IN THE 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, Defendant.	Civil Action No. 1:10-cv-00651-JDB

PLAINTIFF'S RESPONSE TO BOBBY LEE HARRIS'S MOTION TO INTERVENE

I. PRELIMINARY STATEMENT

Bobby Lee Harris seeks to intervene in this action to defend the facial constitutionality of Sections 5 and 4(b) of the Voting Rights Act ("VRA"). More specifically, Harris asserts that he is entitled to intervene as of right under Federal Rule of Civil Procedure 24(a)(2) or, in the alternative, to permissively intervene under Federal Rule of Civil Procedure 24(b)(1). *See* Memorandum in Support of Motion to Intervene as Defendant at 1 ("Harris Mem."). As explained below, it does not appear that Harris can meet the criteria for intervention as of right under Rule 24(a)(2). As with the other proposed intervenors, therefore, the Court must decide in its discretion whether Harris should be allowed to permissively intervene under Rule 24(b)(1) or, instead, whether he should participate in this action as *amicus curiae*.

Although the governing decisional law strongly suggests that allowing Harris to participate as *amicus curiae* is the better course, Plaintiff Shelby County ("Shelby County") has

no objection to permissive intervention. Because this facial constitutional challenge presents a pure question of law—*i.e.*, whether the legislative record compiled by Congress in 2006 was sufficient to uphold Sections 5 and 4(b) of the VRA as enforcing the Fifteenth Amendment's ban on voting discrimination—Harris's participation should be limited to briefing the legal issues raised in the Motion for Summary Judgment irrespective of whether he permissively intervenes or participates as *amicus curiae*. As Shelby County explained in its response to the other pending motions to intervene, it has no objection to Harris expressing his views of the legal merits of this challenge; indeed, Shelby County welcomes the views of any individual, group, or association that is inclined to submit a legal brief addressing the constitutional validity of Sections 5 and 4(b).

Shelby County remains seriously concerned, however, that allowing cumulative and duplicative intervention as of right threatens needless and costly expenditure of time and resources in an otherwise straightforward facial constitutional challenge to Sections 5 and 4(b). From the outset, Shelby County has litigated this case in a manner that would allow this Court to expeditiously reach the merits of its challenge with as little procedural maneuvering as possible. To that end, Shelby County has chosen to limit its lawsuit to a facial challenge that, under Supreme Court precedent, must rise or fall on the evidence in the 2006 legislative record. But given the tenor of his motion, as well as the other intervention motions, it is clear that allowing Harris to intervene as of right could allow this case to be sidetracked by costly, time-consuming, and needless procedural skirmishes and by attempts to introduce irrelevant factual issues. For these reasons, among others, allowing Harris to participate as *amicus curiae* is the more prudent course. If the Court nevertheless exercises its discretion to allow Harris to intervene

permissively, Shelby County respectfully requests that it limit Harris's participation to briefing the legal issues raised in the Motion for Summary Judgment.

II. ARGUMENT

Harris is not entitled to intervene as of right under Rule 24(a)(2). Foremost, he appears to lack standing. Harris claims he possesses the Article III standing needed to intervene as of right because "as an intended beneficiary of the statute, [Harris] has a legally cognizable interest in preserving the current protections guaranteed by Section 5 of the VRA." Harris Mem. at 5. Harris fears that if Section 5 is invalidated his "voting rights would be at risk of injury or impairment, because Shelby County would be free to enact or administer changes to its voting practices and procedures without first showing such changes do not have a discriminatory purpose or effect." *Id.* at 6. But Harris cannot properly claim a substantive right to have the jurisdiction of his residence be subject to preclearance; if he could, then the millions of citizens living in non-covered jurisdictions would be suffering the same injury he alleges. The substantive right that Harris seeks to vindicate is the ban on voting discrimination protected by the Fifteenth Amendment and the many other provisions of the VRA. *See Georgia v. Ashcroft*, 539 U.S. 461, 477-78 (2003). Any hypothetical future injury that Harris *might* suffer, accordingly, would not be traceable to the termination of coverage or the elimination of preclearance. It instead would be attributable to unknown future acts of discrimination that could be redressed under the Fifteenth Amendment and Section 2 of the VRA. *See Reno v. Bossier Parrish Sch. Bd.*, 528 U.S. 320, 335-36 (2000).

