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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, et al. Petitioners	:	
v.	:	
	:	Docket No. 261 MD 2017
THE COMMONWEALTH OF PENNSYLVANIA, et al. Respondents	:	

BRIEF IN SUPPORT OF PROPOSED INTERVENORS' APPLICATION FOR LEAVE TO INTERVENE

Proposed Intervenors: Brian McCann, Daphne Goggins, Carl Edward Pfeifer, Jr., Michael Baker, Cynthia Ann Robbins, Ginny Steese Richardson, Carol Lynne Ryan, Joel Sears, Kurtes D. Smith, C. Arnold McClure, Karen C. Cahilly, Vicki Lightcap, Wayne Buckwalter, Ann Marshall Pilgreen, Ralph E. Wike,

Martin C.D. Morgis, Richard J. Tems, James Taylor, Lisa V. Nancollas, Hugh H. Sides, Mark J. Harris, William P. Eggleston, Jacqueline D. Kulback, Timothy D. Cifelli, Ann M. Dugan, Patricia J. Felix, Scott Uehlinger, Brandon Robert Smith, Glen Beiler, Tegwyn Hughes, Thomas Whitehead, David Moylan, Kathleen Bowman, James R. Means, Jr., Barry O. Christenson, Bryan Leib file the following Brief in support of Proposed Intervenors' Application for Leave to Intervene.

TABLE OF CONTENTS

TABLE OF CITATIONS

Other

INTRODUCTION

At stake in the Application for Leave to Intervene ("Application") is whether political rights protected by the Pennsylvania Constitution—rights to vote, to express political opinions, to organize, to work to elect candidates of choice, to run for political office—have meaning. Since the 2011 reapportionment plan for Pennsylvania's Congressional Districts came into effect, the proposed Intervenors—active Republicans including candidates for office, Republican County Committee Chairpersons, and County Committee members—have worked to elect their preferred candidates to Congress. The Intervenors invest their time, effort, and money into candidates they believe in. They began to prepare for the 2018 elections as soon as the 2016 elections were over. They direct their efforts toward voters residing in established Congressional Districts.

Now, five and a half years after the 2011 reapportionment plan came into effect, a group of petitioners challenge the constitutionality of Pennsylvania's Congressional Districts. The Petitioners assert that the 2011 plan was designed to prevent them from electing their preferred candidates for Congress. They ask this Honorable Court to establish, in the final quarter of the decade, a new redistricting plan before the next census and, in fact, in time for the May 2018 primary election, just seven months away. But the effectiveness of the Intervenors' exercise of their

political rights depends on the existence of the current Congressional Districts. The Intervenors cannot make an informed decision whether to run for office without knowing the voters and constituencies in the district. Nor can they work to organize and advocate on behalf of a Congressional candidate. Even the voters cannot know their choices for Congress if they do not know into which district they could be reassigned.

If the existing Congressional Districts are replaced for the 2018 elections, these Republican candidates and activists will need to start over and direct their activities toward new voters, rendering meaningless all or a significant portion of their protected activities up to that date. These are fundamental Pennsylvania constitutional rights. There is no party that can adequately represent the Intervenors. The Answers to their Application fail to acknowledge their distinct differences that are not represented in the litigation. The Intervenors do not have a seat at the table.

The Intervenors do not exercise their political rights protected by the Pennsylvania Constitution in a vacuum. A court order could wipe out the Intervenors' efforts to date and undo the value of the personal time and effort they have invested, as well as their personal expenditures in support of the 2018 Congressional elections. Thus, the Intervenors must be allowed to participate in this case to defend their legally enforceable interests jeopardized by this litigation.

STANDARD OF REVIEW

The Intervenors seek intervention under Pennsylvania Rule of Civil Procedure 2327(4), on the ground that the outcome of this case may affect their legally protected political rights under the Pennsylvania Constitution.

Rule 2327 states that intervention "shall be permitted" if one of four grounds is met:

> At any time during the pendency of an action, a person not a party thereto *shall be permitted to intervene* therein, subject to these rules if
>
> . . .
>
> (4) the determination of such action may affect any legally enforceable interest of such a person whether or not such person may be bound by a judgment in the action.

Rule 2327 must be read together with Rule 2329, which gives courts discretion to refuse intervention if one of three conditions is met:

> Upon the filing of the petition and after hearing, of which due notice shall be given to all parties, *the court, if the allegations of the petition have been established and are found to be sufficient, shall enter an order allowing intervention*; but an application for intervention *may* be refused, if
>
> (1) the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; or
>
> (2) the interest of the petitioner is already adequately represented; or
>
> (3) the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.

