IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Louis Agre, *et al.*,	)	
	)	
Plaintiffs,	)	Civil Action No. 2:17-cv-4392
	)	
v.	)	The Honorable D. Brooks Smith
	)	The Honorable Patty Schwartz
Thomas W. Wolf, *et al.*,	)	The Honorable Michael M. Baylson
	)	
Defendants.	)	

PLAINTIFFS' RESPONSE IN OPPOSITION
TO MOTION TO INTERVENE AS PLAINTIFFS

Introduction

The movants, proposed Plaintiff-Intervenors, seek to intervene in this case just one month before trial on claims that will in no way be impeded or impaired no matter the outcome of this case. They offer no argument as to why the plaintiffs are inadequate representatives of the interests of voters who seek an end to all partisan gerrymandering—that is, any congressional redistricting plan that purposefully favors one political party over another. The movants, by contrast, press claims much like those in *Gill v. Whitford*—that partisan gerrymandering is unconstitutional only when it is so extreme that it locks in the results of the election "regardless of the share of partisan support that congressional candidates realistically earn on a statewide basis in the future." ECF No. 54-2 at 21 ¶ 69. By definition, those claims cannot be impeded whether plaintiffs win or lose this case. And while this motion is arguably filed "early" in the case timeline, it is just as easily described as being filed "late." The movants, who seek to introduce a new expert and raise new claims not covered by the already fully-briefed motion to dismiss, will surely cause delay in the trial schedule. As a result, they will prejudice plaintiffs' ability to achieve a remedy in time for the 2018 election, which the defendants have indicated is possible under the current schedule, but probably will not be if there is any delay. The main

argument the movants make for their intervention is that they represent Democratic interests. And, like the defendant-intervenors, it is clear that their partisan roots run deep; they are represented by counsel for the Democratic Party and the National Democratic Redistricting Committee. But, the Court should decline the opportunity to turn plaintiffs' case into someone else's partisan fight over how much gerrymandering is "too much." Instead, it should proceed as planned to a swift and timely adjudication of plaintiffs' claims that partisan bias should be removed altogether from the redistricting process.

Argument

I. The movants do not have a right to intervene.

A. The motion is untimely.

The movants argue that their motion is timely because the case was filed just a month ago. But the "[t]imeliness of an intervention request 'is determined by the totality of the circumstances.'" *In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortg. Loan Litig.* (hereinafter "*Community Bank*"), 418 F.3d 277, 314 (3d Cir. 2005) (quoting *United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1181 (3d Cir. 1994)). And the court must consider, among other things, "the prejudice that delay may cause the parties." *Id.* (citing *Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 369 (3d Cir. 1995)). Thus, in this case, it is more significant that the motion was filed just one month before trial. *See Gadley v. Ellis*, Civil Action No. 3:13-17, 2015 U.S. Dist. LEXIS 83283, *9 (W.D. Pa. June 26, 2015) (denying motion to intervene filed "on the eve of trial"); *Lawrence Music, Inc. v. Samick Music Corp.*, 227 F.R.D. 262, 263 (W.D. Pa. 2005) (same). The Court set the trial date in order to ensure that the significant yet straightforward constitutional issues raised by plaintiffs' claims could be resolved before the start of the 2018 congressional election calendar in February.

Although the movants claim without support that they are "able to proceed without adversely impacting the current scheduling order," that is surely not so. *See Scott v. Snider*, Civil Action No. 91-7080, 1993 U.S. Dist. LEXIS 18014, *16 (E.D. Pa. Dec. 14, 1993) (quoting *Molthan v. Temple Univ. of Commonwealth Sys. of Higher Educ.*, 93 F.R.D. 585, 587 (E.D. Pa. 1982) ("additional parties always take additional time"). The movants ask to expand the scope of the case beyond plaintiffs' focused claim to a dispute that includes more parties and more legal theories, and requires the testimony of mathematical and statistical experts to resolve. The defendant-intervenors will undoubtedly seek to file a new motion to dismiss, while the pending motion is set for argument tomorrow. The defendant-intervenors will also seek discovery of the new plaintiffs, including expert discovery concerning the quantitative analysis and "cutting-edge computational social science methodologies" of Dr. Jonathan Rodden. The Court has proceeded on plaintiffs' claims with admirable speed and efficiency. But even were the Court to set the movants' claims on an even more expedited schedule than the one that the defendant-intervenors have already thrice challenged, including in the U.S. Supreme Court, it would be exceedingly difficult to begin the trial as planned, or to complete it within the same timeframe.

While a delay in the trial date might not be sufficient to find a motion to intervene untimely in some cases, this case is unique in that the trial date was set in December specifically because it was necessary to do so in order to provide the plaintiffs an opportunity to secure a remedy. Therefore, while the movants are unable to show that a denial of their motion will impair or impede their ability to protect their interests (as explained below), the Court would likely impair or impede the plaintiffs' ability to protect their interests in a remedy before the 2018 election if it were to grant the motion.

