IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. John Benisek, et al.,	*	**Case No. 13-cv-3233-JKB**
Plaintiffs	*	**Three-Judge Court**
vs.	*	
Linda H. Lamone, et al., *in their official capacities,*	*	
Defendants.	*	

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MOVANT SHAPIRO'S REPLY TO PLAINTIFFS' AND DEFENDANTS' RESPONSES IN OPPOSITION TO HIS MOTION TO INTERVENE

Putative Intervenor Shapiro offers the following reply to the responses of the plaintiffs (ECF 122) and the defendants (ECF 121) in opposition to Shapiro's motion to intervene (ECF 109).

A. Reply to Plaintiffs' Response in Opposition to Shapiro's Motion to Intervene

Plaintiffs first contend that Shapiro does not have the requisite interest in the subject of the main action as Shapiro "is not a Republican and does not live in the Sixth District." Pls.' Resp. at 5. This incorrectly presumes that only Republicans who live in the Sixth District have legally protected interests with respect to the 2011 redistricting of Maryland's congressional districts. This is not the case. Other voters resident in other districts, including Shapiro, have related

protected interests. Shapiro has an interest as he "stand[s] to gain or lose by the direct legal operation of th[is Court's] judgment [in the main action.]" Mot. at 5 (citing *Teague v. Bakker*, 931 F.2d 259, 261 (4th Cir. 1991)). Shapiro has such interests in the remedy of legal infirmities of the Eighth District. *Id.*

Plaintiffs continue that interest is lacking as Shapiro is raising "superficially related theories in a new complaint" and that "[h]e is always free to bring a separate lawsuit." Pls.' Resp. at 5. The first point is inaccurate and the second is irrelevant. A motion for intervention must be accompanied by a complaint. Fed. R. Civ. P. 24(c). There is no expectation in Rule 24 that a complaint-in-intervention will be limited to theories raised in the main action, and as will be discussed, *infra*, most of the theories in the complaint-in-intervention are not just "superficially" related but closely follow those in the Plaintiffs' Second Amended Complaint. The ability to bring a separate lawsuit relates not to interest but to impairment.

Movant has noted that, as a practical matter, it would be both complex and prejudicial for another panel of this Court at another time to extend whatever relief this panel might find appropriate to order as a remedy regarding the Sixth District. Mot. at 5–6. The very purpose of Rule 24 is to allow for the efficient consolidation and resolution of related actions such as here. Indeed, if Movant had files a separate action, this Court would be justified in consolidating it with the main action under Rule 42. Movant has also noted the potential for a res judicata defense to a separate action, which has been previously recognized to support a showing of

impairment. *Id.* (citing *Volvo Grp. N. Am. v. Truck Enters.*, 16-CV-00025, 2016 WL 1453061 at *3 (W.D. Va. Apr. 13, 2016)).

Plaintiffs further suggest that interest is lacking as Movant's complaint fails to state a claim. Pls.' Resp. at 6 (citing *In re Foos*, 183 B.R. 149, 155 (Bankr. N.D. Ill. 1995)). Again, this is irrelevant and inaccurate. *Foos* followed Seventh Circuit precedent, which on this is inconsistent with the Fourth Circuit. In the Fourth Circuit, interest is established where an intervenor would "gain or lose by the direct legal operation of the district court's judgment on [the plaintiff's] complaint." *See CX Reinsurance Co. v. B&R Mgmt.*, 15-CV-3364, 2017 WL 371800 at *3 (D. Md. Jan. 26, 2017) (citing *Teague v. Bakker*, 931 F.2d 259, 261 (4th Cir. 1991)). The Seventh Circuit standard conflates intervention under Rule 24 with whether the intervenor's complaint-in-intervention states a claim under Rule 12(b)(6). These are different findings with different implications for a putative intervenor.

