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

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

REPLY IN SUPPORT OF MOTION OF VIRGINIA REPRESENTATIVES DAVID BRAT AND BARBARA COMSTOCK TO INTERVENE AS ADDITIONAL INTERVENOR-DEFENDANTS

Plaintiffs' Opposition To The Motion To Intervene (DE 152) does not dispute that Representatives Brat and Comstock satisfy Rule 24's standards for intervention as of right and permissive intervention. *See* Mem. 2–6 (DE 147); Opp. 1–8. Nor could it: as this Court already has recognized, it is "proper" to allow intervention in this lawsuit by congressional representatives—including Representatives Brat's and Comstock's predecessors in office—who were elected under the Enacted Plan that Plaintiffs challenge. *See* Order (DE 26). In fact, the Court's granting of Intervenor-Defendants' unopposed intervention comported with the myriad cases where courts have granted intervention under Rule 24 to members of Congress to defend against challenges to congressional districting plans. *See* Mem. 3.

Plaintiffs nonetheless oppose intervention by Representatives Brat and Comstock—and, in so doing, ask the Court to sweep aside the last vestige of "concrete adverseness" in this case, *Baker v. Carr*, 369 U.S. 186, 204 (1962), and to issue an advisory opinion "respond[ing] to the

Supreme Court's directive [and] re-enter[ing] its judgment," Opp. 4 n.2. Plaintiffs argue that Defendants' newfound agreement that "the Enacted Plan . . . is constitutionally indefensible" somehow does not oust the Court's "continuing jurisdiction" to adjudicate liability and order a remedy, *id.* at 1–4 & n.2, but that Representatives Brat and Comstock lack Article III standing to join Intervenor-Defendants' *defense* of the Enacted Plan under which they were elected, *see id.* at 4–8.

Plaintiffs' standing challenge to Representatives Brat and Comstock is multiply flawed. In the first place, Plaintiffs' own cited cases confirm that an intervenor need not show standing if there is "a justiciable case or controversy at the point at which intervention is sought," *City of Colo. Springs v. Climax Molybdenum Co.*, 587 F.3d 1071, 1081 (10th Cir. 2009) (cited at Opp. 3); *Dillard v. Chilton Cnty. Comm'n*, 495 F.3d 1324, 1330 (11th Cir. 2007) (cited at Opp. 3)—and Plaintiffs obviously believe a case or controversy is present here because they ask the Court to exercise its "jurisdiction" to adjudicate their claim, Opp. 4 n.2.

Moreover, Plaintiffs cite no case imposing an Article III standing requirement on an intervenor who seeks to join an existing case or controversy in district court in order to defend the action or statute challenged by the plaintiff. And with good reason: as Fourth Circuit precedent makes clear, no such requirement exists, even where the named parties agree on the merits and the intervenor asserts arguments not made by any other party. *See Feller v. Brock*, 802 F.2d 722, 724 & 729–30 (4th Cir. 1986). Indeed, like a named defendant in an ordinary case, an intervenor-defendant is not seeking judicial *relief* but instead seeking to *prevent* entry of judicial relief in favor of the plaintiff. Thus, Plaintiffs' cases requiring Article III standing from putative intervenors who *were* seeking judicial relief—such as modification of a consent decree or appellate reversal of a judgment—are of no moment.

Finally, regardless of whether the interest Representatives Brat and Comstock seek to vindicate is analyzed under Rule 24 or Article III, it is more than sufficient to allow them to participate in the defense of the Enacted Plan. Representatives Brat and Comstock possess individual and particularized interests in retaining their "base electorate," *King v. Ill. State Bd. of Elections*, 410 F.3d 404, 409 n.3 (7th Cir. 2005), and maximizing their "chances for reelection," *Meese v. Keene*, 481 U.S. 465, 474–75 (1987), that may "likely" be injured by any judgment upholding Plaintiffs' claim, *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013). This "direct stake in the outcome" of the case is sufficient to satisfy any standing requirement. *Id.* at 2662. The Court should grant Representatives Brat and Comstock intervention as additional Intervenor-Defendants.

