KATHRYN SZELIGA, ET AL., *Plaintiff,*	*	IN THE
	*	CIRCUIT COURT
v.	*	FOR
LINDA H. LAMONE, ET AL., *Defendant.*	*	ANNE ARUNDEL COUNTY
	*	No. C-02-CV-21-001816

* * * * * * * * * * *

DEFENDANTS' RESPONSE TO DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE'S MOTION TO INTERVENE

Pursuant to Maryland Rules 2-311(b), Defendants Linda H. Lamone, Maryland State Administrator of Elections; William G. Voelp, Chairman of the Maryland State Board of Elections, and the Maryland State Board of Elections ("Defendants"), respectfully file this response to the motion to intervene filed by the Democratic Congressional Campaign Committee (the "DCCC"). The DCCC seeks both intervention of right under Rule 2-214(a)(2) and permissive intervention under Rule 2-214(b). Because the DCCC is not entitled to intervene as of right under Md. Rule 2-214(a)(2) as it has been interpreted by Maryland appellate courts, Defendants oppose the motion to intervene to the extent that it seeks intervention as of right. Defendants take no position on the DCCC's request for permissive intervention under Rule 2-214(b), but note that "[n]umerous cases support the proposition that allowing a proposed intervenor to file an amicus brief is an adequate alternative to permissive intervention." *McHenry v. Comm'r*, 677 F.3d 214, 227 (4th Cir. 2012); *see, e.g.*, *Abrams v. Lamone*, 394 Md. 330 (2006) (per curiam order) (denying

candidate's motion to intervene in suit challenging another candidate's eligibility for office but granting permission to participate as amicus curiae).

BACKGROUND

Plaintiffs are nine Maryland voters who ask this Court to declare Maryland's newly established Congressional Redistricting Plan (the "2021 Plan") to be an unlawful partisan gerrymander. Specifically, Plaintiffs assert that the 2021 Plan violates their rights under Articles 7, 24, and 40 of the Declaration of Rights and Article I, § 7 of the Constitution, by denying them "free and pure elections" and discriminating against them on the basis of their political views. Compl. ¶¶ 3, 15-18. Plaintiffs seek not only declaratory relief but an injunction against the administration of the fast-approaching 2022 elections under the new 2021 Plan "until such time as the Maryland General Assembly enacts a congressional districting plan that complies with the Maryland Constitution and Declaration of Rights." *Id.* § VI, ¶ (c).

On January 20, 2022, the DCCC filed its motion to intervene in this case, seeking intervention as of right and, in the alternative, permissive intervention pursuant to Rules 2-214(a)(2) and (b), respectively.[1] The DCCC contends that it meets the standard articulated by the Court of Appeals for intervention as of right,[2] because it timely sought intervention,

[1] The DCCC served its motion to intervene on the Defendants on January 21, 2022. Accordingly, by operation of Rules 1-203(a)(1) and 2-311(b), the Defendants' response is due February 7, 2022.

[2] *See Maryland-Nat'l. Cap. Park & Plan. Comm'n v. Town of Washington Grove*, 408 Md. 37, 69-70 (2009).

it claims an interest in electing Democrats from Maryland congressional districts, the disposition of this action may impede those interests, and its interests are not adequately represented by the parties. *See* Mot. to Intervene 4-7. Alternatively, the DCCC seeks permissive intervention because its defense that the Plaintiffs fail to state claims upon which relief can be granted presents a "question of law in common with this case," and because "intervention would not unduly delay or prejudice the adjudication of the parties' rights." *Id.* at 8 (quoting *Doe v. Alt. Med. Md., LLC,* 455 Md. 377, 425 n.26 (2017).

ARGUMENT

I. LEGAL STANDARD

To prevail on a motion to intervene as of right pursuant to Md. Rule 2-214(a)(2), "(1) the application for intervention must be timely; (2) the applicant must have an interest in the subject matter of the action; (3) disposition of the action would at least potentially impair the applicant's ability to protect its interest; and (4) the applicant's interest must be inadequately represented by existing parties." *Environment Integrity Project v. Mirant Ash Mgmt., LLC,* 197 Md. App. 179, 186 (2010); *see Maryland-Nat'l. Cap. Park & Plan. Comm'n v. Town of Washington Grove,* 408 Md. 37, 69-70 (2009) (setting forth the same four requirements). All four factors must be satisfied before an applicant is permitted to intervene as of right. *Env't Integrity Project*, 197 Md. App. at 190.

