IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, Plaintiff, v. UNITED STATES OF AMERICA, and ERIC HOLDER, JR., Attorney General of the United States, Defendants, and SENATOR WENDY DAVIS, REPRESENTATIVE MARC VEASEY, JOHN JENKINS, VICKI BARGAS, and ROMEO MUÑOZ Proposed Defendant-Intervenors	No. 1:11-cv-01303-RMC-TBG-BAH

PROPOSED DEFENDANT-INTERVENORS' REPLY IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE

Proposed Defendant-Intervenors Wendy Davis, Marc Veasey, John Jenkins, Vicki Bargas, and Romeo Munõz ("Proposed Defendant-Intervenors") respectfully submit this reply in support of their motion to intervene. Proposed Defendant-Intervenors continue to believe that they may intervene as of right under Rule 24(a), consistent with this Court's grant of such intervention in similar cases. *See* Fed. R. Civ. P. 24(a); Order, *N.C. State Bd. of Elec. v. United States*, Civ. Act. No. 02-1174 (Jun. 25, 2002); Order, *Florida v. United States*, Civ. Act. No. 02-0941 (May 28, 2002). But in any event, as the Department of Justice ("DOJ") and even the

State of Texas agree, this Court is authorized in its discretion to grant permissive intervention under Rule 24(b), as numerous decisions in this Court have held. *See* Fed. R. Civ. P. 24(b).

The Supreme Court's decision in *Georgia v. Ashcroft*, 539 U.S. 461, 476-77 (2003) is directly on point and plainly establishes that permissive intervention is proper in proceedings under Section 5 of the Voting Rights Act. The State of Texas makes no different arguments to this Court than those the Supreme Court already rejected from the State of Georgia. Though it acknowledges that *Georgia v. Ashcroft* controls here, Texas nonetheless asks this Court to close the proceedings to prospective intervenors. Texas takes a curious position given that it could have, but did not, choose to submit its redistricting plans for preclearance through the DOJ administrative process. Having made the choice to instead pursue judicial preclearance from this Court, Texas cannot now complain that it is prejudiced because the court proceedings (unlike the administrative proceedings it declined to make use of) are open to intervenors.

I. *GEORGIA V. ASHCROFT* CONFIRMS THAT PERMISSIVE INTERVENTION IS APPROPRIATE IN SECTION 5 PROCEEDINGS.

A. The Supreme Court Has Already Rejected Texas's Arguments Against Permissive Intervention

Although Proposed Defendant-Intervenors continue to believe they may intervene as of right pursuant to Rule 24(a), as described at length in their initial filing, *see* Mem. in Support of Mot. To Intervene at 2-10, this Court need not answer that question here because the Supreme Court's decision in *Georgia v. Ashcroft* made clear that permissive intervention pursuant to Rule 24(b) is available. *See* 539 U.S. at 476-77. In *Georgia v. Ashcroft*, the Supreme Court upheld the district court's decision to grant intervention by parties similarly situated to Proposed Defendant-Intervenors in this case. *See id.* The Supreme Court did so even though the intervenors in that case raised claims that were distinct from those raised by the DOJ. *See*

Georgia v. Ashcroft, Civ. Act. No. 01-2111 (Jan. 30, 2002); *see also* Brief of Appellant State of Georgia, *Georgia v. Ashcroft*, 539 U.S. 461 (2003) (No. 02-182), 2003 WL 554486 at *3.