Even if the Court were to proceed now to consider whether the complaint-in-intervention states a claim, this Court should be guided by its affirmative finding to that effect in the main action (ECF 88). Count One and Count Two B. are taken from Plaintiffs' Second Amended Complaint (ECF 44), filed when Movant Shapiro was the lead plaintiff there. Movant and Plaintiffs both similarly rely on such prior cases as *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Cook v. Gralike*, 531 U.S. 510 (2001); *Anne Arundel Republican Central Committee v. State Administrative Board of Election Laws*, 781 F. Supp. 394 (1991); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). *Compare e.g.*, Movant's Compl. in Intervention ¶¶ 21–30, *with*

Pls.' 2d Am. Compl. ¶¶ 31–34 & 130–34; Movant's Compl. in Intervention ¶¶ 41–56, *with* Pls.' 2d Am. Compl. ¶¶ 35–36 & 136–42. Movant's Count Two A. built off of this Court's opinion denying Defendants' Motion to Dismiss. *Compare* Movant's Compl. in Intervention ¶¶ 33–40, *with* Op. Den. Defs.' Mot. to Dismiss 27 (ECF 88) (citing W*esberry v. Sanders,* 376 U.S. 1 (1964)). The Complaint-in-Intervention augments the claims from Plaintiffs' Second Amended Complaint by adding to the justifications for those legal theories and providing further suggestions as to how the Court could manageably apply them to the challenged districts to determine violations, and to order relief to resolve them. Plaintiffs' Response at 6, contending that Movant's claims resemble those of *Parrott v. Lamone*, 15-cv-1849, 2016 WL 4445319 at*3–4 (D. Md. Aug. 24, 2016) (finding that the plaintiffs there adequately alleged a concrete and particularized injury but dismissing the complaint for failure to allege invasion of a legally protected interest), *appeal dismissed* 2017 WL 69143 (U.S. 2017), would similarly apply to Plaintiffs' Second Amended Complaint. However, this Court distinguished those two cases through its denial of Defendant's Motion to Dismiss *Shapiro* (*sub nom Benisek*), and its granting of Defendant's Motion to Dismiss *Parrott*. *Compare Parrott*, 2016 WL 4445319, *with* Op. Den. Defs.' Mot. Dismiss (ECF 88). A complaint applying the claims of the Plaintiffs' Second Amended Complaint, but based on the design and composition of the new districts where residents are now assigned, is no less powerful than claims based on the design and composition of their former district. *Cf. Anne Arundel*, 781 F. Supp. at 401 ("[C]arving Anne Arundel County into four pieces . . . [does not] indicat[e]

that [their residents'] vote will necessarily be any less powerful in any of the four congressional districts in which they will now reside."). The complaints of Movant Shapiro and of Plaintiffs in the main action allege such indications.

Count Two C. of the Complaint-in-Intervention does propose an additional Article 1 legal theory, as to the effectiveness of representation, that goes beyond the claims raised in Plaintiffs' Second Amended Complaint; this theory, and the suggested means to implement it, hardly resemble anything proposed in *Parrott*, where the exclusively Republican plaintiffs sought a finding that districts must be compact as determined by a formula proposed by those plaintiffs. *See* Movant's Compl. in Intervention ¶¶ 57–64. While Count Two C. does propose a legal theory that may well be a matter of first impression, it does so in a manner that specifically alleges the invasion of rights conferred by Article 1, consistent with a plausible interpretation of the text of that Article that is supported by cited reports of the Congressional Research Service and the Commentaries of Justice Story. *Id.* Allegations of invasions of constitutionally conferred and protected interests cannot be interpreted to exclude plausible theories of first impression.

