

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

<p>DAWN CURRY PAGE, et al.,</p> <p style="text-align: center;">Plaintiffs,</p> <p>v.</p> <p>VIRGINIA STATE BOARD OF ELECTIONS, et al.,</p> <p style="text-align: center;">Defendants.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Civil Action No.: 3:13-cv-678</p>
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**MEMORANDUM IN SUPPORT OF MOTION OF VIRGINIA REPRESENTATIVES
DAVID BRAT AND BARBARA COMSTOCK TO INTERVENE
AS ADDITIONAL INTERVENOR-DEFENDANTS**

Representatives David Brat and Barbara Comstock were elected to represent Virginia Congressional Districts 7 and 10, respectively, on November 6, 2014, after the Court’s October 7, 2014 decision in this case. Representatives Brat and Comstock now respectfully move to intervene as additional Intervenor-Defendants under Federal Rule of Civil Procedure 24.

This Court already has recognized that it is “proper” to allow intervention in this lawsuit by congressional representatives elected to office under the Enacted Plan that Plaintiffs challenge, and therefore granted intervention to Intervenor-Defendants. *See* Order (DE 26). Indeed, Plaintiffs not only challenge the constitutionality of the Enacted Plan, but also ask the Court to replace it with a “plan for new congressional districts in the Commonwealth.” Compl. ¶ D (DE 1). Moreover, prior to the Supreme Court’s vacatur and remand, the majority of this Court found a violation and ordered adoption of a remedial plan. Representatives Brat and Comstock, like Intervenor-Defendants, have a strong interest in preserving the current plan under

which they were elected to Congress and represent their constituents. Plaintiffs' request for mid-decade judicial redistricting unquestionably threatens to harm that interest. In addition, Defendants have indicated that they now support Plaintiffs' request and, thus, are inadequate to protect the interests of Representatives Brat and Comstock. Finally, Representative Brat's and Comstock's intervention as additional Intervenor-Defendants will not prejudice or delay any party's rights. The Court should grant Representatives Brat and Comstock intervention as of right or, in the alternative, permissive intervention, as additional Intervenor-Defendants.¹

I. THE COURT SHOULD GRANT REPRESENTATIVES BRAT AND COMSTOCK INTERVENTION AS OF RIGHT

This Court previously granted as "proper" the intervention of the 8 Republican congressional representatives elected under the Enacted Plan—including Representatives Brat's and Comstock's predecessors in office—under Federal Rule of Civil Procedure 24. Order (DE 26). Rule 24(a)(2) requires this Court to "permit anyone to intervene" who files a "timely motion," Fed. R. Civ. P. 24(a)(2), and 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). It is well settled that Rule 24(a) should be construed liberally in favor of permitting intervention. *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986) ("[L]iberal intervention is desirable to dispose of as much of a controversy involving as many apparently concerned persons as is compatible with efficiency and due

¹Defendants have stated that they have no objection to this motion based on the representation that it will not cause any delay in this case, and without prejudice to any argument about any party's entitlement to relief. Counsel for Representatives Brat and Comstock left voice mails for Plaintiffs' counsel on April 6, 2015 and April 10, 2015, stating their intention to file this motion on Monday, April 13, 2015 and requesting Plaintiffs' position on the motion. Counsel for Representatives Brat and Comstock followed up with an email to Plaintiffs' counsel on April 13, 2015. Plaintiffs' counsel did not respond to these messages, and Plaintiffs have not stated their position with respect to this motion.

process.”) (citation and internal quotation marks omitted). Moreover, courts—including this Court—have routinely granted intervention to members of Congress in cases involving challenges to congressional districting plans. *See, e.g., Wright v. Rockefeller*, 376 U.S. 52 (1964) (intervention of congressman to defend redistricting plan); *King v. Ill. State Bd. of Elections*, 410 F.3d 404 (7th Cir. 2005); Order (DE 26); *Hall v. Virginia*, 276 F. Supp. 2d 528, 529 (E.D. Va. 2003) (noting the intervention of Virginia congressional representatives), *aff’d*, 385 F.3d 421 (4th Cir. 2004); *Burton on Behalf of the Republican Party v. Sheheen*, 793 F. Supp. 1329, 1338 (D.S.C. 1992) (noting intervention as of right of Congressman Robin A. Tallon), *vacated on other grounds by Statewide Reapportionment Advisory Comm. v. Theodore*, 508 U.S. 968 (1993) (mem.) & *Campbell v. Theodore*, 508 U.S. 968 (1993) (mem.); *Prince v. Kramer*, No. Civ. No. 9668, 1972 WL 123242, at *2 (W.D. Wash. Apr. 21, 1972) (noting intervention of Congressman Brock Adams).

Here as well, Representatives Brat and Comstock easily satisfy the requirements for intervention as of right. *First*, Representatives Brat and Comstock each has “an interest in the subject matter of this action,” *Teague*, 931 F.2d at 260–61, because Plaintiffs ask the Court to redraw the boundaries of *all* congressional districts in Virginia, *see* Compl. ¶ D. Moreover, Virginia already has enacted a legislative districting plan based on the results of the 2010 Census—so Plaintiffs ask this Court for *mid-decade* judicial redistricting, which would not only upset existing district boundaries and constituent relationships but also engender confusion among the voting public. Representatives Brat and Comstock thus “stand to gain or lose by the direct legal operation of the district court’s judgment,” and have a “significantly protectable interest” warranting intervention as of right. *Teague*, 931 F.2d at 261.