The Commonwealth Court has held that "the effect of Rule 2329 is that if the petitioner is a person within one of the classes described in Rule 2327, the allowance of intervention is mandatory, not discretionary, unless one of the grounds for refusal under Rule 2329 is present." *Larock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa. Commw. Ct. 1999); *accord Robinson Twp. v. Commonwealth*, No. 284 M.D. 2012, 2012 Pa. Commw. Unpub. LEXIS 387, at *5 (Pa. Cmwlth. Apr. 20, 2012), *aff'd*, 84 A.3d 1054 (Pa. 2014).

Thus, while courts must allow intervention when any condition in Rule 2327 is met, a court is not compelled to deny intervention if a condition in Rule 2329 is met.

STATEMENT OF CASE

On June 15, 2017—little more than six months after a federal three-judge panel ruled in favor of the plaintiffs in *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016)—the League of Women Voters of Pennsylvania (LWVPA) and eighteen individuals filed a Petition for Review challenging the constitutionality of Pennsylvania's Congressional Districts. The Petitioners claim that Pennsylvania's Congressional Districts were designed to prevent voters who consistently vote for the Democratic Party from electing their candidates to Congress. They assert that the 2011 reapportionment plan providing for Pennsylvania's Congressional

Districts violates the Pennsylvania Constitution, specifically the free expression and free association clauses, Pa. Const. art. I, §§ 7, 20, the equal protection guarantee, *Id.* §§ 1, 26, and the free and equal elections clause, *Id.* § 5.

Like the Petitioners, the Intervenors are consistent Pennsylvania voters. In fact, they have worked as candidates for public office, Republican County Committee Chairpersons, and Republican County Committee members since the 2011 reapportionment plan came into effect, years before the Petitioners filed their action. Accordingly, they have exercised rights protected by the Pennsylvania Constitution—the same rights alleged by the Petitioners, to free speech, free association, equal protection, and free and equal elections—for the 2012, 2014, and 2016 elections under the existing Congressional Districts challenged by the Petitioners. As soon as the 2016 elections were over, the Intervenors started preparing for the 2018 elections for Congress in reliance on the existing, duly enacted Congressional Districts.

To defend the exercise of their rights protected by the Pennsylvania Constitution, they filed an Application for Leave to Intervene in this matter on August 10, 2017. At the time, no party had yet filed pleadings in response to the Petition.

SUMMARY OF ARGUMENT

In this case, intervention must be permitted under Pennsylvania Rule of Civil Procedure 2327(4), because the Intervenors' legally enforceable interests—the exercise of their political rights protected by the Pennsylvania Constitution—will be significantly impacted by a determination that Pennsylvania's existing Congressional Districts do not conform to the requirements of the Pennsylvania Constitution. The Court may not refuse intervention because no disqualifying condition set forth in Rule 2329 is present. In particular, the Intervenors' interests are not adequately represented by the respondents because the Intervenors have different interests in Pennsylvania's Congressional Districts and seek different relief. Therefore, this Honorable Court must allow leave to intervene.

ARGUMENT

I. The Intervenors have legally enforceable interests—the effective exercise of their rights protected by the Pennsylvania Constitution—entitling them to intervene in this case.

The Intervenors are active members of the Republican Party, including candidates for public office, Republican County Committee Chairpersons, and County Committee members. At a minimum, they have the same legally enforceable voting rights as the individual petitioners in this case. In addition, the Intervenors regularly exercise their right of free speech and association in the practice of politics in the Counties.

These Pennsylvanians exercise their political rights within the context of the 2011 map, which has been in place for three cycles of Congressional elections, and is nearing the end of its lifecycle as the next census approaches. For six years now, the Intervenors have engaged in political activity relying on the constitutionality of the 2011 map. As active members of the Republican Party, the Intervenors have already started their preparations for a fourth cycle, that being the 2018 Congressional elections. If this Court grants the Petition and alters the constituencies of Pennsylvania's eighteen Congressional Districts, these Republican candidates and activists will need to start over and direct their activities toward new voters, rendering meaningless all or a significant portion of their protected activities up to that date. Thus, the outcome of this case will affect the Intervenors' ability to address their campaigns to the correct constituencies. It also affects the ability of voters to learn about the correct candidates. Thus, even if it were determined that districts need to be redrawn, at some point the benefit of redrawing districts before the 2018 elections is outweighed by the cost.

