UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

COMMON CAUSE FLORIDA, et al.,

Plaintiffs, and

MICHAEL ARTEAGA, LENI FERNANDEZ, ANDREA HERSHORIN, JEAN ROBERT LOUIS, MELVA BENTLEY ROSS, DENNY TRONCOSO, BRANDON NELSON, GERALDINE WARE, and NINA WOLFSON,

Intervenor-Plaintiffs,

v.

LAUREL M. LEE, in her official capacity as Florida Secretary of State, et al.,

Defendants.

Case No. 4:22-cv-00109-AW-MAF

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

Pursuant to Local Rule 7.1(E), Michael Arteaga, Andrea Hershorin, Leni Fernandez, Jean Robert Louis, Melva Bentley Ross, Denny Troncoso, Brandon Nelson, Geraldine Ware, and Nina Wolfson (collectively, "Proposed Intervenors"), file this Memorandum in Support of their Motion to Intervene.

INTRODUCTION

This action concerns Florida's imminent failure to enact a new congressional map following the release of 2020 census data. Given near-certain impasse due to gridlock between the Florida Legislature and Governor Ron DeSantis, Floridians will be forced to vote in unconstitutionally malapportioned congressional districts this year absent judicial relief. Proposed Intervenors sought judicial relief by filing an action in state court on March 11, 2022 (ECF No. 10-2), alleging that the current congressional districting plan is unconstitutional and asking the court to adopt a constitutionally compliant map. Later that day, the Common Cause Plaintiffs filed this action in federal court seeking the same remedy.

Proposed Intervenors promptly move to intervene in this action as of right under Federal Rule of Civil Procedure 24(a)(2) and easily satisfy the four prerequisites for intervention. *First*, Proposed Intervenors filed this motion less than one week after the Common Cause Plaintiffs initiated this action. *Second*, Proposed Intervenors—each of whom resides in a congressional district that census data confirms is significantly overpopulated—have a compelling interest in ensuring new districts are drawn according to constitutional requirements. *Third*, denial of the motion would impair Proposed Intervenors' ability to protect their interests, both as voters and as litigants in a parallel state court action. And *fourth*, the existing parties do not adequately represent the Proposed Intervenors' interests. The Common Cause

Plaintiffs are not participants in Proposed Intervenors' state-court action, and they and the Proposed Intervenors live in distinct malapportioned congressional districts. Defendants, meanwhile, are state officials being sued in their official capacity in both this action and the parallel state court action, and thus cannot represent Proposed Intervenors' interests as plaintiffs.

In the alternative, this Court should grant permissive intervention under Federal Rule of Civil Procedure 24(b). Permissive intervention is warranted because Proposed Intervenors have brought claims that share common questions of law and fact with those of the Common Cause Plaintiffs: both suits allege that Florida's current congressional plan is malapportioned and therefore cannot be used in the upcoming election. And permissive intervention would not unduly delay these proceedings or otherwise prejudice the existing parties. This action was filed less than a week ago, and counsel for Defendants have not even entered appearances as of the time of this filing.

Federal district courts throughout the country have repeatedly allowed state-court redistricting plaintiffs to intervene in parallel federal-court proceedings. *See* ECF No. 10-3, *Gonidakis v. Ohio Redistricting Comm'n*, 2:22-cv-00773-ALM-EPD, slip op. (S.D. Ohio Mar. 4, 2022) (granting intervention to state-court redistricting plaintiffs in parallel federal action); ECF No. 10-4, *Toth v. Chapman*, 1:22-cv-00208-JPW, slip op. (M.D. Pa. Feb. 28, 2022) (same); *Hunter v.*

Bostelmann, No. 21-cv-512-JDP-AJS-EEC, 2021 WL 4206654 (W.D. Wis. Sep. 16, 2021) (same). The Court should similarly grant the motion and allow Proposed Intervenors to vindicate their constitutional rights in this forum.

