IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

DAWN CURRY PAGE, et al., **Plaintiffs,** **v.** **VIRGINIA STATE BOARD OF ELECTIONS, et al.,** **Defendants.**	**Civil Action No.: 3:13-cv-678**

INTERVENOR-DEFENDANTS' RESPONSE TO MOTION TO INTERVENE AS PLAINTIFFS BY THE VIRGINIA STATE CONFERENCE OF NAACP BRANCHES

Intervenor-Defendants respectfully submit this Response To The Motion To Intervene As Plaintiffs By The Virginia State Conference Of NAACP Branches (DE 157). The Virginia NAACP concedes that "the full extent of this Court's role in the remedial process is, as of yet, unknown," but nonetheless seeks "limited intervention" for the sole purpose of participating "in any possible remedial proceedings" that may occur at some unknown future date. Mem. 2, 3–5 (DE 158). This motion is premature: there may be no remedial proceedings at all because the Court has not yet "review[ed]" the question of *liability* "anew" in light of the Supreme Court's vacatur and remand order. *United States v. Simmons*, 635 F.3d 140, 144 (4th Cir. 2011), *vacated on other grounds on reh'g en banc*, 649 F.3d 237 (4th Cir. 2011). More important, the Virginia NAACP has not provided any indication, even in general terms, about what sort of remedy it would prefer or how any such hypothesized remedial interest differs from that of Plaintiffs.

To be sure, there are good reasons for the NAACP to take this "wait and see" approach. There are many unknown contingencies at this point concerning what, if any, remedial plan will

emerge from the legislative or judicial process. Consequently, absent a *specific* remedial preference, the NAACP cannot now articulate whether a remedial plan will adversely affect its undefined interests or whether its preferred remedial alternative(s) will differ from that adopted by the Legislature or advocated by the existing parties. But these very uncertainties and contingencies that preclude the NAACP from asserting what specific role it will play in the remedial process also require that its intervention be denied at this time. It is black-letter law that intervention should not be granted to a party that lacks a concrete *present* interest, but seeks intervention to have a "place at the table" *in the event* that its contingent, amorphous interests become adversely affected and unrepresented by existing parties.

Accordingly, the Virginia NAACP's intervention motion should be denied at this time, without prejudice to renewing the motion when and if it can identify a specific remedial interest or preference that is not being adequately represented by an existing party.

ARGUMENT

I. THE VIRGINIA NAACP HAS NOT IDENTIFIED A SUFFICIENT INTEREST TO SUPPORT INTERVENTION AT THIS TIME

Rule 24(a)(2) provides for intervention as of right, upon a "timely motion," Fed. R. Civ. P. 24(a)(2), for a party who demonstrates "(1) an interest in the subject matter of the action; (2) that the protection of this interest would be impaired because of the action; and (3) that the applicant's interest is not adequately represented by existing parties to the litigation." *Teague v. Bakker*, 931 F.2d 259, 260–61 (4th Cir. 1991). Rule 24(b)(2) provides for permissive intervention to "anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(2).

The Virginia NAACP's motion fails to satisfy these standards at this time. It requests "limited intervention" for the sole purpose of participating "in any possible remedial

proceedings" in the future, Mem. 3–5, but such proceedings may never occur because the Court may not find liability "anew" under the Supreme Court's vacatur and remand order, *Simmons*, 635 F.3d at 144. Moreover, even if liability is again found, the Virginia NAACP itself recognizes that a number of additional events must occur before any remedial phase could even commence in this case: the Court would have to accord sufficient time for "the remedial legislative process" to play out in the General Assembly, and then will "be forced to draw a remedial map" only if "the legislature and governor reach an impasse during the legislative process." Mem. 7. The NAACP "intends to participate" in the legislative process, *id.*, and thus will have a full opportunity to address and resolve the unspecified "concerns" it has regarding how that process will "proceed," *id.* at 9.

Accordingly, the NAACP, even on its own terms, has no interest currently affected by this litigation and such an interest will eventually arise only if the Legislature or Court enters a remedy contrary to its (amorphously defined) interests. Thus, the NAACP has failed to identify any current "significantly protectable" interest in the litigation, *Teague*, 931 F.2d at 261, and any potential future interest is "too speculative and too contingent on unknown factors" to support intervention now, *Sutphen Estates, Inc. v. United States*, 342 U.S. 19, 23 (1951).

This is particularly obvious because the NAACP has provided no specific remedy or plan that it favors or that would avoid the generalized injury of having its members' voting rights "excluded or minimized." Mem. 5. Since it has not identified any particular remedial preference or interest, it inherently has no "interest," "claim," or "defense" in any eventual remedy. Fed. R. Civ. P. 24(a), (b); *see also Sutphen Estates*, 342 U.S. at 23. Simply put, the NAACP identifies no specific remedy it seeks to *advocate* in the remedial phase and identifies no realistic remedy it seeks to *avoid*.

