UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MISSOURI EASTERN DIVISON

PAUL BERRY III,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 4:22-CV-465-JAR
	)	
JOHN R. ASHCROFT, in his official capacity as Missouri Secretary of State, and STATE OF MISSOURI,	)	
	)	
Defendants.	)	

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, Patricia Thomas, Derrick Good and Curtis Jared (collectively, the "Proposed Intervenors") face the prospect of having their votes in the 2022 election diluted by a malapportioned congressional map.

On March 31, 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, Exhibit B, Petition, *Thomas, et al. v. State of Missouri, et al.,* No. 22AC-CC00222. 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 overlap between these parallel suits, 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 just over two weeks after Plaintiff Berry commenced this action. Moreover, other proposed intervenors sought intervention on May 6, 2022, and those other proposed intervenors have different interests and claims than Proposed Intervenors.

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. Furthermore, Proposed Intervenors are not adequately represented by the other proposed intervenors in this matter, as Proposed Intervenors are requesting that the majority-minority status of what is currently Congressional District 1 be protected and preserved by any plan which is adopted by the State of Missouri or by a three-judge panel in this matter.

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 just over 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). Moreover, other proposed intervenors filed a motion to intervene, just days ago on May 6, 2022.

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. 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 has been ordered to do so by a state court 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. 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 and perhaps Intervenors Pereles, et al., 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 Third and Seventh 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).

Moreover, the other proposed intervenors cannot be expected to represent the interests of the Proposed Intervenors here. They reside in different districts. They are seeking different relief in the state courts and will likely have distinctly different views about how Missouri's new congressional plan and map should be properly and legally constituted. Moreover, the Proposed Intervenors here have tendered a complaint with a Count II regarding a majority-minority district. That claim is not present elsewhere in this case or has it been advanced by the other proposed intervenors in any manner.

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. This includes Proposed Intervenors' interest in insuring that any relief is timely and that unnecessary delay is avoided.

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 10, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by the Court's CM/ECF filing system on the 10th day of May, 2022, which will notify all parties of record.

/s/ Michael Martinich-Sauter