UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISON

PAUL BERRY III,

Plaintiff,

v.

JOHN R. ASHCROFT, in his official capacity as Missouri Secretary of State, and STATE OF MISSOURI,

Defendants.

Case No. 4:22-CV-465-JAR

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS PLAINTIFFS

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INTRODUCTION

On August 12, 2021, the Census Bureau released updated population data showing that, since the 2010 Census, Missouri's congressional districts have become malapportioned. The Missouri Legislature has made several attempts to enact a redistricting plan to equalize population across Missouri's congressional districts—but each of those attempts failed to garner sufficient support and none were enacted. As a result, Joseph Pereles, Matthew Bax, Ike Graham, Robert Saunders, and Rachel Howard (collectively, the "Proposed Intervenors") face the prospect of having their votes in the 2022 election diluted by a malapportioned congressional map.

On March 11, 2022, Proposed Intervenors filed suit in Missouri state court alleging that the current congressional map was malapportioned and that a court-drawn remedial plan was necessary. *See* Motion to Intervene, Ex. B, Petition, *Pereles v. Ashcroft*, No. 22AC-CC00114 (Cir. Ct., Cole Cnty., Mar. 11, 2022). Six weeks later, on April 22, 2022, Plaintiff Paul Berry III filed this action—alleging substantially similar malapportionment claims and requesting a remedial plan drawn by this Court. Given the near-total overlap between these parallel suits—and the mutually exclusive nature of the remedy—Proposed Intervenors move to join this action to protect their constitutional rights, advise the Court on the solicitude owed to ongoing state redistricting proceedings, and vindicate their own malapportionment claims if federal court intervention becomes necessary.

Intervention should be granted under Rule 24. "Rule 24 is construed liberally, and [courts] resolve all doubts in favor of the proposed intervenors." *United States v. Union Elec. Co.*, 64 F.3d 1152, 1158 (8th Cir. 1995). First, this motion to intervene is unquestionably timely. Proposed Intervenors have moved to intervene before any discovery or responsive pleading have been filed, and only two weeks after Plaintiff Berry commenced this action. Proposed Intervenors also satisfy the tripartite test for intervention of right under Rule 24(a) because they have direct interests in

this litigation—both as voters in malapportioned districts and as litigants in a parallel proceeding—which are not adequately represented by Plaintiff Berry or the state Defendants. Alternatively, the Court should permit intervention under Rule 24(b) because it would not impair any proceedings in this case and the proposed complaint raises the same core legal and factual questions of whether Missouri's congressional districts are malapportioned and how that should be remedied. The Proposed Intervenors would assist the Court's efficient and effective resolution of this case because their claims "share with the main action" several common questions of law and fact. Fed. R. Civ. P. 24(b)(1)(B). Under either standard, Proposed Intervenors' motion should be granted.

ARGUMENT

I. Proposed Intervenors' motion is timely.

Whether a party moves for intervention as of right or for permissive intervention, the motion must be timely. *Am. C.L. Union of Minn. v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088, 1093 (8th Cir. 2011). In assessing timeliness, the court must consider all circumstances, including the stage of the litigation, any delays in seeking intervention, and possible prejudice to the parties already in litigation. *See Bailey v. Allstate Prop. & Cas. Ins. Co.*, No. 4:08CV1456 TCM, 2010 WL 1253651, at *1 (E.D. Mo. Mar. 31, 2010). In a timeliness inquiry, the touchstone for prejudice is whether adding additional parties at this stage would impair the disposition of the lawsuit. *Union Elec. Co.*, 64 F.3d at 1159.

Here, the timeliness of Proposed Intervenors' motion is beyond question. This case is still in its infancy—before any discovery and even before a responsive pleading from Defendants. Indeed, Proposed Intervenors' motion comes only two weeks after the lawsuit was filed, which is well within the range of cases where courts have affirmed timeliness. *See e.g., Union Elec. Co.*, 64 F.3d at 1159 (concluding motion to intervene was timely more than four months after the suit was filed); *see also In re Scott by Simmons v. United States of Am.*, No. 4:10CV1578 TCM, 2011

WL 13366300, at *2 (E.D. Mo. Oct. 3, 2011) (comparing a timely motion filed within one month of the complaint to an untimely motion filed ten months after the lawsuit was filed). Since Proposed Intervenors' involvement will assist the Court's determination of whether to and how to remedy malapportionment, there is no risk of prejudice.