In this Court, the State of Texas makes exactly the same arguments as those the Supreme Court already rejected from the State of Georgia about why permissive intervention should be denied. First, Georgia, just like Texas, argued that permissive intervention was inappropriate because the intervenors' objections to the State's redistricting plans "did not endow them with a 'claim or defense' in common with the 'main action.'" *Compare* Georgia Br. at 43 and Reply Brief of Appellant State of Georgia, *Georgia v. Ashcroft*, 539 U.S. 461 (2003) (No. 02-182), 2003 WL 1945491 at *15 with Dkt. 8 at 2, 6-7. Second, Georgia, just like Texas, argued that allowing intervenors in Section 5 proceedings would "expand[] the scope of the case" and cause delay. *Compare* Georgia Br. at 42 *with* Dkt. 8 at 3. Third, Georgia, just like Texas, argued that whatever "federal rights [intervenors] may have to challenge voting practices derive from the Constitution and § 2 of the Voting Rights Act," and thus they should be limited to pursuing Section 2 suits rather than intervening in Section 5 proceedings. *Compare* Georgia Reply Br. at 12 *with* Dkt. 8 at 4-5. Fourth, Georgia, just like Texas, complained about how Section 5 proceedings "intrude[] upon basic principles of federalism" and argued that permitting intervenors would only exacerbate these concerns. *Compare* Georgia Br. at 40 *with* Dkt. 8 at 9-11.

The Supreme Court unequivocally rejected each of these arguments against Section 5 intervention and instead found that "Section 5 does not limit in any way the application of the Federal Rules of Civil Procedure to this type of lawsuit, and the statute by its terms does not bar private parties from intervening." 539 U.S. at 476. Thus, the Supreme Court held that the district court was fully authorized to permit intervention in Georgia's Section 5 proceedings

under Rule 24(b). *See id.* at 476-77. Texas's disquisition on the differences between Section 2 and Section 5, its complaints about being subjected to suit under Section 2,[1] its laments about the purported federalism burdens that Section 5 imposes, and its opinions on proper standing are completely beside the point. The United States Supreme Court has already looked at the exact circumstances presented here and decided that intervention under Rule 24(b) is permissible. Texas is simply attempting to reargue *Georgia v. Ashcroft* to this Court, but there is nothing that distinguishes the arguments Texas makes from those the Supreme Court already rejected.

B. There Are No Precedents Supporting The Position Texas Takes Here.

Texas's attempts to marshal precedent for its position are unavailing. Indeed, in the only Section 5 preclearance case Texas cites in which intervention was initially denied, the panel later permitted intervention. *See* Dkt. 8 at 2 (citing *Georgia v. Reno*, 881 F. Supp. 7 (D.D.C. 1995)). The only other case Texas cites that even concerns the Voting Rights Act involved the Act's bail-out provision, not Section 5 preclearance. *See Apache County v. United States*, 256 F. Supp. 903, 905 (D.D.C. 1966).[2] Moreover, the court in *Apache County* held only that the intervenors could not intervene as of right, *id.* at 906, while rejecting DOJ's position at the time that

[1] To the extent this Court finds that a party's status in a pending Section 2 suit relevant to the question of party's value to the Court and rights as an intervenor in a Section 5 preclearance – which counsel maintains it is not – only one of the parties here is represented by counsel in any pending Section 2 proceedings. Indeed, Texas concedes as much. *See* Dkt. 8 at 5.

[2] None of the other cases Texas cites are Section 5 or Voting Rights Act cases. Indeed, each involves statutes and circumstances that are entirely inapposite. *See LeBoeuf, Lamb, Greene & MacRae v. Abraham*, 205 F.R.D. 13 (D.D.C. 2001) (addressing intervention in a bid-protest matter); *Stewart v. Rubin*, 848 F. Supp. 1077 (D.D.C. 1996) (addressing whether non-class members could intervene in a Title VII suit against the U.S. Department of Treasury); *United States v. Thomson Corp.*, No. 9601415 PLF, 1996 U.S. Dist. LEXIS 14819, at *7-8 (D.D.C. Sept. 25, 1996) (addressing intervention in a suit involving the Antitrust Procedures and Penalties Act); *Sweet Home Chapter of Communities*, 1991 U.S. Dist. LEXIS 17449 (D.D.C. Dec. 10, 1991) (addressing intervention in a suit involving the Endangered Species Act). Notably, Texas does not (and cannot) cite a single case in which permissive intervention in a Section 5 preclearance case has been denied.

