IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF FLORIDA,

Plaintiff,

v.

UNITED STATES OF AMERICA and ERIC H. HOLDER, Jr., in his official capacity as Attorney General of the United States,

Defendants,

FLORIDA STATE CONFERENCE OF THE NAACP, *et al.*,

Defendant-Intervenors,

KENNETH SULLIVAN, *et al.*,

Defendant-Intervenors,

and

NATIONAL COUNCIL OF LA RAZA, and LEAGUE OF WOMEN VOTERS OF FLORIDA,

Defendant-Intervenors.

CIVIL ACTION NO. 1:11-CV-01428
(CKK-MG-ESH)
THREE-JUDGE COURT

THE UNITED STATES' MOTION TO MODIFY
THE COURT'S APRIL 20, 2012 SCHEDULING ORDER

Defendants United States and Attorney General Eric Holder, Jr. respectfully move the Court to modify its April 20, 2012 Scheduling and Procedures Order (Docket No. 94) regarding the joint constitutional briefing in this case. The Order currently requires the United States and Defendant-Intervenors to file a joint opposition to Florida's brief in support of its constitutional claims. *Id.* at 2. For the reasons outlined below, the United States respectfully requests that the

United States and Defendant-Intervenors be permitted to submit separate, independent briefs in opposition to Florida's motion for summary judgment in support of its constitutional claims, filed on May 23, 2012. The United States intends to file a cross-motion for summary judgment on the constitutional issue as part of its response, and therefore it also proposes that the schedule be modified as a result. The State of Florida does not object to the Defendants' request for separate briefs and to file a cross-motion to the extent that the intervenors' brief is substantially shorter than the United State's brief in light of the State's concerns related to duplicative arguments. The State also does not object to providing the opportunity for the Defendants and intervenors to file a reply one week after the State's final brief is due. The State opposes Defendants' proposed modification to the briefing deadlines, and requests that the intervenors be given a different page-limit for each brief filed by the intervenors. The Defendant-Intervenors support the United States' motion.[1]

I. CONSISTENT WITH 28 U.S.C. § 2403 AND GENERAL PRACTICE, THE UNITED STATES FILES SEPARATES BRIEFS WHEN DEFENDING THE CONSTITUTIONALITY OF FEDERAL LAWS.

Federal courts have generally not required the United States to file joint briefs with private parties in defense of the constitutionality of a federal statute. Indeed, 28 U.S.C. §

[1] This Court also ordered the United States and the Defendant-Intervenors to file one joint brief setting forth proposed Findings of Fact and Conclusions of Law to address the statutory preclearance issues. *See* March 27, 2012 and April 20, 2012 Scheduling and Procedures Order, Docket No. 94 at 2. Although the United States' interest in independent filings applies in that context as well, the United States has complied with the Court's order with regard to the filing of the proposed findings and conclusions in this case. The United States believes that this joint briefing is at least unusual if not unprecedented in Voting Rights Act cases in this Court and may prejudice the ability of counsel to represent their clients fully, independently, and zealously. Accordingly, the United States intends to file a similar motion seeking separate briefing in each of the other pending Section 5 cases where joint briefing has been ordered.

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I. CONSISTENT WITH 28 U.S.C. § 2403 AND GENERAL PRACTICE, THE UNITED STATES FILES SEPARATES BRIEFS WHEN DEFENDING THE CONSTITUTIONALITY OF FEDERAL LAWS.

