IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF ARIZONA, Plaintiff, v. ERIC H. HOLDER, JR., Attorney General of the United States of America, Defendant, and LUIS AVILA, CALVIN GOODE, MELVIN HANNAH, ERIC MANTE, KATHRYN NAKAGAWA, NAPOLEON PISAÑO, and DIONNE THOMAS, Applicants for Intervention.	)	No. 1:11-cv-01559-JDB

MEMORANDUM IN SUPPORT OF
MOTION FOR LEAVE TO INTERVENE AS DEFENDANTS

I. Introduction

This action was brought by the State of Arizona, seeking a declaration that Section 4(b) and Section 5 of the Voting Rights Act, 42 U.S.C. §§ 1973b(b) and 1973c, are unconstitutional and an injunction against their enforcement or, in the alternative, seeking to bail out of coverage under Section 5. Applicants Luis Avila, Calvin Goode, Melvin Hannah, Eric Mante, Kathryn Nakagawa, Napoleon Pisaño, and Dionne Thomas are residents and registered voters of Arizona. Additionally, applicant Calvin Goode, Melvin Hannah, and Dionne Thomas are African American residents of Arizona, and are registered voters. Applicant Kathryn Nakagawa is a Japanese American resident of Phoenix, Arizona, and is a registered voter. Applicant Eric Mante is a Filipino American resident of Mesa, Arizona, and is a registered voter. Applicants Luis

Avila and Napoleon Pisaño are Hispanic residents of Arizona and are registered voters.

All applicants have moved the Court for leave to intervene as of right and for permissive intervention pursuant to Rules 24(a)(1) and (2) and (b)(1)(A) and (B), F.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).

II. Intervention As of Right Is Warranted

Rule 24(a) provides:

> On timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) 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.

As an initial matter, the application for intervention is timely. Plaintiff filed its complaint on August 30, 2011. It filed a motion to convene a three-judge court on that same day. The Attorney General filed a response to the motion to convene a three-judge court on September 14, 2011. The court granted Plaintiff's motion for an extension until September 28, 2011 to file a reply to the response to the motion, and on that date Plaintiff withdrew its earlier motion and filed an amended complaint and a renewed motion to convene a three-judge court. A response to the motion was filed on October 12, 2011, and a reply was filed on October 19, 2011. Defendant filed its answer to the complaint on November 8, 2011. 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 Sch. Bd. 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, provided that the proposed intervenor satisfies the criteria of Rule 24(a). *Texas v. United States*, 802 F. Supp. 481, 482 n.1 (D.D.C. 1992) (affirming the propriety of granting 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).

A. Intervention under Rule 24(a)(1)

A statute of the United States, 42 U.S.C. § 1973b(a)(4), provides that "[a]ny aggrieved party may as of right intervene at any stage in such action [to bail out from Section 5 coverage]." Since Arizona is seeking to bail out from Section 5 coverage, intervention in this action should be granted as of right. Granting intervention would also serve the underlying purpose of § 1973b(a)(4) of providing an "aggrieved party" the opportunity to be heard when a jurisdiction is seeking to terminate Section 5 coverage.

B. Intervention under Rule 24(a)(2)

Applicants also meet the standards for intervention as of right under Rule 24(a)(2).

[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).

1. Applicants Have a Direct Interest in Bailout and the Constitutionality of Section 5

As racial and language minorities protected by Section 5 of the Voting Rights Act, and as registered voters who reside in Arizona, applicants plainly have a direct, substantial, and legally protectable interest in the "transaction that is the subject of the action," Rule 24(a)(2), *i.e.*, the constitutionality of, and whether the plaintiff should be excluded from, Section 5 coverage. Because of the importance of that interest, intervention in Section 5 cases is favored and the courts have routinely allowed it. *See LaRoque v. Holder*, 650 F.3d 777, 782-3 (D.C. Cir. 2011); *Shelby County v. Holder*, 2011 WL 4375001 (D.D.C. 2011); *Georgia v. Holder*, 748 F. Supp.2d 16, 18 (D.D.C. 2010) (granting intervention to four groups of intervenors in a case that challenged the constitutionality of Section 5 of the VRA); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 573 F. Supp. 2d 221, 230 (D.D.C. 2008) (granting multiple motions to intervene presented by African American, Latino and other minority voters in case seeking bailout under Section 4(a) of the VRA and challenging the constitutionality of Section 5 of the VRA); *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 v. United States*, 517 F. Supp. 987, 991 n.2 (D.D.C. 1981); *New York v. United States*, 65 F.R.D. 10, 12 (D.D.C. 1974); *City of Richmond 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*); Virginia v. United States*, 386 F. Supp. 1319, 1321 (D.D.C. 1974); *City of Petersburg v. United States*, 354 F. Supp. 1021, 1024 (D.D.C. 1972).[2] *See also Clark v. Putnam County*, 168 F.3d 458, 462 (11th Cir. 1999) ("black voters had

[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

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 Bd. of Elections*, 838 F. Supp. 601, 604 (S.D. Ga. 1993); *Johnson v. Mortham*, 915 F. Supp. 1529, 1536 (D.C. Fla. 1995) (registered voters had "a sufficiently substantial interest to intervene" in a suit challenging congressional redistricting); *Baker v. Reg'l High Sch. Dist. 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. Metro. Dade County, 985 F.2d 1471, 1480 (11th Cir. 1993).

