IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, Plaintiff, v. UNITED STATES OF AMERICA; ERIC HOLDER in his official capacity as Attorney General of the United States, Defendants, SENATOR WENDY DAVIS REPRESENATIVE MARC VEASEY JOHN JENKINS, VICKI BARGAS and ROMEO MUÑOZ, Defendant Intervenors, and TEXAS LEGISLATIVE BLACK CAUCUS, Proposed Defendant-Intervenor, and MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC), Proposed Defendant- Intervenor.	CIVIL ACTION NO. 1:11-cv-01303 (RMC-TBG-BAH)

JOINT REPLY OF THE TEXAS LEGISLATIVE BLACK CAUCUS AND MEXICAN AMERICAN LEGISLATIVE CAUCUS, PROPOSED DEFENDANT INTERVENORS, TO PLAINTIFF'S OPPOSITION TO INTERVENTION

The Texas Legislative Black Caucus ("TLBC") and the Mexican American Legislative Caucus ("MALC"), proposed Defendant-Intervenors in this action (hereinafter, "Applicants"), respectfully submit this Joint Reply to Plaintiff's Memorandum of Points and Authorities in

Opposition to Intervention [Doc. 22]. As set forth herein and in Applicants' respective Motions (docs. 13 and 16), intervention as of right is appropriate under Fed. R. Civ. P. 24(a)(2) and, in the alternative, permissive intervention should be allowed under Fed. R. Civ. P. 24(b).

Plaintiff has filed a single memorandum in response to Applicants' requests for intervention (as well as two other pending requests), and states that "[b]ecause the court has already granted permissive intervention to one Intervenor, the state will stand on its earlier objections to the Davis Intervenors" (presumably referring to Plaintiff's August 3, 2011 memorandum [doc. 8]). Memorandum, at 3. Indeed, this statement by the Plaintiff implicitly, if not explicitly, recognizes the fundamental problem with Plaintiff's opposition to Applicants' motion: Applicants' intervention motion has the same legal basis as the Davis Intervenors' motion. Plaintiff presented various legal arguments for denying the Davis motion, and this Court rejected those arguments and granted intervention. Accordingly, because Applicants have demonstrated in their original memoranda that they satisfy the standards for Rule 24 intervention, Applicants' motions should be granted as well.

In these circumstances, Applicants will respond to the few specific arguments Plaintiff made in its opposition memorandum, rather than engage in a point-by-point rebuttal of Plaintiff's arguments in opposition to the Davis Intervenors' motion. First, Plaintiff's argument against permissive intervention wrongly conflates the "claim or defense" language of Rule 24(b) with a "cause of action." Rule 24 does not require that intervenors have a cause of action that would allow them to initiate a separate lawsuit. *Trbovich v. United Mine Workers*, 404 U.S. 528, 531-32 (19972) (union member allowed to intervene in a suit brought by the Secretary of Labor despite an express prohibition in the applicable federal statute against union members initiating such actions); *United States v. Philip Morris USA*, 566 F.3d 1095, 1145 (D.C. Cir. 2009) (party

need not have a "cause of action" in order to satisfy the requirements of Rule 24(a)). This is particularly true here where Applicants seek to intervene as Defendants and are not pursuing any counterclaim, and thus, by definition, do not have a cause of action against the Plaintiff.[1]

Plaintiff continues to cite *Georgia v. Ashcroft*, 539 U.S. 461 (2003) in its opposition to intervention (Memorandum at 2), even though the Supreme Court upheld the district court's grant of intervention in that case pursuant to Rule 24, ruling that intervention is appropriate in Section 5 declaratory judgment actions. *Id.* at 476-477. Plaintiff fails to note, moreover, that the district court in that case[2] only addressed intervention of right pursuant to Rule 24(a) and did not mention permissive intervention pursuant to Rule 24(b), *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 32 (D.D.C. 2002); that the court allowed intervention after the Department of Justice filed its Answer, *id*.; and that the postponement of intervention until after the filing of the Answer simply added to the motions practice Plaintiff states that it seeks to avoid. *Id* at 32-36. In this case, moreover, the Court has set a brisk post-Answer schedule: the Justice Department's Answer is due on September 19, 2011, on the following day (September 20, 2011) the parties are to confer, and the court will hold a scheduling conference on September 21, 2011. In light of this schedule, a delay in identifying the parties until after the Department files its Answer can only be counterproductive.

[1] Plaintiff's claim that it is an "impossible task" for Applicants to obtain intervention due to the alleged absence of a "cause of action" on the part of Applicants, Memorandum at 2, not only is contradicted by this Court's ruling in favor of the Davis Intervenors' motion, but is flatly inconsistent with the numerous rulings by the District of Columbia Court granting intervention as defendants in Section 5 declaratory judgment actions. *See* Memorandum of Points and Authorities in Support of MALC's Motion for Leave to Intervene as Defendant, at 3-4 [doc. 13-1].

[2] Although Plaintiff cites *Georgia v. Reno*, 881 F. Supp. 7 (D.D.C. 1995), the District Court decision that addressed the intervention issue in the *Georgia v. Ashcroft* case is reported as *Georgia v. Ashcroft*, 195 F. Supp. 2d 25 (D.D.C. 2002). The *Georgia v. Reno* decision cited by Plaintiff was a separate case which had nothing to do with the 2001 Georgia redistricting at issue in *Georgia v. Ashcroft*; and nothing to do with intervention.

Plaintiff states that in addition to its objections to the Davis Intervenors' motion, Applicants' motions (and the motions of the other intervention applicants) "add timeliness as an issue." Memorandum at 3. Plaintiff offers no basis whatsoever to conclude that the Applicants' showing of timeliness was not sufficient. Plaintiff then inconsistently contends that intervention is inappropriate until after the United States had filed an Answer, but intervention applications cannot be both too early and too late.

Finally, Plaintiff argues, citing only to an internet blog, Memorandum at 2-3, that intervention by additional parties will delay resolution of the case. But given the history of Section 5 declaratory judgment actions in this Court, Plaintiff cannot reasonably claim to be surprised that individuals and groups vitally concerned with the State's redistricting decisions would seek to intervene. Moreover, the State voluntarily chose to institute this action without first seeking administrative preclearance from the Attorney General and thereby making use of this "speedy … expeditious alternative to a declaratory judgment action." *Morris v. Gressette*, 432 U.S. 491, 503-504 (1977). Applicants also note that they are fully prepared to coordinate their filings with other Intervenors to seek to avoid duplication or delay.

WHEREFORE, the TLBC and MALC, proposed Defendant-Intervenors in this action, respectfully urge the Court to grant intervention as a matter of right, or, in the alternative, on a permissive basis.

Dated: September 5, 2011

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on September 5, 2011, I sent a true and correct copy of Joint Reply of the Texas Legislative Black Caucus And Mexican American Legislative Caucus, Proposed Defendant Intervenors, To Plaintiff's Opposition To Intervention to counsel for the parties by email, and transmitted these documents to the Clerk for filing in the Federal Court ECF system.

/s/ John K. Tanner
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