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

Richmond Division

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

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO THE MOTION TO INTERVENE

Plaintiffs submit this memorandum of law in opposition to the motion to intervene by Representatives Barbara Comstock and David Brat pursuant to Rule 24 of the Federal Rules of Civil Procedure.

Typically, a party seeking to intervene in a case is required to show that it meets the requirements for permissive intervention or intervention as of right under Federal Rule of Civil Procedure 24. In special cases, however, where an intervening party is taking a position that is contrary to the position of the only oppositional party that has standing—in this case, the Defendants—it must show that it can independently fulfill the requirements of Article III standing in order to intervene. The proposed intervenors in this case seek to continue defending Virginia's congressional districting plan ("the Enacted Plan") even after the Defendants in the case have concluded that the plan is constitutionally indefensible. *See* Defs.' Opening Br. Regarding the Legal Effect of Ala. Legislative Black Caucus v. Ala. ("Defs.' Ala. Br.") (Dkt No. 145) at 2 ("[T]he Court should reaffirm its ruling that Enacted CD3 is an unconstitutional racial gerrymander."). In order to do so, the proposed intervenors must show that they have suffered

an "invasion of a legally protected interest" that is "concrete and particularized" enough to satisfy the requirements of Article III standing. The proposed intervenors cannot make that showing because they do not reside in or represent Congressional District 3 ("CD3"), the only congressional district whose constitutionality is at issue in this case. Therefore, plaintiffs respectfully submit, the Court should deny the proposed intervenors' motion to intervene.[1]

I. PROCEDURAL BACKGROUND

Intervenor-Defendants Eric Cantor, Randy Forbes, Bob Goodlatte, Morgan Griffith, Robert Hurt, Scott Rigell, Robert Wittman and Frank R. Wolf filed an unopposed motion to intervene in this case under Federal Rule of Civil Procedure Rule 24 on December 2, 2013. The Court granted their motion the next day. This case went to trial in May 2014, and this Court issued an opinion in favor of Plaintiffs on October 7, 2014. On October 30, the Intervenor-Defendants appealed this Court's decision to the Supreme Court of the United States pursuant to 28 U.S.C. § 1253. The Defendants did not appeal the case and have since made clear that they are no longer defending the constitutionality of the congressional map and do not oppose a remedy that includes redrawing the map. *See generally* Defs.' Ala. Br. In light of the Supreme Court's recent similar decision in *Alabama Legislative Caucus v. Alabama*, 135 S. Ct. 1257 (2015), the Supreme Court vacated this Court's decision and remanded the case for further briefing. On April 13, 2015, Virginia Representatives Barbara Comstock and David Brat, for the first time, filed the present motion to intervene in this case. Plaintiffs oppose their motion because they lack standing.

[1] Intervenor-Defendants should be dismissed from this case for the same reasons the proposed intervenors should be denied intervention. Plaintiffs intend to file a Motion to Dismiss Intervenor-Defendants shortly.

II. ARGUMENT

A. The Proposed Intervenors Must Show That They Have Standing

Under Article III of the Constitution, federal courts have jurisdiction only over "cases and controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). This requirement is "an essential limit" to the federal judiciary's power "ensur[ing] that [courts] act *as judges*, and do not engage in policymaking properly left to elected representatives." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013).