A. At a minimum, the Intervenors have the same legally enforceable interests as the individual petitioners.

In addition to the LWVPA, whose standing is in dispute, eighteen individuals—one from each of Pennsylvania's eighteen Congressional Districts—filed the Petition for Review. Each individual petitioner is identified as "a

registered Democrat who has consistently voted for Democratic candidates for Congress." Pet. for Rev. ¶¶ 14–31. The petitioners claim violations of the Pennsylvania Constitution's free expression and free association clauses, Pa. Const. art. I, §§ 7, 20, equal protection guarantee, *Id.* §§ 1, 26, and free and equal clause, *Id.* § 5.

No party has challenged the individual petitioners' standing.[1] In the same vein, no party can successfully challenge the standing of the Intervenors, who, like the individual petitioners, are consistent Pennsylvania voters and individuals exercising their rights under the Pennsylvania Constitution.

The Pennsylvania Supreme Court has held that "it is 'the right to vote and the right to have one's vote counted that is the subject matter of a reapportionment challenge.'" *Erfer v. Commonwealth*, 794 A.2d 325, 330 (Pa. 2002) (quoting *Albert v. 2001 Legislative Reapportionment Comm'n*, 790 A.2d 989, 994–95 (Pa. 2002)). Accordingly, the Supreme Court also held that "any entity not authorized by law to exercise the right to vote in this Commonwealth lacks standing to

[1] The Legislative Respondents and the Intervenors each submitted preliminary objections challenging LWVPA's standing. With respect to the individual petitioners, the Legislative Respondents offer another preliminary objection that the petitioners have failed to state a claim for relief because they failed to allege that they have "essentially been shut out of the political process." *Erfer v. Commonwealth*, 794 A.2d 325, 333 (Pa. 2002). In arguing that the petitioners have failed to state a claim, however, the Legislative Respondents do not challenge the individual petitioners' standing to bring a claim.

challenge the reapportionment plan." *Id.* (internal quotation marks omitted) (quoting *Albert*, 790 A.2d at 995).

As such, the individual petitioners, as Pennsylvania voters, have standing as long as they meet Pennsylvania's substantial-direct-immediate test. *See, e.g., In re Hickson,* 821 A.2d 1238, 1243 (Pa. 2003) (explaining the substantial-direct-immediate test for standing under Pennsylvania law). So too do the Intervenors' interests fall within the scope of the subject matter of a legally cognizable reapportionment challenge. The Intervenors' interests as Pennsylvania voters are legally enforceable interests entitling them to intervene in a reapportionment challenge.

B. In fact, each Intervenor exercises more rights protected by the Pennsylvania Constitution beyond the right to vote.

Each Intervenor does more than consistently vote. The Intervenors include candidates for public office, Republican County Committee Chairpersons, and County Committee members. Their activities are protected by the Pennsylvania Constitution's free expression and free association clauses, Pa. Const. art. I, §§ 7, 20, equal protection guarantee, *Id.* §§ 1, 26, and free and equal elections clause, *id.* § 5—the same grounds under which the petitioners seek relief.

1. Potential Congressional Candidates

Intervenor Scott Uehlinger is a current Congressional candidate in the 15th

Congressional District. As a candidate for office, Uehlinger must assess the needs of his Congressional District; determine whether he is a viable candidate both geographically and demographically; invest substantial time, money, and effort into supporting his campaign; promote and participate in fundraising efforts and events; and utilize and organize the political resources available at the state, caucus, county, and local levels to improve his chances of success in his campaign. These activities of Uehlinger, as a current Congressional candidate falls within the free expression, free association, equal protection, and free and equal elections rights guaranteed by the Pennsylvania Constitution.

To be a viable candidate, Uehlinger must engage in these activities now. He cannot wait as deadlines approach. More importantly, as a candidate he may have made a different decision whether to run and how to run under redrawn Congressional Districts encompassing different constituencies. A candidate who fits one district well may not be a good match for another, or may need to concentrate on different neighborhoods in a redrawn district. Uehlinger lives in Berks County in the 15th Congressional District, which is otherwise centered on neighboring Lehigh County. Uehlinger's ultimate decision to be a candidate hinges on the lines of the 15th Congressional District—if his Berks County home remains in the district at all.

The Petitioners seemingly concede that a candidate for office would have an

interest in this litigation. The Petitioners do not dismiss the candidate's interest in this litigation as no "different from any other citizens desiring to support candidates of their choice." Pet'rs' Answer in Opp. to the App. for Leave to Intervene ¶¶ 10–12, 14–15. Even an undeclared candidate must take action now to determine his candidacy's viability before he announces publicly his intent to run for office, which is a significant, costly, and involved undertaking.