Plaintiffs' next contention in opposition to the Motion to Intervene is that Movant Shapiro lacks standing. Pls.' Resp. at 6. Movant disagrees and contends that he has standing to intervene. First, with respect to Counts Two B. and Two C., Movant alleges cognizable injuries that apply to him personally. The harm from these violations do and are alleged to fall on Democratic, Republican, and Independent voters. On Count Two B., Movant decides his vote separately in each

election and reserves the right to continue to do so. The claim that the General Assembly has effectively taken it for itself to determine the outcome does not require that Movant allege and declare his prior or future votes for representative. If the General Assembly has taken the choice for itself as alleged in Count Two B., it has taken it from voters who may be Democrats, Republicans, or Independents. It is well established that the right to vote is a protected right from which impairment is a cognizable individual harm. *See Smiley v. Holm*, 285 U.S. 355, 361 (1932) (allowing a "citizen, elector and taxpayer" of the state to seek invalidation of fillings for the office of Representative in Congress).

Plaintiffs' have inaccurately described Count Two C. as alleging impairment of representation only the northern segment of the Eighth District. Pls.' Resp. at 6. This is not true. Movant Shapiro clearly alleges impairment in both the northern and southern segments. Movant's Compl. in Intervention ¶¶ 62, 64, 67.

Beyond the fact that Movant claims adequate independent standing to intervene as described above, Movant notes that the Circuits are not in agreement as to the level of standing that an intervenor of right must have, as the Court's Article III jurisdiction has already been established by the parties in the main action. District Courts within the Fourth Circuit have not required intervenors to have independent standing. *See NAACP v. Duplin Cty.*, 88-cv-00005, 2012 WL 360018, at *5 n.3–4 (E.D.N.C. Feb. 2, 2012) (discussing the circuit split and declining to impose such a requirement in light of the Fourth Circuit's silence and other Fourth Circuit case law promoting intervention); *Nat'l Fed'n of the Blind v.*

Lamone, 14–cv–1631, 2014 WL 4388342, at *4 n.14 (D. Md. Sept. 4, 2014) (noting the Circuit split and citing *U.S. v. Arch Coal, Inc.*, 11–CV–0133, 2011 WL 2493072, at *7 n.4 (S.D. W. Va. June 22, 2011) (recognizing disagreement among Circuits and noting that *Shaw v. Hunt*, 154 F.3d 161 (4th Cir.1998), does not include a "definitive analysis" of the standing issue). *See also McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 109 (2003), *overruled on other grounds by Citizens United v. Fed. Election Comm'n,* 558 U.S. 310 (2010) ("Because the FEC clearly has standing, the Court need not address whether the intervenor-defendants, whose position here is identical to the FEC's, were properly granted intervention."); *cf. Bowsher v. Synar*, 478 U.S. 714, 721 (A threshold issue is whether the [plaintiffs] have standing . . . . It is clear that . . . one . . . will sustain injury . . . sufficient to confer standing . . . . We therefore need not consider the standing issue as to the [other plaintiffs]."). Specifically, the Fourth Circuit has not taken the Seventh Circuit's position that intervenors of right must have independent standing. *See Foos*, 183 B.R. at 155 (citing *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985).

It is clearer that the Fourth Circuit allows for permissive intervention based on the standing of existing parties. *See Shaw v. Hunt*, 154 F.3d 161, 165 (4th Cir. 1998) ("Key to our analysis is the Supreme Court's ruling that a party who lacks standing can nonetheless take part in a case as a permissive intervenor. *See S.E.C. v. United States Realty & Improvement Co.*, 310 U.S. 434, 459, 60 S. Ct. 1044, 84 L. Ed. 1293 (1940)."). *See also Shaw*, 154 F.3d at 165 (citing *Nash v. Blunt*, 140 F.R.D. 400, 402 (W.D. Mo. 1992) (suggesting that, because redistricting challenges have a

statewide impact, the argument for including in-state intervenors without standing is especially strong). Even if the Court finds that independent standing is required under Rule 24(a) and is not met, *Shaw* would provide for intervention under Rule 24(b). Count One and Count Two A. of Movant's complaint-in-intervention, even with respect to the Eighth District, come from Plaintiffs' second amended complaint, and Movant Shapiro has independent standing with respect to Count Two B. and Count Two C. *See* Pls.' 2d Am. Compl. ¶¶ 9, 57, 60, 91, 92; *see also* Pls.' 2d Am. Compl. Prayer for Relief ¶ B.

