IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SIXTH DISTRICT OF THE AFRICAN METHODIST EPISCOPAL CHURCH, *et al.*, *Plaintiffs*, UNITED STATES OF AMERICA, *Proposed Intervenor-Plaintiff* v. BRIAN KEMP, Governor of the State of Georgia, in his official capacity, *et al.*, *Defendants*, REPUBLICAN NATIONAL COMMITTEE, *et al.*, *Intervenor-Defendants.*	Civil Action No. 1:21-CV-01284-JPB
IN RE GEORGIA SENATE BILL 202	Master Case No. 1:21-MI-55555-JPB

UNITED STATES' REPLY IN SUPPORT OF MOTION TO INTERVENE

The United States of America ("United States") respectfully submits this reply memorandum in further support of its motion to intervene, ECF No. 838,[1] in *Sixth District of the African Methodist Episcopal Church v. Kemp*, No. 1:21-CV-01284 (N.D. Ga. 2021) ("*AME*"), and in response to State Defendants' opposition brief, ECF No. 842 ("State's Br.").[2]

The United States satisfies the requirements to intervene as a matter of right. *See* Fed. R. Civ. P. 24(a). As the State Defendants concede, the United States has an unconditional right to intervene in *AME*. *See* 42 U.S.C. § 2000h-2; State's Br. at 6. The United States' motion is timely, as explained in the United States' memorandum in support of its motion to intervene, ECF No. 838-1, and will not prejudice Defendants, as it raises no new issues of fact or law. The State Defendants make no credible arguments to the contrary. The United States' motion to intervene should be granted.

I. ARGUMENT

A. The United States' Interest in Intervention Became Clear Only After This Court's December 22, 2023 Order.

The timeliness of a motion to intervene is "assessed in relation to that point in time" at which "the need to seek intervention" arose. *Cameron v. EMW*

[1] ECF Numbers correspond to docket entries in *In re Georgia Senate Bill 202*, No. 21-mi-55555 (N.D. Ga. 2021), unless otherwise noted.

[2] Defendant-Intervenors joined the State Defendants' brief in opposition. ECF No. 844.

Women's Surgical Ctr., 595 U.S. 267, 280 (2022). The United States' interest in pursuing a discriminatory intent claim under the Fourteenth Amendment, and thus its interest in intervention in *AME*, was created by this Court's December 22, 2023 order, ECF No. 777 ("December 22 Order"), denying the State Defendants' motion for judgment on the pleadings. The United States' motion to intervene, filed less than seven weeks after that order was issued, is timely.

To argue otherwise, State Defendants rewrite the history of these proceedings. State Defendants begin by pointing to their repeated assertions that Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, does not allow for intent-based claims. State's Br. at 7; *see* Mot. to Dismiss, *United States v. Georgia*, No. 21-CV-02575 (N.D. Ga. 2021) ("*United States v. Georgia*"), ECF No. 38; Mot. for Recons., *United States v. Georgia*, ECF No. 78. But State Defendants do not acknowledge, let alone grapple with, this Court's prior rejection of that theory—twice. *United States v. Georgia*, 574 F. Supp. 3d 1245, 1253 (N.D. Ga. 2021) (denying motion to dismiss and rejecting contention that "discriminatory purpose claims" brought under Section 2 are "invalid as a matter of law"); Order Den. Mot. for Recons, *United States v. Georgia*, ECF No. 94.[3]

[3] State Defendants likewise provide no explanation as to how their theory can be squared with decades of caselaw, in the Eleventh Circuit and nationwide, that has repeatedly recognized the existence of intent-based claims under Section 2. *See* Pls.' Opp. to State and Intervenor Defs.' Mot. for Summ. J. on Discriminatory Intent Claims, ECF No. 822 ("SJ Opp. Br."), at 17-19 (citing cases). Nor do State

