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

Barbara Diamond, Steven Diamond, Nancy Chiswick, William Cole, Ronald Fairman, Colleen Guiney, Gillian Kratzer, Deborah Noel, Margaret Swoboda, Susan Wood, and Pamela Zidik,

Plaintiffs,

v.

Robert Torres, Acting Secretary of the Commonwealth of Pennsylvania, and Jonathan Marks, Commissioner of the Bureau of Elections, in their official capacities,

Defendants.

Civil Action No. 5:17-cv-5054

PLAINTIFFS' OPPOSITION TO LEGISLATORS' MOTION TO INTERVENE

Plaintiffs oppose the Motion to Intervene filed by Michael C. Turzai, Speaker of the Pennsylvania House, and Joseph B. Scarnati III, Pennsylvania Senate President Pro Tempore (collectively, "Legislators").

INTRODUCTION

The Legislators have asserted no interest in this case capable of supporting their standing to defend the statute that established the 2011 redistricting plan for elections to the United States House of Representatives ("2011 Plan"). After the Supreme Court's decision in *Town of Chester, N.Y. v. Laroe Estates, Inc.*, "an intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing." 137 S. Ct. 1645, 1651 (2017) *abrogating King v. Governor of New Jersey*, 767 F.3d 216, 245 (3d Cir. 2014). Because the Legislators assert defenses unlikely to be raised by the named defendants, they cannot intervene as of right. Even if the Court exercises its discretion to allow permissive

intervention under Rule 24(b), the Legislators nevertheless cannot assert defenses other than those pleaded by the named defendants ("Executive Defendants"), the only parties to this action with standing to defend.

Compounding these defects to their filings, Legislators request a delay in the trial of this case to accommodate their counsel's schedule (ECF No. 25), a request which would effectively deny Plaintiffs an essential component of the relief they seek: a constitutionally-permissible districting plan to be used in the 2018 Congressional elections. This obstruction of the Plaintiffs' prosecution of their claims is alone sufficient to deny permissive intervention. *See* Fed. R. Civ. P. 24(b)(3) ("In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.").

BACKGROUND

On October 25, 2017, this Court granted the Legislators' unopposed motion to intervene in *Agre v. Wolf*, a similar challenge to the 2011 Map. No. 2:17-cv-04392-MMB (E.D. Pa), ECF No. 47.

As here, the Legislators intervened in their "official capacity," claiming that they had a sufficient interest that would be affected by the disposition of the case, because they "played an integral part in drawing and enacting the redistricting plan at issue." *Agre*, ECF No. 45-3 at 5; *see also Diamond*, ECF 26-2 at 3. In each case, the Legislators did not assert that they would suffer a particularized injury from the law, nor that their role and authority as legislators would be burdened if the plaintiffs prevailed. In *Agre*, the Legislators proceeded to assert different defenses than the Executive Defendants, moving to dismiss on abstention grounds pending resolution of two challenges to the 2011 plan pending in Pennsylvania state court and moving to stay the action pending the resolution of *Gill v. Whitford*, No. 16-1161 (U.S. Sup. Ct.), among

other grounds. *Agre*, ECF No. 45-2; *see also Diamond*, ECF No. 26-4. The Executive Defendants sought neither abstention nor a stay.

The Legislators now seek to intervene in this challenge to the 2011 Plan despite having no statutory authority to defend this case, and no concrete, protectable interest in its outcome.

ARGUMENT

I. THE LEGISLATORS CANNOT INTERVENE AS OF RIGHT BECAUSE THEY SEEK DIFFERENT RELIEF THAN THE EXECUTIVE DEFENDANTS AND DO NOT HAVE STANDING

