IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. John Benisek, et al.,	
Plaintiffs,	Case No. 13-cv-3233
vs.	Three-Judge Court
Linda H. Lamone, et al.,	
Defendants.	

PLAINTIFFS' OPPOSITION
TO STEPHEN M. SHAPIRO'S
MOTION TO INTERVENE

Michael B. Kimberly, Bar No. 19086
Paul W. Hughes, Bar No. 28967
Stephen M. Medlock, *pro hac vice*
E. Brantley Webb, *pro hac vice*
Mayer Brown LLP
1999 K Street NW
Washington, D.C. 20006
(202) 263-3127 (office)
(202) 263-3300 (facsimile)

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INTRODUCTION

Stephen Shapiro moves to intervene in this action, proposing to file a complaint-in-intervention that would introduce new alleged constitutional violations predicated on new theories of injury concerning Maryland's Eighth Congressional District. These new legal theories and factual allegations bear only a superficial relationship to the First Amendment and Article I claims raised in the Second Amended Complaint (Dkt. 44). What is more, discovery focused on the Sixth District is already well underway. The State presumably would move to dismiss the complaint-in-intervention, which would be a prejudicial distraction from the parties' ongoing discovery efforts. Worse, if the motion to dismiss were denied (or the State declined to move to dismiss), discovery would be reset completely, assuring many months of delay with no offsetting efficiencies to show for it. These delays and distractions would be highly prejudicial to Plaintiffs' claims, which are time-sensitive.

More fundamentally, none of the prerequisites for intervention is present here. Shapiro lacks the necessary interest in the underlying action to intervene as of right, he lacks standing to bring the generalized grievances that he proposes at all, and his complaint-in-intervention would inject new facts and theories that would upset the progress achieved to date. Shapiro can (and in our view, should) raise his challenge to the Eighth District in a new and separate lawsuit. The motion to intervene accordingly should be denied.[1]

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[1] As Shapiro recounts in his motion, he was an original plaintiff in this action but later agreed to a stipulation of dismissal (without prejudice) because he lacks standing. Undersigned counsel no longer represent Shapiro in this matter or any other matter. Shapiro has given his written informed consent to Mayer Brown LLP's continued representation of the remaining Plaintiffs in this action. *See* Maryland Rule of Professional Conduct 1.9(a); D.C. Rule of Professional Conduct 1.9.

BACKGROUND

Shapiro alleges that he is a registered Democrat living in Maryland's Eighth Congressional District (Dkt. 109-1, ¶ 1), more specifically in the town of Bethesda in Montgomery County (Dkt. 1, at 1). As to the Eighth District, he alleges that "there are significant political differences of opinion between the northern and southern segments of the Eighth District." Dkt. 109-1,¶ 16. He theorizes, more specifically, that "the larger, overwhelmingly Democratic segment centered in Montgomery County . . . constitute[s] a clear voting majority" that, by design, has diminished the ability of more conservative, northern segments of the district to "influence the outcome of [any] election[s]" (*id.* ¶ 18), thereby "intentionally marginaliz[ing]" their votes (*id.* ¶ 24). On this basis, he alleges "ongoing harms due to the current structure and composition of the Eighth District" (*id.* ¶ 19). Those harms include **(1)** the dilution of Republican votes (*id.* ¶¶ 33-40); **(2)** an "[i]mpermissible abridgment of the voters' right to choose their Representatives under Article 1, § 2" under the "totality of the circumstances" (*id.* ¶¶ 41-56); and **(3)** an undefined impairment of "effective representation," as determined by compliance with "traditional districting principles" (*id.* ¶¶ 57-69).

Shapiro seeks to intervene on the grounds that his proposed complaint-in-intervention "stem[s] from the same transaction, specifically the enactment of Maryland's Congressional districts in 2011" (Dkt. 109, at 7), and that he therefore "has a significant interest in the success of the main action," insofar as "[r]elief with respect to his and other Eighth District-specific injuries may be overlooked or inherently limited if intervention is denied." *Id.* at 6.

REASONS FOR DENYING THE MOTION

Intervention is allowed either as of right or permissively. Fed. R. Civ. P. 24(a), 24(b). Shapiro satisfies the requirements of neither.

Civil Rule 24(a)(2) provides for intervention as of right where the applicant "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest." Fed. R. Civ. P. 24(a)(2). "Applicants to intervene as of right must" therefore show that "(1) the application to intervene [is] timely; (2) the applicant [has] an interest in the subject matter of the underlying action; (3) the denial of the motion to intervene would impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by the existing parties to the litigation." *Houston Gen. Ins. Co. v. Moore*, 193 F.3d 838, 839 (4th Cir. 1999).

