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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EUGENE MARTIN LaVERGNE, *et als.,*

Plaintiffs, and

CITIZENS FOR FAIR REPRESENTATION; MARK BAIRD; STEVEN BAIRD; CINDY BROWN; Win CARPENTER; TANYA NEMCIK; and TERRY RAPOZA

Intervenor-Plaintiffs

vs.

UNITED STATES HOUSE OF REPRESENTATIVES, *et als.,*

Defendants.

Civil Action No. 1:17-cv-00793-CKK-CP-RDM
(Three Judge Court)

Honorable Corneila T. L. Pillard, C.J. (*Presiding*)
Honorable Colleen Kollar-Kotelly, U.S.D.J.
Honorable Randolph D. Moss, U.S.D.J.

MOTION FOR LEAVE TO INTERVENE

MOTION FOR LEAVE TO INTERVENE BY CITIZENS FOR FAIR REPRESENTATION (CFR), MARK BAIRD, STEVEN BAIRD, CINDY BROWN, TANYA NEMCIK, AND TERRY RAPOZA

Citizens for Fair Representation (CFR), Mark Baird, Steven Baird, Cindy Brown, Win Carpenter, Tanya Nemcik, and Terry Rapoza (applicants) move the Court for leave to intervene in this case pursuant to Rule 24 of the Federal Rules of Civil Procedure and Local Civil Rule 7(j) of the U.S. District Court for the District of Columbia. CFR and the individual California citizen plaintiffs named above seek intervention as of right pursuant to Rule 24(a)(2), or in the alternative, permissive intervention under Rule 24(b)(1)(B), in order to assert the causes of action and seek that relief which is requested in the complaint which has been filed with this Motion. These California plaintiffs seek to intervene so they can each participate fully in this action with regard their standing and claims for relief.

Pursuant to Local Civil Rule 7(m), counsel for Applicants contacted Plaintiffs on December 4, 2017 to ascertain their position on this motion prior to filing. Plaintiffs consented to and encouraged each California plaintiffs intervention in this action. Applicants' counsel also contacted deputy attorney-general Clay R. Smith from the State of Idaho and Jeffrey Even from the State of Washington to ascertain their position as to filing this motion and was told they would need to review the complaint in order to make that determination. Applicant's Counsel also attempted to contact DOJ attorney Johnny Walker late in the afternoon of December 4, 2017 to obtain his position with regard to applicant's intervention but was unable to reach him. Applicant's counsel did reach Mr.

Walker the morning of December 5, 2017. Mr. Walker asked to review the complaint for 24 hours before taking a position on the intervention. Accordingly, Applicant's counsel sent Mr. Walker a copy of the latest draft of the complaint which existed at that time at approximately 9:40 am EST for his review. Applicants' counsel called Mr. Walker the next day (December 6, 2017) and was told by Mr. Walker he had not received a copy of the applicant's' complaint. So applicant's counsel emailed the intervention complaint out to Mr. Walker again at approximately 9:00 am EST for him to review. The next morning at approximately 9:00 am EST Mr. Walker informed California applicant's counsel that the United States would oppose the intervention.

Applicant's counsel did not make any further attempts to reach counsel for the other numerous defendants as he believed each was likely to respond in the same manner as had the above counsel and accordingly the filing a motion to intervene would likely be necessary under the peculiar circumstances of this case as it was unlikely that all the parties would agree to its filing or could even be contacted.

Memorandum of Points and Authorities in Support of Citizens for Fair Representation; Mark Baird; Steven Baird; Cindy Brown; Win Carpenter; Tanya Nemcik; and Terry Rapoza's Motion for Intervention

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I. Introduction

In this Motion Citizens for Fair Representation (CFR), Mark Baird, Steven Baird, Cindy Brown, Win Carpenter, Tanya Nemcik, and Terry Rapoza move pursuant

to *F.R.Civ.P.* 24 and *L.Civ.R.* 7(j) for an Order permitting them to Intervene in the pending case to argue in support of the factual and legal arguments advanced by the New Jersey Plaintiffs in order to obtain similar legal and equitable relief sought by them as California Plaintiffs.