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2403(a) contemplates the United States intervening in cases where it is not a party specifically for the purpose of defending the constitutionality of federal laws. The statute provides, in relevant part,

> In any action, suit or proceeding in a court of the United States to which the United States . . . is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court . . . shall permit the United States to intervene for presentation of evidence . . . and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party . . . to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

28 U.S.C. § 2403(a). In such cases, federal courts routinely permit the United States to file a separate brief to defend the constitutionality of federal laws.[2]

Consistent with the Attorney General's responsibility to defend the constitutionality of a federal law, the United States has not previously been ordered to file joint briefs with Defendant-Intervenors in cases challenging the constitutionality of Section 5 of the Act. *See, e.g., Nw. Austin Mun. Util. Dist. No. 1 v. Holder ("Northwest Austin")*, No. 1:06-CV-01384 (D.D.C. filed Aug. 4, 2006)); *Shelby Cnty. v. Holder*, 10-CV-0651 (D.D.C. filed Apr. 27, 2010); *LaRoque v. Holder*, No. 1:10-CV-0561 (D.D.C. filed Apr. 7, 2010). In *Northwest Austin*, a Section 5 case that included constitutional claims, the United States and several private intervenors filed separate briefs in support of their summary judgment motions. *See* Docket Nos. 96, 98, 100. In response to the Court's Order in *Northwest Austin*, the United States and private Defendant-Intervenors, consisting of eight separately-represented groups, sought leave to file two separate briefs in opposition to the plaintiff's summary judgment motion. *See* Defendants' Report in

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[2] *See, e.g., Lane v. Tennessee*, Civ. Action No. 98-6730, (6th Cir. filed Dec. 18, 1998) (Mar. 31, 1999 Order granting United States' motion to intervene and file brief to defend constitutionality of the Americans with Disabilities Act); *Chabad Lubavitch of Litchfield Cnty., Inc., v. Borough of Litchfield*, 3:09-cv-01419 (D. Conn.), Docket No. 128 (Order granting United States' motion for leave to intervene for purposes of defending constitutionality of Religious Land Use and Institutionalized Persons Act).

Response to the Court's Order of May 11, 2007, Docket No. 105, at 2 ("At present, Defendants collectively anticipate filing no more than two briefs in Opposition to the Plaintiff's Motion for Summary Judgment."). In support of the request to file separate briefs, the United States specifically noted the "longstanding policy of the Department of Justice prohibiting the sharing of its draft briefs" and the Attorney General's "limited . . . ability to substantively coordinate with the Defendant-Intervenors regarding the content of supporting memoranda and oppositions." *Id.* The Court granted the United States' and Defendant-Intervenors' request, and ordered the United States to file one independent brief and Defendant-Intervenors to file one independent brief. *See* Docket Minute order (June 12, 2007) (setting forth deadline and page lengths for separate filings by the United States and Defendant-Intervenors); Docket Nos. 109, 111 (United States' and private intervenors' oppositions to plaintiff's motion for summary judgment).[3]

The Local Rules of the United States Court of Appeals for the District of Columbia Circuit acknowledge this practice by providing that, even when the United States is an intervenor (rather than the defendant, as in this case), it need not join with other intervenors to file a single brief. Specifically, Local Rule 28(d)(4) provides:

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[3] Similarly, in the *Shelby County* and *LaRoque* cases, the United States and intervenors submitted separate, independent briefs. *Shelby* involved two rounds of briefing; and the Court specifically ordered separate and independent briefs for each round. *See Shelby Cnty, supra*, Docket no. 46 at 1-2 (order requiring United States to file separate briefs); Docket no. Feb. 24, 2011 Minute Order (requiring separate and independent supplemental briefs on specific issues related to the Section 5 coverage formula). In *LaRoque,* the Court also ordered the United States and Defendant-Intervenors to file separate consolidated cross-motions for summary judgment and oppositions. *See* Nov. 12, 2010 and July 15, 2011 Minute Orders (requiring separate briefs and resetting deadline for such briefs). This Court has consistently permitted the United States to file separate briefs in defending cases challenging the constitutionality of Section 5, thereby recognizing that the Attorney General's broad public interest in defending the constitutionality of federal statutes.

> Intervenors on the same side must join in a single brief to the extent practicable. *This requirement does not apply to a governmental entity.* (For this purpose, *the term "governmental entity" includes the United States or an officer or agency thereof*, the District of Columbia, or a State, Territory, or Commonwealth of the United States.) . . .