Instead, according to State Defendants, their narrow construction of Section 2 has been a live issue in this litigation since the United States' complaint was filed in June 2021, not a theory that every party to this litigation had reason to believe was settled by this Court's denial of State Defendants' motion to dismiss in December 2021. On December 22, 2023, in light of State Defendants' third attempt to raise this issue in a motion challenging the Complaint, this Court issued a new Order suggesting that this Court may reverse its prior rejections of State Defendants' argument that Section 2 does not support a stand-alone intent claim. As explained in the United States' opening brief, the issuance of that Order created the United States' interest in preserving its ability to litigate its intentional discrimination claim by intervening in *AME*. *See* Mem. in Supp. of the United States' Mot. to Intervene, ECF No. 838-1, at 12-13. Upon the creation of that interest, the United States promptly moved for intervention. State Defendants make no attempt to argue—nor would caselaw support any argument—that the United States' motion to intervene less than seven weeks after its interest became clear could be construed as an unreasonable delay.[4] *See, e.g.*, *Chiles v. Thornburgh*, 865

Defendants explain how the panel opinion in *League of Women Voters of Florida Inc. v. Florida Secretary of State*, 66 F.4th 905 (11th Cir. 2023)—the intervening circuit authority that they contend supports their interpretation of Section 2—can be read to overrule binding Eleventh Circuit precedent holding that intent-based claims are cognizable under Section 2.

[4] The period between the December 22, 2023 Order and the filing of the United

F.2d 1197, 1213 (11th Cir. 1989).

B. Defendants Are Not Prejudiced Because the United States' Proposed Complaint in Intervention Raises No New Issues of Fact or Law.

State Defendants assert that they would be prejudiced by the United States' intervention in *AME* because the United States' complaint in intervention injects new factual and legal issues into that case. State's Br. at 4-5, 7-8. In so arguing, State Defendants ignore the existing record and misstate the relevant showing of prejudice. In fact, the United States' intervention would not require the State Defendants to address any new legal or factual issue in these consolidated proceedings, and the United States was not tardy, let alone prejudicially so, in moving to intervene after its interest became clear. State Defendants make no serious argument to the contrary, and thus cannot show that the United States' intervention would cause them prejudice, let alone prejudice of the relevant sort.

Nothing in the State Defendants' laundry list of issues, State's Br. at 4-5, is new to this consolidated litigation. Every "new" fact or issue to which the State Defendants point has already been raised in substantively similar or identical form during this litigation in the United States' First Amended Complaint, ECF No.

States' motion to intervene included both the winter holidays and the deadline for filing eight consolidated response briefs and accompanying statements of fact in opposition to the Defendants' eight summary judgment motions in the consolidated proceedings.

765-2 ("FAC"), in briefing on the Consolidated Plaintiffs' motion for a preliminary injunction based on discriminatory intent, in expert reports accompanying the preliminary injunction briefing—served on State Defendants over a year ago—or in summary judgment briefing. Indeed, most of these issues have been addressed multiple times:

- **Census data:** FAC ¶ 23-29; Mem. Supp. of Plaintiffs' Mot. for Prelim. Inj., ECF No. 566-1 ("PI Br.") at 42; SJ Opp. Br. at 97; Expert Report of Maxwell Palmer, Ph.D.,[5] ECF No. 574-4 ("Palmer Rep."), ¶ 30 & fig. 3; Expert Report and Declaration of Dr. Barry C. Burden,[6] ECF No. 574-5 ("Burden Rep."), 23-25; Expert Report of Dr. Daniel G. Chatman,[7] ECF No. 546-23, ¶ 61.[8]
- **Voter turnout data:** PI Br. at 6; SJ Opp. Br. at 100; Burden Rep. tbls. 3, 4; Expert Report of Bernard L. Fraga, Ph.D.,[9] ECF No. 574-12 ("Fraga

[5] Served on all parties on January 13, 2023. ECF No. 373.

[6] Served on all parties on January 13, 2023. ECF No. 372.

[7] Served on all parties on January 27, 2023. ECF No. 393.

[8] In the complaint in intervention, the United States updated certain publicly available Census and voter turnout data to provide this Court with the most up-to-date figures as of the time of filing. State Defendants do not explain how they are prejudiced by that updated data, nor why the United States should instead rely upon older data.

[9] Served on all parties on January 27, 2023. ECF No. 391.

Rep."), tbl. 1.

