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)

APPLICANTS' REPLY TO PLAINTIFFS' RESPONSE TO MOTION FOR LEAVE TO INTERVENE

Applicants Pierson, *et al.*, hereby reply to the Plaintiff's Combined Response to Motions to Intervene (Docket #12) and the Attorney General's Consolidated Response to Motions to Intervene (Docket #11).

I. Applicants should be allowed to intervene as of right.

The Applicants have established the requirements for this Court to grant them intervention as of

right under Rule 24(a) of the Federal Rules of Civil Procedure. They have made a timely application to intervene; they have an interest relating to the transaction which is the subject of the action; disposition of the action may impair their ability to protect their interest; and their interest is inadequately represented by the existing parties in the suit. *See United States v. Phillip Morris USA, Inc.*, 566 F.3d 1095, 1146 (D.C. Cir. 2009); *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986). Once these prerequisites to intervention as of right are established, the court has no discretion to deny the motion to intervene. Rule 24(a), Fed. R Civ.P. ("On timely motion, the court *must* permit anyone to intervene who…")(emphasis added); *see also Johnson v. Mortham*, 915 F. Supp. 1529, 1535 (N.D. Fla. 1995) (court required to grant intervention as of right to black registered voters in district being challenged under Fourteenth Amendment who met all requirements). This is true regardless of whether the Plaintiff here prefers applicants to participate as *amicus curiae*, or whether, as the Attorney General alleges, the majority of interventions in cases arising under the Voting Rights Act have been silent as to the basis for intervention or allowed permissive intervention under Rule 24(b)(1). Since applicants here meet all of the requirements for intervention as of right under Rule 24(a), this Court should order that they participate in this litigation as defendant intervenors as of right.

A. Applicants Have a Direct and Substantial Interest in the Transaction that is the Subject of this Litigation

The Applicants include both residents and registered voters in the Plaintiff jurisdiction. Applicants Pierson, Goldsmith, and Dukes are African American and thus members of the class of voters who are specifically protected by the continued enforcement of Section 5 of the Voting Rights Act. Applicant Alabama NAACP has 2700 members throughout the state, many of whom are members of that same class of protected voters and residents. The Alabama NAACP furthermore works 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. This mission is partially achieved through the organization's numerous voter registration, education and get out the vote efforts.

Plaintiff argues that applicants do not have "a protectable interest." Plaintiff's Response at 5. The protections afforded to voters in Shelby County by virtue of its coverage under Section 5 prevent the implementation of voting practices and procedures that would have the effect of making precisely these applicants worse off in exercising their right to vote. The fact that additional protections exist under other sections of the Voting Rights Act, or that other constitutional provisions may also protect aspects of that right, does not deprive applicants of a vested interest in the protections afforded by Section 5 at issue in the present litigation. The possible abolition of a key protection of the Voting Rights Act and the future impact it may have on minority voters are more than a "hypothetical future injury." Plaintiff's Response at 4. *See Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999) (proposed minority intervenors made sufficient showing that impairment of their substantial legal interests, i.e., gaining admission to a university as prospective minority applicants, was possible if intervention was denied). Numerous voting rights cases arising under the Voting Rights Act and the Constitution have found the interests of minority voters protectable, warranting intervention as of right. *E.g.*, *Johnson v. Mortham*, 915 F. Supp. at 1536 (N.D. Fla. 1995) (holding that registered voters who resided in a disputed majority minority congressional district had the direct, substantial, and legally protectable interest necessitating intervention as of right in a suit alleging that redistricting plan was the result of unconstitutional racial gerrymandering); *Kasper v. Hayes*, 651 F. Supp. 1311, 1313 (N.D. Ill. 1987) (eligible voters purged from registration rolls allowed to intervene in challenge to Chicago's registration

procedure because in "litigation involving an issue so sensitive and central to the democratic process . . . the active participation of all interested parties is essential"). *Meek v. Metropolitan Dade County*, 985 F.2d 1471, 1480 (11th Cir. 1993) (per curiam); *League of United Latin Am. Citizens, Council No. 4434 v. Clements ("LULAC II")*, 999 F.2d 831, 845 (5th Cir. 1993) (en banc) (judges had standing as voters in county to intervene in action challenging judicial elections in that county); *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).

B. Applicants' Interests are not adequately represented by the Attorney General

The Plaintiff and the Attorney General claim that the Applicants' intervention as of right would be inappropriate because Applicants' interests are adequately represented by the Attorney General. Plaintiff ignores that the burden placed upon proposed intervenors is minimal; proposed intervenors are not required to show that the representation will in fact be inadequate. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972); *Grutter*, 188 F.3d at 400; *California v. Tahoe Regional Planning Agency*, 792 F.2d 775, 779 (9th Cir. 1986).

The representation may be inadequate if the applicant can show that the present defendant will not undoubtedly make all of the intervenor's arguments, and that the intervenor would offer necessary elements to the proceeding that the other parties would neglect. *See Grutter*, 188 F.3d at 400 (where university facing challenge over use of race in admissions policy is subject to internal and external pressures regarding its use of race, proposed intervenors found to have distinct interest in defending use of race); *California v. Tahoe Regional Planning Agency*, 792 F.2d 775, 779 (9th Cir. 1986). The inadequacy of representation need not be established to a certainty. It is enough that the current

Defendant *may* provide inadequate representation. *See Kozak v. Wills* 278 F.2d 104, 110 (8th Cir. 1960); *Frank J. Delmont Agency, Inc. v. Graff*, 55 F.R.D. 266, 268 (D. Minn. 1972).