II. Proposed Intervenors are entitled to intervention as of right under Rule 24(a).

Proposed Intervenors are entitled to intervene as of right under Rule 24(a) because they satisfy all three elements: "1) the proposed intervenor has an interest in the subject matter of the action; 2) the interest may be impaired; and 3) the interest is not adequately represented by an existing party to the action." *Sierra Club v. Robertson*, 960 F.2d 83, 85 (8th Cir. 1992). The contours of Proposed Intervenors' own congressional districts and their right to an equal vote are at stake in this litigation. Those interests are not adequately represented by the Plaintiff or the state Defendants. Therefore, Proposed Intervenors are entitled to intervene under Rule 24(a).

A. Proposed Intervenors possess standing and have substantial interests in this litigation.

Under Rule 24(a)(2), a proposed intervenor must have a "recognized interest in the subject matter of the litigation." *Bailey*, 2010 WL 1253651 at *1 (quoting *Tweedle v. State Farm Fire & Cas. Co.*, 527 F.3d 664, 671 (8th Cir. 2008)). This interest must be a direct, legally protectable interest. *See Union Elec. Co.*, 64 F.3d at 1161. In addition, a proposed intervenor must have "Article III standing to litigate their claim in federal court." *Stenger v. Kellet*, No. 4:11CV2230 TIA, 2012 WL 381769, at *1 (E.D. Mo. Feb. 6, 2012).

Proposed Intervenors have multiple, substantial interests in this litigation, and they have standing to bring claims that protect those interests. As voters, Proposed Intervenors have a legally protected interest in an equal vote—and the Supreme Court has squarely held that persons alleging vote dilution "have standing to sue to remedy that disadvantage." *Gill v. Whitford*, 138 S. Ct. 1916,

1929 (2018) (internal quotation omitted); *see also Baker v. Carr*, 369 U.S. 186, 208 (1962) (holding that voters complaining of malapportioned districts "are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes'" (quoting *Coleman v. Miller*, 307 U.S. 433, 438 (1939)). This interest extends to Proposed Intervenors' interests in securing that relief—in the form of a remedial congressional map—in a timely manner, according to constitutional principles, and before the proper forum. Specifically, Proposed Intervenors are litigants who have asked another forum—the Missouri state courts—to find malapportionment and undertake the task of redrawing Missouri's congressional districts. In that sense, Proposed Intervenors have a strong interest in having their own suit proceed without undue federal obstruction. All of these interests are implicated by this litigation.

B. Proposed Intervenors' interests may be impaired by the disposition of this action.

Denial of Proposed Intervenors' motion would leave their interests critically unprotected. Importantly, Proposed Intervenors need not show that their interests *will* be impaired; Rule 24(a) only requires that "they show that the disposition of the action *may* as a practical matter impair their interests." *Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1*, 738 F.2d 82, 84 (8th Cir. 1984) (emphasis in original). Here, Proposed Intervenors' interest in a map that ensures equal representation could be impaired by this Court's decisions of whether, when to, or how to remedy malapportioned districts.

In particular, as litigants in a parallel state court suit, Proposed Intervenors have a direct interest in being able to pursue those claims consistent with U.S. Supreme Court precedent and without premature federal intrusion. *See Growe v. Emison*, 507 U.S. 25, 33 (1993) ("[T]he Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task

itself."). The disposition of this suit raises the prospect of federal litigation that may impede state efforts to reapportion Missouri. *Id.* at 34. Since Missouri "can have only one set of [congressional] districts," *id.* at 35, any efforts by a federal court to adopt and implement a remedial plan before the state court has had the opportunity to do so would directly impair the Proposed Intervenors' parallel state suit.