The petitioners' citation to *Fraenzl v. Secretary of the Commonwealth of Pennsylvania* is inapposite. *Fraenzl* concerned whether the Socialist Workers Party's candidate for Congress would appear on the ballot. *Fraenzl v. Sec'y of Commonwealth*, 478 A.2d 903, 904 (Pa. Commw. Ct. 1984). The Republican candidate sought to intervene. Although the *Fraenzl* court recognized that its "decision will no doubt have an effect on the outcome of the election," the Republican candidate could "assert no legally enforceable interest in potential votes which may be lost to an additional candidate." *Id.*

The instant case is not about qualifying for the ballot or counting votes. It is about the very districts in which a candidate, such as Uehlinger, would run for office. In *Fraenzl*, both the Socialist and Republican candidates knew the exact boundaries of the 22nd Congressional District. Moreover, in denying intervention, the *Fraenzl* court noted that Pennsylvania law provided other, statutory methods for the Republican candidate to challenge the Socialist candidate's nomination. *Id.*

at 904–05. Here, Uehlinger has no alternative method for protecting his legally enforceable interests.

The situation might be different if the Petitioners had proposed a redistricting plan, but they have not done so. As a result, there is no way to know how the districts might be redrawn and take that into account in planning for the 2018 elections.

2. County Committee Chairpersons and Members

The Intervenor County Chairpersons and County Committee members also exercise rights under the Pennsylvania Constitution beyond the right to vote. County Chairpersons identify and recruit potential candidates who would best represent the unique interests and concerns of their geographic area; assisting in the re-election of Congressional incumbents who appropriately and zealously represent and advocate for the interests of the constituents in his or her Congressional District; campaigning for and supporting Congressional candidates; organizing and encouraging voters to support Congressional candidates; promoting and participating in fundraising efforts and similar events; discussing, promoting, and addressing Congressional District issues with Congressional incumbents and candidates; and holding Congressional incumbents accountable for campaign positions and promises.

County Committee members have similar, but also distinctive

responsibilities to: participate in supporting incumbent Congressional candidates; recruit Congressional candidates who would best represent the unique interests and concerns of the constituents in the respective Congressional Districts; vote on supporting potential candidates for Congress and other offices; campaign for and support federal candidates at the local, grassroots level in their respective counties; organize and encourage voter support; advocate for and discuss issues with Congressional incumbents and candidates; promote and participate in fundraising efforts and events; assist in the re-election of Congressional incumbents who appropriately and zealously represent and advocate for the interests of the constituents in their Congressional Districts; and assist with election day activities in the County. As required by applicable law, these particular Intervenors are also often called upon to vote for candidates for Congress to fill vacancies on the ballot and for special elections, as well as to fill vacancies and for special elections for other candidates at the state, local, and federal level. All of these Intervenors' personal roles are inextricably linked with who will be the Congressional candidate in their Congressional Districts.

In at least one case, time is especially of the essence. On September 2, 2017, President Trump announced his intent to nominate Congressman Tom Marino to

serve as Director of the Office of National Drug Control Policy.[2] Congressman Marino currently represents Pennsylvania's 10th Congressional District. As a result, four Intervenors—Thomas Whitehead, Mark Harris, Lisa Nancollas, and Hugh Sides—must prepare for the possibility of a special election well before November 2018. Whitehead is the Chair of the Monroe County Republican Party; Harris is a former Chairman of the Snyder County Republican Party; Nancollas is a former Snyder County Commissioner and the current Treasurer of the AG Republicans Committee; and Sides, a resident of Lycoming County, is active in Republican campaign activities.

The 10th Congressional District Intervenors must identify and recruit candidates for Congress and organize voter support quickly in a short campaign. Whitehead has already met with potential candidates, but recruitment has been difficult. According to Whitehead, one candidate has said he is not interested in running because he is concerned that district lines could be redrawn. If the 10th Congressional District changed, Whitehead, Harris, Nancollas, and Sides may recruit different candidates and use different strategies to elect their preferred candidates—if Monroe County, Snyder County, and Lycoming County even

[2] Press Release, The White House, President Trump Announces Intent to Nominate Personnel to Key Administration Posts (Sept. 2, 2017), https://www.whitehouse.gov/the-press-office/2017/09/02/president-donald-j-trump-announces-intent-nominate-personnel-key.

remain in the same district.

The difficulty does not end there. As Monroe County Chair, Whitehead must select conferees to a nomination commission to ultimately select the Republican nominee in a 10th Congressional District special election. Monroe County is divided between the 10th and the 17th Congressional Districts. Even a slight change in the boundary between the 10th and the 17th Congressional District could affect Whitehead's choices for the nomination committee.

