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

DAWN CURRY PAGE, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 3:13cv678
VIRGINIA STATE BOARD OF ELECTIONS, et al.,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE OF THE VIRGINIA STATE CONFERENCE OF NAACP BRANCHES

The Virginia State Conference of NAACP Branches ("Virginia NAACP") respectfully moves for limited intervention as of right as plaintiff, or, in the alternative, permissive limited intervention as plaintiff in the above-captioned lawsuit challenging the constitutionality of Congressional District 3 in Virginia's 2012 Congressional Plan, Va. Code Ann. § 24.2-302.2 (2012). The Virginia NAACP is entitled to intervene in this case as a matter of right under Federal Rule of Civil Procedure 24(a)(2). In the alternative, the Virginia NAACP requests permissive intervention pursuant to Rule 24(b). In accordance with Rule 24(c), a proposed complaint in intervention is attached to the motion as Exhibit A.

The Virginia NAACP seeks intervention at the remedy stage of this case, and for any appeal that might arise from dispute over that remedy, to ensure that the rights of minority voters throughout Virginia are represented in this litigation. The Virginia NAACP has thousands of members across the state, and therefore has a strong interest in ensuring that its members and all

voters are afforded a fair opportunity to elect their candidates of choice and are not assigned to districts solely on the basis of their skin color. Moreover, the Virginia NAACP seeks to intervene because of the significance of the remedy in this action. The Court's ruling will require redrawing boundary lines not only for Congressional District 3, but also for - adjacent congressional districts, as well. The Virginia NAACP, representing minority voters in the affected districts and across the Commonwealth, has a substantial interest in ensuring that this remedy is fair for all voters of color. While the full extent of this Court's role in the remedial process is, as of yet, unknown, the Court will benefit from the perspective of the Virginia NAACP in any possible remedial proceedings.

BACKGROUND

The Virginia NAACP is a membership organization and part of the national NAACP, the oldest and largest civil rights organization in the United States. The Virginia NAACP, headquartered in Richmond, VA, has over one hundred statewide units, including members in Richmond, Petersburg, Norfolk, and Virginia Beach. The Virginia NAACP has approximately 16,000 members statewide. It has members throughout Congressional District 3, in every congressional district adjacent to Congressional District 3, and across the state. One of the priorities of the Virginia NAACP is to advance and defend the voting rights of its members, including the right to be free from racial discrimination in voting and to elect candidates of their choosing at every political level.

The Complaint in this matter was filed on October 2, 2013. On December 3, 2013, this Court granted the motion to intervene as defendants as to eight members of the Virginia congressional delegation. Doc. 26. Following denial of Defendants' motion for summary judgment on January 27, 2014, a bench trial took place on May 21 and 22, 2014. Doc 50, 100-

101. On October 7, 2014, this Court rendered judgment in favor of Plaintiffs and ordered the Commonwealth to act "within the next legislative session to draw electoral districts based on permissible criteria." *Page v. Va. State Bd. of Elections*, No. 3:13cv678, 2014 U.S. Dist. LEXIS 142981, at *6 (E.D. Va. Oct. 7, 2014) (three-judge court), *vacated and remanded sub nom. Cantor v. Personhuballah*, 2015 U.S. LEXIS 2204 (U.S., Mar. 30, 2015). On February 23, 2015, Intervenor-Defendants' motion to postpone the remedial deadline until September 1, 2015, was granted while appeal was pending in the United States Supreme Court. In the wake of *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. ____ (2015), the Supreme Court vacated this Court's judgment and remanded for further consideration consistent with the *Alabama* decision. Thus, this Court will once again consider this case and likely implement an appropriate remedy.