See D.C. Cir. Local Rule 28(d)(4) (emphasis added). The same practice should be followed in this case, which presents complex and novel issues regarding the constitutionality of Section 5.

II. THE IMPORTANT INTERESTS AT STAKE IN THIS CASE, INCLUDING THE ATTORNEY GENERAL'S UNIQUE ROLE IN ENFORCING SECTION 5, WEIGH IN FAVOR OF THE FILING OF A SEPARATE, INDEPENDENT BRIEF.

The United States has an overriding public interest apart from the private defendant intervenors in defending the constitutionality of Section 5 of the Voting Rights Act ("Act"). Under the Act, the Attorney General is charged with protecting the public interest in eradicating discrimination in voting. To that end, the Attorney General administers the Section 5 preclearance process, brings affirmative suits to enforce the Act, and serves as the statutory defendant in Section 5 cases brought in this Court. *See* 42 U.S.C. §§ 1973b(a), 1973c, 1973j(d), & 1973*l*(b). Likewise, the Attorney General is authorized to intervene in cases to defend the constitutionality of Acts of Congress, 28 U.S.C. § 2403(a), and Congress has vested the responsibility of conducting the litigation of the United States with the Attorney General, 28 U.S.C. § 519. This public responsibility often necessitates a litigation strategy separate and distinct from that of private intervenors, whose interests do not always align with those of the United States. As demonstrated in this case, for example, the United States and intervenors differed regarding whether the State had met its burden under Section 5 with respect to the constitutional initiative amendment set of voting changes. *See* Joint Status Report at p. 14 (Docket No. 76). The intervenors have noted these potentially differing viewpoints as a reason for their intervention when they moved to intervene in this case. *See, e.g.,* Motion to Intervene

as Defendants, Docket No. 15, ¶¶ 8-10 (Sept. 6, 2011). The Attorney General therefore should not be required to join a brief with parties whose interests or arguments may differ from the broader interests of the United States, particularly in light of the Attorney General's specific statutory responsibilities under the Act.

The Court's joint briefing requirement also imposes significant logistical burdens on the Attorney General in light of his statutory duties, the Department's longstanding policy of not sharing its draft briefs, and the Attorney General's "limited . . . ability to substantively coordinate with the Defendant-Intervenors regarding the content of supporting memoranda and oppositions." *See* Docket No. 105 at 2, *Northwest Austin*, No. 06-1384 (D.D.C. May 29, 2007). A joint briefing approach is complicated by the Department's internal review process and can compel disclosure of deliberative process and attorney work product protected materials in the course of combining the work of counsel for intervenors and the United States.

The filing of separate briefs on the constitutional issues in this case will not prejudice the State's case. As set forth above, allowing the Attorney General to brief constitutional issues separately is both the established practice of the D.C. Circuit, and consistent with the orders and procedures followed in similar cases filed in this Court. In contrast, the United States will be prejudiced should it be required to file one brief with the intervenors, in that the Attorney General will necessarily be forced to adjust or eliminate arguments regarding the constitutionality of Section 5 as it attempts to meld varying views from a variety of private parties whose interests and arguments can and do differ from the Department. In the Section 5 context, the Attorney General serves a truly unique role, as envisioned by Congress, in enforcing the Act, administering the Section 5 preclearance process, serving as the statutory defendant in

Section 5 judicial preclearance cases such as this one, and defending constitutional challenges to Section 5 of the Act.[4]

If this motion is granted, the United States and Defendant-Intervenors will continue to work together cooperatively to minimize duplicative or cumulative briefing as much as is possible.

III. TO RESOLVE THE CONSTITUTIONAL QUESTIONS IN AN EFFICIENT MANNER, THE UNITED STATES PROPOSES SLIGHT MODIFICATIONS TO THE COURT'S SCHEDULING ORDER.

