Plaintiff in this litigation, however, would immediately impair Proposed Intervenors' rights in four significant ways.

First, in contrast to Section 2, Section 5 places the burden of demonstrating that voting changes are free from retrogressive effect or discriminatory intent squarely upon the covered jurisdiction. *See e.g.*, *Georgia v. Ashcroft*, 539 U.S. 461, 493-94 (2003), *superseded by statute on other grounds*, Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246; 120 Stat. 577 (amending 42 U.S.C. §1973). This burden-shifting difference is not simply conjectural, but real and potentially outcome-determinative. *Cf. Fund for Animals v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) ("It is not enough to deny intervention under 24(a)(2) because applicants may vindicate their interests in some later, albeit more burdensome, litigation.") (quoting *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 910 (D.C. Cir. 1977)).

Second, the existence of Section 5 deters discriminatory conduct which makes litigation unnecessary.

Third, Section 2 cases typically arise in the context of a challenge to statutes that are already in place and thus, are already tangibly, and at times adversely, affecting the rights of voters. In

contrast, Section 5 operates by deterring or blocking those changes found to be retrogressive or otherwise discriminatory *before* they can adversely affect the voters' right to participate fully in the political process.

Fourth, if the Section 4(b) scope of coverage provision and Section 5 preclearance requirement were eliminated Proposed Intervenors will be forced to spend additional time and resources to more closely monitor voting changes in Shelby County, and, because this case involves a constitutional challenge to Sections 4(b) and 5, to all statewide voting changes as well.

Plaintiff's contention, therefore, that Proposed Intervenors would suffer no real injury and can file a Section 2 lawsuit when voting discrimination occurs, *see* Pl.'s Mem. at 4, ignores that an adverse judgment in this case would clearly impair the rights of Proposed Intervenors. The impact of the future pecuniary and other costs associated with the fundamental reconfiguration of VRA protections that Plaintiff seeks would visit the type of injury upon Proposed Intervenors that well satisfies the standing inquiry. Significantly, it would be an injury to Proposed Intervenors caused by an adverse judgment that could have been redressed by the rejection of Plaintiff's claims. *See Fund for Animals*, 322 F.3d at 732-33 (setting forth a three-prong standing test for intervenors under Rule 24(a)(2), requiring injury-in-fact, causation, and redressabilty; and reversing denial of intervention as of right); *cf. United States v. Phillip Morris USA*, 566 F.3d 1095, 1145 (D.C. Cir. 2009) (party need not have a "cause of action" in order to satisfy requirements for intervention as of right), *cert. denied*, 2010 U.S. LEXIS 5350 (U.S. June 28, 2010); *McConnell v. FEC*, 2004 U.S. Dist. LEXIS 22496, *7 (D.C. Cir. 2004) ("To date, neither the Supreme Court nor the D.C. Circuit has specifically addressed whether an Article III standing analysis is as appropriate in the Rule 24(a)(1) context as it is in the Rule 24(a)(2) context."). And because this case involves a constitutional

challenge to Sections 4(b) and 5 of the VRA, an adverse ruling would have a permanent and irreversible effect on Proposed Intervenors' voting rights.

Finally, Plaintiff's assertion that "millions of citizens living in non-covered jurisdictions" do not currently benefit from Section 5 coverage and have no "right" to such coverage, Pl.'s Mem. at 4, has no bearing on the interests of Proposed Intervenors in this action. By virtue of living within a jurisdiction that falls under the Section 4(b) scope of coverage provision and as residents of Plaintiff Shelby County, Proposed Intervenors possess standing as persons whose rights are entitled to protection under the statute at issue, and would be harmed by an adverse ruling. "[T]he interests of those who are governed by [a statutory] scheme[is] sufficient to support intervention" in a case challenging the constitutionality of that scheme. *See, e.g.*, *Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989) (quoting 7C Charles Alan Wright, Arthur Miller and Mary Kay Kane, *Federal Practice and Procedure* § 1908, at 285 (2d ed. 1986)).

In sum, the interests asserted here well satisfy this circuit's intervention standards. *See, e.g.*, *Nuesse v. Camp*, 385 F.2d 694, 702-04 (D.C. Cir. 1967) (recognizing need for liberal application of the rules permitting intervention as of right); *Am. Horse Prot. Ass'n., Inc. v. Veneman*, 200 F.R.D. 153, 157 (D.D.C. 2001) (noting the "liberal and forgiving" nature of the interest prong of the intervention as of right test); *Wilderness Society v. Babbitt*, 104 F. Supp. 2d 10 (D.D.C. 2000) (recognizing D.C. Circuit's liberal approach to intervention).

1. The "Factual History and Record of Shelby County" is Relevant to this Litigation

Proposed Intervenors also have an interest in ensuring that, in evaluating Plaintiff's claim, the court properly considers the relevant history and contemporary record of voting discrimination against African Americans and other minority voters within Shelby County, and Alabama generally.