permissive intervention was barred, *id.* at 907. Unsurprisingly, in the more than 45 years that have passed since the *Apache County* case, DOJ has changed its position. As reflected in the response DOJ filed to Prospective Defendant-Intervenors motion to intervene, DOJ does not oppose permissive intervention in Section 5 cases and does not oppose it here. Dkt. 6 at 1, 5. Indeed, DOJ believes that "[a]s elected officials, residents, and registered voters, Movant-Intervenors possess relevant knowledge and a 'local perspective on the current and historical facts,' at issue in this litigation." *Id.* at 3. And DOJ points this Court to the vast number of cases in which permissive intervention was granted in Section 5 proceedings. *Id.* at 3 n.1. As DOJ notes, this Court has "routinely recognized intervention by persons situated similarly" to Proposed Defendant-Intervenors. *See County Council of Sumter County v. United States*, 555 F. Supp. 694, 696-97 (D.D.C. 1983); *see also* DOJ Resp. at 3 n.1 (listing cases).

Texas's assertions that Proposed-Intervenor Defendants do not have standing or a private cause of action are contrary to long-established, as well as more recent, precedent.[3] Texas inexplicably relies on *Georgia v. Ashcroft*, 539 U.S. at 479, for this point, but as noted the Court upheld intervention of similarly situated parties in that case. Texas characterizes *Georgia v. Ashcroft* as prohibiting individuals from demanding that a particular district be drawn in a particular place. Dkt. 8 at 8 (citing *Georgia v. Ashcroft*, 539 U.S. at 479). But in the passage Texas cites, the Court noted that "the diminution of a minority group's effective exercise of the electoral franchise in one or two districts may be sufficient to show a violation of § 5" if this loss is not offset state-wide. That is precisely the combination of factors that Proposed Defendant-Intervenors allege here. They contend, *inter alia*, that Texas has fractured a pre-existing

[3] Texas's standing argument is also erroneous to the extent that it describes Proposed Defendant-Intervenors solely as "office holders and seekers." Dkt. 8 at 5. Rather, Proposed Defendant-Intervenors represent individuals in their capacity as minority voters, Mot. for Leave to Intervene at ¶¶ 4-8, as well as two successful candidates of choice for minority voters, *id.* at ¶¶ 4-5.

effective minority State Senate seat, Mot. to Intervene ¶¶ 10-12, 16, while also failing to make up for this retrogression in other areas of the state in a process infected with a discriminatory purpose, *id.* ¶¶ 13-15. Thus, Proposed Defendant-Intervenors raise precisely the injuries envisioned by *Georgia v. Ashcroft*.

Moreover, this Court has recognized that parties like Proposed Defendant-Intervenors, a group of minority voters and two legislators, "have standing and an interest in this case" because they "allege their right to vote will be impaired by the proposed redistricting plans." *See Georgia v. Ashcroft*, Civ. Act. No. 01-2111 (D.D.C. Jan. 10, 2002), at 4 (citing *Federal Election Commission v. Akins*, 523 U.S. 11, 25 (1998)); *cf. LaRoque v. Holder*, 2011 WL 2652441, at *1, *8-9, *11-13 (D.C. Cir. July 8, 2011) (holding that office seekers had standing and a cause of action to challenge enforcement of Section 5 that would bar changes to a partisan election system). Additionally, other federal courts have recognized that the candidate of choice from a minority opportunity district that is fractured represents an additional, personal, and representational interest. *See League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 884 F.2d 185, 188 (5th Cir. 1989); *Johnson v. Mortham*, 915 F. Supp. 1529, 1538 (N.D. Fla. 1995). Proposed Defendant-Intervenors bring exactly these interests to bear.

Finally, Texas suggests that prospective intervenors should simply participate as *amici*. But *amicus* status is not sufficient to vindicate the interests at stake here. Unlike *amici*, intervenors do not have to ask the court's consent to file initial motions, participate in discovery, or attend settlement discussions. *Cf. LeBoeuf*, 205 F.R.D. at *21. Intervenors also have the right to appeal cases, even if they raise different issues than that of the initial party on whose side they have filed and even where the initial party chooses not to appeal. *See City of Lockhart v. United States*, 460 U.S. 125, 130 (1982) (noting that the United States had joined the position of

the City, while intervenor continued to defend the result below); *Georgia v. Ashcroft*, 539 U.S. at 477 (upholding private parties' intervention even where private parties raised claims not raised by DOJ); *National Wildlife Fed'n v. Lujan*, 928 F.2d 453, 456 n. 2 (D.C. Cir.1991) (proceeding to the merits of private intervenors' appeal even though the government did not appeal).[4] Thus, in this context, Proposed Defendant-Intervenors would be significantly prejudiced if they are relegated to the status of *amici*.