ARGUMENT

I. The Virginia NAACP Is Entitled to Intervene as a Matter of Right Under Rule 24(A)(2).

To succeed on its motion to intervene as a matter of right, the Virginia NAACP must show, "(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." *Stuart v. Huff*, 706 F.3d 345, 349 (4th Cir. 2013) (citing *Teague v. Bakker*, 931 F.2d 259, 260-61 (4th Cir. 1991)); *see* Fed. R. Civ. P. 24(a)(2). Further, the Virginia NAACP's motion must be timely. *See* Fed. R. Civ. P. 24(a). Each of these criteria strongly supports the Virginia NAACP's motion to intervene.

A. Limited Intervention

First, as an overarching matter, limited intervention, as the Virginia NAACP seeks here, strikes a perfect balance between protecting the interests of all parties and ensuring that the case proceeds expeditiously. Limited intervention allows a party to intervene, but limits its

participation to a specific issue or argument, as the court finds appropriate. Limited intervention is not expressly provided for in Rule 24, but it was approvingly discussed in the Advisory Committee's note to that rule. "An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." Fed. R. Civ. P. 24, Advisory Committee Note (1966). Additionally, in *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972), the Supreme Court approved limited intervention where the intervenor was limited to the legal claims already presented by the parties. *Id*. at 539.

Traditionally, courts have been receptive to movants seeking limited intervention. *See United States v. Duke Energy Corp.*, 171 F. Supp. 2d 560, 565 (M.D.N.C. 2001) (allowing intervention as of right by citizen environmental groups while "impos[ing] reasonable limitations on Applicants' participation to ensure the efficient adjudication of the litigation"); *see also Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 383 (1987) (Brennan, J., concurring) (noting that "[r]estrictions on participation may…be placed on an intervenor of right and on an original party"); *United States v. S. Fla. Water Mgmt. Dist.*, 922 F.2d 704, 710 (11th Cir. 1991) (authorizing intervention of right but remanding to the district court "to condition…intervention in this case on such terms as will be consistent with the fair, prompt conduct of this litigation"). Indeed, the Fourth Circuit recently allowed plaintiffs to intervene during the appellate process in a case such as this one raising constitutional issues of general significance. In *Bostic v. Schaefer*, plaintiff-intervenors sought to intervene after the district court declared Virginia's ban on same-sex marriage unconstitutional. *See Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014). That order was stayed pending appeal, at which point the

Fourth Circuit allowed the intervention during the course of the appellate proceedings. *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014).

Limited intervention is appropriate in this case given the complexity of the issues, the challenges in reviewing a remedial plan and its effect on voters across the Commonwealth, and the civil rights at stake. The Virginia NAACP is a unique participant representing a significant number of voters who will be affected by the remedy developed by the legislature and approved by this Court. This Court's review of the remedial plan will certainly be aided by the perspective of the Virginia NAACP.

B. The Virginia NAACP Has a Significantly Protectable Interest in the Subject Matter of this Action.

The Virginia NAACP meets the first factor for intervention as of right, which requires that an intervenor have a "significantly protectable" interest in the litigation. *Teague v. Bakker*, 931 F.2d 259, 261 (4th Cir. 1991) (quoting *Donaldson v. United States*, 400 U.S. 517, 531 (1971)). The Virginia NAACP's interest is "significantly protectable" because it and its members stand to directly "gain or lose by the direct legal operation of the district court's judgment." *Id.*; *see also* 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Fed. Prac. & Proc.*: Civ § 1908.1 (3d ed. 2007) ("[I]n cases challenging various statutory schemes as unconstitutional . . . , the courts have recognized that the interests of those who are governed by those schemes are sufficient to support intervention.")

Given the two primary legal questions in the case, the Virginia NAACP's interest is even clearer. The Equal Protection Clause of the Fourteenth Amendment was a Reconstruction Amendment designed to ensure that former Confederate states applied laws equally, including to people of color. *Strauder v. West Virginia*, 100 U.S. 303, 306-07 (1879) (The Fourteenth Amendment "was designed to assure to the colored race the enjoyment of all the civil rights that

under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation.") The Voting Rights Act was passed primarily to prohibit discrimination against African Americans in voting. 42 U.S.C. §§ 1973 to 1973aa-6 (2012). Courts have historically recognized and continue to recognize that redistricting schemes have been drawn so as to inhibit and dilute the voting strength of African-Americans. *See, e.g.*, *White v. Register*, 412 U.S. 755 (1973); *Thornburg v. Gingles*, 478 U.S. 30 (1986).