Plaintiff asserts that this history is "not relevant" to their facial challenge to the constitutionality of Section 5, Pl.'s Mem. at 5. Plaintiff's assertion is clearly belied by its contention that the "burdens" imposed by Section 5 compliance must be justified by "current needs." Pl.'s Mem. in Supp. of Mot. For Summ. J. at 5, 16, 20, 24 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2512 (2009)). The "current need" for Section 5 will be illuminated in this case through both discovery and careful examination of the legislative record developed by Congress during its 2006 reauthorization. Proposed Intervenors will bring a "local perspective on the current and historical facts at issue," which have not been addressed by Plaintiff, which are unlikely to be addressed by Defendant, and which will be of benefit to this court in evaluating Plaintiff's claim. *County Council of Sumter County*, 555 F. Supp. at 697.

Proposed Intervenor Councilman Ernest Montgomery can directly attest to the importance and effectiveness of Section 5 in Shelby County. Mr. Montgomery is a registered African-American voter and has been a resident of Calera, a city in Shelby County, for more than thirty years. Mr. Montgomery is a member of Calera's City Council, a position he has held since 2004, and is only the second African American in history to hold that post. Mr. Montgomery initially lost his 2008 bid for re-election when Calera conducted an illegal municipal election based on a discriminatory redistricting plan—which drew an objection from the United States Department of Justice—that eliminated the City's sole majority African-American district. *See* Letter from Acting Assistant Attorney General Grace Chung Becker to Dan Head, Columbiana, Alabama (August 25, 2008), *available at* http://www.justice.gov/crt/voting/sec_5/pdfs/l_082508.pdf. The Department of Justice ultimately rejected the results of the illegal election, in which Mr. Montgomery received the fewest number of votes of all city council candidates. Mr. Montgomery later regained his seat and won the

most votes of all candidates after Calera conducted another election based on a nondiscriminatory redistricting plan, which was eventually precleared by the Department of Justice.

Accordingly, Plaintiff's argument is internally inconsistent to the extent that it seeks to elevate Shelby County's purported burdens above the benefits that Section 5 confers on minority voters in Shelby County and other covered jurisdictions.

2. The Authorities Relied Upon by Plaintiff Support Proposed Intervenors' Motion for Intervention

In its Reponse Memorandum, Plaintiff cites four cases concerning voting or election law-related disputes. *Each* of these cases involved a *grant* of intervention. In three of these cases, courts permitted intervenors to defend their rights in the context of declaratory judgment proceedings before the court. *See Nw. Austin*, 573 F. Supp. 2d at 230 (noting grant of intervention) (cited at Pl.'s Mem. at 7)[1]; *Georgia v. Ashcroft*, 539 U.S. at 477 (upholding grant of intervention) (cited in Pl.'s Mem. at 4); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 323 (2000) (noting intervention) (cited in Pl.'s Mem. at 4). In the fourth case, *In. Democratic Party v. Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006) (cited in Pl.'s Mem. at 8-9), the intervenor was the State of Indiana rather than a private party. But in that case, too, the district court granted the motion for intervention. *See id.* at 783 (noting intervention of the State of Indiana).

To be sure, Plaintiff does cite a few cases in which intervention was denied – each of which was from a different circuit and/or involved disputes entirely unrelated to voting. But the authorities

[1] Plaintiff attempts to distinguish *Nw. Austin* on the grounds that the case involved a claim for bailout, which Plaintiff concedes would involve issues on which intervenors could make a "unique factual contribution." Pl.'s Mem. at 7 n.3. However, participation of the intervenors in *Nw. Austin* was not in fact limited to the bailout question, but rather involved all aspects of the litigation, including the constitutional issues, with over half of the substantive section of their brief before the United States Supreme Court dedicated to the constitutional questions presented in that case. *See* Br. for Def.-Intervenors, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2513 (2009), 2008 WL 5079035, at **12-36. There is no basis for claiming that Proposed Intervenors could not make a similar contribution in this case, with issues similar to those presented in *Nw. Austin*.

cited by Plaintiff in its memorandum that are most germane to this case in no way undermine this motion for intervention, and, if anything, demonstrate that the requirements for intervention are easily satisfied here.

B. The Parties' Assertion that Defendant is an Adequate Representative of Proposed Intervenors' Interest Does Not Undermine Their Intervention Right

Both Plaintiff and Defendant oppose the request for intervention as of right pursuant to Rule 24(a)(2) on the grounds that the Attorney General is an adequate representative of the Proposed Intervenors' interests. The Parties' opposition is unavailing. Although the Defendant is charged with representing the broad public interest through enforcement of the VRA, Defendant simply does not have the same stake in this action as Proposed Intervenors. Moreover, Intervenors bring to the litigation a local perspective and awareness of conditions that is distinct from that held by the Defendant Attorney General.

