IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF FLORIDA Office of the Secretary of State 500 S. Bronough Street Tallahassee, FL 32399-0250 Plaintiff, vs. UNITED STATES OF AMERICA and ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States, Defendants, and, KENNETH SULLIVAN, ALBERT LEO SULLIVAN, MICHAEL BERMAN, SEN. ARTHENIA JOYNER, REP. JANET CRUZ, HELEN GORDON DAVIS, JOYCE HAMILTON HENRY, HAROLD WEEKS, OPHELIA ALLEN, PROJECT VOTE, VOTING FOR AMERICA, HARRY L. SAWYER, JR., ION SANCHO, and REV. TOM SCOTT, Defendant-Intervenors.	)	Case No: 1:11-cv-01428-CKK THREE JUDGE COURT

MEMORANDUM IN SUPPORT OF MOTION
FOR LEAVE TO INTERVENE AS DEFENDANTS

1. Introduction

This action was brought by the State of Florida seeking preclearance of four voting changes under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The changes are:

restrictions on third-party voter registration activities (§ 97.0575, Fla. Stat.); reduction in the number of days for early voting (§ 101.657, Fla. Stat.); limiting the opportunities for election-day address changes (§ 101.045, Fla. Stat.); and reducing the shelf life of petition signatures (§ 100.371, Fla. Stat.).

Movants include members of racial and language minorities, and are residents and registered voters of Monroe, Hillsborough, and Collier Counties, which are covered by Section 5. Movants also include Project Vote and Voting for America, two nonprofit corporations dedicated to conducting voter registration drives in minority communities and supporting the efforts of other organizations doing similar work. Movants also include Harry L. Sawyer, Jr., the Supervisor of Elections of Monroe County, Florida, since 1988, and Ion Sancho, the Supervisor of Elections of Leon County, Florida, since 1989.

They 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), Fed.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).

II. Intervention As of Right Is Warranted

Rule 24(a)(2) provides:

> On timely motion, the court must permit anyone to intervene who . . . 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 motion for intervention is timely. The complaint was filed on August 1, 2011, and the Defendants have not yet filed an answer. No status conference has been held, no discovery has been undertaken, no dispositive orders have been entered in the case, and no trial has been set or held. 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 School Board 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) ("[i]n fact, this may well be the only significant consideration when the proposed intervenor seeks intervention of right").[1] Where intervention will not delay resolution of the litigation, intervention should be allowed. Texas v. United States, 802 F. Supp. 481, 482 n.1 (D. D.C. 1992) (affirming the propriety of granting

[1] 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).

intervention); Cummings v. United States, 704 F.2d 437, 441 (9th Cir. 1983) (it was an abuse of discretion for the trial court to deny intervention in the absence of a showing of prejudice to the government). Applicants' motion to intervene is timely.

B. Movants Have an Interest Relating to the Litigation

The movants include racial and language minorities protected by Section 5 of the Voting Rights Act, and are residents and registered voters of Monroe, Hillsborough, and Collier Counties, which are covered by Section 5. Movants Project Vote and Voting for America are corporations whose purposes include helping minority citizens to register to vote and supporting the voter registration programs of other organizations doing similar work. Movants Sawyer and Sancho are Supervisors of Elections and their duties include: administering county, state, and federal elections; registering voters; providing for absentee and early voting; and upholding and administering state election laws.

All movants plainly have an interest in the "transaction that is the subject of the action," Rule 24(a)(2), i.e., whether the submitted voting changes 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 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, Texas v. United States, 517 F.Supp. 987, 991 n.2 (D. D.C. 1981); New York State v. United States, 65 F.R.D. 10, 12 (D. D.C. 1974); City of Richmond, Virginia 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); Commonwealth of Virginia v. United States, 386 F.Supp. 1319, 1321 (D. D.C. 1974); City of Petersburg, Virginia v. United States, 354 F.Supp. 1021, 1024 (D. D.C. 1972);

Northwest Austin Municipal Utility District v. Gonzales, Civ. No. 1:06-cv-01384 (D. D.C. Nov. 09, 2006, Doc. 33); LaRoque v. Holder, Civ. No. 10-0561 (D. D.C. Aug. 25, 2010, Doc. 24); Shelby County, Alabama v. Holder, Civ. No. 10-0651 (D. D.C., Aug. 25, 2010, Doc. 29); Texas v. United States, 1:11-cv-01303 (D. D.C. Aug. 16, 2011, Doc. 11).[2] 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 Board 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. Regional High School District 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. Metropolitan Dade County, 985 F.2d 1471, 1480 (11th Cir. 1993).

Intervention is particularly appropriate in this case because movants, unlike the

[2] 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. 460 U.S. at 130.