When intervention as of right is unavailable, a movant may instead seek permissive intervention. "[When] a movant seeks permissive intervention as a plaintiff, the movant must [show] . . . (1) that [his] motion is timely; (2) that [his] claim or defense and the main action have a question of law or fact in common . . .; (3) that there exists an independent ground of subject matter jurisdiction; and, (4) that intervention will not unduly delay or prejudice the adjudication of the rights of the original parties." *Shanghai Meihao Elec., Inc. v. Leviton Mfg. Co.*, 223 F.R.D. 386, 387 (D. Md. 2004) (internal quotation marks, citations and brackets omitted).

A. Shapiro does not have the necessary interest in the subject matter of this lawsuit to warrant intervention as of right.

1. Intervention as of right requires "a direct, substantial, legally protectable interest in the [subject matter of the] proceeding." *Cont'l Cas. Co. v. ZHA, Inc.*, 154

F.R.D. 281, 282 (M.D. Fla. 1994). Textbook examples of the necessary interest include one creditor's interest in another creditor's adversary proceeding against a common, bankrupt debtor (*Safety-Kleen, Inc. v. Wyche*, 274 F.3d 846, 867 (4th Cir. 2001)); and a third-party beneficiary's interest in a lawsuit concerning interpretation of the contract that grants it benefits (*Jones v. Koons Auto., Inc.*, 752 F. Supp. 2d 670, 689-690 (D. Md. 2010)). In cases like these, the court's disposition of the assets or interpretation of the contract would directly impede the intervenor's ability to protect its legally-protected rights in the relevant property or under the relevant contract.

That does not describe this case. Shapiro, who admittedly is not a Republican and does not live in the Sixth District (Dkt. 109-1, ¶ 1), does not have a direct, legally-protected interest in the subject matter of these proceedings. *See* Dkt. 109, at 5 ("movant Shapiro was dismissed from the main action due to his lack of standing"). The only continuing interest that Shapiro might have here is the same general interest that any Marylander might have—that is, an interest in seeing the 2011 congressional map struck down as an unconstitutional gerrymander.

It does not alter this conclusion that Shapiro intends to challenge the lines of the Eighth District on superficially related theories in a new complaint. The mere prospect that a ruling in this case might have a tangential *stare decisis* effect on subsequent gerrymandering complaints, including Shapiro's, is not the sort of direct, legally-cognizable interest that the text of Rule 24 was intended to cover.[2]

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[2] Shapiro asserts that his rights may be impeded because a victory in the principal action can only "indirectly" help his claims concerning the Eighth District, given that the focus of the principal action is "limited to the former Sixth District." Dkt. 109, at 5. That confuses two different issues; to say that a victory in the principal action would not achieve all that Shapiro hopes to achieve is not to say that his rights will be legally impeded if he is not permitted to intervene. He is always free to bring a separate lawsuit seeking whatever broader relief he likes.

2. "[T]o determine whether an interest is sufficient for purposes of Rule 24(a)(2), a court must [also] consider the legal validity, cognizab[ility], and sufficiency of the movant's underlying claim." *In re Foos*, 183 B.R. 149, 155 (Bankr. N.D. Ill. 1995). Yet Shapiro appears to lack standing even with respect to the claims stated in the new complaint-in-intervention. He claims that Republicans' votes in the Eighth District have been diluted (Dkt. 109-1,¶¶ 33-40) but describes himself as "a registered Democrat" (*id.* ¶ 1); he claims that the legislature in practical effect chose the U.S. Representative for the Eighth District (*id.* ¶¶ 41-56) but fails to allege that the winner of the election was not his candidate of choice; and he claims that the 2011 congressional map has impaired "effective representation" in the northern segments of the Eighth District (*id.* ¶¶ 57-69) but admittedly lives in southern Montgomery County, where no such impairment is asserted (*id.* ¶¶ 15-18).

What is more, Shapiro's claims bear close resemblance to the claims raised in the *Parrott* case. There, this Court rejected the proposition "that the Constitution protects the right to reside in a district that has not been mechanically manipulated to transfer the power to select representatives away from the people" and dismissed the case because the plaintiffs there lacked standing to bring generalized grievances on behalf of all Maryland voters. *See Parrott v. Lamone*, 2016 WL 4445319, at *3 (D. Md. 2016), *appeal dismissed* 2017 WL 69143 (U.S. 2017). That same can be said with respect to Shapiro's proposed complaint-in-intervention.

Because Shapiro lacks the necessary interest in the underlying action—and because he appears to lack standing even to bring his proposed complaint-in-intervention—intervention as of right should be denied.

