

**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 COMBINED RESPONSE TO MOTIONS TO INTERVENE

I. PRELIMINARY STATEMENT

Earl Cunningham, Harry Jones, Albert Jones, Ernest Montgomery, Anthony Vines, and William Walker (“Cunningham Applicants”), as well as Bobby Pierson, Kenneth Dukes, Mary Paxton-Lee, Willie Goldsmith, Sr., and the Alabama State Conference of the National Association for the Advancement of Colored People, Inc. (“Pierson Applicants”) (collectively, “Applicants”) seek to intervene in this action to defend the facial constitutionality of Sections 5 and 4(b) of the Voting Rights Act (“VRA”). More specifically, Applicants assert that they are entitled to intervene as of right under Federal Rule of Civil Procedure 24(a) or, in the alternative, to permissively intervene under Federal Rule of Civil Procedure 24(b). *See* Memorandum in Support of Motion for Leave to Intervene as Defendants at 2 (“Pierson Mem.”); Statement of Points and Authorities in Support of Motion to Intervene as Defendants on Behalf of Earl Cunningham, et al. at 2 (“Cunningham Mem.”). As explained below, it does not appear that

Applicants can meet the criteria for intervention as of right under Rule 24(a). Thus, the Court must decide in its discretion whether Applicants should be allowed to permissively intervene under Rule 24(b) or, instead, whether they should participate in this action as *amicus curiae*.

Although the governing decisional law strongly suggests that allowing Applicants 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—Applicants’ participation should be limited to briefing the legal issues raised in the Motion for Summary Judgment irrespective of whether they permissively intervene or participate as *amicus curiae*. Shelby County has no objection to Applicants expressing their view 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 has serious concern, 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 their motions, it is clear that allowing Applicants 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 Applicants to participate as *amicus curiae* is the more prudent course. If the Court nevertheless exercises its discretion to allow Applicants to intervene permissively, Shelby County respectfully requests that it limit Applicants' participation to briefing the legal issues raised in the Motion for Summary Judgment.

II. ARGUMENT

Applicants are not entitled to intervene as of right under Rule 24(a). The Pierson Applicants (but not the Cunningham Applicants) assert that they may intervene as of right because Section 4(a)(4) of the VRA is “a statute of the United States conferring an unconditional right to intervene[.]” Fed. R. Civ. P. 24(a)(1). But, as the Attorney General agrees, neither Section 4(a)(4) (nor any other federal statute) confers the right to intervene here. *See* Attorney General's Consolidated Response to Motions to Intervene at 3-4 (“AG Resp.”). Section 4 of the VRA, which allows a covered jurisdiction to seek bailout, provides that “[t]he State or political subdivision bringing *such action* shall publicize the intended commencement and any proposed settlement of *such action* in the media serving such State or political subdivision and in appropriate United States post offices. Any aggrieved party may as of right intervene at any stage in *such action*.” 42 U.S.C. § 1973b(a)(4) (emphasis added). As the text shows, and as Pierson Applicants essentially concede, the “action” referred to in Section 4(a)(4) is a bailout action. *Cf. Allen v. State Board of Elections*, 393 U.S. 544, 557 (1969). The Pierson Applicants are forced, therefore, to untenably assert that “a declaration that Section 5 is unconstitutional . . . is the functional equivalent of bail out[.]” Pierson Mem. at 4. But the relief sought here would extend to all covered jurisdictions. Unlike in a bailout action, Shelby County is not seeking to prove that it is different from other covered jurisdictions. Rather, it argues that Sections 5 and

4(b) are facially unconstitutional—a claim that could have been brought by any covered jurisdiction. In any event, this Court would not even have statutory jurisdiction to entertain a bailout action. *See Laroque v. Holder*, No. 10-0561, at *3 (D.D.C. May 12, 2010).

Therefore, Applicants' only avenue for pursuing intervention as of right is Rule 24(a)(2). But it does not appear that Applicants can meet the test for intervention under that rule either. Applicants claim they possess the Article III standing needed to intervene as of right because they have “a vested interest in retaining the protections against discriminatory voting changes that they enjoy through the prophylactic Section 5 preclearance process, as well as in ensuring that this Court upholds the constitutionality of both the Section 4(b) scope of coverage provision and Section 5 preclearance provision.” *Cunningham Mem.* at 19; *see also Pierson Mem.* at 6. But Applicants cannot properly claim a substantive right to have the jurisdiction of their residence be subject to preclearance; if they could, then the millions of citizens living in non-covered jurisdictions would be suffering the same injury as Applicants herein allege. The substantive right that Applicants seek 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 Applicants *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).¹

¹ That the Alabama NAACP engages in “litigation, advocacy, legislation and communications” also is plainly insufficient to show injury-in-fact. *Pierson Mem.* at 2. A “conflict between a [plaintiff’s] conduct and an organization’s mission is alone insufficient to establish Article III standing.” *Nat’l Treasury Employees Union v. United States*, 101 F.3d 1423, 1429 (D.C. Cir. 1996). In any event, the motion for intervention offers no substantial argument as to how the local NAACP’s organizational interests will be injured within the meaning of Article III or Rule 24(a)(2). Its entire argument for

For similar reasons, it does not appear that Applicants have the protectable interest needed to intervene as of right under Rule 24(a)(2). Applicants claim that they “have a direct interest in ensuring that the Section 5 preclearance provision is both interpreted in a way that does not undermine the constitutional guarantees of the right to vote and upheld against Plaintiff’s constitutional challenge.” Cunningham Mem. at 8-9; *see also* Pierson Mem. at 4-6. In particular, Applicants “seek to ensure that this Court’s analysis of Plaintiff’s claims takes into account the relevant history and modern day impact of voting discrimination against African-American and other minority voters, including Section 5 violations that have affected proposed Intervenors within Shelby County, and the evidence of discrimination that was compiled by Congress during the hearings conducted during the 2006 reauthorization of Section 5.” Cunningham Mem. at 9.