Defendants, include residents and voters of counties covered by Section 5, and are therefore in a special position to provide the Court with a local appraisal of the facts and circumstances involved in the litigation. In County Council of Sumter County 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." Similarly, organizational movants are experienced in conducting and supervising voter registration drives and are therefore uniquely qualified to assess the impact of the Florida voting changes at issue on such constitutionally protected activities. For example, the fact that Voting for America intends to conduct a voter registration drive in Hillsborough County would make its compliance with two different sets of procedures (one in the preclearance counties, including Hillsborough, and one elsewhere in Florida) extremely burdensome.[3] This burden is especially heavy for community registration drives, many of which are staffed by volunteers. Movant Scott has held elective office in Tampa and Hillsborough County, and is a strong supporter of early voting and increasing the opportunities for voter registration. Movants also include Supervisors of Elections who are in a special position to articulate the burdens the submitted changes have upon them in administering elections, registering voters; providing for absentee and early voting; and upholding and administering state election laws. The unique perspectives of movants are not represented by Defendants in this action.

Intervention is also appropriate because movants include plaintiffs in a pending action

[3] Movants do not agree that dual enforcement of the state's election laws is permitted under state or federal law, and as noted infra, have challenged the state's decision to implement the four changes at issue in this litigation in the non-covered counties pending Section 5 preclearance.

seeking an injunction against any implementation of the voting changes at issue in this case absent preclearance under Section 5. See Sullivan v. Scott, Civ. No. 11-cv-10047-KMM (S.D. Fla.). Counsel for movants also filed a Section 5 comment letter with the Department of Justice asking that preclearance be denied the four changes at issue in this case. It was apparently in response to that letter, as well as similar comment letters filed by others, that the state withdrew the four changes from the administrative process and now seeks judicial preclearance. Florida Secretary of State Browning was reported by the Associated Press as saying he asked for a court review of the four sections to get a decision free of "outside influence." Florida Wires, "DOJ OKs non-controversial parts of Fla. voting law," August 9, 2011. In any event, it is apparent that movants have a direct and substantial interest in the current litigation.

Movants have an interest in the subject matter of this action sufficient to warrant intervention. Indeed, as racial and language minorities and voters of covered counties, as well as organizations dedicated to bringing voter registration opportunities to minority communities and Supervisors of Elections, no individuals or entities could have a greater interest in the subject matter of the litigation.

C. Movants' Ability to Protect Their Interests Will Be Impaired or Impeded if Intervention Is Denied

The outcome of this action may as a legal and practical matter impair or impede movants' ability to protect their interests. Rule 24(a)(2). If the voting changes are precleared, there would be new restrictions placed on third-party voter registration activities, the number of days for early voting would be reduced, new limits would be placed on the opportunities for election-day address changes, and the shelf life of petition signatures would be shortened. These changes

would have a direct and adverse impact on the ability of racial and language minorities to participate effectively in the electoral process, and for that reason movants contend they should be denied preclearance.

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

Movants can satisfy Rule 24(a)(2)'s inadequate representation requirement by showing merely that representation of their interests "'may be' inadequate" and "the burden of making this showing should be treated as 'minimal.'" United Guaranty Residential Insurance 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)). 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 Defendants and the movants "may share some objectives" with respect to Section 5 preclearance, In re Sierra Club, 945 F.2d at 780, that does not mean the Defendants' interests and movants' 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); County Council of Sumter County, 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 Insurance, 819 F.2d at 475 (referring to 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.

Movants' interests in this litigation are, in like fashion, sufficiently different from those

of the Defendants to justify intervention. The Defendants 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 Insurance Co., 819 F.2d at 475 (holding that the largest mortgage holder could intervene 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 Defendants vigorously perform their duty to represent its citizenry, representation of movants' distinct interests may still be inadequate because the Defendants 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 many issues, they may diverge when it comes to arguments to be made and appealing any adverse decisions. 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 Resources Defense 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 Public 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 General 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").

Movants meet the standards for intervention as of right, and their motion should be granted.

III. Permissive Intervention Is Also Appropriate

Even if this Court should determine that movants do not satisfy the requirements for intervention of right, it should grant permissive intervention under Rule 24(b)(B). Rule 24(b)(B) permits intervention on timely motion when a person "has a claim or defense that shares with the main action a common question of law or fact." As discussed above, movants seek to have the submitted voting changes denied preclearance, which claim and defense shares 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 Indian's participation in litigation critical to their welfare should not be discouraged." Id. at 615. The pending litigation is no less critical to movants'

welfare, and accordingly intervention should be granted.

IV. Conclusion

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

Respectfully submitted,

/s/ Estelle H. Rogers

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Certificate of Service

I certify that on this 25th day of August, 2011, a true and correct copy of the foregoing document was served upon counsel for Plaintiff:

Daniel E. Nordby, General Counsel
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Although the United States and Attorney General Holder have not entered an appearance in this action, I further certify that a true and correct copy of the foregoing document was mailed to:

U.S. Department of Justice
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/s/ Estelle H. Rogers