Even where special elections are not being held, local party members must work now to identify and recruit candidates for Congress. Congressman Lou Barletta of the 11th Congressional District has announced that he will run for Senate, and Congressman Charlie Dent of the 15th Congressional has announced that he will retire. Intervenor William P. Eggleston, the Vice Chair of the Wyoming County Republican Party, is faced with the reality that he must now recruit and support a new candidate in the 11th Congressional District. So too must Patricia J. Felix, an executive member of the Northampton County Republican Party Committee, in the 15th Congressional District. Indeed, Intervenor Scott Uehlinger, of Berks County, is a current candidate in the 15th Congressional District himself.

The Petitioners counter that these Intervenors are no "different from any other citizens desiring to support candidates of their choice." Pet'rs' Answer in

Opp. to the App. for Leave to Intervene ¶¶ 10–12, 14–15. Yet, there is no question that their activities are protected by the Pennsylvania Constitution, specifically the rights to free expression, free association, equal protection, and free and equal elections.

An analogy to the "substantial" prong of Pennsylvania's substantial-direct-immediate test for standing makes clear the significance of the Intervenors' activities. "A 'substantial' interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law." *In re Hickson*, 821 A.2d at 1243 (internal quotation marks omitted) (quoting *Bergdoll v. Kane*, 731 A.2d 1261, 1268 (Pa. 1999)). By investing as much of their personal time and effort as they do to elect their preferred Congressional candidates, including in Uehlinger's case by also being a candidate for Congress, the Intervenors' interests surpass the average citizen's interest in voting and ensuring votes are properly counted.

The Petitioners insist that the Intervenors "have not alleged that they have been prevented from participating in their campaign activities nor do they have a right to perpetuate unconstitutional congressional district boundaries because a change will cause some inconvenience with respect to campaign activities." Pet'rs' Answer in Opp. to the App. for Leave to Intervene ¶¶ 10–15. But the Intervenors did not draw the Congressional District lines. Rather, they have relied

on the constitutionality of the 2011 plan for three election cycles. In some cases, a petitioner's preferred candidate won; in other cases, an Intervenor's. The outcomes of these races are not predetermined.

The risk in this litigation is that the Intervenors' electoral activities—in spite of the rights protected by the Pennsylvania Constitution—are rendered ineffective or a nullity. The Intervenors' efforts preparing for the 2018 elections will become instantly meaningless upon a court order materially modifying the districts for the 2018 elections. In that scenario, the Intervenors would be allowed to exercise their political rights—at the same time a court order granting the relief the Petitioners request would wipe out the Intervenors' efforts to date and undo the value of the personal time and effort they have invested, as well as their personal expenditures in support of the 2018 Congressional elections.

Campaigns for the 2018 elections have already begun. Changing the rules in the middle of the electoral process will harm the Intervenors' legally enforceable interests.

C. For the 2018 elections, the Intervenors exercise their rights in the context of the 2011 map.

In December 2011, then-Governor Corbett signed into law Senate Bill 1249, enacting the 2011 reapportionment plan for Pennsylvania's Congressional Districts. This map was uncontested, and remained in effect for the 2012, 2014,

and 2016 elections. Petitioners did not file their Petition for Review until June 15, 2017—five and a half years after the reapportionment plan became law.

The Intervenors exercise their political rights, working to elect their preferred Congressional candidates, or conducting their own personal campaign for Congress, within the context of the existing and well-established Congressional District boundaries. In 2011, the Intervenors knew to prepare for the 2012 elections carefully. The Intervenors knew that the General Assembly must pass a new reapportionment plan after the 2010 census, to take effect for the 2012 elections and to address the loss of a Congressional seat. The Intervenors knew that the map in effect in 2010 would not remain in 2012.

Now, the Petitioners ask this Court for relief that the Intervenors did not anticipate: a mid-decade redistricting of Pennsylvania's Congressional Districts. Unlike decennial redistricting which is constitutionally mandated, the Intervenors absolutely had no reason to expect new districts for the 2018 elections, particularly when the 2011 map was never challenged before. As a result, the Intervenors have already started substantial preparations for the 2018 elections based on the existing districts.

New districts would harm the Intervenors' legally enforceable interests. If the Intervenors had expected new districts, they would have prepared for the 2018 elections as they did for the 2012 elections, the first election after reapportionment.

Instead, they are preparing for the 2018 elections as they did for the mid-decade 2014 and 2016 elections, when they had no reason to expect reapportionment and could begin as soon as the last election ended.

