IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, Plaintiff, v. UNITED STATES OF AMERICA, and ERIC H. HOLDER, JR. in his official capacity asAttorney General of the United States, Defendants.	)	Case No. 11-01303 RMC

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO INTERVENTION

Texas agrees with the United States that the request by Senator Davis, Representative Veasey, and their respective constituents to intervene as parties to the proceeding is not proper under Federal Rule 24(a), as the United States adequately represents the interest they seek to advance and there is no unconditional statutory right to intervene. Rather, if intervention is proper here, it is so because it might be allowed at the discretion of the Court under subsection (b) of that Rule.

In view of the unique nature of this proceeding, it is unlikely that intervention could ever fit within the literal text of subsection (b), which "generally" requires any putative intervenor to either point to an explicit statutory right to intervene or show a "claim" or "defense" in common with the United States or Texas—neither of which has been established in the instant motion—and to show that intervention would not risk delaying the proceeding.

See FED. R. CIV. P. 24(b). For present purposes, however, Texas is prepared to concede that the Court has the discretion to permit intervention as a general proposition, as reflected in the holding in *Georgia v. Ashcroft*, 539 U.S. 461 (2003)(approving discretionary intervention without confronting existence of implied private right of action in the main preclearance action, Eleventh Amendment, or standing issues).

Even assuming jurisdiction and the existence of a private cause of action, the first question here, notably unasked and unanswered in *Ashcroft*, is whether and when that discretion should be exercised in a case of this nature. Here, beyond extreme timing constraints, three factors militate strongly against intervention: (1) the intervenors have no direct right or interest at stake in this matter but are already actively pursuing their private interest in pending litigation elsewhere; (2) the United States Department of Justice is not only mandated to pursue the one statutorily-created "claim" at issue here, but is actively and competently pursuing it; and (3) the intervenors' ability to promote the proper application of the law to that claim can be fully preserved by the simple expedient of filing an amicus brief.

For these and other reasons, the Court has rejected similar intervention efforts in the past, including *Georgia v. Ashcroft,* where it initially denied intervention as premature pending development of the Department of Justice's preclearance position. *See Georgia v. Reno,* 881 F. Supp. 7 (D.D.C. 1995); *see also, Leboeuf v. Lamb*, 2001 U. S. Dist. LEXIS 6569, at *24 ("Although Nevada is not entitled to intervene in this case, either permissively or of right, the court

will allow Nevada to participate as amicus curiae."); *Stewart v. Rubin*, 948 F. Supp. 1077, 1105 (D.D.C. 1996) ("[T]he Putative Intervenors are not prejudiced because their views could be presented as amicus curiae…") *United States v. Thomson Corp.,* No. 96-1415 PLF, 1996 U. S. Dist. LEXIS 14819, at *7-8 (D.D.C.) (intervention denied but right to participate as amicus curiae by filing a brief allowed); *Sweet Home Chapter of Communities*, 1991 U.S. Dist. LEXIS 17449, at *11 ("[I]ntervenors' input may also be adequately received through the timely filing of amicus brief; *Apache County v. United States,* 256 F. Supp. 903, 906 (D.D.C. 1966) ("the right enforced by [the statute] is a public right, appertaining not to individual citizens, but to the United States itself").

Granting the intervenors party status at this stage will serve only to promote an expansion of discovery and motion practice, and could result in a trial or an appeal that might otherwise be avoided in view of the ongoing communications between the State and the Department of Justice. *United States v. Blagojevich,* 612 F.3d 558 (7th Cir. 2010). ("Intervention not only complicates the process of adjudication (extra parties file extra briefs and may obstruct settlements by the original parties) but also is expensive for everyone involved.").

In all events, intervention is simply not warranted given the unique nature of the case and the claims the intervenors hope to advance.

I. THE SECTION 5 INQUIRY IS *SUI GENERIS* AND RAISES HEIGHTENED FEDERALISM AND COMITY CONCERNS THAT ARE DISSERVED BY OPENING THE STATES TO PRIVATE LITIGATION WITH DISGRUNTLED OFFICE SEEKERS.