Plaintiffs next contend that plaintiffs adequately represent Movant Shapiro's interests. Pls.' Resp. at 7. However, their contention does not address the Fourth Circuit's standard for determining whether a putative intervenor shares the plaintiffs' "ultimate objective." See Mot. at 6 (citing *Virginia v. Westinghouse Electric Corp.*, 542 F.2d 214, 216 (4th Cir. 1976) (denying intervention where "[v]irginia seeks no relief other than that which VEPCO seeks for itself"). Clearly the relief sought by Plaintiffs is now limited to the Sixth District. Plaintiffs concede that "Shapiro says that his challenge to the Eighth District may be 'overlooked' if intervention is not permitted. Dkt, 109, at 6. That is true, and rightly so." Plaintiffs cannot have it both ways; either they represent Movant's interests or they do not. It is clear from their response that they do not seek relief for the Eighth District. Indeed, Movant Shapiro was dismissed from the main action for lack of standing there, as he does not live in the former Sixth District that is now the sole focus of the Court in the main action. ECF 105; *see also* ECF 132, Order Granting

Mot. Compel 5 n.1 (noting that the Second Amended Complaint requested relief for the Sixth, Seventh, and Eighth Districts, but that proceedings are now exclusively focused on the Sixth District). By definition, per *Westinghouse*, since Movant Shapiro's injury is beyond that which plaintiffs state they seek to redress, this establishes a clear lack of the same ultimate objective, and therefore, inadequate representation. See *Westinghouse Electric Corp.*, 542 F.2d at 216. The Fourth Circuit has guided District Courts in applying *Westinghouse* to "heed the Supreme Court's determination that the burden on the applicant of demonstrating a lack of adequate representation 'should be treated as minimal.'" *Teague v. Bakker*, 931 F.2d 259, 262 (4th Cir. 1991).

Lastly, Plaintiffs contend that intervention would prejudice them. Pls.' Resp. at 8. However, they have not adequately alleged such harm. Plaintiffs do not demonstrate why this Court must decide the main action a full year before the 2018 primary election to protect their interests; nor do they explain why, even if that is true, that the Court would be unable to grant relief this summer if intervention is granted. First, Plaintiffs exaggerate the differences between the relevant facts, discovery, and legal theories. There is overwhelming "overlap with the facts at issue in the main action." *Contra id.* For instance, Plaintiffs and Defendants have been in an ongoing discovery dispute as to depositions from various current and former members of the General Assembly and the former Governor's Redistricting Advisory Committee. *See, e.g.,* ECF 124–128, 132. The same and similar information from these same officials—such as those getting to their purpose and

intent of a state-wide configuration to bring about the election of seven Democrats and one Republican; their reasoning getting to purpose and intent for placing specific precincts within the Sixth, Seventh, and Eighth (and other) Districts rather than in perhaps more rational adjacent districts—is highly relevant to both Movant's claims and to Plaintiffs, as intent is such a common and critical issue. If Plaintiffs will not be inquiring as to facts from outside the Sixth District that could well bear on intent with respect to the Sixth District, Movant would have strong reason to so supplement Plaintiffs' questions. The overriding issue here is the extent to which the same overall facts related to the 2011 redistricting prove the multiple similar claims under the related legal theories of Plaintiffs and Movant.

The efficiencies to be gained from consolidating such depositions and other discovery and inquiry is a key reason why this Court should grant intervention. The net prejudice to the Court, parties, and witnesses would be far greater if Movant Shapiro files the complaint-in-intervention as a separate action as Plaintiffs suggest. Pls.' Resp. at 2, 5.