ARGUMENT

I. REPRESENTATIVES BRAT AND COMSTOCK DO NOT NEED TO DEMONSTRATE STANDING

There is no dispute that Representatives Brat and Comstock satisfy Rule 24's standards for intervention. *See* Opp. 1–8. Indeed, any such dispute is impossible: Representatives Brat and Comstock satisfy Rule 24(a)'s standard for intervention as of right because they "stand to gain or lose by the direct legal operation of the [Court's] judgment," possess a "protectable interest" that "will be impaired by th[is] action," and are not "adequately represented" by Defendants, who now agree with Plaintiffs that the Enacted Plan is unconstitutional. *Teague v. Bakker*, 931 F.2d 259, 260–61 (4th Cir. 1991); *see also* Mem. 3–5. They also meet Rule 24(b)'s lower standard for permissive intervention because they have "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b); *see also* Mem. 6.

Accordingly, it is unsurprising that courts routinely have 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); *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). This Court followed suit when it granted Intervenor-Defendants' unopposed intervention, *see* Order, and should do so again by granting intervention to Representatives Brat and Comstock, *see* Mem. 3–6.

Plaintiffs raise no arguments that Representatives Brat and Comstock fail Rule 24's requirements. *See* Opp. 1–8. Instead, they argue that Representatives Brat and Comstock bear the *additional* burden to prove that they have Article III "standing" to defend the Enacted Plan that Defendants have abandoned. *See id.* at 3–4. But Plaintiffs' own cited cases confirm that an intervenor need not show Article III standing if there is "a justiciable case or controversy at the point at which intervention is sought." *City of Colo. Springs*, 587 F.3d at 1081 (cited at Opp. 3); *Dillard*, 495 F.3d at 1330 (cited at Opp. 3). Plaintiffs must believe that this case presents a justiciable case or controversy: they acknowledge that "federal courts have jurisdiction only over 'cases and controversies,'" Opp. 3 (quoting *Raines v Bird*, 521 U.S. 811, 818 (1997)), and ask the Court to exercise its "jurisdiction" to adjudicate their claim in light of "the Supreme Court's directive," *id.* at 4 n.2. Indeed, there plainly is a live case or controversy here because the Enacted Plan remains in effect, and Plaintiffs and Intervenor-Defendants, who contested liability

at trial, continue to contest liability on remand. *See United States v. Windsor*, 133 S. Ct. 2675, 2685 (2013) (a "justiciable controversy" existed where the executive branch declined to defend a statute but continued to enforce it); Int.-Defs. Resp. Br. Re. *Alabama Legislative Black Caucus v. Alabama* (DE 151). Accordingly, Representatives Brat and Comstock may intervene to join the defense of the Enacted Plan without showing that they have Article III "standing." *City of Colo. Springs*, 587 F.3d at 1081 (cited at Opp. at 3); *Dillard*, 495 F.3d at 1330 (cited at Opp. 3).

Plaintiffs nonetheless seek to have their cake and eat it, too. Without a single citation to authority or any coherent explanation, Plaintiffs argue that there is no longer a "case or controversy" here, but that the Court somehow has "continuing jurisdiction to respond to the Supreme Court's directive, to re-enter its judgment, or to enter an appropriate remedial order." Opp. 4 & n.2. Plaintiffs, however, make no attempt to reconcile this unsupported position with their acknowledgement that "federal courts have jurisdiction only over cases and controversies." *Id.* at 3. Plaintiffs, moreover, misstate the effect of the Supreme Court's vacatur and remand order: that order vacated the Court's decision *on liability* and requires this Court to "review the issue anew." *United States v. Simmons*, 635 F.3d 140, 144 (4th Cir. 2011), *vacated on other grounds on reh'g en banc*, 649 F.3d 237 (4th Cir. 2011). "The [C]ourt's [prior] decision" therefore does not "resolve[]" the liability question or the "case or controversy" here. Opp. 4. In other words, under Plaintiffs' vacillating positions, this case either presents a "case or controversy"—in which event this Court has jurisdiction and Representatives Brat and Comstock may intervene, *see id.* at 3–4—or it does *not*, in which event the Court cannot adjudicate the merits of Plaintiffs' claim and must dismiss this action, *see id.*