At stake in this litigation and, more specifically, in the remedial stage, are the civil and voting rights of Virginia NAACP members—voters of color long excluded and minimized in the political process. The Virginia NAACP's members, located in every congressional district in the state, will be governed by whatever remedial map is developed for the rest of the decade, and thus have a "significantly protectable" interest in advancing the interests of those minority voters during the remedy stage of this litigation.

C. Denial of This Motion Would Impair the Virginia NAACP's Ability to Protect its Interests.

The Virginia NAACP meets the second factor for intervention of right, which requires an intervenor to "show that 'as a practical matter,' its interest may be 'impaired' or 'impeded' by the trial court's failure to allow intervention." *Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976) (quoting Fed. R. Civ. P. 24(a)(2)).

The Virginia NAACP and its thousands of members will suffer substantial and significant harm if intervention is not granted. The allegations in Plaintiffs' complaint, and this Court's ruling in this matter, directly implicate the rights of African-American voters. If a fair and legal

remedial redistricting plan is not devised and implemented, the voting power of African-Americans in Virginia could be significantly diluted. Unless intervention is granted, the Virginia NAACP will be limited in its ability and opportunity to ensure that the remedial redistricting plan addresses the needs and rights of African-American voters. While the Virginia NAACP intends to participate in the remedial legislative process, the Virginia NAACP can only effectively protect its interests if granted intervention. First, intervention is the only mechanism in this instance that will allow the Virginia NAACP to directly participate as a party in any appeal of this Court's decision on the remedial plan. Participating only as an amicus at this stage would not afford that direct, substantial right. Second, should the legislature and governor reach an impasse during the legislative process, this Court may be forced to draw a remedial map. *See Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) ("[W]hen those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the 'unwelcome obligation' of the federal court to devise and impose a reapportionment plan pending later legislative action." (quoting *Connor v. Finch*, 431 U.S. 407, 415 (1977) (internal citations omitted)). If that task did fall on the Court, the Virginia NAACP would need to be a party in order to effectively represent the interests of its members in the development of that remedy.

D. The Virginia NAACP's Interest Is Not Adequately Represented by Existing Parties to this Litigation.

The Virginia NAACP meets the third factor for intervention of right, which requires merely that an intervenor show that representation of its interest by the current parties "may be" inadequate; an intervenor's "burden of showing an inadequacy of representation is minimal." *Westinghouse Elec. Corp.*, 542 F.2d at 216 (citing *Trbovich*, 404 U.S. at 538 n.10). Any doubt

regarding the adequacy of representation should be resolved in favor of the would-be intervenor. *See* 6 James Wm. Moore, et al., *Moore's Fed. Prac.* § 24.03[4][a][i] (3d ed. 2011).

Although the Virginia NAACP members may share a common interest with the existing plaintiffs in wanting to see a constitutional construction of Congressional District 3, the Virginia NAACP is also concerned that the remedial configuration of Congressional District 3 not have a detrimental impact on voters of color in surrounding congressional districts. Existing plaintiffs only reside in Congressional District 3—as such, they have no legally-cognizable interest in the ability of voters in adjacent districts to participate fairly in the political process. The Virginia NAACP does not seek to malign the intent of existing plaintiffs, but rather submits that given its membership, it has insights and interests that existing plaintiffs simply do not have.

E. The Intervention Is Timely.

The Virginia NAACP meets the final factor for intervention of right, which requires an intervenor to bring a "timely motion." Fed. R. Civ. P. 24(a). The circumstances and complexity of this case all support a conclusion that this application is timely.