- **Use of absentee ballots by race in November 2022**: Burden Rep. tbl. 5.
- **Allegations related to Secretary of State's 2021 analysis of voter registration records:** FAC ¶ 53; PI Br. at 19-20; SJ Opp. Br. at 80.
- **Allegations regarding voter registration records without associated driver's license numbers:** PI Br. at 20, 35-36; SJ Opp. Br. at 89, 102 & n.28; Expert Report and Declaration of Dr. Marc Meredith,[10] ECF No. 566-44, ¶¶ 66, 90-91 & tbls. VI.A.2, VI.F.1.
- **Allegations regarding absentee ballot rejection rates for Black voters:** PI Br. at 38; SJ Opp. Br. at 109; Fraga Rep. ¶¶ 99-100, tbl. 7.
- **Allegations regarding racial makeup of voters returning absentee ballots:** FAC ¶ 66; PI Br. at 37-38; Burden Rep. 13-20, figs. 1-6.
- **Allegations regarding drop box availability for Black voters:** PI Br. at 22; SJ Opp. Br. at 120; Fraga Rep. ¶¶ 148-150, tbl. 15.
- **Allegations regarding motivations for line-warming:** PI Br. at 40; SJ Opp. Br. at 121-23.
- **Allegations regarding line length in majority-Black areas:** PI Br. at

[10] Served on all parties on January 13, 2023. ECF No. 372.

40; SJ Opp. Br. at 124.

- **Allegations regarding expected rate of provisional ballot use by Black voters:** FAC ¶ 80; PI Br. at 25, 40-41, 43; SJ Opp. Br. at 124-26 & n.34; Burden Rep. 35-38, 53-55, tbls. 13, 14.
- **Allegations regarding the Georgia Legislature's knowledge that provisions of SB 202 would disproportionately impact Black voters:** PI Br. at 33-34; Plaintiffs' Reply in Supp. of Their Mot. for Prelim. Inj. Regarding Intentional Racial Discrimination, ECF No. 617 ("PI Reply Br.") at 24, 29-30; SJ Opp. Br. at 78-87.
- **Allegations that race was a factor in passing SB 202:** FAC ¶¶ 138-57; PI Br. at 33, 63-64; PI Reply Br. at 3, 24; SJ Opp. Br. 59-73.
- **Allegations related to racially polarized voting in Georgia:** PI Br. at 45, 60; PI Reply Br. at 30; Burden Rep. at 4-7 & tbls. 1, 2.

State Defendants develop no argument to support their claim of prejudice beyond their bare allegations that the United States' complaint in intervention adds new factual and legal issues to the case.

Further, although State Defendants cast the prejudice inquiry as a question of harm to their case overall, and tie this alleged harm to questions of timeliness, *see* State's Br. at 7-8, that is not the proper measure by which timeliness is

evaluated, *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977).[11] The relevant inquiry is "the extent" to which State Defendants may be prejudiced "as a result of the [the United States]'s failure to apply for intervention *as soon as [it] actually knew or reasonably should have known of [its] interest*." *Comm'r, Ala. Dep't of Corr. v. Advance Loc. Media, LLC*, 918 F.3d 1161, 1171 (11th Cir. 2019) (emphasis added). As explained above, the United States moved to intervene as soon as practicable in light of this Court's December 22 Order, to make sure the United States could continue to pursue its intent-based claim through the Fourteenth Amendment. State Defendants make no attempt to argue that they were prejudiced by the time that elapsed between that Order and the United States' motion to intervene.

State Defendants' assertion that they will be prejudiced by the United States' intervention in *AME* because State Defendants have already filed their summary judgment motions in the consolidated proceeding fails for the same reason. The State Defendants' summary judgment briefing was submitted before this Court's December 22 Order, and so the event that suggested this Court might take a new view of Defendants' arguments on Section 2 intent-based claims arose *after* Defendants had filed for summary judgment. Further, the United States seeks to

[11] In *Bonner v. City of Prichard*, the Eleventh Circuit adopted as binding precedent former Fifth Circuit decisions handed down by September 30, 1981. 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

pursue an intent-based theory of liability under the Constitution, an issue Defendants had already briefed in their motions for summary judgment.