Absent such a specific, concrete, and non-contingent interest, intervention should not be granted. As the Supreme Court has emphasized, allowing intervention to parties based on such generalized concerns about undesirable remedial outcomes runs too great a risk that the intervenors will merely be "superfluous spectator[s]" because the unwanted remedy never eventuates or is adequately resisted by existing parties. *United Airlines v. McDonald*, 432 U.S. 385, 394 n.15 (1977). Thus, the far more preferable course is to grant intervention only at the point when the intervenors allege a specific, current remedial interest not being advocated by one of the parties. *See id.* at 394.

Finally, intervention is improper because the NAACP cannot articulate any reason to believe that its generalized remedial interest is different from or "not adequately represented by the existing parties to the litigation." *Teague*, 931 F.2d at 260–62. Indeed, the NAACP's interests seem no different than Plaintiffs' interests.[1] First, the NAACP's proposed complaint in intervention is materially identical to, and seeks the same relief as, Plaintiffs' Complaint. *Compare* Corrected Compl. In Intervention ¶ 3 (seeking "a declaration that Virginia's Congressional District 3 is invalid and an injunction prohibiting Defendants from calling, holding, supervising, or taking any action with respect to Congressional elections based on Congressional District 3 as it currently stands") (DE 166), *with* Compl. ¶ 6 (same) (DE 1); *see also* Corrected Compl. In Intervention ¶¶ A-D (seeking identical relief as Compl. ¶¶ B-E). In fact, the proposed complaint in intervention advances the exact same liability theory as Plaintiffs' Complaint, challenging the alleged "racial gerrymander in Virginia's Congressional

[1] In the typical *Shaw* case, the plaintiff's proposed alternative plan serves as both the basis for liability and an initial point of departure for any judicial remedy. *See Easley v. Cromartie*, 532 U.S. 234, 258 (2001). Plaintiffs' Alternative Plan, however, does not prove a *Shaw* violation or propose a tenable remedy because Plaintiffs have admitted that it violates *Shaw* by "subordinat[ing] traditional districting principles to race" to achieve a "50%" racial "quota" in District 3. Tr. 172–73; *see also Easley*, 532 U.S. at 258.

District 3." *See* Corrected Compl. In Intervention ¶ 2; *see also id.* ¶¶ 10–38 (replicating nearly verbatim the allegations in Complaint ¶¶ 21–51).

The NAACP, moreover, acknowledges that its members "may share a common interest with the existing plaintiffs," who reside in District 3, "in wanting to see a constitutional construction of Congressional District 3." Mem. 8. It suggests that its interests supplement Plaintiffs' interests because it has members in "surrounding congressional districts" whom it wishes to protect from any "detrimental impact" under a remedial plan. *Id.* But the NAACP never articulates what "detrimental impact" its members in surrounding districts might face. More important, such a detrimental impact cannot occur if District 3 is remedied in a constitutional manner and, again, the NAACP provides no basis for believing Plaintiffs' interest in a constitutional District 3 differs from the NAACP's interests or will not be adequately represented.

In short, because "the objectives the [NAACP] seeks to achieve in this case are goals shared by" Plaintiffs, this demonstrates that Plaintiffs "adequately represent[]" the Virginia NAACP's interests and, thus, that intervention should be denied. *United States v. City of Miami*, 278 F.3d 1174, 1178–79 (11th Cir. 2002) (upholding denial of intervention in civil rights case where organization sought the same objectives as the plaintiff); *Smith v. Cobb County Bd. of Elecs. & Regs.*, 314 F. Supp. 2d 1274, 1312 (N.D. Ga. 2002) (applying *City of Miami* in redistricting case and denying intervention where black voters, as putative intervenors, did "not object[] that the plaintiffs' proposed plan violates" the law and "merely want[ed] an opportunity to present an alternative apportionment plan to the Court that differs from the plan presented by the plaintiffs"). This is particularly true here, where the Virginia NAACP has disclaimed any effort "to malign the intent of existing plaintiffs," Mem. 7–8, and has not even attempted to show

"adversity of interest, collusion, or nonfeasance" on Plaintiffs' part, *Fletcher v. Lamone*, 2011 WL 6097770, *3 (D. Md. Dec. 5, 2011) (denying intervention in redistricting case where putative intervenors "share[d] the same ultimate goal" as the plaintiffs (citing *Commonwealth of Va. v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976))). Finally, the NAACP will be free to articulate its desired general remedial principles in an amicus brief.

Accordingly, at this premature juncture, the Virginia NAACP has not identified a cognizable interest in its requested "limited intervention," Mem. 3, much less an interest that Plaintiffs do not adequately represent, *see Teague*, 931 F.2d at 260–61. The Court should therefore deny the motion, without prejudice to renewal if and when the NAACP identifies a specific remedial alternative that avoids the injury to its members that would purportedly be caused by other specific remedial options.

CONCLUSION

The Court should deny the Virginia NAACP's motion.

Dated: May 19, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 19, 2015, a copy of the INTERVENOR-DEFENDANTS' RESPONSE TO MOTION TO INTERVENE AS PLAINTIFFS BY VIRGINIA STATE CONFERENCE OF NAACP BRANCHES was filed electronically with the Clerk of Court using the ECF system, which will send notification to the following ECF participants:

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