A. The Injury Intervenors Advance Arises Under Section 2 of the Voting Rights Act—Not Section 5.

The Voting Rights Act was "a dramatic and severe response" to a serious national crisis. *Shaw v. Reno*, 509 U.S. 630, 639 (1993). Section 2 of that Act opens the states to claims of discrimination in the application of a "voting qualification, or prerequisite to voting or standard, practice, or procedure [that is imposed] in a manner which result in abridgement of the right of any citizen . . . to vote on account of race . . . ." 42 U.S.C § 1973(a) (2003). That section has been construed to reach to not only the standards by which districts are devised (i.e. multi-member versus single member districts), but also the metes and bounds by which every single member district is drawn. *E.g., Growe v. Emison*, 501 US. 25 (1993). As a result, the section 2 proceeding has developed into a generalized forum for any and all complainants directed at a state's redistricting plan or, as is often the case, to simply re-assert and redress (as dilution claims) what are essentially political arguments that were made in floor debates and rejected in the state legislature. This far-reaching and ever evolving claim is available whether the effort to redistrict was a matter of the State's choice or, as here, is an unavoidable mandate effected by the new census and the teachings of *Baker v. Carr*, 369 U.S. 186 (1962).

Indeed, section 2 proceedings have already been brought against the Texas plan in the apparent hope, as one well-known political consultant

describes it, that if "you throw every cause of action at the map" something might stick; "You never know what's going to interest the judges." Lawsuit Alleges Texas Congressional Redistricting Plan Discriminates Against African Americans, *Houston Chronicle* (www.blog.chron.com) 7/16/11 (attributing quote to Harold Cook). As of this filing, Texas has been sued not just once, but 18 times over this round of redistricting, with many of those cases having been filed before Texas had even proposed, much less enacted, the plans to which the claims apply. The section 2 filing-frenzy has already devolved to the point where the various plaintiffs have been reduced to debating amongst themselves (over the course of weeks no less) what precise day and minute the window for properly filing a ripe section 2 suit opened. Op. Dissenting from Order of Transfer, *Rodriguez v. Perry*, No. A-11-CA-451-LY-JES-OLG (W.D. Tex., Jul. 27, 2011)(Yeakel, J., dissenting). Putative Intervenor Veasey is already a party to the pending section 2 proceedings where he engages the same counsel seeking intervention here.

B. Plaintiffs Have No Personal Claims or Constitutional Injury to Pursue In a Section 5 Proceeding.

Enlarging the section 5 proceeding to add a third forum for office holders and seekers to air their respective grievances is not simply unhelpful in view of the ongoing parallel litigation, it also risks ignoring the narrow purpose and scope of section 5. Section 5 imposes on some states the affirmative burden of demonstrating that any change in voting, including mandated redistricting, does not retrogress the position of racial minority groups on a statewide basis. *Georgia v.* Ashcroft, 539 U.S. at 479. Section 5 was designed as an

extraordinary (and ostensibly temporary) mandate compelling a proceeding between sovereigns to address a serious national crisis. As explained in *Beer v. United States*, 425 U.S. 130, 140 (1976):

> Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down. That practice had been possible because each new law remained in effect until the Justice Department or private plaintiffs were able to sustain the burden of proving that the new law, too, was discriminatory . . . . Congress therefore decided, as the Supreme Court held it could, "to shift the advantage of time and inertia from the perpetrators of the evil to its victim," by "freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory."

425 U.S., at 140.

A. Intervenors Have Not Alleged a "Claim" in Common With the United States

Under Rule 24, intervenors must show a "claim" in common with the United States. Significantly, but not surprisingly, section 5 contains no explicit private cause of action opening the states to private lawsuits and the attendant burdens associated therewith. In *Allen v. State Board of Elections*, 393 US. 544 (1969), the Supreme Court recognized an implied cause of action for a very narrow purpose: to enjoin implementation of a change in voting procedure that has not been submitted for preclearance pursuant to section 5. That implied claim did not reach to the main preclearance action, such as the one at issue here. As Justice White later observed in *Cannon v. University of Chicago*, 441 U.S. 677, the *Allen* Court,

> pointedly declined to infer a private cause of action to enforce the suspension requirement of section 4 of the Act; nor may those

> allegedly discriminated against bring suit to test voting changes in covered units against the substantive standard of section 5, either directly or through judicial review of the Attorney General's preclearance decision.

Id. at 728-29 (White, J., dissenting) (internal citation omitted).