Though parties may intervene as of right where they meet the requirements of Rule 24(a), when proposed intervenors seek relief that differs from existing parties, they must independently show Article III standing to intervene. *See* U.S. Const. art. III, § 2 (limiting the jurisdiction of federal courts to "cases" and "controversies"); *Town of Chester*, 137 S. Ct. at 1651. Consequently, to intervene as of right and assert different defenses from the Executive Defendants in this matter, they must have Article III standing. *See Seneca Res. Corp. v. Highland Twp.*, No. 16-CV-289, 2017 WL 4168472, at *3 (W.D. Pa. Sept. 20, 2017) (*Town of Chester* "requir[es] a litigant to possess Article III standing in order to intervene as of right under Rule 24(a)(2)," barring intervention of a proposed defendant); *United States Dep't of Justice v. Utah Dep't of Commerce*, No. 2:16-CV-611-DN-DBP, 2017 WL 3189868, at *4 (D. Utah July 27, 2017) (under *Town of Chester*, defendant "intervenors must independently satisfy the test for standing if their interests do not align with those of a party with standing"); *Zimmerman v. GJS Grp., Inc.*, No. 2:17-CV-00304-GMN, 2017 WL 4560136, at *4 (D. Nev. Oct. 11, 2017) (applying *Town of Chester* to determine "[w]hether the State has standing to intervene on the side of the Defendants").

A. The Legislators Will Seek to Raise Different Defenses than the Executive Defendants

The Legislators seek to assert defenses that are unlikely to be raised by the Executive Defendants. As in *Agre,* if the Legislators' intervention motion is granted, they will move this court to dismiss Plaintiffs' complaint on abstention defenses not raised by the Executive Defendants, as well as lack of manageable justiciable standards and standing. *Diamond*, ECF Nos. 26-3, 26-4; *see also Agre*, ECF Nos. 45-1, 45-2. If the Executive Defendants answer the complaint as they did in *Agre*, the Legislators will be seeking entirely different relief that requires an independent showing of standing to pursue. *Contra Town of Chester*, 137 S. Ct. at 1651 ("For all relief sought, there must be a litigant with standing").

In sum, under *Town of Chester*, once the Legislators seek to assert unique defenses to Plaintiffs' claims, they must have standing to intervene.

B. The Legislators Do Not Have Standing to Defend this Action

"Legislators, like other litigants in federal court, must satisfy the jurisdictional prerequisites of Article III standing, including . . . an 'injury in fact,' constituting 'an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.'" *Russell v. DeJongh*, 491 F.3d 130, 133 (3d Cir. 2007) (quoting *United States v. Hays,* 515 U.S. 737, 742–43 (1995)). "Concerns for separation of powers and the limited role of the judiciary are at the core of Article III standing doctrine," and "are particularly acute in legislator standing cases, [where] they inform the analysis of whether a legislator . . . has asserted an injury in fact sufficient to confer standing . . . ." *Russell*, 491 F.3d at 133. The "principal reason" for limiting the scope of injury for legislative standing "is that once a bill has become law, a legislator's interest in seeing that the law is followed is no different

from a private citizen's general interest in proper government." *Goode v. City of Philadelphia*, 539 F.3d 311, 317 (3d Cir. 2008) (quoting *Russell*, 491 F.3d at 135).

1. The Legislators do not have standing under *Coleman v. Miller*

In narrow circumstances, not present here, courts have found that legislators have a "legally protected interest" in "maintaining the effectiveness of their votes." *Coleman v. Miller*. 307 U.S. 433, 438 (1939). In other words, "legislators *whose votes would have been sufficient to defeat (or enact) a specific legislative Act* have standing to sue if that legislative action goes into effect (or does not go into effect) on the ground that their votes have been completely nullified.'" *Common Cause of Pennsylvania v. Pennsylvania*, 558 F.3d 249, 266 (3d Cir. 2009) (quoting *Russell*, 491 F.3d at 135 n. 4) (emphasis in original).