II. TEXAS'S COMPLAINTS ABOUT POTENTIAL DELAY AND PREJUDICE ARE BASELESS.

Texas's arguments that intervention would cause delay and prejudice are baseless. Not only did the Supreme Court reject these same objections in *Georgia v. Ashcroft*, *see supra*, but also the facts of this case demonstrate why such concerns are unfounded. Texas does not even try to argue that Proposed Defendant-Intervenors caused any delay by waiting a mere two days after Texas filed its complaint to file their intervention. *See* Dkt. 8 at 11-12. Instead, Texas contends that the "prospect of discovery and motion practice . . . creates new and unnecessary risk of delay." *Id.* at 11. This Court's routine practice of allowing intervenors in these cases, s*ee supra*, refutes this concern. Indeed, this Court has cited the importance of the evidence that intervenors are in a unique position to present in allowing intervention. *See Sumter County*, 555 F. Supp. at 697. The fact that DOJ has not objected to the intervention proposed here provides another indication that there is little risk of prejudicial burdens brought on by Proposed Defendant-Intervenors. *Cf. Allen v. State Bd. of Elections*, 393 U.S. 544, 557 n.23 (1969) ("It is

[4] As discussed more fully in Proposed Defendant-Intervenors' Memorandum in Support of the Motion to Intervene, courts have often recognized the right to intervene in similar contexts because government entities may not represent identical interests to those of private parties. *See Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538-39 (1972); *see also* Proposed Defendant-Intervenors' Memorandum in Support of the Motion to Intervene at 9-10. As the cases cited above demonstrate, this divergence of interests has arisen in the Section 5 preclearance context over the course of the litigation.

significant that the United States has urged that private litigants have standing to seek declaratory and injunctive relief in these suits."). Proposed Defendant-Intervenors will adhere to any schedule the Court sets as Proposed Defendant-Intervenors have no interest in delaying the proceedings.[5]

If Texas had truly desired the speediest route to a decision, Texas had the option of filing a formal submission requesting preclearance from DOJ. The Supreme Court has emphasized that the "most expeditious method" of seeking preclearance is this administrative process. *McCain v. Lybrand*, 465 U.S. 236, 247 (1984); *see also Morris v. Gressette*, 432 U.S. 491, 504 (1977) (explaining that the legislative history shows that the administrative process was meant to offer a "speedy alternative" to "declaratory judgment actions"). Had Texas chosen to pursue administrative preclearance, private parties like Proposed Defendant-Intervenors would not be able to seek judicial review if DOJ decided not to interpose an objection to the proposed plans. *See Morris*, 432 U.S. at 502-03. Having chosen to avail itself of the resources of this Court, rather than the speedier, closed administrative process at DOJ, Texas cannot now complain when the Court remains open to intervenors consistent with this Court's longstanding practice.

[5] Texas's argument that Proposed Defendant-Intervenors, inasmuch as they are candidates, have no countervailing interest because the filing deadline is not until November 12, 2011, is unavailing. *See* Dkt. 8 at 11. In *LaRoque*, the D.C. Circuit concluded that injury to a candidate was sufficiently imminent where the election was "only nineteen months away," rather than the "four years" that had been too far away in *McConnell v. FEC*, 540 U.S. 93, 225–26, (2003). 2011 WL 2652441 at *8. Moreover, as discussed, other federal courts have found that elected officials do indeed have an interest at stake. *See supra* at 6.

CONCLUSION

For the foregoing reasons, Proposed Defendant-Intervenors respectfully request that the Court grant their Motion to Intervene in this matter under Fed. R. Civ. P. 24(a)(2) or, alternatively, grant permissive intervention under Fed. R. Civ. P. 24(b).

This 8th day of August, 2011.

Respectfully submitted,

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