Permissive intervention requires that an applicant file a "timely motion," that the applicant's "claim or defense has a question of law or fact in common with the action," and

that intervention would not "unduly delay or prejudice the adjudication of the rights of the original parties." Md. Rule 2-214(b)(1); *see Doe*, 455 Md. at 425 n.26.

II. THE DCCC IS NOT ENTITLED TO INTERVENE AS OF RIGHT BECAUSE ITS INTEREST IN DEFENDING THE CONSTITUTIONALITY OF THE 2021 PLAN IS ADEQUATELY REPRESENTED BY THE ORIGINAL DEFENDANTS.

The DCCC's proposed answer confirms that, in essence, its objective is dismissal of this lawsuit. It denies that Plaintiffs are entitled to any relief, *see* [Proposed] Answer of the DCCC ¶ 84, and asserts as affirmative defenses (among other things) that the complaint fails to state a claim upon which relief can be granted and pleads non-justiciable claims, *see id.* ¶¶ 85-88. These are also the grounds upon which the Defendants have moved to dismiss the Complaint. *See generally* Mem. in Support of Defts.' Mot. to Dismiss or, in the Alternative, for Summ. J. Thus, if the Court grants the dismissal or summary judgment already requested by Defendants, that disposition necessarily will achieve the result sought by the DCCC's proposed answer.

Under the Constitution of Maryland and applicable statutes, the Attorney General, who "is first and foremost the lawyer of the State," not only "has the duty of appearing in the courts as the defender of the validity of enactments of the General Assembly," but also has a "duty as the State's advocate to present the best arguments he can possibly muster in support of the State's position." *State ex rel. Atty. Gen. v. Burning Tree Club, Inc.*, 301 Md. 9, 34, 37, 36 (1984). The Attorney General also generally has a statutory responsibility to defend suits brought against State agencies, officers, and employees, such as the named Defendants. Md. Code Ann. State Gov't §§ 6-106(b); 12-304. This Court must presume

that the Attorney General will perform these duties not just adequately, but properly, because under Court of Appeals precedent, '"[t]here is a strong presumption that public officers properly perform their duties.'" *Anne Arundel County v. Halle Dev., Inc.*, 408 Md. 539, 565 (2009) (citation omitted).

Since "an existing party is charged by law with representing the proposed intervenor's interest" in defending the 2021 Plan and securing dismissal of Plaintiffs' suit, '"a compelling showing should be required to demonstrate why this representation is not adequate.'" *Town of Washington Grove*, 408 Md. at 103 (quoting *Maryland Radiological Society, Inc. v. Health Services Cost Review Commission*, 285 Md. 383, 390-91 (1979)). Far from making the compelling showing required under these circumstances, the DCCC has presented no basis for the Court to conclude that the Defendants, through the Attorney General as their counsel, cannot adequately defend the 2021 Plan against Plaintiffs' challenge. *See Cities Serv. Co. v. Governor*, 290 Md. 553, 578, 561 (1981) (finding "no error in the trial judge's ruling" denying intervention as of right as to private defendant who sought intervention to defend constitutionality of a statute, where "the Governor, Comptroller and Attorney General . . . could adequately represent the [private intervenor's] interests"). The motion to intervene does not come close to showing the sort of actual conflict of interest the Court of Appeals has deemed sufficient to establish that would-be defendant-intervenors are inadequately represented by government parties having a legal responsibility to defend a lawsuit. *Compare Doe v. Alternative Medicine Maryland, LLC*,

455 Md. 377 (2017) (permitting intervention as of right by cannabis growers awarded licenses by Medical Cannabis Commission, in suit brought by unsuccessful license applicants against, where the Commission "has a conflict of interest with respect to the representation of the Growers in a lawsuit in which the Growers seek to maintain their status as pre-approval awardees and the Commission seeks to assure that the selection process is lawfully implemented"), *with Duckworth v. Deane*, 393 Md. 524, 542 (2006) (denying intervention as of right and rejecting would-be intervenors' assertion "that the Attorney General and the existing defendants are 'sympathetic to plaintiffs' cause'" where "the assertion amount[ed] to pure speculation," was "unsupported by the record," and "furnishe[d] no legal basis for holding that the representation by existing parties may be inadequate").

The DCCC's authorities are not to the contrary. In *LULAC v. Pate*, No. CVCV061476 (Iowa Dist. Ct. June 24, 2021), the court granted the Republican Party's motion to intervene because the plaintiffs had "withdrawn their opposition" to the motion, not because (as the DCCC suggests) the court "concluded that . . . interference with a political party's electoral prospects constitutes a direct injury."[3] Mot. to Intervene at 6.