II. The Pending Case

The original plaintiffs in this action are New Jersey citizens Eugene Martin LaVergne, Frederick John LaVergne, Leonard P. Marshall, Scott Neuman, and Allen Cannon. They complain in Paragraph 1 of Section II of the pending Complaint that each of them have been concretely aggrieved in a way this Court can redress by Congress *ultra vires* enactment of S.J. Res. 34 as Public Law No: 115-22 (04/03/2017). Intervenors are California citizens who are similarly aggrieved with regard to this statute and like the New Jersey plaintiffs seek to have the statute declared unconstitutional. The basis for both groups' assertions that the law is unconstitutional is the premise that "*Article the First*", which mandates that the House of Representatives be composed of members representing ***not more than*** 50,000 persons, is positive Constitutional Law.

In other words, both these New Jersey plaintiffs and intervenor California plaintiffs claim that the real first amendment to the United State's Constitution provides:

> After the first enumeration, required by the first Article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall be not be less than one hundred representative, nor more than one representative for every forty thousand persons, until the number of Representatives shall amount to two hundred, after which the proportion shall be so regulated by Congress, that there shall be no less than, that there shall be no less than two hundred Representatives, nor less than one Representative for every fifty thousand persons.

If both sets of plaintiffs are correct about this, then the number of members in the House of Representatives would need to be greatly increased from the present 435 members to more than to more than 6,000 members. The following chart sets forth the number of Representatives both the New Jersey, California, and the other States Applicants contend each State is constitutionally entitled to under *Article the First* based upon the 2010 census.

Correct Apportionment under Article the First based upon 2010 Census				
State	***# of Reps***		***State***	***# of Reps***
Alabama	96		**Montana**	20
Alaska	15		**Nebraska**	37
Arizona	129		**Nevada**	55
Arkansas	59		**New Hampshire**	27
California	747		**New Jersey**	177
Colorado	101		**New Mexico**	42
Connecticut	72		**New York**	389
Delaware	19		**North Carolina**	192
Florida	379		**North Dakota**	14
Georgia	195		**Ohio**	232
Hawaii	28		**Oklahoma**	76
Idaho	32		**Oregon**	77
Illinois	258		**Pennsylvania**	255
Indiana	131		**Rhode Island**	22
Iowa	62		**South Carolina**	93
Kansas	58		**South Dakota**	17
Kentucky	88		**Tennessee**	128

Louisiana	112		**Texas**	506
Maine	25		**Utah**	56
Maryland	116		**Vermont**	13
Massachusetts	132		**Virginia**	161
Michigan	199		**Washington**	136
Minnesota	107		**West Virginia**	38
Mississippi	60		**Wisconsin**	114
Missouri	121		**Wyoming**	12

If plaintiffs can prove their allegations that three-quarters of the States ratified this amendment, which is undisputed to have been the first of those twelve amendments proposed in the March 4, 1789 Resolution of the First Congress Submitting Twelve Amendments[1] to the States of the union, then a great many things should change.

Although the New Jersey plaintiffs' requests for relief tend to indicate this to some extent, the California plaintiffs believe they should have asserted additional claims and sought more and different kinds of relief. For example, under the Separation of Powers, Federalism, and checks and balances structure of our Constitution the United States President is indirectly elected by the people through the Electoral College. See Art. II, § 1. The Electoral College includes electors "equal to the whole Number of Senators and Representatives to which … [States] may be entitled in the Congress". *Id.* If the number of Representatives were increased to one for every fifty thousand people, then the electors voting for the president would increase dramatically.

For example, instead of 55 Electors, California would have 749 electors. Instead

[1] http://avalon.law.yale.edu/18th_century/resolu02.asp#b1 (accessed December 2, 2017).

of 14, the state of New Jersey would have 179. The following chart shows the number of electors each State should have for purposes of electing the President if *Article the First* was ratified.

