

**IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

LIONEL GUSTAFSON, <u>et al.</u>,)	
)	
Plaintiffs,)	
)	
vs.)	CIVIL ACTION NO. 05-0352-CG-L
)	
ADRIAN JOHNS, <u>et al.</u>,)	
)	
Defendants.)	

ORDER

This matter is before the court on the motions to intervene of Lowell Barron, Hank Sanders, Seth Hammett, and Governor Bob Riley (Docs. 75, 80, 97), plaintiffs’ responses thereto (Docs. 96, 99, 111), and the movants’ replies (Docs. 104, 108).

Senators Lowell Barron and Hank Sanders seek intervention in their official capacity as President Pro Tem and as a member of the Alabama Legislative Black Caucus. (Doc 75). Seth Hammett moves to intervene in his official capacity as Speaker of the Alabama House of Representatives and on behalf of the citizens of Alabama and “their elected representatives he represents.” (Doc. 80). Lastly, Governor Bob Riley’s moves to intervene as a party defendant in his official capacity as Governor of Alabama. (Docs. 97 & 98). The Federal Rules of Civil Procedure provide for intervention by right under Rule 24(a) and for permissive intervention under Rule 24(b).

A. Intervention by Right

Intervention by right is permitted upon timely application:

(1) when a statute of the United States confers an unconditional right to intervene: or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and 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, unless the applicant's interest is adequately represented by existing parties.

FED. R. CIV. P. 24(a). No movant has alleged that a federal statute confers on any of them an unconditional right to intervene. Thus, to intervene by right, movants must satisfy §24(a)(2) by demonstrating (1) an interest relating to the property or transaction which is the subject of the action, (2) that movants' ability to protect that interest may be impaired or impeded by the disposition of the action, and (3) that movants are inadequately represented by the existing parties.

Plaintiffs argue that Senators Barron and Sanders and Speaker Hammett do not have a direct, substantial, and legally protectable interest in the litigation because the subject matter of this suit involves only the constitutional rights of plaintiffs under the Equal Protection Clause of the Fourteenth Amendment (one person, one vote and the elimination of illegal partisan gerrymanders) and under the First Amendment (free speech). Movants claim an interest in protecting the rights of voters who are Democrats and African-American. Plaintiffs claim that the senators and Speaker are trying to raise political and racial issues that are not at issue in this case. However, how and whether the redistricting plans are altered or continue in use unchanged (regardless of what the stated purpose of altering or continuing to use the plans is purported to be) clearly will affect movants' political and racial interests at least in their individual capacity.

Barron, Sanders, and Hammett also claim to have a legally protectable interest in defending the redistricting plan they successfully negotiated through the legislative process. However, movants have no legal interest in the implementation of the laws they pass. Chiles v. Thornburgh, 865 F.2d 1197,

1205 (11th Cir. 1989). Legislators are not charged with enforcing or implementing voting districts and are given immunity from suits challenging redistricting plans. Scott v. Taylor, 405 F.3d 1251 (11th Cir. 2005). Thus, although Barron, Sanders, and Hammett have an interest in their individual capacity in the continued use of the plans, they have no legally protectable interest in their official capacity as Senators and Speaker of the House. Moreover, Alabama law specifically mandates that “[a]ll litigation concerning the interest of the state, or any department of the state, shall be under the direction and control of the Attorney General.” ALA CODE § 36-15-21. Thus, Barron, Sanders, and Hammett do not have a significant protectable legal interest in their official capacity and cannot litigate such matters in their official capacity except through the Attorney General.

Plaintiffs further argue that Barron, Sanders, and Hammett cannot meet the second prong of the test because their ability to protect their interest is not impaired or impeded by the disposition of this litigation since they do not have a legally protectable interest in the case. For the reasons explained above, the court agrees that they have no legal interest in their official capacities as legislators; however, the court finds that, in their individual capacities, they have political and racial interests that may be impeded by the outcome of this litigation

As to the third prong, plaintiffs contend that even if Barron, Sanders, and Hammett do have a legal interest, that interest is adequately represented by defendants and the Attorney General. There is a “presumption of adequate representation where an existing party seeks the same objective as the interveners.” Stone v. First Union Corp, 371 F.3d 1305, 1311 (11th Cir. 2004). Barron, Sanders, and Hammett contend that there is inadequate representation because defendants are bound to uphold their constitutional oaths to represent all citizens of Alabama and “are unable fully, aggressively and

adequately to respond to the partisan agenda of plaintiffs and to advance the arguments of fact and law movants would assert in order to protect their aforesaid political interests.” However, Barron, Sanders, and Hammett would presumably have the same duty in their official capacity as Senators and Speaker of the House. The court finds that Lowell Barron, Hank Sanders, and Seth Hammett have not demonstrated that they are entitled to intervene in their official capacity under Rule 24(a).