C. Proposed Intervenors are not adequately represented in this action.

Proposed Intervenors interests are not shared by, nor are they adequately represented by, the existing parties. To satisfy this element, Proposed Intervenors need only provide a "minimal showing that representation may be inadequate." *Kans. Pub. Emps. Ret. Sys. v. Reimer & Koger Assocs., Inc.*, 60 F.3d 1304, 1308 (8th Cir. 1995). The primary inquiry is whether the interests of the parties and the Proposed Intervenors are "sufficiently 'disparate' to warrant intervention." *S.E.C. v. Flight Transp. Corp.*, 699 F.2d 943, 948 (8th Cir. 1983) (quoting *Planned Parenthood of Minn. v. Citizens for Cmty. Action*, 558 F.2d 861, 870 (8th Cir. 1977)). That burden is easily met with respect to both the state Defendants and Plaintiff Berry because their interests notably differ.

The state Defendants have their primary interest in defending the legality of Missouri's congressional map—not in ensuring the enactment of a timely remedial map. Indeed, in the parallel state litigation, the Secretary of State has already taken the position that the malapportionment claims before the state court are not ripe because, theoretically, the Missouri Legislature *could* still enact a remedial map. *See* Ex. A, Mot. to Dismiss, *Pereles v. Ashcroft*, No. 22AC-CC00114 (Cir. Ct., Cole Cnty., Apr. 18, 2022). In that sense, the Secretary and the Proposed Intervenors are pursuing directly contrary legal outcomes, which demonstrates that the Secretary has "already disregarded the interest[s]" of the Proposed Intervenors. *Union Elec. Co.*, 64 F.3d at 1170.

Though Proposed Intervenors and Plaintiff Berry may have "tactical similarit[ies]," in that they both seek a properly apportioned congressional map, that is insufficient to show adequate

representation. *Kans. Pub. Emps. Ret. Sys.*, 60 F.3d at 1308 (citation omitted). Indeed, even if their legal goal were the same, disparate interests would be sufficient to justify intervention. *Id.* at 1308-09. As an initial matter, Plaintiff Berry and Proposed Intervenors have filed separate suits in different forums and have different views on which forum should develop a remedial congressional map—state court or federal court. Further, Berry is the lone plaintiff, and he resides in Missouri's Second Congressional District. In contrast, Proposed Intervenors include residents of the Second, Fourth, Fifth, Sixth, and Seventh Congressional Districts—representing a wide variety of interests implicated by overpopulated districts across the state. As a candidate, Plaintiff Berry has unique interests different from *any* voter, and he will not be adequate to represent the interests of the proposed intervenors from across Missouri's overpopulated districts. His decision to proceed *pro se*, without the benefit of counsel, further undermines any claim he may make to adequately represent the interests of Proposed Intervenors. Finally, if federal intervention is necessary, Proposed Intervenors will likely have very different views about precisely how Missouri's congressional map should be corrected as compared to Plaintiff Berry, which is enough to show that his representation "may be inadequate." *Kans. Pub. Emps. Ret. Sys.*, 60 F.3d at 1308; *see also S.E.C. v. Flight Transp. Corp.*, 699 F.2d 943, 948 (8th Cir. 1983) (explaining that interests need not be "adverse" to qualify as "disparate" under Rule 24). Indeed, these differing interests are routinely considered a sufficient basis for intervention in malapportionment cases. *See, e.g.*, *Hunter v. Bostelmann*, No. 21-cv-512-jdp-ajs-eec, 2021 U.S. Dist. LEXIS 176219, at *3-4 (W.D. Wis. Sep. 16, 2021) (granting intervention of state court individual voter plaintiffs to federal court in redistricting impasse case).

III. Alternatively, the Court should permit the Proposed Intervenors to intervene under Rule 24(b).

In the alternative, the Court should permit intervention under Rule 24(b). Permissive

intervention rests with the court's discretion and the primary consideration is whether "the proposed intervention would unduly delay or prejudice the adjudication of the parties' rights." *Phillips v. Aldi, Inc.*, No. 4:10CV837 TIA, 2013 WL 1490487, at *1 (E.D. Mo. Apr. 11, 2013) (quoting *S.D. ex rel Barnett v. U.S. Dep't of Interior*, 317 F.3d 783, 787 (8th Cir. 2003)). Here, there is no of risk prejudice. Proposed Intervenors' timely motion comes at the earliest stages of litigation and would not alter any case schedule. Moreover, Proposed Intervenors' claims would not broaden the scope of the litigation because they raise the same core legal and factual issues that are currently before the Court—namely, whether the current congressional districts are malapportioned, whether this Court should remedy that malapportionment and, if so, how. Proposed Intervenors are prepared to contribute to the complete development of the factual and legal issues before this Court to permit a resolution of the congressional map in advance of the 2022 election.