For similar reasons, it does not appear that Harris has the protectable interest needed to intervene as of right under Rule 24(a)(2). Harris claims he has an "interest in retaining the protections afforded by Section 5's preclearance requirements." Harris Mem. at 7. In particular,

Harris argues that his "history and involvement in local politics underscores both his interest in the subject matter of this action and his ability to provide this Court with relevant information regarding the impact of the VRA on minority voters in Shelby County." *Id.*; *see also id.* at 12 ("[Harris] has knowledge of the conditions and experiences of minority voters in Shelby County, and some of the problems they have encountered in exercising their federally protected voting rights.").

But Harris's avowed interest in litigating the factual history and record of Shelby County is not relevant to this *facial* challenge. *See* Complaint ¶ 1; *see also* Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment ("Plaintiff's SJ Mem.") at 17, 26. The facial constitutionality of Sections 5 and 4(b) depends exclusively on whether the legislative record compiled by Congress in 2006 can meet the applicable test for judging whether the VRA enforces the Fifteenth Amendment—not on any extra-record evidence Harris would like to present to this Court. *See South Carolina v. Katzenbach*, 383 U.S. 301, 308-09 (1966); *City of Rome v. United States*, 446 U.S. 156, 180-82 (1980). And Harris's purported interest in ensuring that this Court favorably interprets these statutory provisions is even weaker. Such an interest is sufficient to support participation as *amicus curiae*—not as a party. *See, e.g.*, *Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 539 (D.C. Cir. 1999); *City of Cleveland v. NRC*, 17 F.3d 1515, 1518 (D.C. Cir. 1994).

Intervention as of right under Rule 24(a)(2) also appears to be inappropriate because Harris's interests are adequately represented by the Attorney General. Harris asserts that he has "a unique and particularized interest in defending the voting rights of minority voters in Shelby County" and, moreover, that these interests "may differ substantially from those of the Attorney General." Harris Mem. at 9. Harris's concern appears to be that the Attorney General may not

vigorously defend the facial constitutionality of Sections 5 and 4(b) of the VRA. *See id.* at 10 (arguing that Harris "may well have a different perspective than the [Attorney General] regarding (1) the history of discrimination in Shelby County, Alabama, and even nationwide; (2) the continuing presence of vote denial and vote dilution in the same; [and] (3) the continuing barriers to African-Americans and other racial and language minorities in exercising their franchise in the same").[1]

But there is no basis in fact for Harris's suggestion that the Attorney General may not vigorously defend the facial constitutionality of these statutes. As the cases referenced by Harris reflect, *see* Harris Mem. at 10-13, there may be times when the litigation interests of the government and private citizens will diverge; in the area of voting rights, for example, the Attorney General may take a different view than local residents on the merits of a voting change or bailout request.[2] Again, however, such cases cannot be equated to a stand-alone facial constitutional challenge. The Attorney General has both a statutory obligation, *see* AG Resp. at 4 (citing 28 U.S.C. § 2403(a)), and an ethical duty to defend the constitutionality of a federal law absent exceptional circumstances, *see, e.g.*, *The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 4A Op. Off. Legal Counsel 55, 55 (1980) ("[I]t is

[1] Harris also believes his "knowledge of the conditions and experiences of minority voters in Shelby County" could aid the Attorney General's defense. Harris Mem. at 12; *see also id.* at 13 ("[Harris's] unique knowledge and experiences may help contribute to the proper development of the factual issues in the litigation."). But, again, Harris's knowledge and experiences are immaterial because this is a *facial* challenge. *See supra* at 4.