In the case at hand, there is no guarantee that the Attorney General will present all of the Applicants' arguments. It is well recognized that the interests of a governmental body and members of its body politic are often divergent and distinct. *See Chiles v. Thornburgh*, 865 F.2d 1197, 1214-15 (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"). It is tautological that the participants in this action who are in perhaps the best position to assert the interests of minority voters in the covered jurisdictions are minority voters from the jurisdiction.

Plaintiff's argument on these points is inconsistent. It acknowledges that the defendant intervenors in the *NAMUDNO* litigation[1] emphasized different aspects of the Congressional record and presented arguments and evidence that supplemented that provided by the Attorney General, but then states that the Attorney General vigorously defended the constitutionality of Section 5 such that intervention now is inappropriate. Plaintiff's Response at 6-7. What is clear is that the defendant intervenors in that case made arguments and emphasized aspects of the litigation that the Attorney General did not. Likewise here, although the interests of the applicants and the Attorney General may not necessarily be adverse to one another, they are sufficiently distinct to warrant intervention by the Applicants, especially since there has been such a history in Section 5 cases. In addition, "[i]t also has been recognized that 'interests need not be wholly 'adverse' before there is a basis for concluding that existing representation of a 'different' interest may be inadequate.'" 7C Charles Alan Wright, *et al.*, Federal Practice and Procedure §1909 (3d ed. 2007) (quoting *Nuesse v. Camp* 385 F.2d at 703).

Finally, Plaintiff Shelby County alleges that Applicants would engage in duplicative and cumulative efforts, interject new issues into the case, and convert a "purely legal dispute over the facial validity of these statutes into a factual controversy about Shelby County or some other covered jurisdiction." Plaintiff's Response at 10-11. Plaintiff further claims that it has chosen to bring a "facial challenge" to Sections 5 and 4(b). However, Plaintiff's Complaint raises a number of factual assertions about Shelby County and the State of Alabama that suggest that this is not a purely facial challenge. *See* Complaint, ¶¶ 30-35. While Applicants do not seek to delay or obfuscate, it is no small task to attempt to overturn a statute as important as the Voting Rights Act. Plaintiff's declaration that this is a facial

[1] In fact, the order granting applicants' intervention in *Nw. Austin Mun. Util. Dist. No. One v. Holder* was silent as to whether the intervention was permissive or as of right. *See* unpublished orders appended to Defendant Attorney General's Response (Docket #11-1).

constitutional challenge does not make the inquiry easier or Plaintiff's burden lighter. *See Crawford v. Marion County Election Bd.*, 553 U.S. 181, 200 (2008) ("Given the fact that petitioners have advanced a broad attack on the constitutionality of [Indiana's photo identification voting statute], seeking relief that would invalidate the statute in all its applications, they bear a heavy burden of persuasion"). Given the likely impact that such an action would have on the voting strength of minority voters in Alabama and throughout the covered jurisdictions, it is highly appropriate for applicants to raise defenses to protect their interest in the continued operation and existence of the Act.

II. If permissive intervention is allowed, movants should be permitted to present a range of defenses that may not be raised by the Attorney General.

Should this Court decide that alternatively Applicants are granted intervention permissively, Applicants should be granted wide latitude to present defenses not presented by the Attorney General as would be in the spirit of Rule 24.

CONCLUSION

For the foregoing reasons, this Court should permit the Pierson, *et al.*, applicants to intervene in this action as party defendants.

s/Meredith Bell-Platts_____
LAUGHLIN McDONALD
MEREDITH BELL-PLATTS (application pending)
American Civil Liberties
Union Foundation, Inc.
230 Peachtree Street, NW
Suite 1440
Atlanta, GA 30303-1227
(404) 523-2721
(404) 653-0331 (fax)
lmcdonald@aclu.org
mbell@aclu.org

s/Arthur B. Spitzer____
Arthur B. Spitzer (D.C. Bar. No. 235960)
American Civil Liberties Union of the Nation's Capital
1400 20th Street, N.W., Suite 119
Washington, DC 20036
Tel. (202) 457-0800
Fax (202) 452-1868
artspitzer@aol.com

Attorneys for Applicants

Laura D. Blackburne
Interim General Counsel
NAACP
4805 Mt. Hope Drive
Baltimore, MD 21215-3297
(410) 580-5791
(410)358-9350 (fax)
lblackburne@naacpnet.org

Victor L. Goode
Assistant General Counsel
NAACP
4805 Mt. Hope Drive
Baltimore, MD 21215-3297
(410) 580-5120
(410) 358-9350 (fax)
vgoode@naacpnet.org

Attorneys for Applicant Alabama State Conference of the NAACP.

Allison E. Neal
American Civil Liberties Union of Alabama
207 Montgomery Street, Suite 910
Montgomery, AL 36104
(334) 265-2754
(334) 269-5666 (fax)
anaclual@bellsouth.net

Of Counsel