No new legal issues are raised by the United States pursuing a constitutional claim based on intentional discrimination. Again, other plaintiffs have already sought to prove such constitutional intentional discrimination claims. All parties agree that the legal framework for proving such a claim is provided by *Arlington Heights*. Throughout this litigation, the United States has also sought to prove a statutory intentional discrimination claim by using the *Arlington Heights* framework. *See, e.g.*, Complaint at ¶¶ 159-164, *United States v. Georgia*, ECF No. 1; Opp. to the State's Mot. to Dismiss at 4-6, *United States v. Georgia*, ECF No. 58; PI Br. at 28-30; FAC ¶¶ 159-164; SJ Opp. Br. at 16-18, 24-137. While intervention means that the United States can litigate a claim under the Constitution, the factual and legal substance of the intentional discrimination violation that the United States intends to prove remains the same. *NAACP v. Gadsden Cnty. Sch. Bd.*, 691 F.2d 978, 980-81 (11th Cir. 1982).[12]

[12] State Defendants argue that, if intervention is granted, they will need to address these allegations in their summary judgment reply briefs. State's Br. at 8 n.2. The United States notes that, because these issues are already part of the summary judgment briefing in the consolidated case, there is nothing new for the State Defendants to address.

C. As an Intervening Party, the United States May Add Defendants As Though It Had Instituted the Suit.

State Defendants appear to argue that the United States' naming of a so-called "new" defendant would prejudice the existing defendants in *AME*. State's Br. at 3, 8. The only defendant the United States' complaint in intervention adds to the *AME* case is the State of Georgia, which is an existing defendant in this consolidated case through the United States' initial complaint. *Compare* United States' Proposed Complaint in Intervention, ECF No. 838-3 (naming as defendants only the State of Georgia, the Georgia State Election Board, and Brad Raffensperger, in his official capacity as Georgia Secretary of State) *to* AME Plaintiffs' Proposed Second Amended Complaint, ECF No. 788-1 (naming as defendants, among others, the Georgia State Election Board and Brad Raffensperger, in his official capacity as Georgia Secretary of State); *see also* Complaint, *United States v. Georgia* (N.D. Ga. June 25, 2021), ECF No. 1. State Defendants provide no explanation as to why adding the State of Georgia as a defendant to *AME* would cause any prejudice to the State Defendants.

As noted, the State of Georgia was already named as a defendant in *United States v. Georgia*, a case consolidated for discovery purposes with the *AME* case. Because both Fourteenth Amendment claims and Section 2 intent-based claims are governed by the *Arlington Heights* framework, *Gadsden Cnty. Sch. Bd.*, 691 F.2d at 980-81, the State of Georgia has had the opportunity to conduct all relevant

discovery during the consolidated discovery proceedings. Indeed, although State Defendants claim the addition of the State of Georgia as a defendant in *AME* would necessitate additional discovery, State Defendants do not suggest a single topic that additional discovery might cover—nor could they, as all relevant issues were covered during months of consolidated discovery. And State Defendants have not made any argument as to why adding the State of Georgia would in any way alter their litigation strategy, the real parties in interest, or any other element of *AME*. Because the addition of the State of Georgia as a defendant in *AME* does not change the posture of the State Defendants in these proceedings, that addition cannot be a source of prejudice.[13]

[13] To the extent that State Defendants are suggesting that, as a matter of law, the United States cannot as an intervenor add the State of Georgia as a defendant in *AME*, the argument fails. The United States may, of course, sue a state for violations of federal law. *Franchise Tax Board v. Hyatt*, 139 S. Ct. 1485, 1495 (2019) ("The States, in ratifying the Constitution, similarly surrendered a portion of their immunity by consenting to suits brought against them by the United States in federal courts."). And, when intervening under Section 902 of the Civil Rights Act, the United States is entitled to "the same relief as if it had instituted the action." 42 U.S.C. § 2000h-2; *Spangler v. United States*, 415 F.2d 1242, 1244 (9th Cir. 1969) (holding in school desegregation case that the United States, when intervening under Section 902, could seek "complete relief involving the entire . . . school system" even when original plaintiffs sought relief for only a subset of schools); *cf. Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424, 430-31 (1976) (holding that Section 902 allows the United States to "continue as a party plaintiff . . . despite the disappearance of the original plaintiffs . . . so long as such participation serves the statutory purpose").