Correct Apportionment for the Electoral College				
State	***# Electors***		***State***	***# Electors***
Alabama	98		**Montana**	22
Alaska	17		**Nebraska**	39
Arizona	131		**Nevada**	57
Arkansas	61		**New Hampshire**	29
California	749		**New Jersey**	179
Colorado	103		**New Mexico**	44
Connecticut	74		**New York**	391
Delaware	21		**North Carolina**	194
Florida	381		**North Dakota**	16
Georgia	197		**Ohio**	234
Hawaii	31		**Oklahoma**	78
Idaho	34		**Oregon**	79
Illinois	260		**Pennsylvania**	257
Indiana	133		**Rhode Island**	24
Iowa	64		**South Carolina**	95
Kansas	60		**South Dakota**	19
Kentucky	100		**Tennessee**	130
Louisiana	114		**Texas**	508
Maine	27		**Utah**	58
Maryland	118		**Vermont**	15
Massachusetts	134		**Virginia**	163
Michigan	201		**Washington**	138

Minnesota	109		**West Virginia**	40
Mississippi	62		**Wisconsin**	116
Missouri	123		**Wyoming**	14

Although both groups of plaintiffs seek to have the automatic apportionment statute, 2 USC 2, which has effectively limited the apportionment of House Members to 435 since 1910 declared unconstitutional based on *Article the First*, the California plaintiffs also request that if the Court denies such relief then it consider Applicants' claims that this statute violates the Constitution's Separation of Powers, Federalism, and checks and balances structure of government as it exists in 2017.

III. ARGUMENT

A. Mandatory Intervention

"The right of intervention conferred by *Rule* 24 implements the basic jurisprudential assumption that the interest of justice is best served when all parties with a real stake in a controversy are afforded an opportunity to be heard." *Hodgson v. United Mine Workers of Am.*, 473 *F.2d* 118, 130 (D.C. Cir. 1972). To that end, pursuant to *Federal Rule of Civil Procedure Rule* 24(a)(2), "[a] district court must grant a timely motion to intervene that seeks to protect an interest that might be impaired by the action and that is not adequately represented by the parties." *Roane v. Leonhart*, 741 *F.3d* 147, 151 (D.C. Cir. 2014); *see also Crossroads Grassroots Policy Strategies v. FEC*, 788 *F.3d* 312, 320 (D.C. Cir. 2015) (citing *Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 *F.3d* 189, 192 (D.C. Cir. 2013)); *Fed. R. Civ. P.* 24(a)(2).

The D.C. Circuit has identified four factors to be considered in ruling on a motion for intervention as of right: "(1) the timeliness of the motion; (2) whether the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) whether the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and (4) whether the applicant's interest is adequately represented by existing parties." *Fund for Animals, Inc. v. Norton*, 322 *F.3d* 728, 731 (D.C. Cir. 2003) (citations and quotation marks omitted).

As detailed below, each of these California plaintiffs readily satisfies each of those requirements.

1. *This Motion is Timely*

As an initial matter, this application for intervention is timely. Applicant California plaintiffs have filed this motion, along with their proposed complaint, within 60 days of this Court's October 20, 2017 initial Case Management and Scheduling Conference. Eugene Martin LaVergne advised California's plaintiffs counsel that he informed this Court and defendants during that October 20, 2017 Case Management and Scheduling Conference that a California group of plaintiffs would likely be intervening.

Based on this Court's briefing schedule (ECF 51) and applicants' counsels commitments, the California plaintiffs timed their intervention so as to occur for the same day the reply in the res judicata/collateral estoppel motion against only Eugene Martin LaVergne would be filed (which was on or about Friday December 1, 2017) . While Applicants missed this self imposed "soft" deadline because of the magnitude of the

project, they are nonetheless filing this motion before this Court has resolved that motion. That motion, of course, does not involve the merits of this litigation.

Although it is true the case was filed by four of the five New Jersey plaintiffs on April 28, 2017, there were an extremely large number of defendants and service of original process on upon all of them appears to been extraordinarily difficult and the appearances of all defendants does not yet appear to be complete.