Instead, in the proceeding contemplated by *Allen*, neither the parties nor the court has the power to pose the substantive question at issue in a judicial or administrative preclearance proceeding: "whether the change at issue resulted in an impairment of the right to vote." *NAACP v. Hampton County Elec. Comm'n*, 470 U.S. 166, 181 (1985). That question is reserved to this Court or the Department of Justice with, at least in the case of administrative preclearance, no private judicial review afforded to the decision not to object. *Morris v. Gressette*, 432 US. 491 (1977). Neither the briefing to the Court nor the Court's decision in *Georgia v. Ashcroft* probed the question of whether a broader cause of action has been or should be implied in section 5 under the current law, *e.g., Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.,* 128 S. Ct. 761 (2008) (applying modern implied cause of action standard), or whether in the process of doing so Congress "unequivocally expressed its intent to abrogate [the states'[1] Eleventh Amendment immunity] and . . . if it did, whether Congress acted pursuant to a valid grant of constitutional authority." *Kimel v. Florida Bd. of Regents,* 582 U.S. 62, 73 (2000).

[1] Notably, this action is between the United States and the State of Texas. The claim intervenors intend to pursue is one directly against the State.

B. Plaintiffs Have Alleged No Justiciable Injury Under Section 5.

Intervenors also fail to identify a cognizable injury that would support their standing to proceed in this action, as they must to support intervention. *E.g., Stewart v. Rubin*, 948 F. Supp. 1077, 1105 (D.D.C. 1996). While a section 2 proceeding, like those pending in Texas, is aimed at protecting the individual right to vote and thus has been the subject of multiple interventions, a section 5 proceeding simply looks to the state as a whole to determine whether entire groups of people within it have retrogressed in their collective ability to exercise the franchise. Thus, in a section 2 case, it is no answer to say that a historically "performing" majority-minority district has been erased in favor of another one somewhere else; this is because it well-settled that the rights at issue in a section 2 are peculiar to the voters in each district. *E.g., LULAC v. Perry,* 548 U.S. 388, 430 (2006).[2] In contrast, in a section 5 proceeding such as this, no individual voter -- or office seeker for that matter -- has a right to demand that a particular district be drawn in a particular place. *Georgia v. Ashcroft,* 539 U.S. at 479.[3] The only personal "injury" an intervenor could

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[2] Simply put, "the State's creation of an opportunity district for those without a [section] 2 right offers no excuse for its failure to provide an opportunity district for those with a [section] 2 right. And since there is no [section] 2 right to a district that is not reasonably compact, the creation of a noncompact district does not compensate for the dismantling of a compact opportunity district**. . . .** The noncompact district cannot, however, remedy a violation elsewhere in the State." *Id.* (internal citations and quotations omitted).

[3] "[I]n examining whether the new plan is retrogressive [under section 5], the inquiry must encompass the entire statewide plan as a whole. Thus, while the

allege in such a case is an amorphous and generalized psychic grievance of a type that would not support Article III standing.

C. Subjecting the States to "Routine" Intervention Exacerbates the Federalism Concerns that Already Weigh Heavily on Section 5

As the Supreme Court has recognized, this section 5 proceeding between Texas and the United States already carries massive federalism costs that were once "justified by those extraordinary circumstances" and the expectation that the provision would expire. *Miller v. Johnson*, 515 U.S. 900, 925 (1995) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 309, 86 S.Ct. 803, 808, 15 L.Ed.2d 769 (1966)). Of course, the expectation that section 5 would be temporary or necessarily constrained to a constitutional purpose has since proved optimistic. *E.g., Miller*, 515 U.S. at 925 (rejecting Justice Department's reading of section 5 as "implicit command that States engage in presumptively unconstitutional race-based districting"); *Lopez v. Monterey County*, 525 U.S. 266, 293 (Scalia, J., dissenting).

Just two years ago the Court avoided the "difficult constitutional question" of "whether conditions continue to justify such legislation" as between the several states to which it applies and the national government in *Northwest Austin Municipal Utility Dist. v. Holder*, 129 S. Ct. 2504, 2517 (2009).

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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 [section] 5, it is only sufficient if the covered jurisdiction cannot show that the gains in the plan as a whole offset the loss in a particular district." *Id.* (internal citations omitted).

Now, the proposed intervenors at bar claim that the states are held open "as a routine matter" to suit from all comers and their various demands to produce documents, answer interrogatories and sit for depositions, putting more weight on the Act than its design limits could ever bear.