ARGUMENT

I. Proposed Intervenors are entitled to intervene as of right.

A party has the right to intervene under Federal Rule of Civil Procedure 24(a) if four conditions are met: (1) the motion to intervene is timely; (2) the movant claims an interest related to the subject of the action; (3) the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect its interests; and (4) the movant's interests are not adequately represented by the existing parties. Fed. R. Civ. P. 24(a)(2); *Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1250 (11th Cir. 2002). Proposed Intervenors easily satisfy each of these factors.

A. The motion to intervene is timely.

First, the Motion to Intervene is timely. In determining whether a motion to intervene is timely, courts consider (1) the length of time during which the proposed intervenor knew or should have known of its interest in the case before moving to intervene; (2) the extent of prejudice to the existing parties; (3) the extent of prejudice to the movant if intervention is denied; and (4) any unusual circumstances

militating for or against a determination of timeliness. *Georgia*, 302 F.3d at 1259 (citing *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989)).

Proposed Intervenors filed this Motion to Intervene on March 16, 2022, less than a week after the Common Cause Plaintiffs filed this action on March 11, 2022. ECF No. 1. The motion is unquestionably timely under controlling precedent. *See, e.g.*, *Chiles*, 865 F.2d at 1213 (finding seven months to be timely); *Howard v. McLucas*, 782 F.2d 956, 960 (11th Cir. 1986) (finding six weeks to be timely); *see also CCUR Aviation Finance, LLC v. South Aviation, Inc.*, No. 21-cv-60462-BLOOM/Valle, 2021 WL 1254337, at *2 (S.D. Fla. Apr. 5, 2021) (finding two weeks to be timely).

In determining whether prejudice counsels against granting intervention, courts must assess whether prejudice to one side from the timing of the motion "outweighs" the prejudice to the other. *Brown ex rel. O'Neil v. Bush*, 194 F. App'x 879, 883 (11th Cir. 2006). Granting Proposed-Intervenors' motion will not prejudice Defendants because counsel for Defendants have not yet entered their appearances; this case remains in its infancy. On the other hand, Proposed Intervenors would be severely prejudiced if this federal action proceeded without them, given the significant possibility that relief in this Court could affect any judgment that Proposed Intervenors obtain in their parallel state court action.

Finally, there are no "unusual circumstances" that militate against a finding of timeliness. On the contrary, the unique circumstances of this litigation support intervention. This case remains in its infancy and intervention therefore will not lead to any delays in the adjudication of this action.

B. Proposed Intervenors have strong interests in this litigation.

Proposed Intervenors have strong interests in the issues addressed in this litigation. Under Rule 24(a)(2), "a party is entitled to intervention as a matter of right if the party's interest in the subject matter of the litigation is direct, substantial and legally protectable." *Georgia*, 302 F.3d at 1249. And "in cases challenging various statutory schemes as unconstitutional or as improperly interpreted and applied, the courts have recognized that the interests of those who are governed by those schemes are sufficient to support intervention." *Chiles*, 865 F.2d at 1214 (quoting 7C Wright & Miller, Fed. Prac. & Proc. § 1908, at 285 (2d ed. 1986)).

Proposed Intervenors easily satisfy this standard. As registered Florida voters residing in overpopulated congressional districts, Proposed Intervenors are directly governed by the unconstitutional malapportioned districting scheme that is the subject of this litigation and their parallel state court action. Proposed Intervenors' right to an equal vote will be denied absent the implementation of a new congressional redistricting plan. And Proposed Intervenors share the Common Cause Plaintiffs' view that "there is a significant likelihood that Florida's political

branches will fail to reach consensus to enact a lawful congressional district plan to be used in the upcoming 2022 elections." ECF No. 1, ¶ 3. Thus, absent court action, Proposed Intervenors' "right to vote [will] simply not [be] the same right to vote as that of those living in a favored part of the State." *Reynolds v. Sims*, 377 U.S. 533, 563 (1964). Proposed Intervenors also have a strong interest in protecting any relief they obtain in the parallel state-court proceeding, which would likely be affected by this Court's proceedings. *See Huff v. Comm'r of IRS*, 743 F.3d 790, 800 (11th Cir. 2014); *infra* pp. 7-8.