Plaintiffs also fail to recognize the Court's ability under Rule 24 to tailor intervention, on an ongoing basis, to prevent or mitigate any undue prejudice. *See e.g. CX Reinsurance Co. v. Leader Realty Co.,* 15–CV–3054, 2017 WL 105674, at *2–3 (D. Md. Jan. 10, 2017); *CX Reinsurance Co. v. B&R Mgmt.*, 15-CV-3364, 2017 WL 371800, at *6 (D. Md. Jan. 26, 2017); *City of Greensboro v. Guilford Cty. Bd. of Elections,* 15–CV–559, 2015 WL 12752936, at *2 (M.D.N.C. Oct. 30, 2015). For

instance, the Court may limit discovery, afford injunctive relief in the main action while further proceedings are still in progress, or even sever the intervention.

B. Reply to Defendants' Response in Opposition to Shapiro's Motion to Intervene

Defendants have strongly implied that a motion to intervene after a dismissal by stipulation under Rule 41(a)(1)(A)(ii) "should be addressed under Rule 60(b)." Defs.' Resp. at 1. None of the cases cited by Defendants address let alone support this contention. The cases cited by Defendants address whether a Court has jurisdiction to grant a Rule 60 motion to reopen a case that ceased to exist after a Rule 41(a)(1) dismissal, where the case or controversy affording jurisdiction has been terminated. *See e.g., Nelson v. Napolitano*, 657 F.3d 586, 589 (7th Cir. 2011) ("A voluntary dismissal pursuant to Rule 41(a)(1)(A)(i), therefore, does not deprive a district court of jurisdiction for all purposes. . . . [A] district court retains jurisdiction to consider a Rule 60(b) motion following a voluntary dismissal." *Nelson* made clear that a plaintiff who is voluntarily dismissed under Rule 41(a)(1)(A) is dismissed without prejudice and retains the right to file a new complaint in the matter. *Nelson*, 657 F.3d at 587–88 ("[T]he effect of a voluntary dismissal is to turn back the clock; it is as if the plaintiff's lawsuit had never been brought. . . [T]he plaintiff may bring the suit again by filing a new complaint."). This is precisely Movant Shapiro's status after the Rule 41 dismissal by stipulation. By its design, Rule 41(a)(1) provides for a presumption that a plaintiff so dismissed for the first time will bring suit again. *See* Fed. R. Civ. P. 41(a)(1)(B).

If Defendants wanted the dismissal to have been with prejudice, they could have declined to agree to the stipulation and moved for dismissal with prejudice.

Neither *Nelson* nor the other cases cited by Defendants address intervention under Rule 24 as those cases all ceased to exist with the dismissals. Rule 24 was irrelevant as there were no continuing main actions to intervene in. None of the cases offered by Defendants suggests that Shapiro must file a new action rather than move to intervene. Indeed, the right to file a new action implies a right to also move to intervene—provided the requirements of Rule 24 are met. Rule 24 has no provision limiting its scope in this situation. Such a limit would be inconsistent Rule 24's purpose to promote efficiency by avoiding separate related actions. Also, such a limit, or a determination that a Rule 41(a)(1) dismissal precludes the interest required by Rule 24(a), would incur prejudice clearly inconsistent with Rule 41(a).

Defendants further contend that intervention would subject them to prejudice. However, Defendants do not provide any specificity as to what this prejudice would be, or how intervention would entail any greater prejudice, burden, or inconvenience to them than a new action might. Defendants also fail to recognize the Court's ability under Rule 24 to tailor intervention, on an ongoing basis, to prevent or mitigate any undue prejudice. *See e.g. CX Reinsurance Co. v. Leader Realty Co.,* 15–CV–3054, 2017 WL 105674, at *2–3 (D. Md. Jan. 10, 2017); *CX Reinsurance Co. v. B&R Mgmt.*, 15-CV-3364, 2017 WL 371800, at *6 (D. Md. Jan. 26, 2017); *City of Greensboro v. Guilford Cty. Bd. of Elections,* 15–CV–559, 2015 WL 12752936, at *2 (M.D.N.C. Oct. 30, 2015).

CONCLUSION

For the reasons noted above and in the Motion to Intervene, ECF 109, the Court should grant the Motion.

Respectfully submitted,

2/10/2017

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