IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF SOUTH CAROLINA, Plaintiff, v. UNITED STATES OF AMERICA and ERIC H. HOLDER, JR., Attorney General of the United States, Defendants, and JAMES DUBOSE, JUNIOR GLOVER, FAMILY UNIT, INC., BRENDA C. WILLIAMS, M.D., and AMANDA WOLF, Applicants for Intervention.	)	No. 1:12-cv-00203-CKK-BMK-JDB

MEMORANDUM IN SUPPORT OF
MOTION FOR LEAVE TO INTERVENE AS DEFENDANTS

I. Introduction

This action was brought by the State of South Carolina seeking preclearance of Sections 4, 5, 7, and 8 of Act R54 (A28 H3003), collectively the "voter photo identification law," under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. When the voter photo identification law was submitted by the State of South Carolina to the Department of Justice for administrative preclearance, counsel for applicants submitted multiple Section 5 comment letters urging the Department of Justice to interpose an objection to the law. Copies of the comment letters setting out the basis for an objection are attached hereto as Exhibit A and Exhibit B and are incorporated herein by reference.

Applicants James Dubose, Junior Glover, and Brenda C. Williams, M.D. are African American residents and registered voters of South Carolina. Applicant Amanda Wolf is Caucasian and a resident and registered voter in South Carolina. Additionally, applicant Brenda C. Williams is the Executive Director of the Family Unit, Inc., a South Carolina-based non-profit organization that helps South Carolina citizens to register to vote. Furthermore, applicants Dubose, Glover, and Wolf do not currently possess an acceptable form of photo identification as required under South Carolina's voter photo identification law.[1]

All applicants have moved the Court for leave to intervene as of right and for permissive intervention pursuant to Rules 24(a)(2) and (b)(1)(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). In addition, the courts have stressed that Rule 24's intervention requirements should be liberally construed to favor intervention. *See, e.g., Nuesse v. Camp*, 385 F.2d 694, 702-04 (D.C. Cir. 1967); *American Horse Prot. Ass'n., Inc. v. Veneman*, 200 F.R.D. 153, 157 (D.D.C. 2001) (the interest requirement is "liberal and forgiving"); *Wilderness Society v. Babbitt*, 104 F.Supp.2d 10 (D.D.C. 2000) (same).

[1] South Carolina's voter photo identification law, Act R54, would require voters to present one of the following forms of photo identification in order to vote in person: (1) a South Carolina driver's license; another form of identification containing a photograph issued by the Department of Motor Vehicles; a passport; a military identification containing a photograph issued by the federal government; or a South Carolina voter registration card with a photograph. Applicants Dubose, Glover, and Wolf currently do not possess any of these forms of identification.

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.

A. Intervention is Timely

As an initial matter, the application for intervention is timely. Plaintiff filed its complaint on February 7, 2012. No answer or responsive pleading has been filed. No status conference has been held, no discovery has been undertaken, no dispositive orders have been entered in the case, and no trial date has been set. 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 Sch. Bd. 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) ("In fact, this may well be the *only* significant consideration when the proposed intervenor seeks intervention of right.") (emphasis added).[2] Where intervention will not delay resolution of the litigation, intervention should be allowed, provided that the proposed intervenor satisfies the criteria of Rule 24(a). *Texas v.*

[2]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).

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) (finding that the trial court abused its discretion by denying intervention in the absence of a showing of prejudice to the government). Applicants maintain that their motion for intervention is timely and that none of the parties will be prejudiced if they are allowed to intervene in this action.

B. Applicants Have an Interest Relating to the Litigation

As racial minorities protected by Section 5 of the Voting Rights Act, and as registered voters who reside in South Carolina, 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.*, whether the voter photo identification law should be precleared. Because of the importance of that interest, intervention in Section 5 cases is favored and the courts have routinely allowed it. *See Arizona v. Holder*, No. 11-1559, Order of January 11, 2012 (D.D.C.); *LaRoque v. Holder*, 650 F.3d 777, 782-3 (D.C. Cir. 2011); *Shelby County v. Holder*, 2011 WL 4375001 (D.D.C. 2011); *Georgia v. Holder*, 748 F. Supp.2d 16, 18 (D.D.C. 2010) (granting intervention to four groups of intervenors in a case that challenged the constitutionality of Section 5 of the VRA); *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 the VRA); *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 v. United States*, 517 F. Supp. 987, 991 n.2 (D.D.C. 1981); *New York v. United States*, 65 F.R.D. 10, 12 (D.D.C. 1974); *City of Richmond 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*); Virginia v. United States*, 386 F. Supp. 1319, 1321 (D.D.C. 1974); *City of Petersburg v. United States*, 354 F. Supp. 1021, 1024 (D.D.C. 1972).[3] *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 Bd. of Elections*, 838 F. Supp. 601, 604 (S.D. Ga. 1993); *Johnson v. Mortham*, 915 F. Supp. 1529, 1536 (N.D. Fla. 1995) (registered voters had "a sufficiently substantial interest to intervene" in a suit challenging congressional redistricting); *Baker v. Reg'l High Sch. Dist. 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:

> 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. Metro. Dade County, 985 F.2d 1471, 1480 (11th Cir. 1993).

Intervention is particularly appropriate in this case because applicants, unlike the defendants, are residents and voters of South Carolina and are therefore in a special position to

[3]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.

provide the Court with a local appraisal of the facts and circumstances involved in the litigation. In *Sumter County Council 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 racial minority voters of South Carolina, no individuals or entity could have a greater interest in the subject matter of the litigation.

C. 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). As registered voters in South Carolina, applicants Dubose, Glover, and Wolf have the right to vote in person on election day. However, Dubose, Glover, and Wolf do not possess any of the acceptable forms of photo identification that Act R54 would require. Specifically, applicant Wolf has been trying to obtain a driver's license or state-issued photo identification card from the Department of Motor Vehicles (DMV), but she first had to secure a copy of her original birth certificate, which was difficult because she was adopted. She also needed a copy of both her marriage license and divorce decree because she had taken the last name of her ex-husband. The process of obtaining these documents has taken her months, required the assistance of an attorney, caused her to incur financial expenses, and she still needs the DMV to finally issue her an acceptable form of identification. As for applicants Dubose and Glover, neither of them has or is able to locate an original birth certificate which means they will have to secure a delayed birth certificate. The process for obtaining a delayed birth certificate involves filing a petition with a court which, for

these men, would require the assistance of an attorney. S.C. Code Ann. § 44-63-100. Mr. Dubose and Mr. Glover lack the resources to retain an attorney and the other associated financial costs of obtaining an acceptable form of identification under Act R54.

Thus, if the voter photo identification law is precleared, these applicants will be unable to vote on in-person election day and, as a result, will be limited solely to casting absentee ballots. Moreover, applicant Williams will have less time to spend assisting people in voter registration and her non-profit organization, the Family Unit, Inc., will have to devote more of its limited financial resources and time helping potential voters to obtain proper identification. This would significantly hamper the primary mission of the organization's members, including Williams.

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

Applicants can satisfy Rule 24(a)(2)'s inadequate representation requirement by showing that representation of their interests "'*may be*' inadequate" and "the burden of making this showing should be treated as 'minimal.'" *United Guaranty Residential Ins. 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 Section 5 preclearance, *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); *Sumter County Council*, 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 Ins. Co.*, 819 F.2d at 475 (citing *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 Ins. Co.*, 819 F.2d at 475 (holding that the largest mortgage holder could intervene as 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 plaintiff, who oppose it. While the interests of the United States and applicants may converge on issues such as the constitutionality of Section 5 or the proper application of Section 5 to covered jurisdictions, they may diverge when it comes to which specific arguments should

be made before the Court and whether to appeal any adverse court rulings. 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 Res. Def. 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 Pub. 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 Gen. 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 determines that applicants do not satisfy the requirements for intervention as of right, it should grant permissive intervention under Rule 24(b)(1)(B). Rule 24(b)(1)(B) 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 a denial of preclearance as to the voter photo identification law, and their claims and defenses share 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 applicants' welfare, and accordingly intervention should be granted. Moreover, this Court routinely has granted permissive intervention in Section 5 actions. S*ee, e.g.*, *Arizona v. Holder*, No. 11-1559, Order of January 11, 2012 (D.D.C.); *LaRoque v. Holder*, 650 F.3d 777, 782-3 (D.C. Cir. 2011); *Shelby County v. Holder*, 2011 WL 4375001 (D.D.C. 2011); *Florida v. United States*, No. 11-01428, Order of October 19, 2011 (D.D.C.).

Conclusion

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

Respectfully submitted,

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