[3] The order appears to be available at https://www.democracydocket.com/wp-content/uploads/2021/03/210624_LULAC-of-Iowa-v.-Pate_Order-Granting-Intervention.pdf

In *Town of Chester, N.Y. v. Laroe Estates*, 137 S. Ct. 1645 (2017), the Supreme Court concluded that an intervenor must have "standing in order to pursue relief that is different from that which is sought by a party with standing." *Id.* at 1651. But as shown above, the DCCC is not seeking "relief that is different" from the result Defendants are pursuing with their pending motion to dismiss or, in the alternative, for summary judgment.

In *Issa v. Newsom*, Nos. 2:20-cv-01044-MCE-CKD, 2:20-cv-01055-MCE-CKD, 2020 WL 3074351 (E.D. Cal. June 10, 2020), the DCCC successfully intervened in an action seeking to enjoin enforcement of an executive order requiring all California counties to implement all-mail ballot elections for the November 3, 2020 election. *Id.* at *1, *4. But in granting the motion to intervene, the court noted that the existing state defendants' "interests in the implementation of the Executive Order differ[ed] from those of the Proposed Intervenors." *Id.* at *3. That is not the case here, where—for all practical purposes—the DCCC's interest in preserving the 2021 Plan does not differ from the Defendants' legal obligation to defend it.

Finally, *Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, 2020 WL 2042365 (D. Nev. Apr. 28, 2020), is even farther afield, because there the DCCC "disagree[d]" that the all-mail primary election plan adopted by Nevada for which it was seeking intervention to defend in part was "adequate to extend the franchise for all Nevada voters." *Id.* at *2. Indeed, the DCCC had filed suit to enjoin other aspects of that same plan in a separate proceeding. *Id.* at *1, *2. Here, by contrast, the DCCC has not challenged other aspects

of the 2021 Plan, nor has it offered any suggestion that the 2021 Plan does not "go far enough" in advancing its interests. [4]

Therefore, the DCCC has not made the compelling showing necessary to establish inadequate representation by the named Defendants, especially in light of the "strong presumption" that the Attorney General will perform properly his constitutional and statutory duty to defend the challenged enactment. *Halle Dev., Inc.*, 408 Md. at 565.

CONCLUSION

Accordingly, the DCCC's motion to intervene as of right pursuant to Rule 2-214(a) should be denied.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

/s/ Andrea W. Trento

ANDREA W. TRENTO
Assistant Attorney General
Attorney No. 0806170247
STEVEN M. SULLIVAN
Assistant Attorney General
Attorney No. 9706260005
200 Saint Paul Place
20th Floor

[4] The DCCC's remaining cited authorities do not involve motions to intervene, and thus do not address the issue of whether a putative intervenor's interests were "adequately" represented by existing parties. *See Texas Democratic Party v. Benkiser*, 459 F.3d 582, 586-87 (5th Cir. 2006) (declaratory judgment action, not motion to intervene, by political party); *Owen v. Mulligan*, 640 F.2d 1130 (9th Cir. 1981) (injunction action, not motion to intervene, by chair of political party).

Baltimore, Maryland 21202
atrento@oag.state.md.us
(410) 576-6472
(410) 576-6955 (facsimile)

February 7, 2022

Attorneys for Defendants

CERTIFICATE OF SERVICE

I certify that on this 7th day of February, 2022 the foregoing was filed and served electronically by the MDEC system on all persons entitled to service, as well as on counsel for the movants:

Brenton H.J. Conrad, Esq.
706 Giddings Avenue
Suite 305
Annapolis, Maryland 21401
bconrad@mdswlaw.com

Strider L. Dickson, Esq.
706 Giddings Avenue
Suite 305
Annapolis, Maryland 21401
sdickson@mdswlaw.com

Jessica P. Weber, Esq.
Brown, Goldstein & Levy, LLP
120 E. Baltimore Street, Suite 2500
Baltimore, Maryland 21202
jweber@browngold.com

Marc E. Elias, Esq.
Elias Law Group LLP
10 G St NE, Ste 600
Washington, DC 20002
MElias@elias.law

Kathryn E. Yukevich, Esq.
Elias Law Group LLP
10 G St NE, Ste 600
Washington, DC 20002
KYukevich@elias.law

Melinda K. Johnson, Esq.
Elias Law Group LLP
10 G St NE, Ste 600
Washington, DC 20002
MJohnson@elias.law

Aaron M. Mukerjee, Esq.
Elias Law Group LLP
10 G St NE, Ste 600
Washington, DC 20002
AMukerjee@elias.law

/s/ Andrea W. Trento
_____
Andrea W. Trento