CONCLUSION

For the reasons stated above, the Proposed Intervenors should be granted intervention as of right under Rule 24(a)(2). Alternatively, the court should permit Proposed Intervenors to intervene under Rule 24(b).

Dated: May 6, 2022

Respectfully submitted,

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**Pro Hac Vice* motions forthcoming

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by the Court's CM/ECF filing system on the 6th day of May, 2022, which will notify all parties of record.

/s/ Jeremy A. Root

IN THE CIRCUIT COURT OF COLE COUNTY
NINETEENTH JUDICIAL CIRCUIT OF MISSOURI

JOSEPH PERELES, *et. al*,	)	
	)	
Plaintiffs,	)	
	)	Case No. 22AC-CC00114
v.	)	
	)	
JOHN R. ASHCROFT, in his official capacity as Missouri Secretary of State,	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION TO DISMISS THE PETITION

COMES NOW, Defendant Secretary of State Ashcroft, by and through counsel, and moves the court to dismiss the Petition for lack of subject-matter jurisdiction as unripe.

This case is unripe, and "[r]ipeness, like standing, is an element of justiciability." *Calzone v. Ashcroft*, 559 S.W.3d 32, 35 (Mo. Ct. App. 2018). In declaratory judgment cases, the court must be presented with "(1) a justiciable controversy that presents a real, substantial, presently-existing controversy admitting of specific relief, as distinguished from an advisory decree upon a purely hypothetical situation; (2) a plaintiff with a legally protectable interest at stake, ...; (3) a controversy ripe for judicial determination; and (4) an inadequate remedy at law." *Missouri NAACP v. State*, 601 S.W.3d 241, 246 (Mo. banc 2020) (quoting *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102

S.W.3d 10, 25 (Mo. banc 2003)). Courts "employ[] a two-fold test in ascertaining whether a controversy is ripe for judicial determination: (1) whether the issues presented are fit for judicial resolution, and (2) whether denying relief would create hardship for either party." *Graves v. Missouri Dep't of Corr., Div. of Prob. & Parole*, 630 S.W.3d 769, 773 (Mo. banc 2021).

"A declaratory judgment is not a general panacea for all real and imaginary legal ills. It is not available to adjudicate hypothetical or speculative situations that may never come to pass." *Graves v. Missouri Dep't of Corr., Div. of Prob. & Parole*, 630 S.W.3d 769, 773 (Mo. banc 2021). "Courts do not sit in judgment on the wisdom or folly of proposals. Neither will courts give advisory opinions as to whether a particular proposal would, if adopted, violate some superseding fundamental law...." *Calzone*, 559 S.W.3d 3 at 35 (quoting *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. banc 1990)).

The petition claims that the current congressional district map is unconstitutional because the court-approved 2011 map is no longer numerically equal. Pet. ¶¶ 46-49. They further claim that "[t]he General Assembly and Governor have failed to enact a new congressional plan." Pet. ¶ 44. But the Petition concedes that time still exists for the General Assembly to adopt a map before the primary election. The Petition notes that with an emergency clause a law becomes effective immediately, Pet. ¶ 5, and without

an emergency clause a law becomes effective in 90 days, Pet. ¶ 4. The Petition admits that the General Assembly could change course. Pet. ¶ 40. Despite claiming that the General Assembly has failed to enact a map before the candidate filing deadline, Plaintiffs have not alleged that they filed or intended to file to become candidates. Nor have they alleged that they are harmed by not knowing what district they will reside in before the primary or the general election. Pet. ¶ 42 (claiming only that "[i]t is in the interest of voters … that new congressional districts be established as soon as possible…"). Plaintiffs claim that their concern is that "the 2022 election will be held using illegal district maps, depriving Plaintiffs of their constitutional rights." Pet. ¶ 44. The Petition further requests that the court "enjoin Defendant from using the current plan in any future elections," Pet. ¶ 9, an event that may not happen. *See also* Pet. ¶¶ 31 ("If used in any future election"), 49 ("Any future use of Missouri's current congressional district plan would violate Plaintiffs' constitutional right to cast an equal, undiluted vote.").