D. The United States Will Be Prejudiced If Intervention Is Denied.

Denying the United States' motion to intervene will prejudice the United States by preventing the United States from continuing to litigate the intent-based theory it has pursued under the *Arlington Heights* framework for years if this Court holds that a statutory claim relying on proof of intentional discrimination is not cognizable. The United States would be prejudiced if it can no longer pursue a claim under that standard, as its discovery efforts and briefing to date have all focused on that legal theory. In contending otherwise, State Defendants recycle their arguments as to why the United States' motion to intervene is untimely. State's Br. at 7-8. Even if those contentions were somehow correct—and they are not—they say nothing about the prejudice the United States would suffer if intervention is denied.[14] Nor do State Defendants address the prejudice that the

[14] State Defendants, citing *Turner v. Goolsby*, 255 F. Supp. 724, 732-33 (S.D. Ga. 1965), suggest that the court may grant the United States' motion to intervene but limit the scope of that intervention. But State Defendants do not explain how the United States' intervention could be limited, or how *Goolsby* provides support for such a limitation. Here, the United States brings only a single claim in its proposed complaint in intervention—violation of the Fourteenth Amendment—and does not challenge any provision of SB 202 that was not challenged in its original complaint. By contrast, in *Goolsby*, the United States sought to intervene on all claims, including those the District Court viewed as no longer or not properly before it, and the District Court limited the United States' intervention only to claims that the District Court believed could be subject to further litigation. *Id.* Here, where the United States seeks to continue litigating a single intent-based claim, *Goolsby* does not support a limitation on the United States' participation in *AME*.

United States would suffer if it were prevented from pursuing its sovereign interest in ensuring enforcement of the Constitution, *see In re Debs*, 158 U.S. 564, 584-86 (1895)—an interest that cannot be represented by a private party.

II. CONCLUSION

Section 902 of the Civil Rights Act grants the United States an unconditional right to intervene in a case, like *AME*, which has been certified to be of "general public importance" by the Attorney General. 42 U.S.C. § 2000h-2. The United States' motion to intervene timely followed this Court's December 22 Order, which raised the possibility that this Court may interpret recent Eleventh Circuit caselaw as precluding the United States' intent-based claim under Section 2 and thus created the United States' interest in intervening in *AME*, and will not unduly prejudice Defendants. Because the United States meets the requirements for intervention as of right under Rule 24(a), its motion to intervene should be granted.

Dated: March 5, 2024

Respectfully submitted,

RYAN K. BUCHANAN
United States Attorney
Northern District of Georgia

/s/ Aileen Bell Hughes
AILEEN BELL HUGHES
Georgia Bar No. 375505
Assistant U.S. Attorney
Office of the United States Attorney
600 U.S. Courthouse
75 Ted Turner Drive, SW
Atlanta, GA 30303
Phone: (404) 581-6000
Fax: (404) 581-6181

KRISTEN CLARKE
Assistant Attorney General

SPARKLE SOOKNANAN
Principal Deputy Assistant Attorney General
Civil Rights Division

/s/ Brian Remlinger
R. TAMAR HAGLER
JOHN A. RUSS IV
JASMYN G. RICHARDSON
RACHEL R. EVANS
ERNEST A. MCFARLAND
MAURA EILEEN O'CONNOR
ELIZABETH M. RYAN
SEJAL JHAVERI
J. ERIC RICH
JUDY BAO
BRIAN REMLINGER
Attorneys, Voting Section
Civil Rights Division
U.S. Department of Justice
4 Constitution Square
150 M Street NE, Room 8.923
Washington, D.C. 20530
Phone: (800) 253-3931
Fax: (202) 307-3961
brian.remlinger@usdoj.gov

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(D)

Pursuant to Local Rule 7.1(D), I certify that the foregoing document was prepared in Times New Roman 14-point font in compliance with Local Rule 5.1(C).

/s/ Brian Remlinger
BRIAN REMLINGER
Attorney, Voting Section
Civil Rights Division
U.S. Department of Justice

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2024, I electronically filed the foregoing with the clerk of the court using the CM/ECF system, which will send notification of this filing to counsel of record.

/s/ Brian Remlinger
BRIAN REMLINGER
Attorney, Voting Section
Civil Rights Division
U.S. Department of Justice