As a general rule, plaintiffs, defendants, and intervenors must have standing under Article III as courts have held that "standing to sue *or defend* is an aspect of the case or controversy requirement." *Arizonans for Official English, v. Arizona*, 520 U.S. 43, 64 (1997) (emphasis added). A party seeking to intervene, however, need not establish independent Article III standing so long as another party with constitutional standing "*on the same side*" as the intervenor continues in the case. *City of Colo. Springs v. Climax Molybdenum Co.*, 587 F.3d 1071, 1079 (10th Cir. 2009) (quoting another source). This requirement looks beyond the nominal "side" on which the intervenor seeks to intervene, and considers whether "the existing party upon whose side the intervenors propose[] to . . . [intervene]" has either "'join[ed] in the [i]ntervenors' request for relief,'" "'pray[ed] independently for'" the same relief, or otherwise has taken "'action on its own behalf'" to the same ends sought by the intervenor, including "fil[ing] claims . . . that 'would have revived the prior adversarial conflict between the original parties.'" *Id*. at 1080-81 (quoting *Dillard v. Chilton Cnty. Comm'n*, 495 F.3d 1324, 1329 (11th Cir. 2007)). In the special case where an intervening party attempts to intervene when no other party with constitutional standing continues to defend the law on the same side as the intervening party, the intervening party must show that it fulfills the requirements of Article III standing on

its own. *Hollingsworth*, 133 S. Ct. at 2659; *Diamond v. Charles*, 476 U.S. 54 (1986). In other words, an intervening party "cannot step into the shoes of the original party" in a case unless the intervening party independently "fulfills the requirements of Article III." *Arizonans*, 520 U.S. at 65.

This Court found that it was "proper" to allow Intervenor-Defendants to intervene in this case when Defendants were still defending the constitutionality of the Enacted Plan. *See* Order on Va. Reps.' Unopposed Mot. to Intervene (Dkt. No. 26). At that time, Defendants had Article III standing and Intervenor-Defendants could "piggyback" on the Defendants' case or controversy. *See Diamond*, 476 U.S. at 64.

At this point, however, Defendants are no longer defending the constitutionality of the Enacted Plan. Defendants instead support the Court's judgment that CD3 is an unconstitutional racial gerrymander, and take the position that the Court's judgment is required by the Supreme Court's decision in *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015). *See* Defs.' Ala. Br. at 2. Thus, the legal foundation that permitted the Intervenor-Defendants to intervene in this case without Article III standing no longer exists. The "case or controversy" between Plaintiffs and Defendants has been resolved by this court's decision; all that remains is for this Court to address the implications of the *Alabama* decision and to implement a remedial plan. Accordingly, the Intervenor-Defendants and the proposed intervenors are required to demonstrate that they have Article III standing in order to continue in this case. Because they cannot make that showing, the Intervenor-Defendants should be dismissed from this case and the proposed intervenors' motion to intervene should be denied.[2]

[2] This does not mean, however, that the Court lacks continuing jurisdiction to respond to the Supreme Court's directive, to re-enter its judgment, or to enter an appropriate remedial order.

B. The Proposed Intervenors Have Not Shown That They Have Standing

The proposed intervenors in this case contend that they meet the requirements for intervention under Federal Rule of Civil Procedure 24, but do not claim that they have independent Article III standing. *See* Mem. In Supp. of Mot. of Va. Reps. Brat and Comstock to Intervene as Additional Intervenor-Defs. (Dkt. No. 147) ("Va. Rep.'s Mot. to Intervene"). Although the requirements for intervention and standing may sometimes overlap, they are not the same. Federal Rule of Civil Procedure 24(a)(2) requires a court to permit a party to intervene if the party files a timely motion and demonstrates "(1) an interest in the subject matter of the action; (2) that the protection of [its] 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)(1) allows the Court to grant permissive intervention to anyone 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)(1). By contrast, to qualify as a party with standing to litigate, a person must show, first and foremost, "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quoting Whitmore *v. Arkansas*, 495 U.S. 149, 155 (1990)).

Rule 24's requirement of "an interest in the subject matter of the action" precludes intervention of right by many prospective intervenors who also would be unable to satisfy Article III standing. But most federal courts have recognized that Article III imposes a *different and higher* standard than Rule 24. *See, e.g., ACLU of Minn. V. Tarek Ibn Ziyad Acad*, 643 F.3d 1088, 1092 (8th Cir. 2011) ("In our circuit, a party seeking to intervene must establish Article III

standing *in addition to the requirements of Rule 24*.") (emphasis added) (quoting *United States v. Metro St. Louis Sewer Dist.*, 569 F.3d 829, 838 (8th Cir. 2009)).