B. The movants have no interest in ending all partisan gerrymandering.

While the movants claim an interest in the "property or transaction that is the subject of the action," they cannot show that disposition of this action "may as a practical matter impair or impede [their] ability to protect" that interest, nor that the plaintiffs do not adequately represent that interest. To begin with, it is not clear what movants' precise interest in this action is. If they have the "same ultimate objective" as the plaintiffs, namely, the eradication of partisan gerrymandering from Pennsylvania's congressional redistricting process, there is a presumption that the plaintiffs adequately represent that interest. *Community Bank*, 418 F. 3d at 315 (citing *Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976)). In order to overcome that presumption, the movants "must ordinarily demonstrate adversity of interest, collusion, or nonfeasance on the part of a party to the suit." *Id.* (citing *Int'l Tank Terminals, Ltd. v. M/V Acadia Forest*, 579 F.2d 964, 967 (5th Cir. 1978)); *see also Brody v. Spang*, 957 F.2d 1108, 1123 (3d Cir. 1992) (citing *Hoots v. Pennsylvania*, 672 F.2d 1133, 1134 (3d Cir. 1982)). The movants have not even attempted to make such a showing, nor could they.

But a review of movants' proposed intervening complaint indicates that they do not share plaintiffs' interest in eradicating partisan gerrymandering. Rather, they take the more typical partisan approach to gerrymandering: they oppose it when their opponents take it "too far." Even their Election Clause claim, perhaps included in order to strengthen their argument that their interests might be impeded by the resolution of this litigation, differs from plaintiffs' claim. The movants' Election Clause claim does not seek a ruling that any attempt to favor or disfavor one political party in the redistricting process necessary impedes on the "privileges or immunities" of national citizenship protected by the Fourteenth Amendment. Instead, as in Counts I and II, the movants base their challenge to the 2011 Plan on the fact that it "will continue to ensure that Republican candidates prevail in these thirteen Congressional districts regardless of the share of

partisan support that congressional candidates realistically earn on a statewide basis in the future." ECF No. 54-2 at 21 ¶ 69. In other words, like the plaintiffs in *Gill v. Whitford*, the movants challenge only "extreme" gerrymandering—or maps that reflect "extreme and durable partisan bias." *Id.* at 19 ¶ 60.

C. The disposition of this matter will not as a practical matter impair or impede the movants' ability to protect their interest.

Even assuming that the movants' Election Clause claim does mirror that of the plaintiffs, the movants make no attempt whatsoever to demonstrate that their interests are not adequately protected insofar as they pursue the same legal theories advanced by the plaintiffs. Instead, they argue that their interests may be impeded precisely because they are pursuing *different* claims than the plaintiffs. But, as noted above, movants' claims differ because they seek only to strike down the 2011 Plan as going "too far." And there is no basis for their claim that the disposition of plaintiffs' claims will impair or impede their ability to pursue such claims in another proceeding. If plaintiffs are successful in striking down the map on the ground that all partisan congressional gerrymandering is unconstitutional, then the movants could only claim their interests were impeded by arguing that they are actually *opposed* to a rule that strikes down all partisan gerrymandering—that they, the Democrats, want to gerrymander too, when it's their turn. The movants have not made that argument, and the plaintiffs do not expect them to. Nor will their peculiarly partisan viewpoint be particularly helpful at the remedy stage, where the Court will be tasked with ensuring that the state acts in a non-partisan manner in drawing a new map. On the other hand, if the plaintiffs are unsuccessful on their theory that all partisan gerrymandering is unconstitutional, there is no reason to think it will somehow impair or impede the movants' ability to pursue a theory that *some extreme* gerrymandering is unconstitutional.

It is telling that the movants have not sought to intervene in the *LWV* case pending before the Pennsylvania state courts, where the plaintiffs *are* pursuing claims much like theirs. It reveals that the movants are not actually concerned that a court will decide claims like theirs without them having an opportunity to be heard.

In order for intervention to be a right, the movants must do more than show that their claim will be incidentally affected. They must demonstrate that their "claim is in jeopardy" in this suit—that allowing this case to proceed without them poses "a tangible threat" to their legal interest. *Brody*, 957 F.2d at 1122-23 (quoting *Harris v. Pernsley*, 820 F.2d 592, 596 & 601 (3d Cir.), *cert. denied*, 484 U.S. 947 (1987)). While it may not always be dispositive that the movants are free to pursue their claims in a separate lawsuit without any chance of this case precluding that possibility, it should be dispositive in a case like this one, where intervention will likely have a substantial prejudicial effect on the plaintiffs.

II. The Court should deny permissive intervention.

The arguments set forth above concerning the prejudice to the plaintiffs that will result from intervention apply with even more force under Rule 24(b), which governs permissive intervention. *See* Fed. R. Civ. P. 24(b)(3). But there is one additional point raised by the movants regarding permissive intervention that is worth addressing. The movants claim that their expert witness will shed additional light on the factual questions currently before the Court. But the primary factual question before the Court is whether the map was drawn to favor or disfavor one party or another, and the movants do not explain what their witness has to offer on this question. Instead, their witness appears to be an expert on *how much* partisan gerrymandering happened, or *how much* of a burden it placed on voters' rights. These questions are not at issue in the case currently. The movants would inject these issues into the case with their claims about "extreme" gerrymanders.

There is no compelling reason to delay the trial of this case in order to allow new plaintiffs bring new claims that will broaden the Court's inquiry. If the movants desire to litigate their claims, they are free to do so in a separate suit.

Conclusion

For all the above reasons, plaintiffs respectfully request that this Court deny the motion to dismiss under Rule 12(b)(1) and (b)(6).

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Respectfully submitted

s/ Sean Morales-Doyle
One of Plaintiffs' Attorneys

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