On August 1, 2017 Motions for 1) a Rule 16 scheduling conference and 2) to stay defendant's duty to file a responsive pleading or *Rule* 12(b) motion was filed by Idaho defendants. (See ECF 25), This motion was joined in by several other defendants on August 4, 2017. (See ECF 28). On August 17, 2017 this Court issued an order extending the time to effectuate service on the parties until October 6, 2017 and ordered a teleconference on the record to be held October 20, 2017. *See* ECF 44.

The most important factor in determining whether intervention is timely is whether any delay in seeking intervention will prejudice the existing parties to the case. *See, e.g., McDonald v. E.J. Lavino Co.*, 430 *F.2d* 1065, 1073 (5th Cir. 1970) ("In fact, this may well be the only significant consideration when the proposed intervenor seeks intervention of right.") (emphasis added).[2] Where intervention will not delay resolution of the litigation, intervention should be allowed, provided that the proposed intervenor satisfies the criteria of *Rule* 24(a). *Texas v. United States*, 802 *F. Supp*. 481, 482 n.1 (D.D.C. 1992) (affirming the propriety of granting intervention); *Cummings v. United*

[2] Prejudice should not, of course, be confused with the convenience of the parties. *See McDonald v. E.J. Lavino Co*., 430 *F.2d* at 1073 ("mere inconvenience is not in itself a sufficient reason to reject as untimely a motion to intervene as of right"); *Clark v. Putnam County*, 168 *F.3d* 458, 462 (11th Cir. 1999) (same).

States, 704 *F.2d* 437, 441 (9th Cir. 1983) (finding that the trial court abused its discretion by denying intervention in the absence of a showing of prejudice to the government).

Applicants are cognizant of the Court's interest in a prompt resolution of this case. However, the case remains in its infancy and, under the circumstances, there is no danger of delay or disruption of the proceedings and no party will be prejudiced by the proposed intervention.

2. ***Applicants Have an Interest Relating to the Litigation.***

Applicants have plead facts establishing they have the same interest in bringing this litigation as do the New Jersey plaintiffs, *i.e.* to stop the Congress' *ultra vires* reversal of an administrative order by the FCC pursuant to *Public Law No.* 115-22 (04/03/2017). However, applicants have gone further in their complaint and allege additional interests relating to their interest as citizens of California in bringing this lawsuit.

California applicants are involved in a similar litigation in California which challenges a cap on the number of members of the California state legislature (40 Senators and 80 assembly persons) imposed by California's 1879 Constitution. *See CFR et al v Alex Padilla* (the California Secretary of State), case no. 2:17-cv-00973-KJM-CMK., which is currently pending in the Eastern District of California (A copy of a proposed amended complaint in that action is attached as Exhibit 1 to Applicant's complaint filed in this action). Accordingly both this case and the ongoing California apportionment case regarding a cap on the number the statewide legislators involve similar issues under the Fourteenth Amendment and the one

person/one vote judicial standard relating to the evolution of the people's right to representation in both the United States House of Representatives and the California state legislature in 2017.

California Applicants believe this Court resolution of *Article the First*'s ratification if in applicant's and New Jersey plaintiffs' favor here will likely have significant consequences in their California litigation because under the concept of federalism these principles of self-governance at the State and Federal level are interrelated; and 2.) will likely have consequence for the California Applicants which will not be the same for the New Jersey Plaintiffs as they are not involved in the California lawsuit.

3. *Applicant's' Ability to Protect Their Interests Will be Impaired or Impeded If Intervention is Denied*

The outcome of this action will, as both a legal and practical matter, impair or impede California applicants' ability to protect their interests, thus satisfying *Rule* 24(a)(2). While the issue as to whether the passage of *Public Law No.* 115-22 (04/03/2017) violates *Article the First* will be same the all Americans, several of the issues raised by the California applicants apply only to them because of the federal structure of our government. Only the California applicants can complain about the operation of State and Federal courts ***in California*** because the New Jersey Plaintiffs are not affected in the same way as are the California Plaintiffs.

If this Court concludes that *Article the First* has been properly ratified, the New Jersey plaintiffs' case will be over. The California plaintiffs, on the other hand, believe that even if this Court finds *Article the First* is not a properly ratified Amendment to the

Constitution, then 2 U.S.C. 2 is still unconstitutional for the reasons set forth in their intervention complaint.