This case is different. The Legislators have not shown that they have any "legally protected interest" to defend in this suit. Here, the Legislators seek to intervene because they "played an integral part in drawing and enacting the redistricting plan at issue," ECF No. 45-3 at 5, and are members of the "legislative bodies bestowed with the constitutional obligation to prepare and enact redistricting plans." ECF No. 45-3 at 6. But "[o]nce legislation is enacted, legislators . . . seeking to intervene in this litigation, do not have a significantly protectable interest in its implementation to entitle them to intervene as of right." *Land v. Delaware River Basin Comm'n*, No. 3:16-CV-00897, 2017 WL 63918, at *4 (M.D. Pa. Jan. 5, 2017) (citation omitted); *accord Robinson Twp. v. Com.*, 624 Pa. 219, 221-22, 84 A.3d 1054, 1055 (2014). As mere proponents of the legislation at issue in this case, Legislators have no cognizable interest to warrant their intervention as of right. *Compare Roe v. Casey*, 464 F. Supp. 483, 486 (E.D. Pa. 1978) (finding a legislator did not have standing to intervene to defend the constitutionality of a state law where the issue did not concern whether the law was "duly and lawfully enacted," and he asserted no "sufficiently substantial, direct or legally protectable interests to warrant

intervention") & *One Wisconsin Inst., Inc. v. Nichol*, 310 F.R.D. 394, 397 (W.D. Wis. 2015) (rejecting the argument in a voting rights case that "a legislator's personal support for a piece of challenged legislation gave rise to an interest sufficient to support intervention as a matter of right," as it would mean "legislators would have the right to participate in every case involving a constitutional challenge to a state statute") *with Coleman v. Miller*, 307 U.S. at 438 (finding state legislators had standing to challenge the State Lieutenant Governor's authority after he cast a deciding vote in favor of legislation, where the senators' votes would have otherwise been sufficient to defeat it).

2. The Legislators do not have standing under *Sixty-seventh Minnesota State Senate v. Beens*

Nor do the Legislators have standing to intervene under *Sixty-seventh Minnesota State Senate v. Beens*. 406 U.S. 187 (1972) *cited in* Legislators' Mem. ISO Mot. To Intervene, ECF 26-2 at 4. Even an expansive reading of *Minnesota State Senate* suggests only that a legislative body ***as a whole*** may have standing to litigate if its members ***own*** districts would be "'be directly affected by'" a case's outcome. *Id.* at 194 (internal citation omitted). Here, members of the ***Pennsylvania*** legislature seek to intervene regarding the electoral districts for the ***United States*** House of Representatives. Moreover, unlike *Minnesota State Senate* and its precursor (*Silver v. Jordan*, 241 F. Supp. 576 (S.D. Cal. 1964), *aff'd*, 381 U. S. 415 (1965)), only individual legislators seek intervention, not the legislative body as a whole. *See also U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 67 (D.D.C. 2015) (distinguishing standing of a legislative body from standing of its members).

3. Under Pennsylvania law, the Attorney General has sole authority to defend state statutes

A legislator may also have standing to defend a state law where vested by the state with such authority. "[A] State has a cognizable interest 'in the continued enforceability' of its laws

that is harmed by a judicial decision declaring a state law unconstitutional," and this interest extends to those "agents" who the state explicitly designates "to represent it in federal court." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2664 (2013) (citation omitted). However, this interest does not extend to legislators who simply wish to maintain the applicability of a state law that they support when they have not been vested by state law with the authority to defend it. *Cf. Karcher v. May*, 484 U.S. 72, 81-81 (1987) (holding that two state legislators could intervene to defend the constitutionality of a state statute only because "the New Jersey Legislature had authority under state law to represent the State's interests in both the District Court and the Court of Appeals").

Under Section 204(a)(3) of the Commonwealth Attorneys Act, the authority to defend Pennsylvania statutes is vested in the Attorney General. It provides: "It shall be the duty of the Attorney General to uphold and defend the constitutionality of all statutes so as to prevent their suspension or abrogation in the absence of a controlling decision by a court of competent jurisdiction." 71 P.S. § 732-204; *see also Maryland Cas. Co. v. Odyssey Contracting Corp.*, 2006 PA Super 25, ¶ 11, 894 A.2d 750, 755 (2006) ("In Pennsylvania, the Attorney General is the Commonwealth officer statutorily charged with defending the constitutionality of all enactments passed by the General Assembly.") (citation omitted). The Legislators themselves admit that the Executive Defendants "are the parties charged with the implementation of the 2011 Plan." *Agre*, ECF No. 45-3 at 6; *see also Diamond,* ECF No. 26-2 at 7.