Participation of the Governor in litigation is not restricted by statute in the same manner as the other movants. Alabama law specifically allows the Governor to employ an attorney “to institute, conduct or appear in any court or in any civil or criminal case in which the state is interested...” ALA. CODE § 36-13-2; see also ALA. CODE §§ 36-15-21 (“nothing in this section shall prevent the Governor from employing personal counsel, whose compensation shall be payable out of the governor’s Contingency fund”) and 36-13-31 (“Included within the authorized expenditures by the Governor...are... for compensation and expenses of attorneys and experts employed by or on behalf of the Governor...”). Plaintiffs concede that Governor Bob Riley has the right to participate in this action and to hire his own counsel. No party has objected to Riley’s intervention, and the court finds it appropriate to allow Governor Bob Riley to intervene. **B. Permissive Intervention**

The decision whether to allow permissive intervention is “wholly discretionary with the court.” Purcell v. BankAtlantic Financial Corp., 85 F.3d 1508, 1513 (11th Cir. 1996). Permissive intervention may be permitted upon timely application:

- (1) when a statute of the United States confers a conditional right to intervene; or
- (2) when an applicant’s claim or defense and the main action have a question of law or fact in common.

FED. R. CIV. P. 24(b). “In exercising its discretion the court shall consider whether the intervention will

unduly delay or prejudice the adjudication of the rights of the original parties.” Id. There has been no allegation that any statute confers a right, conditional or otherwise, to intervene. Plaintiffs contend that the intervention of Barron, Sanders, and Hammett will add nothing to the defense of the plans except delay. Plaintiffs also contend the claims or defenses of Barron, Sanders, and Hammett do not present any common questions of law or fact relevant to this case that have not already been raised. According to plaintiffs, movants’ race based claims are not related to the main action. The court disagrees. As discussed briefly above in relation to intervention of right, although movants’ claims and theories are different, they nonetheless relate to and are affected by the disposition of plaintiffs’ claims. Although plaintiffs’ claims are not based on race, those claims involve questions of fact and law common to the claims raised by movants regarding the redistricting plans at issue in this case.

Plaintiffs also contend that if intervention by the legislators is permitted, the intervenors’ motions and arguments would be duplicative of the original parties’ motions and arguments. However, the court finds that their interests are sufficiently different from the current defendants that their addition as parties would not be meaningless. Barron, Sanders, and Hammett assert claims and theories distinct from the current defendants.

The court further finds that the addition of Barron, Sanders, and Hammett will delay the case only minimally. This case is still in its early stages and there is no dispute that the motions to intervene were timely.

As discussed above with regard to intervention by right, to the extent the legislators seek permissive intervention in their official capacity, their participation must be “under the direction and control of the Attorney General.” ALA CODE § 36-15-21. Thus, the court finds that Barron, Sanders,

and Hammett cannot intervene in their official capacity. However, based on the above analysis, the court finds it appropriate to allow Barron, Sanders, and Hammett to intervene in their individual capacities.

CONCLUSION

For the reasons stated above the court **ORDERS** as follows:

- (1) the motion of Governor Bob Riley to intervene (Doc. 97) is **GRANTED**;
- (2) the motions of Lowell Barron, Hank Sanders, and Seth Hammett to intervene (Doc. 75, 80) are **DENIED in part** to the extent they seek intervention in their **official capacities**;
- (3) Lowell Barron, Hank Sanders, and Seth Hammett are **GRANTED** intervention in their **individual capacities**.

DONE AND ORDERED this 30th day of September, 2005.

/s/ Callie V. S. Granade

CHIEF UNITED STATES DISTRICT JUDGE