The Petitioners' constitutional concerns about the 2011 reapportionment plan were just as present the moment the plan became law in the 2011 as they were the moment they filed their petition in 2017. The Petitioners had absolutely no reason to wait to bring their claims. In fact, in the past, petitioners did not wait. Contrast the Petitioners' lack of challenge to the Congressional redistricting with their challenge to the General Assembly districts in time for the 2012 elections. *Holt v. 2011 Legis. Reapportionment Comm'n*, 38 A.3d 711 (Pa. 2012). With respect to the last decade, there too the Pennsylvania Supreme Court decided a partisan gerrymandering claim to Pennsylvania's Congressional Districts in time for the 2002 elections, the first elections under the new map. *Erfer*, 794 A.2d 325. Indeed, states like North Carolina and Texas have been litigating their Congressional Districts since inception of the maps in 2011. *See, e.g., Harris v. McCrory,* 159 F. Supp. 3d 600, 609 (M.D.N.C. 2016), *aff'd sub nom. Cooper v. Harris,* 137 S. Ct. 1455 (2017); *Perez v. Abbott*, No. SA-11-CV-360, 2017 U.S. Dist. LEXIS 129982, at *16 (W.D. Tex. Aug. 15, 2017).

The reason why the Petitioners waited until now to bring their case is that the United States Supreme Court only recently agreed to take up the case of in

Whitford v. Gill, in which a U.S. District Court for the Western District of Wisconsin panel recognized a partisan gerrymandering claim in part based on a newly proposed measure of partisan gerrymandering: the efficiency gap. *Gill*, 218 F. Supp. 3d at 918 ("Instead, we acknowledge that the expert opinions in this case have persuaded us that, on the facts before us, the [efficiency gap] is corroborative evidence of an aggressive partisan gerrymander that was both intended and likely to persist for the life of the plan."). The United States Supreme Court has announced that it will hear *Gill* in a few weeks during the October 2017 term—accordingly, the Supreme Court will issue an opinion whether the *Gill* panel appropriately accepted the efficiency gap as corroborative evidence. The Pennsylvania General Assembly, Speaker Turzai, and Senator Scarnati (Legislative Respondents) have asked this Honorable Court to stay this case pending the Supreme Court's disposition of *Gill*. Given that: (1) *Gill* immediately preceded and emboldened the Petitioners' claims in this case; and (2) the Petitioners have already waited three election cycles to challenge the reapportionment plan, it is not inappropriate for the Petitioners to wait a little longer for the outcome of their claims.

Notwithstanding *Whitford v. Gill*, the Petitioners have a laches hurdle to overcome in bringing this litigation. A laches defense consists of two essential elements: (1) a delay arising from the Petitioners' failure to exercise due diligence;

and (2) prejudice to the intervenors resulting from the delay. *See Stilp v. Hafer*, 718 A.2d 290, 293 (Pa. 1998). Here, the Petitioners delayed and failed to exercise due diligence by waiting almost six years to bring their claims. During that time, Pennsylvania has already held three Congressional elections, with only two remaining before the next census occurs. The Intervenors will be prejudiced by the Petitioners' requested relief because the political activity in which Intervenors have engaged and plan to engage depends on the 2011 map, the constitutionality of which was never questioned until now. If the court grants the Petitioners' relief, it will also render the Intervenors' protected activities for the 2018 election cycle ineffective and meaningless.

Like the Intervenors, the Petitioners have also exercised their political rights under the 2011 map. The Petitioners have not "essentially been shut out of the political process," as required by *Erfer*. *Erfer*, 794 A.2d at 333. In one district especially criticized by the Petitioners—Pennsylvania's 7th Congressional District—six candidates have already announced runs for the Democratic nomination to challenge a Republican incumbent. Clearly, candidates have not been shut out of the political process when so many are eager to run.

County Committee Chairpersons and members need a Congressional District before they can exercise their political rights on behalf of a candidate for Congress with any effect. Since 2011, the Chairpersons and members have exercised their

rights under the constitutionality of the current Congressional Districts. The Committees and their members and Uehlinger have already started preparing for the 2018 elections. If districts changed now, their work and their personal investment of time, effort, and money to date would be wasted. Thus, County Committee Chairpersons, their members, and Uehlinger must be allowed to intervene in this case to assert their legally enforceable interests—political rights protected by the Pennsylvania Constitution.