4. *Applicants' Interests Cannot Be Adequately Represented by the Existing Parties*

Applicants satisfy *Rule* 24(a)(2)'s inadequate representation requirement by showing that representation of their interests "'may be' inadequate" and "the burden of making this showing should be treated as 'minimal.'" *United Guaranty Residential Ins. Co. v. Philadelphia Sav. Fund*, 819 *F.2d* 473, 475 (4th Cir. 1987) (quoting *Trbovich v. United Mine Workers of America*, 404 *U.S.* 528, 538 n.10 (1972)) (emphasis by the United Guaranty court); see also *In re Sierra Club*, 945 *F.2d* 776, 779 (4th Cir. 1991) (same). Both this Circuit and this Court have held that *Rule* 24 "underscores both the burden of those opposing intervention to show the adequacy of the existing representation and the need for a liberal application in favor of permitting intervention." *Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967); *see also Smuck v. Hobson*, 408 F.2d 175, 181 (D.C. Cir. 1969) (same).

Although the New Jersey plaintiffs, who are bringing this action *pro se*, "may share some of the objectives" as California applicants with regard to this lawsuit, it appears their primary purpose is to have this Court order and declare that *Article the First* is a properly ratified amendment to the United States Constitution based on the book written by Eugene Martin LaVergne. While the California Plaintiffs respect and admire the scholarship of LaVergne's work and fully agree with its conclusions, their ultimate purpose in bringing this lawsuit is to remove the mechanical cap of the number of members of the House of Representatives through use of any and legal means necessary.

In this regard, the California Applicants propose in their complaint that if this Court finds *Article the First* is not a fully ratified amendment then that cap on number of members of the House of Representatives is unconstitutional for those other reasons stated in their complaint. The Supreme Court acknowledged in *Department of Commerce v. Montana*, 158 US 601 (1895) that such challenges as those being made by the California applicants should be heard by courts:

> The District Court suggested that the automatic character of the application of the method of equal proportions was inconsistent with Congress' responsibility to make a fresh legislative decision after each census. We find no merit in this suggestion. ... To the extent that the potentially divisive and complex issues associated with apportionment can be narrowed by the adoption of both procedural and substantive rules that are consistently applied year after year, the public is well served, ***provided, of course, that any such rule remains open to challenge or change at any time***. … (emphasis supplied)

Further, the interests of United States citizens residing in New Jersey are not the same as those residing in California. Accordingly, both sets of plaintiffs under our federalism system, are entitled to heard, especially where as here one group of plaintiffs are self represented and are not represented by an attorney.

B. Permissive Intervention Is Also Appropriate

Alternatively or cumulatively, even if this Court determines that applicants do not satisfy the requirements for intervention as of right, it should grant permissive intervention under *Fed. R. Civ. P.* 24(b)(1)(B).

Rule 24(b)(1)(B) permits intervention upon timely application by anyone who "has a claim or defense that shares with the main action a common question of law or fact." The Committee need only "show[] that representation of [its] interest 'may be'

inadequate; and the burden of making that showing should be treated as minimal." Trbovich v. United Mine Workers of Am., 404 *U.S.* 528, 538 n.10 (1972) (citation omitted); See Fund for Animals, 322 *F.3d* at 735 (this The Committee need only "show[] that representation of [its] interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of Am*., 404 U.S. 528, 538 n.10 (1972) (citation omitted); *United States v. Am. Tel. & Tel. Co.*, 642 *F.2d* at 1293 (intervention "ordinarily should be allowed . . . unless it is clear" that an existing party provides adequate representation (internal quotation omitted)).

In this case it is not clear that pro se plaintiffs in new Jersey can represent the interests of the California applicants in this case as are set out in the context of their complaints in this action and their related California litigation.

Conclusion:

For the foregoing reasons, the Court should permit the California applicants to intervene in this action as party Plaintiffs.

DATED: December 6, 2017.

Respectfully submitted,

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