Thus, it is unsurprising that *none* of Plaintiffs' cited cases imposing on intervenors a requirement to show Article III standing involves an intervenor seeking to *defend* in district court

the action or statute challenged by the plaintiff. *See, e.g.*, *City of Colo. Springs*, 587 F.3d at 1081 (cited at Opp. 3); *Dillard*, 495 F.3d at 1330 (cited at Opp. 3); *ACLU of Minn. v. Tarek Ibn Ziyad Acad*, 643 F.3d 1088, 1092 (8th Cir. 2011) (cited at Opp. 5–6). Rather, Plaintiffs' cases *all* involve an intervenor who was seeking judicial relief, such as by asserting a claim as a *plaintiff*, *see ACLU of Minn.*, 643 F.3d at 1092 (cited at Opp. 5–6), or requesting the relief of modifying a decades-old consent decree that no original party challenged, *see, e.g.*, *City of Colo. Springs*, 587 F.3d at 1081 (cited at Opp. 3); *Dillard*, 495 F.3d at 1330 (cited at Opp. 3).

Such parties seeking judicial relief obviously must satisfy Article III's standing requirements of injury, causation, and redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (cited at Opp. 5). So, too, must a party seeking the judicial relief of an appellate reversal of an adverse judgment—although the question whether Representatives Brat and Comstock (and Intervenor-Defendants) have standing to appeal any adverse judgment from this Court will be resolved by the Supreme Court (if the issue is even presented) and has no bearing on whether they may intervene at this stage of the case. *See, e.g.*, *Hollingsworth*, 133 S. Ct. at 2659 (analyzing in first instance appellate standing of party who intervened as defendant in district court where named defendant did not appeal) (cited at Opp. 3–4); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) (same) (cited at Opp. 3); *Diamond v. Charles*, 476 U.S. 54 (1986) (same) (cited at Opp. 4).

By contrast, an intervenor seeking to *defend* a challenged action or statute in district court is not seeking judicial relief at all: rather, like a named defendant in an ordinary case, such an intervenor is seeking to *prevent* entry of judicial relief in favor of the plaintiff. Since they are *defending* the action or statute challenged by the plaintiffs, an intervenor-*defendant* in district court need not and invariably cannot satisfy Article III's standing requirements to show that *the*

challenged action or statute has caused "'an invasion of a legally protected interest.'" Opp. 5 (quoting *Lujan*, 504 U.S. at 560).

Rather, in such cases, courts allow intervention under Rule 24 upon a showing that the intervenor "will be affected by the outcome" of the case, regardless of whether the intervenor shows Article III standing or seeks different or additional relief than the named defendant. *Feller*, 802 F.2d at 724 & 729–30. The Fourth Circuit's decision in *Feller* is on point. There, several apple pickers moved to intervene as defendants in a case between apple growers and the Department of Labor (DOL) regarding picker wages. *See id.* The district court denied the motion to intervene. *See id.*

The Fourth Circuit reversed and held that intervention as of right should have been granted under Rule 24(a), without requiring the intervenors to demonstrate Article III standing. *See id.* The Fourth Circuit reasoned that the intervenors had a sufficient interest under Rule 24(a) because their wages "will be affected by the outcome of this litigation." *Id.* at 724. The Fourth Circuit also held that DOL did not adequately represent the intervenors' interests "in light of DOL's admission at oral argument that on the merits, it agrees with [plaintiffs]" and "its intention to argue against" an "interpretation of the piece rate regulations . . . preferred by the intervenors." *Id.* at 730.

Thus, Plaintiffs have it exactly backwards: the fact that Defendants now *agree* with Plaintiffs on the merits requires *granting* intervention to allow Representatives Brat and Comstock to represent interests that are now not adequately represented by Defendants, not *denying* intervention due to a purported lack of standing to join the defense of the Enacted Plan in this live "case or controversy." *See id.*; *King*, 410 F.3d at 409 n.3 (allowing congressman to intervene as defendant as of right because "participation of the State Election Board and its

members as defendants" did not "adequately represent[]" his interests); *see also* Opp. 1–5. The Court should grant the Motion.