First, the fact that this Court rendered judgment on October 7, 2014 does not mean this application is untimely. Pursuant to instructions of the United States Supreme Court, this Court's judgment was vacated and this Court was ordered to reconsider its decision in light of the *Alabama* ruling. *Cantor v. Personhuballah*, 2015 U.S. LEXIS 2204 (U.S. Mar. 30, 2015). Thus, there is no final judgment.

But, even if there was a final judgment rendered, that still does not make this application untimely. Courts have often allowed intervention even after a lawsuit has entered its remedial phase, especially when the aim of intervention is the protection of intervenors' constitutional rights. *See Stallworth v. Monsanto*, 558 F.2d 257, 267 (5th Cir. 1977) (holding that the trial

court abused its discretion in denying non-union white employees' intervention after entry of a consent order because the remedial provisions deprived the applicants of seniority rights); *see also United States v. City of Chicago*, 870 F.2d 1256, 1263 (7th Cir. 1989) (permitting intervention after final decree because intervenors' chances for promotion would be affected by the remedy). "Timeliness presents no automatic barrier to intervention in post-judgment proceedings where substantial problems in formulating relief remain to be resolved." *Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 129 (D.C. Cir. 1972). Thus, the fact that final judgment will shortly be entered presents no problem for the timeliness of this application.

In fact, the Virginia NAACP did move expediently once it became clear that intervention might be necessary. The Supreme Court only issued its GVR in this case on March 30, 2015. *Cantor v. Personhuballah*, 2015 U.S. LEXIS 2204 (U.S. Mar. 30, 2015). This Court then invited briefing on the implications of the Supreme Court's decision in the *Alabama* case on the instant case. That briefing schedule only concluded last Thursday, on April 30, 2015. The Court has yet to indicate whether any oral argument on the issue will be necessary, and it has not made a ruling. More importantly, this Court extended the deadline for the legislature to pass a remedial plan until September 1, 2015. *Page v. Va. State Bd. of Elections*, No. 3:13cv678, Docket No. 137 (E.D. Va. Feb. 23, 2015). While this Court may provide some additional guidance for the legislature, the Virginia NAACP has concerns about how the legislative process will proceed given the rule of law that emerged from the *Alabama* case. At this point, though, the legislature has not passed any remedial plan, and this Court's role in the remedial process cannot begin until it is presented with a remedial plan. Thus, given the fact that the Virginia NAACP seeks limited intervention in the remedial process, the motion to intervene is timely.

Second, this case presents an extraordinary situation in which any timeliness concerns are outweighed by the value of the Virginia NAACP's participation in this litigation. Regardless of what this Court is called upon to do—review the legality and sufficiency of the remedial plan or devise a remedial plan itself—the Court would benefit from understanding the impact of a proposed remedial plan on voters of color in all the congressional districts affected by the remedy, a unique prospective that would be provided by the Virginia NAACP.

Third, intervention at this natural transition stage in the litigation will not delay the proceedings or cause prejudice to any other party. The Virginia NAACP will not seek any alteration of any existing scheduling order, and will comply fully with any future order set by this Court. The proposed intervention will not prejudice any of the existing parties because the Virginia NAACP does not, absent further order or inquiry of the court, intend to seek discovery from any of the existing parties. The arguments it intends to present during this Court's consideration of the adequacy of the remedy will not cause duplicative work or administrative burdens on any of the parties. Further, the limited nature of the intervention sought by the Virginia NAACP adequately ensures that the existing parties will not be prejudiced by the intervention.