[2] Thus, even if allowing local residents to intervene as of right in the *Northwest Austin* litigation was appropriate, it would not be here. In *Northwest Austin*, individual residents arguably were entitled to intervene in that action under Section 4(a)(4) of the VRA to defend against Northwest Austin's bailout claim. And, because Northwest Austin sought bailout and, at least initially, raised an as-applied constitutional challenge to Section 5, it was arguably unclear at the outset of that litigation that the interests of local residents would fully align with the Attorney General. Likewise, the bailout question raised issues with respect to which the local residents were able to provide a unique factual contribution. *See, e.g.*, 42 U.S.C. §§ 1973b(a)(1)(F)(ii)-(iii). Unlike *Northwest Austin*, this case does not present any of those bailout-specific issues.

almost always the case that [the Attorney General] can best discharge the responsibilities of his office by defending and enforcing the Act of Congress."). Indeed, the Attorney General must inform Congress if he intends to "refrain (on the grounds that the provision is unconstitutional) from defending or asserting, in any judicial, administrative, or other proceeding, the constitutionality of any provision of any Federal statute . . . ." 28 U.S.C. § 530D(a)(1)(B)(ii).

In any event, it is not an abstract question here: *this* Attorney General vigorously defended the constitutionality of *these* statutory provisions before the Supreme Court just last year. *See Nw. Austin Mun. Utility Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009). Moreover, the Attorney General has emphasized here that "there is no indication that [he] will not properly carry out his responsibility to defend this lawsuit." AG Resp. at 4. That the Attorney General may emphasize different aspects of the legislative record or make different legal arguments is an insufficient basis for granting party status to Harris. "It is not sufficient that the party seeking intervention merely disagrees with the litigation strategy or objectives of the party representing its interests." *Little Rock Sch. Dist. v. N. Little Rock Sch. Dist.*, 378 F.3d 774, 780 (8th Cir. 2004). At base, then, it seems clear that Harris intends to participate in this litigation in order to duplicate the Attorney General's constitutional defense of Sections 5 and 4(b) of the VRA. But intervention for the purpose of engaging in cumulative and duplicative litigation is inappropriate. *See Environmental Defense Fund v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979).

In fact, this is exactly the type of intervention application of which a district court should be especially wary; "piling on parties" can "result in delay as parties and court expend resources trying to overcome the centrifugal forces springing from intervention, and prejudice will take the form not only of the extra cost but also of an increased risk of error." *Mass. School of Law at Andover, Inc. v. United States*, 118 F.3d 776, 782 (D.C. Cir. 1997). A district court that grants

party status to individuals who "only marginally satisfy the standing requirements" and are not "truly aggrieved" will be "repeatedly required to respond to vague hypotheticals and speculation rather than concrete and actual harms." *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 825 n.75 (S.D. Ind. 2006). Harris believes his intervention "would not delay this litigation" and he notes that he "does not propose to add a counterclaim, expand the questions presented by the Complaint, or raise any additional affirmative defenses." Harris Mem. at 14. But it is unclear whether this Court could enforce such promises if Harris were allowed to intervene as of right under Rule 24(a)(2). *See City of Cleveland*, 17 F.3d at 1517; *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 469 (4th Cir. 1992).

If the Attorney General's own assurance that he will vigorously defend the constitutionality of Sections 5 and 4(b) is not enough, this Court should at least follow the course set by the district court in *Georgia v. Ashcroft*, 195 F. Supp. 2d 25 (D.D.C. 2002), before allowing intervention as of right. In that case:

> Two motions to intervene were filed early in the proceedings, one by four African American citizens of Georgia, Patrick Jones, Roielle Tyra, Della Steele and Georgia Benton ('Jones'), and one by Michael King, an African American lawyer and resident of Senate District 44. Both motions were denied without prejudice following the court's order that the United States identify its legal position . . . . The court invited the movants to file *amicus curiae* briefs, but held that, without clarification of the United States' legal position, it could not determine if the existing parties adequately represented the interests of the putative intervenors.
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> On December 31, 2001, the United States identified its position with respect to the proposed redistricting plans. On January 4, 2002, Jones filed a renewed motion to intervene. After receiving a response and reply to this motion, on January 10, 2002, the court granted Jones' motion to intervene and required the intervenors to comply with the Court's initial scheduling and pretrial order.