Indeed, subjecting the states to a suit where they bear the burden of proving, in essence, that they are not governed by recalcitrant lawbreakers is extraordinary in itself, albeit perhaps once justified by the historic exigencies of the middle 1960s. But where the state is already subjected to the same burdens in a private suit, the inherent federalism and comity concerns already weighing on Section 5 are joined with Eleventh Amendment concerns and questions of whether the section is best read to support a private right of action in the first place. Finding an after-the-fact claim impliedly lurking in the Act, as the Supreme Court has in *Allen*, is a far cry from opening the state to suit at the plenary pre-clearance stage with all or any private parties who want to debate (or as here re-argue) its redistricting choices. *Id.*

While a state is typically held to have waived its Eleventh Amendment immunity by voluntarily filing suit in federal court, the resulting waiver is always a product of the state's choice in filing suit. Here, Texas did not have any choice but to redistrict. *See Baker v. Carr*, 369 U.S. 186 (1962) (One-person, one-vote principles require redistricting upon issuance of new decennial census). And, just as surely, it cannot conduct an election without initiating this proceeding (or an administrative proceeding that would lead

directly back to this Court if the State failed to obtain administrative pre-clearance).

While Texas freely concedes that private parties have the right to seek injunctive or declaratory relief (in federal court in Texas) should the State attempt to hold an election without first obtaining pre-clearance and, further, that these same parties have a private right of action to pursue claims on their behalf in section 2 proceedings, as they already are, subjecting the state to suit with two of its office-holders in this proceeding is neither proper nor necessary.

II. THE INTERVENTION HERE IS NOT OF THE TYPE RULE 24(b) PROMOTES, AND CARRIES RISKS OF DELAY AND PREJUDICE THAT MILITATE IN FAVOR OF DENIAL

This is not a stock drop, mass tort or other case of the type imagined by Rule 24's permissive intervention mechanism. Intervention here would serve only to complicate and delay the proceedings and preclude the prospect of a prompt settlement of a claim that exists only between two co-equal and cooperating sovereigns.

Meanwhile, the filing deadline for candidates seeking to run for office, including intervenors here and their would-be opponents, will open on November 12, 2011. Allowing the intervention here, with the attendant prospect of discovery and motion practice, creates new and unnecessary risk of delay. FED. R. CIV. P. 24(B)(3) (identifying possible delay as cause for denying permissive intervention). The Department of Justice has established a

commendable record of preclearance[4] and has already administratively settled or disposed of two prior statewide preclearance actions filed in this Court during this redistricting cycle. *E.g.*, *Louisiana v. Holder,* No1:11-cv-00770-ABJ (dismissed). Permitting intervention at this stage is, at a minimum, premature and unhelpful.[5]

Dated: August 3, 2011

Respectfully Submitted,

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[4] U.S. COMMISSION ON CIVIL RIGHTS, *"Voting Rights Enforcement and Reauthorization: The Department of Justice's Record of Enforcing the Temporary Voting Rights Act Provisions"* at 62 (May 2006). http://www.usccr.gov/pubs/051006VRAStatReport.pdf).

[5] The very recent decision of the District of Columbia Circuit in *LaRoque v. Holder,* 2011 WL 2652441 (D.C. Cir.), illustrates an instance in which the prospective intervenors' interests were *not* being properly addressed by the government-parties to the litigation. (The City of Kinston, North Carolina, expressly refused to seek review of the objection interposed by the Department of Justice to preclearance of the voting change approved by the referendum in suit.) Absent participation by the intervenors, no remedy for their supposed injury exists. Here, of course, the Department of Justice is both actively and ably representing the same interests as the proposed intervenors.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent *via* certified mail, return receipt requested and/or through the Court's electronic notification system to the following parties on August 3, 2011:

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ORDER

Before the Court is the proposed intervention of Senator Wendy Davis, Representative Marc Veasey, John Jenkins, Vicki Bargas and Romeo Muñoz. Movants seek intervention as of right, pursuant to Fed. R. Civ. P. 24(a), and, in the alternative, permissively, pursuant to R. 24(b). The United States has responded, opposing intervention as of right, but interposing no opposition to permissive intervention. The State of Texas has filed an Opposition to Intervention under either subdivision.

The Court concurs with both Respondents that only permissive intervention is properly before it, as no intervention of right is available to the Movants.

For the reasons set forth in the Memorandum in Opposition filed by the State of Texas, the Court exercises its discretion and, it is this _____ day of August, 2011:

ORDERED that the Motion for Intervention is DENIED.

DATED:_____ _____
United States District Judge