The proposed intervenors in this case only contend that they meet the requirements for intervention as set forth in Rule 24. *See* Va. Reps.' Mot. Intervene at 2. They have not shown, and in fact cannot show, that they have independent Article III standing. Because the requirements for Rule 24 intervention and Article III standing are different, the parties seeking to intervene may not use Rule 24 as a proxy for showing Article III standing. *See, e.g.*, *Hollingsworth*, 133 S. Ct. at 2662 (even though the intervenors had been permitted to intervene during the district court proceedings because they satisfied the Rule 24 requirements, they did not have Article III standing to appeal when the state decided not to appeal).

C. The Proposed Intervenors Do Not In Fact Have Standing

The Virginia representatives seeking to intervene do not have independent Article III standing, and therefore, the Court should deny their motion to intervene. To qualify as a party with standing to litigate, a person must show, first and foremost, "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent." *Lujan*, 504 U.S. at 560 (quoting *Whitmore*, 495 U.S. at 155). "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Article III's requirements." *Diamond*, 476 U.S. at 62.

The proposed intervenors are two Republican politicians who were elected in the November 2014 election as members of Virginia's congressional delegation. One of the parties seeking to intervene, Representative Barbara Comstock, represents CD10. The other party seeking to intervene, Representative David Brat, represents CD7. As such, neither of the proposed intervenors resides in or represents CD3, the only district whose constitutionality is at

issue in this case. Nor do the parties seeking to intervene bear the legal responsibility or have authority for redistricting or the conduct of elections in Virginia—those jobs belong to the state's General Assembly and Board of Elections, respectively, and the state's attorney is no longer defending the Enacted Plan. Thus, the proposed intervenors have not suffered any "direct injury"—either as congressional representatives of the affected district, voters who reside in the affected district, or as persons with the legal authority or responsibility for redistricting or the conduct of elections—that would permit them to continue in this lawsuit taking a position contrary to the position of the only oppositional party that has standing. The only injury that the prospective intervenors can claim—that when the General Assembly remediates the racial gerrymander in CD3, their interests in *other* congressional districts will suffer—is wholly speculative and not sufficient to satisfy the standing requirements. Furthermore, the Enacted Plan has not yet been redrawn, and when it is redrawn that task will likely be completed by virtually the same Republican-controlled legislature that drew CD3 as an unconstitutional racial gerrymander. Therefore, any claim that the map that will replace the Enacted Plan will injure the proposed intervenors' interests is speculative and not "actual" or "imminent" as required by Article III.

Courts have held that in redistricting cases, two parties—representatives of challenged districts and voters who reside in challenged districts—have standing or are permitted to intervene. A congressional representative whose district is being challenged as a racial gerrymander is entitled to intervene as of right because he has a "direct, substantial, and legally protectable interest in the litigation." *Johnson v. Mortham*, 915 F. Supp. 1529, 1538 (N.D. Fla. 1995). "Elected officials have personal interests in their office sufficient to give them standing *when the district they represent is subject to constitutional challenge*." *Id*. (emphasis added) On

the other hand, congressional representatives who do *not* represent the district that is the subject of a *Shaw* challenge may not intervene because they have "no more than a generalized interest in [the] litigation, since . . . the possibility of a remedy that would impair their interest in their congressional seats is no more than speculative." *Id*. This rule applies even in cases where, as here, the court's decision that the challenged district is the product of unconstitutional gerrymandering "would necessarily require the [legislature] to adopt a redistricting plan that would effectively abrogate the [enacted] plan—and might even result in the redrawing" of the other districts in the plan. *Id*. Similarly, an individual voter is injured by a redistricting plan if he resides in the district affected by the alleged unconstitutionality. *United States v. Hays*, 515 U.S. 737, 744 – 45 (1995). But where a voter does not live in the district that is the primary focus of a racial gerrymandering case, he lacks standing. *Id*. at 739.