In any event, the Supreme Court and courts of this circuit recognize that the inadequacy of representation showing is minimal. *See Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) ("[t]he requirement of the Rule is satisfied if the applicant shows that the representation of his interest may be inadequate; and the burden of making that showing should be treated as minimal.") (internal citations and quotation marks omitted); *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (proposed intervenors' burden to show inadequacy of representation is "not onerous" and is satisfied by a showing that representation of their interests by the parties '"may be' inadequate, not that representation will in fact be inadequate"); *Nuesse*, 385 F.2d at 703 ("interests need not be wholly adverse before there is a basis for concluding that existing representation of a different interest may be inadequate") (internal quotation marks omitted).

Viewed in this light, Plaintiff's suggestion that Proposed Intervenors' motion is premised on mere differences in litigation strategy, *see* Pl.'s Mem at 8, is inaccurate. Although the Attorney General has a duty to defend the constitutionality of federal statutes, private parties who seek to defend a particular regulatory scheme are frequently granted intervention even where the government is tasked with enforcing and protecting that same scheme. *See* Opening Mem. at 12-14 (citing cases). Indeed, while the Attorney General defended the constitutionality of Section 5 in *Nw. Austin*, intervention by private parties was permitted in that litigation, and the intervenors in that case fully participated in all aspects of that litigation, including discovery and in the oral arguments before the three-judge court and Supreme Court with the support of the United States, which recognized that intervenors made distinctive contributions. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, No. 08-322 (U.S. April 3, 2009) (Order granting divided argument to include intervenors), *available at* http://www.supremecourt.gov/orders/courtorders/040309zr.pdf. Of course, Plaintiff's thinly supported suggestion that Movants should be limited to *amicus* status would effectively eliminate the possibility of intervenors' oral argument participation, as well as participation in the discovery that Defendant Holder seeks. Def.'s Mem. in Opp'n. to Summ. J. at 6-14.

Thus, intervention as of right pursuant to 24(a)(2) for Proposed Intervenors is appropriate.

C. In the Alternative, Permissive Intervention Should Be Granted under Rule 24(b)

Rule 24(b) makes clear that permissive intervention can be granted when an applicant " has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). In contrast to the standing requirement for intervention as of right, a grant of permissive intervention in this circuit does not follow the same strict rule as under Rule 24(a). *See e.g.*, *In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 31 (D.C. Cir. 2000); *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998) (recognizing flexible rule). Moreover,

permissive intervention is routinely granted in matters involving Section 5. *See, e.g.*, *County Council of Sumter County*, 555 F. Supp. at 696-698 (intervention by voters granted in declaratory judgment action by county seeking preclearance of its at-large election procedure; citing other section 5 cases in which this court "routinely allowed intervention by persons similarly situated to movants"); *Bossier Parish Sch. Bd. v. Reno*, 157 F.R.D. 133, 135 (D.D.C. 1994) (intervention granted to African American voters in declaratory judgment action filed by section 5 covered jurisdiction seeking preclearance of redistricting plan); *Texas v. United States*, 802 F. Supp. 481, 481 n.1 (D.D.C. 1982) (upholding grant of intervention by individuals opposing preclearance of Texas reapportionment plans).

Neither party opposes permissive intervention in this matter. *See* Pl.'s Mem. at 10; Def.'s Mem. at 4-5. There is no basis, however, for limiting a grant of permissive intervention to "briefing the pertinent legal issues" as suggested by Plaintiff, which would essentially limit Proposed Intervenors' involvement to that of *amici curiae*. Pl.'s Mem. at 10. Unlike an *amicus*, movants' interest in this matter is direct, substantial, and legally protectable. *See supra* at 4-7. And contrary to Plaintiff's suggestion, granting intervention will not cause any delay in the proceedings. Despite the early stage of this litigation and Intervenors' express commitment to following the schedule set by the parties, Plaintiff claim that Proposed Intervenors will "engage[e] in cumulative and duplicative" litigation, Pl.'s Mem. at 8, is without basis.

Indeed, Proposed Intervenors are committed to avoiding delays and unnecessary duplication of effort in those areas satisfactorily addressed and represented by Defendant, and also to coordinating proceedings with the Defendant to the extent possible. *See* Opening Mem. at 2. Proposed Intervenors are also committed to participating on the same schedule established for the existing parties.

Full participation by intervenors in *Nw. Austin* (several of whom were also represented by the NAACP Legal Defense & Educational Fund, Inc.) did not prevent the timely completion of litigation in accordance with the court' scheduling orders, which provided seven months to complete discovery and briefing on dispositive cross-motions. *See* Def.'s Mem., Exhibits 2 and 3. Accordingly, granting Proposed Intervenors' request for permissive intervention at this very early and preliminary stage of the litigation is appropriate in this matter.

CONCLUSION

For all the reasons stated in the moving brief, as well as this reply brief, Proposed Intervenors' Motion to Intervene should be granted.

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Respectfully submitted,

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