II. REPRESENTATIVES BRAT AND COMSTOCK SATISFY ANY STANDING REQUIREMENT

Finally, in all events, regardless of whether the interest Representatives Brat and Comstock seek to vindicate is analyzed under Rule 24 or Article III, it is more than sufficient to allow them to intervene in defense of the Enacted Plan. There is no dispute that Representative Brat and Comstock have a sufficient interest to satisfy Rule 24, *see* Opp. 1–8; Mem. 1–6—and their "direct stake[s]" in this action that could be impaired by a judgment in Plaintiffs' favor are more than adequate to satisfy any standing requirement, *Hollingsworth*, 133 S. Ct. at 2659. Plaintiffs ask the Court to redraw the boundaries of *all* congressional districts in Virginia and to do so mid-decade. *See* Compl. ¶ D; *see also* Mem. 3. If the Court grants this remedy, Representatives Brat and Comstock will be harmed: any such remedy would upset existing district boundaries and constituent relationships, would engender confusion among the voting public, might replace a portion of their "base electorate" with unfavorable voters, *King*, 410 F.3d at 409 n.3, and could affect their "chances for reelection," *Meese*, 481 U.S. at 474–75 (standing to appeal based on harm to "chances for relection"). Representatives Brat and Comstock therefore are "likely" to be affected by any judgment for Plaintiffs in this case, and therefore have whatever standing is required to defend the Enacted Plan under which they were elected against Plaintiffs' challenge. *Hollingsworth*, 133 S. Ct. at 2659; *see also Meese*, 481 U.S. at 474–75.

Plaintiffs offer two arguments in an attempt to avoid this straightforward conclusion, neither of which is persuasive. *First*, Plaintiffs suggest that any harm to Representative Brat's and Comstock's interests is "speculative" because "the Enacted Plan has not yet been redrawn."

Opp. 7. That is like arguing that a plaintiff lacks standing because it is "speculative" that he will prevail on the merits and thereby have his injury remedied. As this reflects, Plaintiffs' argument puts the cart before the horse and is fundamentally flawed: that the harms to Representatives Brat and Comstock would flow from a future adverse judgment confirms, rather than defeats, their standing to defend the Enacted Plan against Plaintiffs' *liability* claim. *See, e.g.*, *Hollingsworth*, 133 S. Ct. at 2659; *Meese*, 481 U.S. at 474–75; *Clinton v. City of New York*, 524 U.S. 417, 430 (1998) (standing to appeal based on "contingent" harm from order vacating a defense verdict and granting a new trial). Moreover, Plaintiffs' claim is that the Enacted Plan places too many black (and overwhelmingly Democratic) voters into District 3—so the statewide remedy Plaintiffs seek or any other remedy must move such voters out of District 3 and into other districts. Thus, any remedial plan approved by the "Republican-controlled legislature" (and new *Democratic* governor), Opp. 7, or the court will necessarily alter districts.

Second, Plaintiffs argue that courts have held that only "two parties—representatives of challenged districts and voters who reside in challenged districts—have standing or are permitted to intervene." *Id.* But once again, the two cases Plaintiffs cite confirm that Representatives Brat and Comstock satisfy any standing requirement to defend the Enacted Plan. Just as a plaintiff seeking to *change* the status quo is adversely affected by a legislative redistricting plan if he resides in the district that is allegedly contrary to law, Representatives Brat and Comstock and Intervenor-Defendants seeking to *maintain* the status quo would be adversely affected by any command of this Court to alter the Enacted Plan. *See United States v. Hays*, 515 U.S. 737 (1995) (cited at Opp. 8). Moreover, *Johnson v. Mortham*, 915 F. Supp. 1529, 1538 (N.D. Fla. 1995) (cited at Opp. 7–8), was a case about intervention—but Plaintiffs do not dispute that Representatives Brat and Comstock, like Intervenor-Defendants, satisfy the Rule 24 standards

for intervention, *see* Opp. 1–8. In all events, the court there granted intervention to a congresswoman whose district was challenged under *Shaw* based on her "personal interest in her office" and in "keeping District 3 intact." *Johnson*, 915 F. Supp. at 1538. Representatives Brat and Comstock have identical interests in their "office" and in "keeping District 3" and their own districts "intact." *Id.* That the *Johnson* court denied intervention to other congressmen who faced only "speculative" harm, *id.*, is irrelevant because, as explained, Representatives Brat and Comstock have "direct stake[s]" in this case, *Hollingsworth*, 133 S. Ct. at 2662.

CONCLUSION

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

Dated: May 4, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 4, 2015, a copy of the REPLY 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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