Contrary to Plaintiffs' speculation, the General Assembly still has ample time to act, and it may replace the current congressional district map; thus, judicial intervention is unwarranted before that time has expired. The federal and state constitutions entrust map-drawing to the State's legislature. U.S. CONST. art. I, § 4; MO. CONST. art. III, § 45. Ninety days before the August 2,

2022, primary is May 4, 2022.[1] The last day of the General Assembly's regularly scheduled session is May 13, 2022. On March 24, 2022, the Missouri Senate passed a new map with an emergency clause, 30-2. St. Louis Public Radio, *Missouri Senate passes new 6-2 Republican majority congressional map*, STLPR (Mar. 24, 2022), available at https://bit.ly/3r2K838. As a result, a map can pass on the last day of the session with an emergency clause, or before May 4, 2022 to be effective before the August primary. Even after that, the General Assembly may still act through a special session called by the Governor.

Missouri precedents confirm that there is no controversy until the General Assembly cannot act. *S.C. v. Juv. Officer*, 474 S.W.3d 160, 163 (Mo. banc 2015) ("Ripeness does not exist when the question rests solely on a probability that an event will occur."). When the Auditor filed for declaratory judgment before the Fiscal Year had ended and the Governor could still act until the final day of the fiscal year, the Court held that "the requirements for ripeness were not met." *Schweich v. Nixon*, 408 S.W.3d 769, 779 (Mo. banc 2013). When a budget excess was not current or foreseeable, plaintiffs could not maintain a refund action. *Buechner v. Bond*, 650 S.W.2d 611, 614 (Mo. banc 1983). When a prisoner seeks to challenge a preliminary action which

[1] The court may take judicial notice of the calendar and the events of the General Assembly. *Hartman v. Logan*, 602 S.W.3d 827, 839 n.10 (Mo. Ct. App. 2020); *Missouri NAACP v. State,* 601 S.W.3d 241, 244 (Mo. banc 2020).

may lead to a decision or further action, the case is not ripe. *Graves*, 630 S.W.3d at 775 (noting "a court's authority to entertain preemptive challenges to an agency action or decision" inherently raises ripeness concerns).

Notably, this is not a pre-enforcement challenge where a party may challenge an enacted law when "the facts necessary to adjudicate the underlying claims were fully developed and the law at issue were affecting the plaintiff in a manner that gave rise to an immediate, concrete dispute." *S.C.*, 474 S.W.3d at 163. Instead, this is a pre-*enactment* challenge betting against the General Assembly's future actions. Regardless of the merits of Plaintiffs' claims, any declaration would merely be an advisory opinion and unnecessarily coercive until the General Assembly's time has expired. *See Growe v. Emison*, 507 U.S. 25, 34 (1993) ("Absent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it.").

Finally, no prejudice will result in requiring Plaintiffs to raise their claims at a later date *if and when* the necessary facts have crystallized into a dispute the court can adjudicate. Indeed, the facts that underlie the premise of the Petition have changed substantially, and Defendant should not bear the burden of responding to stale factual allegations. Plaintiffs have not claimed an injury or harm from the current map presently existing (nor could they),

and any alleged vote dilution may only occur, at the earliest, on the primary date: August 2, 2022. No prejudice will occur from dismissal.

By contrast, preliminary adjudication of Plaintiffs' claims would result in prejudice to the State and to its voters. It might also generate confusion and/or inter-branch conflict. Accordingly, Plaintiffs' claims are not fit for judicial resolution at this time, and the risk of prejudice from premature adjudication is significant. Plaintiffs' Petition should be dismissed in its entirety as unripe.

CONCLUSION

The court should grant the motion to dismiss the Petition as unripe.

April 18, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on April 18, 2022, a true and correct copy of the foregoing was filed with the Court's electronic filing system to be served by electronic methods on counsel for all parties entered in the case.

/s/ *D. John Sauer*
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