C. Denial of the motion to intervene would impair Proposed Intervenors' ability to protect their interests.

Denial of the motion to intervene would leave Proposed Intervenors' interests unprotected. "All that is required under Rule 24(a)(2) is that the would-be intervener be practically disadvantaged by his exclusion from the proceedings." *Huff*, 743 F.3d at 800; *see also Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, 386 U.S. 129, 135 n.3 (1967) ("If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene."). And courts have "long held" that "the potential for a negative *stare decisis* effect 'may supply that practical disadvantage which warrants intervention of right.'" *Huff*, 743 F.3d at 800 (quoting *Stone v. First Union Corp.*, 371 F.3d 1305, 1309-10 (11th Cir. 2004)).

Proposed Intervenors are unquestionably affected by the outcome of this litigation—both as voters and litigants. As voters, Proposed Intervenors are interested in how the districts where they reside are drawn and how their constitutional rights are protected—all issues that this Court has been asked to resolve. And as litigants, Proposed Intervenors are uniquely affected by the Court's handling of this suit. Proposed Intervenors have already filed a similar action in state court to vindicate their constitutional rights by obtaining a lawfully apportioned congressional map. *See Arteaga v. Lee*, No. 2022-CA-000398 (Fla. 2d Cir. Ct. Mar. 11, 2022) (ECF No. 10-2). But the Common Cause Plaintiffs ask this Court to implement a new congressional map as well, directly implicating and potentially foreclosing Proposed Intervenors' ability to vindicate their rights in state court. This sort of significant legal effect entitles state court redistricting plaintiffs to intervene as of right in the parallel federal action.

D. Proposed Intervenors' interests are not adequately represented by the existing parties.

The existing parties cannot adequately protect Proposed Intervenors' interests. While a would-be intervenor has some burden to establish that its interest is not adequately protected by the existing parties, "the burden of making that showing should be treated as minimal," and it is sufficient "if the applicant shows that representation of his interest 'may be' inadequate.'" *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); *Chiles*, 865 F.2d at 1214.

The Common Cause Plaintiffs cannot adequately protect Proposed Intervenors' interests here. For one thing, the Common Cause Plaintiffs are not participants in Proposed Intervenors' state court action and therefore have no stake in protecting any judgment obtained in that case. For another, redistricting is an intensely local affair and the Common Cause Plaintiffs and Proposed Intervenors live in distinct malapportioned districts throughout Florida. Common Cause Plaintiffs reside in only five overpopulated congressional districts: Congressional Districts 2, 5, 10, 19, and 27. *See* ECF No. 1, ¶ 8. In contrast, Proposed Intervenors include voters from four additional overpopulated districts: Congressional Districts 4, 11, 12, and 15. *See* ECF No. 10-1, ¶ 10. Proposed Intervenors are therefore connected to districts that are unrepresented in this action.

Nor do Defendants adequately represent Proposed Intervenors' interests. While Defendants are various Florida government officials,[1] Proposed Intervenors seek to intervene as plaintiffs in this matter to challenge the action (or lack thereof) of these officials. As such the Defendants are necessarily adverse to Proposed Intervenors' interests and there is no presumption of adequate representation. *See Victim Rights Law Ctr. v. Rosenfelt*, 988 F.3d 556, 561 (1st Cir. 2021) (presumption

[1] The Common Cause Plaintiffs have named as Defendants the Florida Secretary of State, the President of the Florida State Senate, the Speaker of the Florida House of Representatives, the Chair of the Florida Senate Reapportionment Committee, the Chair of the Florida Senate Select Subcommittee on Congressional Reapportionment, the Chair of the Florida House of Representatives Redistricting Committee, the Chair of the Florida House of Representatives Congressional Redistricting Subcommittee, and the Governor. *See* ECF No. 1 at 1.

of adequate representation by a government entity applies only "when the movant seeks to intervene *as a defendant* alongside a government entity").