II. The Intervenors' legally enforceable interests are not adequately represented by the respondents.

The Petitioners, Secretary Cortés, and Lieutenant Governor Stack each filed Answers opposing the Application for Leave to Intervene on the grounds that the Intervenors' interests are adequately represented. It is true that the Legislative Respondents' preliminary objections to the Petition for Review include two of the Intervenors' preliminary objections: (1) the LWVPA lacks standing to pursue its Petition for Review; and (2) the petition fails to state a claim upon which relief can be granted, given that a plurality of the U.S. Supreme Court ruled in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), that claims of partisan gerrymandering are nonjusticiable. It is also true that the Intervenors promote the imposition of a stay pending the United States Supreme Court's disposition of *Whitford v. Gill*, 218 F.

Supp. 3d 837 (W.D. Wis. 2016), *cert. granted*, 137 S. Ct. 2289 (2017).[3]

However, the Intervenors' interests are not the same as the Legislative Respondents' interests. Moreover, each party seeks different outcomes in this litigation. Therefore, this Court should not refuse intervention under Rule 2329 on the basis that the Intervenors' interests are adequately represented because clearly, they are not.

A. The Intervenors' legally enforceable interests are not adequately represented by the Legislative Respondents.

The Intervenors' legally enforceable interests are not adequately represented by the Legislative Respondents for two reasons. First, the Intervenors' interests in this litigation differ from those of the legislative respondents. Second, the different sets of parties seek different relief.

With regard to the first distinction, unlike the Legislative Respondents, the Intervenors were not involved in the creation of the 2011 reapportionment plan. The Legislative Respondents seek to enforce a reapportionment plan which they devised to last the decade, through the 2020 census. In addition, the Legislative

[3] The Intervenors also note that, after the United States Supreme Court stayed the order in *Whitford v. Gill* pending its disposition of the case, the Court also stayed the order in *Abbott v. Perez*, No. SA-11-CV-360, 2017 U.S. Dist. LEXIS 129982 (W.D. Tex. Aug. 15, 2017), a racial gerrymandering case from Texas. *Abbott v. Perez*, No. 17A225, 2017 U.S. LEXIS 4434 (Sept. 12, 2017). The Court's stays of both partisan and racial gerrymandering cases counsel this Honorable Court to wait for the United States Supreme Court's guidance before deciding this case.

Respondents have other concerns, namely state government. The Legislators have a lesser interest in Congressional Districts than in the districting which governs the Assembly seats they hold. It is the Assembly seats, not the Congressional Districts, which provide the Legislators with their role in Pennsylvania state government.

By contrast, the Intervenors' sole focus in this litigation is the effective exercise of their political rights protected by the Pennsylvania Constitution. The Intervenors work to elect their preferred candidates to Congress without regard to the General Assembly's internal decennial mechanism and procedures to draw Congressional Districts, except that they comply with the requirements of Pennsylvania's Constitution. Each Intervenor simply wants to know in what District they reside, and who the viable candidates are in their Congressional Districts so they can work to elect their preferred candidates.

Second, the Intervenors seek different relief than the Legislative Respondents. As stated above, the Intervenors' immediate interest is the meaningful exercise of their political rights for the 2018 election. As explained above, absent a challenge for the past six years, the existing reapportionment plan is presumed constitutional. Because the petitioners have waited to challenge the 2011 map for three election cycles, the Intervenors have relied the constitutionality of the existing plan. The Intervenors' exercise of their political rights will be

meaningless if they must restart their activities under new maps before the 2018 elections. And, if the Pennsylvania courts must change Congressional Districts again as a result of the United States Supreme Court's decision in *Gill v. Whitford*, the Intervenors' political rights will be rendered meaningless a second time and would result in the unbelievable and extremely burdensome need to prepare for the 2018 elections under a third iteration of maps.

This Honorable Court has recognized that intervenors are not adequately represented if they seek a different outcome than an existing party. In *Larock v. Sugarloaf Township Zoning Hearing Board*, this Court considered township residents' appeal of the denial of their petition to intervene in zoning litigation. Like this case, the residents sought to intervene to challenge the position of the petitioners, who sought to operate a quarry on their property. The petitioners appealed the Township's denial. The trial court had held that the Township adequately represented the intervening residents' interests. But on appeal, this Honorable Court reversed. This Honorable Court noted that the intervening residents sought "to prohibit the quarry entirely," while the Township was willing to concede and settle the case subject to restrictions favorable to the Township. *Larock*, 740 A.2d at 314. Thus, an intervenor's interests are not adequately represented by an existing respondent when nuances exist and the parties, although similarly inclined, do "not unequivocally share" the same interests in the litigation.

Id.

Here, the Legislative Respondents do not share the same interest in this litigation as the Intervenors. The Legislators seek to enforce the 2011 reapportionment plan until the next census. The Intervenors, on the other hand, seek to protect their constitutional rights to effectively exercise their political rights and involvement in the election process. Accordingly, the Intervenors are not adequately represented by the Legislative Respondents.