But Applicants’ 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 Applicants 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, Applicants’ 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

intervention is premised on the interests of Shelby County voters. “A litigant does not properly raise an issue by addressing it in a cursory fashion with only bare-bones arguments.” *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001) (internal quotation marks omitted).

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 Applicants' interests are adequately represented by the Attorney General. Applicants assert that the Attorney General "does not have the same stake as do Proposed Intervenors, the intended beneficiaries of the VRA, whose voting rights could be adversely impacted by a negative ruling in this matter." Cunningham Mem. at 12; *see also* Pierson Mem. at 7-10. Although Applicants' allegations as to how their interests might diverge from the Attorney General are exceedingly vague, their concern must be that the Attorney General may not vigorously defend the facial constitutionality of Sections 5 and 4(b) of the VRA. *See* Cunningham Mem. at 16 ("While Defendant Attorney General Holder's obligation is to represent the broad interest of the United States, Proposed Intervenors are concerned specifically with the interests of African-American voters in Shelby County and those residing in other Section 5 covered jurisdictions that are the target of Plaintiff's Complaint and Motion for Summary Judgment."); *but see id.* at 17 ("[E]ven if Defendant Attorney General Holder appropriately interprets and defends the Section 4(b) scope of coverage provision and, similarly, defends the constitutionality of Section 5, the effort to represent Proposed Intervenors' distinct interests may nevertheless prove inadequate."). As evidence for this concern as to the Attorney General's intentions, however, Applicants merely note that in the *Northwest Austin* litigation "Defendant Intervenors emphasized different aspects of the Congressional record and presented arguments and evidence that supplemented that provided by the Attorney General in its defense of Section 5." *Id.* at 15.

There is no basis in fact for Applicants' suggestion that the Attorney General may not vigorously defend the facial constitutionality of these statutes. As the cases referenced by

Applicants reflect, *see* Cunningham Mem. at 11-17; Pierson Mem. at 7-10, 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 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

² Thus, even if allowing local residents to intervene as of right in the *Northwest Austin* litigation was appropriate, it would not be here. As noted above, 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. *See supra* at 3. 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.

may emphasize different aspects of the legislative record or make different legal arguments is an insufficient basis for granting party status to Applicants. “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 Applicants intend to participate in this litigation in order to duplicate the Attorney General’s constitutional defense of Sections 5 and 4(b) of the VRA. 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).³

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,

³ Although the Pierson Applicants concede that the “interests of the United States and applicants may converge on issues such as the constitutionality of Section 5,” they claim that their interests “may diverge when it comes to arguments to be made and deciding to appeal any adverse decisions.” Pierson Mem. at 9. Concern over appellate rights is not a sufficient ground for allowing the Pierson Applicants to intervene as of right at this juncture. First, if the Court elects to grant Applicant’s permissive intervention, Applicants’ appellate rights would be fully protected, *see Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 377 (1987) (“As a permissive intervenor, CNA will have the same rights of appeal from a final judgment as all other parties.”). Second, if this Court were to determine that Applicants should instead participate as *amicus curiae*, it could later allow them to intervene in the unlikely event that the Attorney General declines to appeal an order of this Court declaring Section 5 and/or Section 4(b) facially unconstitutional. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 393-95 (1977); *Smuck v. Hobson*, 408 F.2d 175, 181 (D.C. Cir. 1969).

825 n.75 (S.D. Ind. 2006). Although Applicants make a contingent promise to “avoid delays or the *unnecessary* duplication of effort in those areas *satisfactorily* addressed and represented by the existing Defendant *to the extent possible*,” Cunningham Mem. at 2 (emphasis added), it is far from clear that this Court would be empowered to enforce that promise if Applicants are allowed to intervene as of right under Rule 24(a), *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.

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 Applicants are properly entitled only to participation as *amicus curiae*, Shelby County would not object to allowing Applicants 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 uncontested 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, Applicants’ 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 Applicants’ 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 permissive intervenors to: (1) hold Applicants to their promise not to duplicate the efforts of the Attorney

General or engage in cumulative briefing; (2) keep Applicants from interjecting new issues into this straightforward case arising under an undisputed legislative record; and, (3) prevent intervenors from 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 Applicants to *amicus curiae* participation, or whether the Court instead is inclined to allow them to permissively intervene, Shelby County remains focused on having these important constitutional questions resolved in a timely manner. By setting the terms of Applicants' 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 both Motions to Intervene as of right under Rule 24(a) and instead either allow Applicants to intervene permissively under Rule 24(b) or participate as *amicus curiae* in accordance with the conditions set forth in the Proposed Order.

Dated: June 25, 2010

Respectfully submitted,

/s/ William S. Consovoy

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