Intervention is particularly appropriate in this case because applicants, unlike the defendant, are residents and voters of Arizona 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 *Sumter County Council 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."

States. *See* 460 U.S. at 130.

Applicants have an interest in the subject matter of this action sufficient to warrant intervention. Indeed, as racial and language minority voters of Arizona, no individuals or entity could have a greater interest in the subject matter of the litigation.

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

The outcome of this action may, as both a legal and practical matter, impair or impede applicants' ability to protect their interests, thus satisfying Rule 24(a)(2). If Section 5 is found to be unconstitutional, or if plaintiff is allowed to escape Section 5 coverage in the future, applicants would be denied the protection of preclearance. The State of Arizona would then be free to enact changes in its voting practices and procedures without first showing that the changes did not have the purpose or effect of discriminating on the basis of race or color or membership in a language minority.

3. Applicants' Interests Cannot Be Adequately Represented by the Existing Parties

Applicants 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 Ins. 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)) (emphasis by the *United Guaranty* court); *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 Attorney General and the applicants for intervention "may share some objectives" with respect to bailout and the constitutionality of Section 5, *In re Sierra Club*, 945 F.2d at 780, that does not mean that the Attorney General's interests and applicants' 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); *Sumter County Council*, 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 Ins. Co.*, 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*.

Applicants' interests in this litigation are, in like fashion, sufficiently different from those of the United States to justify intervention. The United States 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 Ins. Co.*, 819 F.2d at 475 (holding that the largest mortgage holder could intervene as 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 United States vigorously performs its duty to represent its citizenry, representation of applicants' distinct interests may still be inadequate because defendant United States must balance the competing interests presented by the proposed intervenors as well as those individuals or entities, like the plaintiffs, who oppose it. While the interests of the United States and applicants may converge on issues such as the constitutionality of Section 5, they may diverge when it comes to arguments to be made and deciding to appeal 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 Res. Def. 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 Pub. 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 Gen. 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").

Applicants therefore 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 applicants do not satisfy the requirements for intervention as of right, it should grant permissive intervention under Rules 24(b)(1)(A) and(B). As noted above, 42 U.S.C. § 1973b(a)(4) provides that any aggrieved party may intervene at any stage of an action to bail out from Section 5 coverage.

Rule 24(b)(1)(B) also permits intervention upon timely application by anyone who "has a claim or defense that shares with the main action a common question of law or fact." As discussed above, applicants seek to defend the constitutionality of Section 5, 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 Indians' participation in litigation critical to their welfare should not be discouraged." *Id*. at 615. The pending litigation is no less critical to applicants' welfare, and accordingly intervention should be granted. Permissive intervention has been routinely granted by this court in Section 5 actions. S*ee, e.g., Shelby County, Alabama v. Holder*, No. 1:10-cv-00651-JDB (D.D.C.); *LaRoque v. Holder*, No. 1:10-cv-00561-JDB (D.D.C.); *Florida v. United States*, No. 1:11-cv-01428-CKK (D.D.C.).

Conclusion

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

Respectfully submitted,

/s/ *Arthur B. Spitzer*
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ORDER

This matter is before the Court on motion by registered voters and racial and language minorities residing in the State of Arizona for leave to intervene as defendants.

Having reviewed the motion as well as the memorandum of points of authorities in support of the motion, the Court finds that the applicants may intervene as of right pursuant to Rule 24(a)(1), F.R. Civ. P., in that 42 U.S.C. § 1973b(a)(4) confers such a right in an action to bail out from coverage under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. In addition, applicants have timely filed their motion and have an interest in the outcome of the case that will be prejudiced if they cannot intervene. Because the United States cannot represent their interests adequately within the meaning of Rule 24, applicants may also intervene in this action as a matter of right pursuant to Rule 24(a)(2). Even if applicants could not intervene as a matter of

right, the Court would permit applicants to intervene permissively pursuant to Rules 24(b)(1)(A) and (B). Therefore, the motion to intervene is GRANTED.

AND IT IS SO ORDERED, this ___ day of _____, 2011.

_____
John D. Bates
United States District Judge