B. Nor are the Intervenors' legally enforceable interests adequately represented by other respondents.

The Petitioners also make the more general argument that "intervention should not be permitted under Pa.R.C.P. 2329(2) when a Respondent is already defending the 'legally enforceable interest' of a Proposed Intervenor." Pet'rs' Answer in Opp. to the App. for Leave to Intervene at 20. In asserting this broad statement, the Petitioners cite a case in which it was determined that the Commonwealth adequately represented the interests of the proposed intervenors. *Pa. Ass'n of Rural & Small Sch. v. Casey, 613* A.2d 1198, 1200–01 (Pa. 1992) ("PARSS").

In *PARSS*, a case brought by an association of school districts challenging the public-school funding formula, the Commonwealth Court had granted a different association of school districts leave to intervene while denying

intervention to an individual school district, Central Bucks School District ("Central Bucks"). If its Preliminary Objections were dismissed, Central Bucks intended to assert a defense that no party had raised. But, the Supreme Court held that Central Bucks' main interest—maintaining its funding—was adequately represented by the other parties defending the constitutionality of the existing formula. Importantly, the Supreme Court added that Central Bucks could raise disproportionate taxation in a separate action. *Id.*

Unlike in *PARSS*, however, the Intervenors in this case are not represented by the other respondents. Governor Wolf, Lieutenant Governor Stack, and Secretary Cortés are all Democratic officeholders. Although the Commonwealth has the duty to defend the constitutionality of Acts of the General Assembly, the Commonwealth is also represented by a Democratic officeholder, Attorney General Josh Shapiro.

These respondents have not raised objections to the Petition in defense of the 2011 reapportionment plan. In its preliminary objections, the Commonwealth and Governor Wolf object to the Petition for Review on procedural, not substantive, grounds: primarily, the Petitioners' failure to state a claim against them individually. Secretary Cortés filed an Answer and New Matter raising essentially the same defense. Lieutenant Governor Stack, however, does not seek to dismiss the claims against him. Instead, he seeks to use his status as a respondent in this

case to participate in support of the Petitioners.

The Lieutenant Governor's position demonstrates the Intervenors' concerns about the Commonwealth representing their interests in this litigation. Attorney General Shapiro voted against the 2011 reapportionment plan as a member of the Pennsylvania House of Representatives. Like Lieutenant Governor Stack, Attorney General Shapiro could decide not to defend the 2011 map, or even to participate in support of the petitioners. Such a decision would be consistent with the Attorney General's position when he was a member of the Pennsylvania House of Representatives.

Clearly, no respondent is representing the interests of Uehlinger as a current active candidate for Congress. His Constitutional rights are not being addressed by any of the respondents. In sum, no respondent is defending the Intervenors' interests in this case. And, unlike in *PARSS*, the Intervenors have no alternative method to represent their interests. Thus, there are no grounds to refuse intervention.

III. Intervention will not unduly delay or prejudice the efficient disposition of this case.

The Petitioners also argue that the addition of individual intervenors "will complicate and delay the orderly resolution of this lawsuit." Pet'rs' Answer in Opp. to the App. for Leave to Intervene at 4. There is absolutely nothing to

support that allegation. Intervention will not unduly delay the proceeding because the Intervenors acted quite promptly in filing their Application for relief before the pleadings even closed.

First, the Intervenors did not delay in seeking intervention. Indeed, they promptly filed their Application for Leave to Intervene before any party filed pleadings in response to the Petition for Review.

Second, the Petitioners' concern about the number of intervenors is misplaced. Other gerrymandering cases routinely include a number of parties. For example, the *Perez v. Abbott* panel identified six groups of plaintiffs, including fifty-four individual plaintiffs. *Perez*, 2017 U.S. Dist. LEXIS 129982, at *16 & nn.1–6. The number of plaintiffs is unsurprising, because reapportionment cases implicate political rights such as the free speech, free association, equal protection, and free and equal elections rights asserted by both the Petitioners and the Intervenors in this case.

The bottom line is that the Republican activists seek intervention because this litigation could impact the exercise of their political rights protected by the Pennsylvania Constitution. This Honorable Court should not refuse intervention based on the number of intervenors, because the constitutional rights of each Intervenor are at stake. If intervention is denied, the Intervenors will have no recourse to defend their interests raised by this litigation. Thus, intervention must

be allowed.

CONCLUSION AND RELIEF REQUESTED

Intervenors respectfully request this Honorable Court to grant leave to intervene.

Respectfully submitted,
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