Second, this interest will “be impaired because of the action” if Representatives Brat and Comstock are not permitted to intervene. *Id.* Representatives Brat and Comstock seek to protect their own interests and the interests of their constituents in the current congressional districting map. But Plaintiffs’ proposed remedy would require Representatives Brat and/or Comstock to seek re-election in districts with at least some new constituents, and many Virginia voters would be thrust into new districts with an unfamiliar representative. *See* Compl. ¶ D. As real parties in interest, Representatives Brat and Comstock should be permitted to intervene to defend the current legislatively enacted districting plan under which they were elected, will seek re-election, and serve their constituents.

Third, Representatives Brat and Comstock interests will not be “adequately represented” by Defendants, who “might be less vigorous” than Representatives Brat and Comstock would be in advancing their interests. *Teague*, 931 F.2d at 261–62. This requirement “is satisfied if the applicant shows that representation of his interest *may be* inadequate,” and “the burden of making that showing should be treated as minimal.” *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (emphasis added). The three remaining Defendants are members of the Virginia State Board of Elections charged with administering elections in Virginia, and are entirely unaffected by the boundaries or ultimate composition of the congressional districts. *See* Compl. ¶¶ 10–11. These Defendants therefore have no clear stake in the controversy and no incentive to engage in the “vigorous,” zealous advocacy of Representatives Brat’s and Comstock’s interests that they would offer themselves. *Teague*, 931 F.2d at 262.²

Moreover, the attorney for these Defendants, Virginia’s Attorney General, is not a

² Plaintiffs originally named the Virginia State Board of Elections and Attorney General Cuccinelli as defendants, but dismissed them by stipulation on November 21, 2013. *See* Stipulation Of Dismissal (DE 14).

sufficiently adequate representative to preclude intervention as of right. To the contrary, the Attorney General is now at “cross purposes” with Representatives Brat and Comstock, *see Stuart v. Huff*, 706 F.3d 345, 352 (4th Cir. 2013), because his office indicated to the Court on the April 1, 2015 conference call that the office now supports at least some of Plaintiffs’ position in this lawsuit. Thus, the Attorney General will not represent Representative Brat’s and Comstock’s interests *at all*, let alone “vigorous[ly].” *Teague*, 931 F.2d at 261–62. Thus, even assuming the Attorney General is an adequate representative of the generic public interest underlying the redistricting plan, he is not an adequate representative of Representative Brat’s and Comstock’s specific interests. *See, e.g., Stuart*, 706 F.3d at 350–52 (citing *Trbovich*, 404 U.S. at 538 & n.10 and *United Guar. Res. Ins. Co. of Iowa v. Phila. Sav. Fund Soc’y*, 819 F.2d 473, 475 (4th Cir. 1985)). And, in all events, the consistent granting of intervention to congressional representatives in these circumstances confirms that a state Attorney General’s representation does not support denying intervention as of right—a conclusion that is particularly simple here since the Attorney General now opposes the position of Representatives Brat and Comstock and has stated that Defendants have no objection to this intervention.

Finally, the Representatives Brat’s and Comstock’s motion to intervene is timely. The most important timeliness consideration is whether any delay in filing a motion to intervene “has prejudiced the other parties.” *Spring Const. Co., Inc. v. Harris*, 614 F.2d 374, 377 (4th Cir. 1980). Here, there is no delay or prejudice because proceedings following the remand of this case have been minimal: the Court has ordered a briefing schedule on the effect of the *Alabama* decision on this case, and Plaintiffs and Defendants are filing their brief today. Representatives Brat and Comstock will not be filing a separate brief on that issue, but instead will be joining the brief that the Court already has authorized the other Intervenor-Defendants to file on April 23.

Representatives Brat and Comstock thus have acted promptly and timely following the remand to protect their interests, and the Court should grant them intervention as of right.

II. IN THE ALTERNATIVE, THE COURT SHOULD GRANT REPRESENTATIVES BRAT AND COMSTOCK PERMISSIVE INTERVENTION

Even if the Court determines that Representatives Brat and Comstock are not entitled to intervene as of right, it still should permit them to intervene. Federal Rule of Civil Procedure 24(b)(2) allows the Court to grant 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). Representatives Brat and Comstock satisfy this requirement because their defense of the current congressional districting plan obviously involves *all* of the same questions of law and fact as Plaintiffs’ challenge to that plan. And, as explained, their intervention will not “unduly delay or prejudice the adjudication of the original parties’ rights.” Fed. R. Civ. P. 24(b)(3); *see supra* Part I.

CONCLUSION

The Court should grant Representatives Brat and Comstock intervention as additional Intervenor-Defendants.

Dated: April 13, 2015

Respectfully submitted,

/s/ Jonathan A. Berry

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CERTIFICATE OF SERVICE

I certify that on April 13, 2015, a copy of the MEMORANDUM IN SUPPORT OF MOTION OF VIRGINIA REPRESENTATIVES DAVID BRAT AND BARBARA COMSTOCK TO INTERVENE AS ADDITIONAL INTERVENOR-DEFENDANTS 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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