In any event, Defendants do not hold or assert the same rights as the Proposed Intervenors. Proposed Intervenors are Florida voters whose individual constitutional and statutory rights will be violated absent a constitutional congressional district map. Defendants are all parties in their official capacities as government officials and, in that capacity, have no constitutional voting rights that are implicated in this case or threatened by the lack of a lawful district map. *See* ECF No. 10-4, *Toth*, slip op. at 11-12 (representation by Pennsylvania Governor, Secretary of State, and Director of Bureau of Election Services and Notaries inadequate because their interests "are distinct from [intervenors'] constitutional and statutory rights as voters"). Moreover, Defendants are many of the same officials who placed Proposed Intervenors in this predicament by failing to enact lawfully apportioned congressional districts in the first place. The notion that they can adequately represent Proposed Intervenors' interests in vindicating their constitutional rights after falling well short of their own constitutional obligations in redistricting strains credulity.

II. In the alternative, the Court should grant permissive intervention.

Even if Proposed Intervenors are not entitled to intervene as of right, permissive intervention is warranted under Rule 24(b). The Court has broad

discretion to grant a motion for permissive intervention when it determines that (1) the proposed intervenors' claim or defense and the main action have a question of law or fact in common, and (2) the intervention will not unduly delay or prejudice the adjudication of the original parties' rights. *See* Fed. R. Civ. P. 24(b)(1)(B), (b)(3); *Nielsen v. DeSantis*, No. 4:20-cv-236-RH-MJF, 2020 WL 6589656 (N.D. Fla. May 28, 2020).

First, Proposed Intervenors' claims and defenses will inevitably raise common questions of law and fact with those of the Common Cause Plaintiffs. The Common Cause Plaintiffs allege that Florida's current congressional plan is malapportioned and therefore cannot be used in the upcoming election. And as multiple federal courts have held, Proposed Intervenors' parallel claims necessarily raise common questions of law and fact, including the appropriate schedule for court intervention and the necessity of properly apportioned districts. *See Hunter*, 2021 WL 4206654, at *1 ("The Johnson intervenors' proposed complaint shares questions of law and fact with the Hunter plaintiffs' complaint because they raise virtually identical claims regarding legislative and congressional malapportionment."); ECF No. 10-3, *Gonidakis*, slip op. at 5-6 (similar).

Second, there is no discernible prejudice or delay that would result in granting Proposed Intervenors permission to intervene in this matter. As discussed, this litigation remains in its infancy, and allowing Proposed Intervenors to intervene will

in no way disrupt these proceedings. *Id.*, slip op. at 7 (finding "no risk of undue delay or prejudice" that would render permissive intervention inappropriate where state-court redistricting plaintiffs sought intervention "at the earliest possible stage of litigation—no more than four business days after the [federal court] Complaint was filed"). This action, moreover, concerns a single redistricting process that is already the subject of pending state court litigation, and failure to allow parties with an interest in the outcome of that process the opportunity to intervene will likely result in simultaneous and piecemeal litigation. Proposed Intervenors are prepared to contribute to the complete development of the factual and legal issues before this Court to permit a resolution of this suit in advance of the 2022 election.

CONCLUSION

For the reasons stated above, this Court should grant Proposed Intervenors' motion to intervene as of right. In the alternative, this Court should exercise its discretion and grant the Proposed Intervenors permissive intervention.

LOCAL RULE 7.1(F) CERTIFICATION

Undersigned counsel certifies that this memorandum contains 2,530 words, excluding the case style and certifications.

Dated: March 16, 2022

Respectfully submitted,

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**Pro hac vice application forthcoming*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 16, 2022, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Frederick S. Wermuth
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