B. Shapiro's interests, such as they are, will be adequately represented

Intervention should be denied also because Shapiro's interests in this action are adequately represented. Plaintiffs are represented *pro bono* by Mayer Brown LLP, which has committed substantial resources to litigating this case. And Plaintiffs and Shapiro share the same ultimate objective: an injunction prohibiting enforcement of Maryland's 2011 congressional map and requiring the adoption of a new map by means that do not violate the First Amendment or Article I of the Constitution. That matters, because "[w]hen the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented." *Md. Restorative Justice Initiative v. Hogan*, 316 F.R.D. 106, 111 (D. Md. 2016) (quoting *Va. v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976)). The presumption may be overcome only by a "demonstrate[ion of] adversity of interest, collusion, or nonfeasance" (*id.*), none of which is present here.

In resisting this conclusion, 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; because Plaintiffs' grievance is focused narrowly on the former *Sixth* District, this lawsuit is not concerned with the Eighth District or Democratic voters in Bethesda. "While Rule 24 promotes judicial economy by facilitating, where constitutionally permissible, the participation of interested parties in others' lawsuits, the fact remains that a federal case is a limited affair, and not everyone with an opinion is invited to attend." *Eischeid v. Dover Const., Inc.*, 217 F.R.D. 448, 467 (N.D. Iowa 2003) (quoting *Curry v. Regents of Univ. of Minn.*, 167 F.3d 420, 423 (8th Cir. 1999), in turn quoting *Mausolf v. Babbitt*, 85 F.3d 1295, 1301 (8th Cir. 1996)). If

Shapiro would like to present a challenge to the Eighth District, he is free to do so in a separate civil action.

C. Allowing permissive intervention would prejudice Plaintiffs

Permissive intervention requires that the "intervention will not unduly delay or prejudice the adjudication of the rights of the original parties." *Shanghai Meihao Elec.,* 223 F.R.D. at 387 (internal quotation marks omitted). For much this reason, "a motion to intervene under Rule 24(a)(2) is properly denied where intervention would result in the injection of completely new issues into the case." *Weathers v. Am. Family Mut. Ins. Co.*, 1988 WL 139514, at *1 (D. Kan. 1988) (citing *FDIC v. Jennings*, 816 F.2d 1488 (10th Cir. 1987)). "Denial is especially warranted where intervention would necessitate much additional discovery, thus burdening judicial efficiency." *Id.*

That is the case here. To begin with, the State presumably will move to dismiss the complaint-in-intervention if intervention is allowed. That would be, at minimum, an unwelcome distraction from discovery and would risk substantial delay all on its own. *Cf. Rodriguez v. Pataki*, 211 F.R.D. 215, 219 (S.D.N.Y. 2002) (denying permissive intervention where it "would cause undue distraction"). Beyond that, discovery—and especially expert discovery—has so far been focused narrowly on the Sixth District. Shapiro's allegations, concerning a different district and different theories of injury, have almost no real substantive overlap with the facts at issue in the primary action, other than that both concern the 2011 congressional map. Intervention would therefore require a discovery reset, putting the parties back at square one. Judicial efficiency accordingly would be undermined if intervention were allowed.

These concerns take on special force in this case, which is highly time-sensitive. To obtain relief in time to affect the 2018 primaries, Plaintiffs must have a judgment

no later than mid-summer of this year. As it is, that will be a difficult deadline to meet, with the close of discovery, dispositive motions, and trial all compressed into the next four or five months. Shapiro's assertion that "[t]here is ample time for the Court to decide the claims in the main action and in the complaint-in-intervention" (Motion 4) is misinformed. And the delay that would follow from allowing his intervention would be harmful to Plaintiffs. For that reason, too, that motion should be denied.

CONCLUSION

For the foregoing reasons, the motion to intervene should be denied.

Dated: January 17, 2017

Respectfully submitted,

/s/ *Michael B. Kimberly*

Michael B. Kimberly, Bar No. 19086
mkimberly@mayerbrown.com
Paul W. Hughes, Bar No. 28967
Stephen M. Medlock, *pro hac vice*
E. Brantley Webb, *pro hac vice*
Mayer Brown LLP
1999 K Street NW
Washington, D.C. 20006
(202) 263-3127 (office)
(202) 263-3300 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January 2017, a copy of the foregoing Opposition to Stephen M. Shapiro's Motion to Intervene was filed in the United States District Court for the District of Maryland, electronically served upon all counsel of record through the Court's CM/ECF system, and served via electronic mail and first class mail upon non-party Stephen M. Shapiro.

/s/ *Michael B. Kimberly*

Michael B. Kimberly, Bar No. 19086
mkimberly@mayerbrown.com
Paul W. Hughes, Bar No. 28967
Stephen M. Medlock, *pro hac vice*
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