The United States also respectfully requests a brief seven-day extension of the time to file its opposition to the State's motion for summary judgment and a cross-motion for summary judgment on Florida's constitutional challenge. At present, the United States and intervenors are required to file a joint brief on the constitutional issues on June 25, 2012, only a few days after the evidentiary hearing and oral argument from June 19 to 21.[5] *See* Minute Order (May 23, 2012). A brief extension is warranted to allow the parties a full opportunity to brief the constitutional claims raised in Florida's brief. The United States understands the Court's interest in continuing to expedite these proceedings, and notes that the requested extension would still allow for full briefing of the constitutional issues well before the judicial preclearance question is resolved. *See* Scheduling Order at 2 n.1 (Mar. 27, 2012) (Doc. 87) ("[D]espite early indications to the contrary, Florida no longer states that it needs a ruling on its judicial preclearance claims

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[4] Nor is it a solution to simply to divide the 50 pages allocated for Defendants between the United States and the intervenors. The Voting Rights Act of 1965, and in particular Section 5, is one of the most important and effective civil rights statutes in this nation's history. To provide a full and vigorous defense of this statute's constitutionality, the United States requests 50 pages. Permitting only a truncated defense of the statute would severely prejudice the United States.

[5] In addition, the Department notes that the current June 25 deadline coincides with a significant filing deadline in another pending Section 5 case before another three-judge court. *See* Order, *State of Texas v. Holder*, 12-CV-128, at p. 6 (D.D.C. May 22, 2012) (Docket No. 137) (setting a June 25 deadline for the Attorney General to file an opposition brief and additional proposed findings of fact and conclusions of law).

before the primary election scheduled for August 14, 2012. Florida accepts that the schedule set out below, which was extended at Florida's request, is unlikely to result in a ruling before that date.").

In addition, because the United States intends to file a cross-motion for summary judgment to ensure an efficient resolution of the constitutional issues in this case, it respectfully requests that the Court provide the United States and intervenors the opportunity to file reply briefs. The filing of cross-motions for summary judgment will require filing a Statement of Material Facts pursuant to Federal Rule of Civil Procedure 56, as well as any related Rule 56 supporting declarations. *See, e.g., Shelby Cnty.*, Docket No. 54, 57 (Statement of Materials Facts filed by United States, Defendant-Intervenors).

The United States therefore proposes the following modified deadlines for the constitutional briefing in this case:

The United States and Defendant-Intervenors would each separately file a brief in opposition to the State's motion for summary judgment and in support of their cross- motions for summary judgment on **July 2, 2012** (one week after the current deadline). As required by the Court's March 27, 2012 Order, the United States asserts that moving the June 25, 2012 deadline would require changing the date by which the State would serve its consolidated reply and its opposition to the cross-motions for summary judgment, from July 9 to **July 16, 2012.** The United States and Defendant-Intervenors would file their separate reply briefs on **July 30, 2012**. The United States further notes that it does not oppose increasing the page-limit for the State's consolidated opposition/reply brief (to be filed on **July 16, 2012**).

On May 31, counsel for the United States met and conferred by telephone with the State's counsel regarding this motion. The State's counsel advised that Florida would not oppose a

motion for separate briefs or the filing of a cross-motion for summary judgment; regarding the schedule, the State's opposes the proposed briefing dates. The State also opposes providing intervenors with the same-page limits as the United States and proposes that intervenors' brief be substantially shorter than the United State's brief. Counsel for Defendant-Intervenors have advised that Intervenors support the United States' motion.

IV. CONCLUSION

In light of the foregoing, the United States respectfully requests that the Court modify its April 20, 2012 Scheduling and Procedures Order to allow the United States and Defendant-Intervenors to file separate briefs in opposition to the State of Florida's brief challenging the constitutionality of Section 5 of the Act, and to make additional modifications to its scheduling order.

May 31, 2012

Respectfully submitted,

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