Id. at 32 (citations omitted). Thus, the district court granted the Jones application for intervention as of right only after it was assured that their position diverged from the Attorney General. *See Ashcroft*, 539 U.S. at 477 ("[T]he District Court granted the motion to intervene

because it found that the intervenors' 'analysis of the . . . Senate redistricting pla[n] identifies interests that are not adequately represented by the existing parties.'" (citation omitted)). Indeed, the district court even denied the ACLU's request to participate as *amicus curiae* because it "presented no unique information or perspective that [could] assist the court in this matter, and [sought] only to make additional legal arguments on behalf of the United States, a more than adequately represented party." *Georgia*, 195 F. Supp. 2d at 33.

But this Court need not engage in that exercise to resolve the present application. Although Harris is properly entitled only to participation as *amicus curiae*, Shelby County would not object to allowing him to permissively intervene if the Court determines in its discretion that such a step would be compatible with allowing this matter to proceed expeditiously. As this facial constitutional challenge involves an uncontestable factual record, *see* Plaintiff's SJ Mem. at 16-17 and n.2, there is no functional difference between permissive intervention and participation as *amicus curiae* in this instance. Either way, Harris's participation should be limited to briefing the pertinent legal issues. But unlike intervention as of right, permissive intervention allows this Court to set the terms of Harris's participation. *See Columbus-America Discovery Group*, 974 F.2d at 469 ("When granting an application for permissive intervention, a federal district court is able to impose almost any condition, including the limitation of discovery." (citation omitted)); *Beauregard, Inc. v. Sword Services LLC*, 107 F.3d 351, 352 n.2 (5th Cir. 1997) ("It is undisputed that virtually any condition may be attached to a grant of permissive intervention."). "Even highly restrictive conditions may be appropriately placed on a permissive intervenor, because such a party has by definition neither a statutory right to intervene nor any interest at stake that the other parties will not adequately protect or that it could

not adequately protect in another proceeding." *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 382 n.1 (1987) (Brennan, J., concurring).

As a consequence, this Court can exercise its plenary authority over Harris to prevent him from: (1) duplicating the efforts of the Attorney General or engaging in cumulative briefing; (2) interjecting new issues into this straightforward case arising under an undisputed legislative record; and (3) attempting to convert a purely legal dispute over the facial validity of these statutes into a factual controversy about Shelby County or some other covered jurisdiction. Shelby County has chosen to bring a facial challenge to Sections 5 and 4(b) both because it is convinced that these statutes are no longer constitutionally justified under the Fifteenth Amendment and because a facial challenge will allow this question to be finally resolved. This litigation strategy may have its own challenges, but Shelby County remains the master of its complaint. Thus, whether the Court chooses to limit Harris to *amicus curiae* participation, or instead allows him to permissively intervene, Shelby County remains focused on having these important constitutional questions resolved in a timely manner. By setting the terms of Harris's participation at the outset of the litigation, the Court can ensure that this straightforward legal dispute will not be sidetracked by costly, time-consuming, and needless procedural fencing or by the introduction of irrelevant factual issues.

III. CONCLUSION

For the foregoing reasons, Plaintiff Shelby County respectfully requests that this Court deny Harris's Motion to Intervene as of right under Rule 24(a)(2) and instead either allow him to intervene permissively under Rule 24(b)(1) or participate as *amicus curiae* in accordance with the conditions set forth in the Proposed Order.

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Respectfully submitted,

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