As a practical matter, the consequence of this Court considering or approving a remedy that would fail to adequately take into account the Virginia NAACP's interests and legal arguments could be a significant waste of judicial resources. If the Virginia NAACP had to bring a separate action challenging the remedial plan on equal protection or Voting Rights Act grounds, that would push final resolution of the entire matter even further down the road. It would also be inconsistent with the rule that courts are to construe intervention liberally so as to "'involv[e] as many apparently concerned persons as is compatible with efficiency and due

process.'" *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986) (quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)). Further, failure to allow the Virginia NAACP to intervene of right in the remedy stage could undermine the legitimacy of a settlement agreement in later appeal. *See Benjamin* ex rel. *Yock v. Dept. of Pub. Welfare of Pa.*, 701 F.3d 938, 948 (3rd Cir. 2012). Thus, the letter and spirit of the Rule is best promoted by granting the Virginia NAACP's motion for intervention, so that its interest may be considered and efficiently addressed together with the interests of the original plaintiffs.

II. Alternatively, the Virginia NAACP Should Be Allowed to Permissively Intervene Under Rule 24(B).

If the Court does not grant the Virginia NAACP's motion to intervene as a matter of right, the Movant respectfully requests that the Court exercise its discretion to allow it to intervene under Rule 24(b). The Court has broad discretion to grant a motion for permissive intervention: (1) where the intervenor's claim or defense and the main action have a question of law or fact in common, and (2) after considering whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights. Fed. R. Civ. P. 24(b)(1)(B); *McHenry v. C.J.R.*, 677 F.3d 214, 222 (4th Cir. 2012).

The Virginia NAACP qualifies for permissive intervention. First, the Virginia NAACP's proposed complaint has a question of law in common with the original complaint because both raise Equal Protection claims and concern questions on the proper interpretation of the Voting Rights Act. Second, for the reasons set forth above, the motion is timely and, given the current transition stage of the litigation, intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. To the contrary, the Virginia NAACP's intervention will only serve to contribute to a comprehensive understanding of minority voters' interests as the

Court oversees the remedial process. Thus, permissive intervention is amply warranted in this case.

CONCLUSION

The Virginia NAACP has conferred with the other parties in this matter. Plaintiffs consent to the intervention. Based on the understanding that the Virginia NAACP will not seek to reopen discovery in connection with its limited intervention, unless the Court itself should invite it, Defendants do not oppose this motion.[1] Intervenor-Defendants state that they are unable to take a position on this proposed intervention unless and until they know the remedy that the proposed intervenors will be seeking and whether a remedial phase, if any, will occur in this case.

For the reasons stated above, the Virginia NAACP respectfully requests that the Court grant its motion to intervene as of right under Rule 24(a)(2) or, in the alternative, permit them to intervene under Rule 24(b). If granted permission to intervene under either provision, the Virginia NAACP has attached a proposed complaint in intervention for filing in accordance with the Federal and Local Rules of Civil Procedure.

Respectfully submitted this 5th day of May, 2015.

/s/ David O. Prince

David O. Prince, Esquire
VSB # 17044
411 East Franklin Street
Richmond, VA 23219

[1] With regard to the potential of the Virginia NAACP filing an appeal, should it object to the remedial plan, Defendants take no position at this time whether the Virginia NAACP would have standing to do so.

804-788-4861
princelaw@aol.com

Anita S. Earls (NC State Bar # 15597)
pro hac vice pending
Allison J. Riggs (NC State Bar # 40028)
pro hac vice pending
George Eppsteiner (NC State Bar # 42812)
pro hac vice pending
Southern Coalition for Social Justice
1415 Highway 54, Suite 101
Durham, NC 27707
Telephone: 919-323-3380 ext. 117
Facsimile: 919-323-3942
E-mail: allison@southerncoalition.org

Attorneys for the Virginia State Conference of NAACP Branches

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of May, 2015, a true and correct copy of the foregoing Memorandum of Law was delivered to Plaintiffs, Defendants and Defendant-Intervenors via the United States District Court, Eastern District of Virginia, Richmond Division, CM/ECF system.

___/s/ David O. Prince_____
David O. Prince, Esquire
VSB # 17044
411 East Franklin Street
Richmond, VA 23219
804-788-4861
princelaw@aol.com

Attorney for the Virginia State Conference of NAACP Branches