* * *

Thus, without a protected legislative interest or a statutory authority to defend the constitutionality of Pennsylvania law, the Legislators cannot show they hold an "interest" sufficient to support standing to intervene in this case.

C. The Attorney General Adequately Represents the Interests of the Legislators in Defending the 2011 Plan

In addition, the Legislators have not made the required showing that the Executive Defendants will not adequately represent their interests, a prerequisite for intervention as of right under Rule 24(a). *See In re Cmty. Bank of N. Virginia*, 418 F.3d 277, 314 (3d Cir. 2005) ("It is axiomatic that to intervene as a matter right under Rule 24(a)(2) the prospective intervenor must establish," *inter alia*, that their "interest is not adequately represented by an existing party in the litigation.") (citation omitted).

` The Legislators seek the same outcome as the existing Executive Defendants: the maintenance of the 2011 Plan. "[W]hen the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented." *Id.*, 418 F.3d at 315 (citation omitted). "To overcome the presumption of adequate representation, the proposed intervenor must ordinarily demonstrate adversity of interest, collusion, or nonfeasance on the part of a party to the suit." *Id.* But mere differences in litigation strategy do not justify intervention. *See e.g.*, *Buquer v. City of Indianapolis*, No. 1:11-CV-00708-SEB, 2013 WL 1332137, at *3 (S.D. Ind. Mar. 28, 2013) (denying intervention where the legislators and "proposed intervenors merely disagree with the litigation strategy decisions made by the [state] Attorney General"). Moreover, the Legislators have not shown that the Attorney General has failed to adequately defend the 2011 Plan in accordance with his statutory duties. Without such a showing, the Legislators have not overcome the presumption that their interests are adequately represented, precluding intervention under Rule 24(a).

II. THIS COURT SHOULD REJECT THE LEGISLATORS' REQUEST FOR PERMISSIVE INTERVENTION TO DELAY TRIAL AND RAISE THEIR OWN DEFENSES

A. This Court Should Deny the Motion for Permissive Intervention

The Legislators' motion also seeks permissive intervention under Rule 24(b). In general, Rule 24(b) grants this Court broad discretion to allow—or disallow—parties to intervene. *See Brody v. Spang*, 957 F. 2d 1108, 1115 (3d Cir. 1992). However, intervention should be denied here for three reasons. First, pursuant to Rule 24(b)(3), "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Here, the Legislators have already made clear that their intervention would require a delay of the trial (ECF No. 25) -- jeopardizing Plaintiffs' ability to secure injunctive relief in time for the 2018 election. Second, the Court should deny permissive intervention by legislators in voting rights cases on the ground that executive branch defendants adequately represent their interests in upholding the law. *See One Wisconsin Inst.,* 310 F.R.D. 394 (so holding). Third, this Court should also deny the motion on the ground that the Legislators lack standing. *See Seneca Res. Corp.*, 2017 WL 4168472, at *6. Underlying each ground for denial is the same principle: the Legislators' professed preference in the continuing validity of their enactment is insufficient to justify intervention and delay the trial of this matter.

B. Regardless, Legislators' Lack of Standing Precludes Their Assertion of Unique Defenses

If the court nevertheless exercises its discretion to allow the Legislators to intervene pursuant to Rule 24(b), the Legislators are still barred from asserting defenses that are not raised by the Executive Defendants, the only parties with standing to defend this action. For example, the Executive Defendants have not sought to dismiss this case on abstention grounds, a defense that is waivable. *See Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 481 (1977);

Sheils v. Bucks Cty. Domestic Relations Section, 921 F. Supp. 2d 396, 408 (E.D. Pa. 2013). Given that the Legislators lack standing, see Section II.B, *supra*, they cannot seek relief on grounds other than that sought by a party with standing, namely the Executive Defendants.

CONCLUSION

For the foregoing reasons, the motion should be denied.

Dated: November 20, 2017

By: */s/ Bruce V. Spiva*

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CERTIFICATE OF SERVICE

I certify that on November 20, 2017, I filed the foregoing with the Clerk of the Court using the ECF System which will send notification of such filing to the registered participants as identified on the Notice of Electronic Filing.

Date: November 20, 2017

/s/ Bruce V. Spiva
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