The rules from *Johnson* and *Hays* apply squarely to this case. The parties seeking to intervene at this time do not represent the challenged district, and thus, under *Johnson*, do not have a sufficient particularized interest to intervene. As discussed above, standing requires a higher showing of particularized interest than Rule 24 intervention. Thus, if a congressional representative who does not represent the district that is the subject of *Shaw* litigation cannot show a sufficient interest to meet the standard to *intervene*, it is difficult, if not impossible, to see how the parties seeking to intervene in this case, who do not represent the challenged district, can show sufficient "direct injury" and "particularized interest" to satisfy the rigors of Article III standing. Similarly, the proposed intervenors are not voters residing in the challenged district in this case and thus, under *Hays* lack standing as voters to continue defending the redistricting plan.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny the motion to intervene by Virginia Representatives Barbara Comstock and David Brat.

Dated: April 27, 2015

Respectfully submitted,

By /s/*John K. Roche*
John K. Roche (VSB# 68594)
Marc Erik Elias (admitted *pro hac vice*)
John Devaney (admitted *pro hac vice*)
Perkins Coie LLP
700 13th St. N.W., Suite 600
Washington, D.C. 20005-3960
Phone: (202) 434-1627
Fax: (202) 654-9106
Email: JRoche@perkinscoie.com
Email: MElias@perkinscoie.com
Email: JDevaney@perkinscoie.com

Kevin J. Hamilton (admitted *pro hac vice*)
Perkins Coie LLP
1201 Third Avenue, Ste. 4900
Seattle, WA 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000
Email: KHamilton@perkinscoie.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 2015, I caused the foregoing to be electronically filed with the Clerk of this Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Stuart R. Raphael
Mike Melis
Trevor S. Cox
Carly L. Rush
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071
Fax: (804) 786-1991
mmelis@oag.state.va.us

Attorneys for Defendants James B. Alcorn, Matthew A. Gray, and Singleton B. McAllister in their official capacities

Frederick W. Chockley , III
Baker & Hostetler LLP
1050 Connecticut Ave NW
Suite 1100
Washington, DC 20036
(202) 861-1500
fchockley@bakerlaw.com

Jennifer Marie Walrath
Baker & Hostetler LLP (DC)
1050 Connecticut Ave NW
Suite 1100
Washington, DC 20036
202-861-1702
Fax: 202-861-1783
jwalrath@bakerlaw.com

Attorneys for Movants Robert B. Bell, Christopher Marston, and William Janis

Jonathan Andrew Berry
Jones Day
51 Louisiana Ave NW
Washington, DC 20001
202-879-3939
Fax: 202-626-1700
jberry@jonesday.com

John Matthew Gore
Jones Day
51 Louisiana Ave NW
Washington, DC 20001
(202) 879-3930
Fax: (202) 626-1700
jmgore@jonesday.com

Michael Anthony Carvin
Jones Day
51 Louisiana Ave NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

Attorneys for Intervenor-Defendant Virginia Representatives

Cullen Dennis Seltzer
Sands Anderson PC
1111 E Main Street
24th Floor
P O Box 1998
Richmond, VA 23218-1998
804-648-1636
Fax: 804-783-7291
cseltzer@sandsanderson.com

Attorneys for Interested Parties Clerk of the Virginia Senate, Clerk of the Virginia House, and Division of Legislative Services

Respectfully submitted,

By*/s/ John K. Roche*
John K. Roche (VA Bar No. 68594)
Perkins Coie LLP
700 13th St., N.W., Suite 600
Washington, D.C. 20005-3960
Phone: (202) 434-1627
Fax: (202) 654-9106
JRoche@perkinscoie.com

Attorneys for Plaintiffs