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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 :

**INTERVENORS' ANSWER TO PETITIONERS' MOTION IN LIMINE TO
EXCLUDE INTERVENOR WITNESS TESTIMONY**

The Intervenors Brian McCann, Daphne Goggins, Carl Edward Pfeifer, Jr., Michael Baker, Cynthia Ann Robbins, Ginny Steese Richardson, Carol Lynne Ryan, Joel Sears, Kurtis 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, and Bryan Leib hereby submit this Answer to the Petitioners’ Motion in Limine to Exclude Intervenor Witness Testimony.

INTRODUCTION

The Intervenor—candidates for office, County Committee Chairs and members, and active volunteers, all of whom are consistent Pennsylvania voters—sought intervention in this case to protect their legally enforceable interests. Their rights to vote, to express political opinions, to work to elect candidates of choice, and to run for political office are at stake in this litigation. For that reason, this Honorable Court granted intervention. Order (Nov. 13, 2017) ¶ 1.

Now, Petitioners seek to re-litigate the Court’s order granting intervention. They argue that the Intervenor’s rights are not relevant to Petitioners’ case. Pet’rs’ Mot. in Limine to Exclude Intervenor Witness Testimony (“Pet’rs’ Mot. in Limine”) 6. But the Intervenor is and has been engaged in their protected political activities, in reliance on the existing congressional map. Joint Stip. of Facts ¶ 201. Of course any relief granted to Petitioners will have an impact on the Intervenor and other Pennsylvania voters like them. Thus, this Honorable Court must allow the Intervenor to be heard in this case.

ARGUMENT

I. The issue is not whether Intervenor’s testimony is relevant to Petitioners’ case; the issue is Intervenor’s legally enforceable interests.

The Intervenor did not intervene to help Petitioners' case. They intervened to ensure that their legally enforceable interests are represented as this Court considers this litigation.

Petitioners assert that Intervenor has no relevant rights at stake in this litigation because “[i]t 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); *Albert v. 2001 Legis. Reapportionment Comm’n*, 790 A.2d 989, 994–95 (Pa. 2002). But Petitioners take the Pennsylvania Supreme Court’s pronouncement, made in the context of associational standing, out of context. In *Erfer*, the Supreme Court held that the Pennsylvania State Democratic Committee lacked standing to pursue a reapportionment challenge because the Committee “does not have the right, in and of itself, to vote.” *Erfer*, 794 A.2d at 330. Likewise, in *Albert*, the Supreme Court had previously denied standing to a number of organizations, not individuals: the Lehigh Valley Coalition for Fair Reapportionment, the Board of Commissioners of the Township of Lower Merion, the Chairs of the Lower Merion Republican and Democratic Committees in their *representative* capacities, the Neighborhood Club of Bala Cynwyd, the Board of Commissioners of Radnor Township and the League of Women Voters of Radnor Township, and the North Hills School District and the Township of Ross. *Albert*, 790 A.2d at 994. Petitioners remain fixated on the

rights protected in reapportionment challenges since this Honorable Court dismissed the League of Women Voters of Pennsylvania from this case for lack of standing. Order (Nov. 13, 2017) ¶ 4. In no case have Pennsylvania courts denied standing to persons in their individual capacities who exercise their right to vote, as is the case for the Intervenors.

No party has challenged that the Intervenors are consistent Pennsylvania voters—just like Petitioners. In fact, if the right to vote and the right to have one’s vote counted are the only rights protected in a reapportionment challenge, then Petitioners lack standing to bring their own claims. Petitioners’ depositions have revealed that no Petitioner has been prevented from voting or has any evidence that their vote was not counted.

In reality, the political process is indeed relevant to reapportionment challenges. Petitioners recognize that they must prove discriminatory intent and discriminatory effect to prevail on an equal-protection theory of partisan gerrymandering. Pet’rs’ Statement in Resp. to the Court’s Dec. 5, 2017 Order ¶ 4.¹ Assuming this Court follows the prevailing discriminatory effect test explicated in *Erfer*, however, Petitioners must show that: (1) “the reapportionment plan works disproportionate results at the polls”; and (2) “adduce evidence indicating ‘a strong

¹ Now Petitioners claim that they need not follow the discriminatory effect prong in *Erfer* to prove their case. Pet’rs’ Statement in Resp. to the Court’s Dec. 5, 2017 Order ¶ 4. Accordingly, the Intervenors do not know whether their testimony will be relevant to the test ultimately adopted by the Pennsylvania Supreme Court. Thus, the Intervenors’ witness testimony must be included now, or else they may not have the record necessary to support their legal arguments later.

indicia of lack of political power and the denial of fair representation,”” which requires showing that Petitioners have ““essentially been shut out of the political process.”” *Erfer*, 794 A.2d at 333.

II. Petitioners claim the same legally enforceable interests as Intervenors.

Petitioners also claim the same rights as the Intervenors. For example, Petitioners make free speech and free association claims. They would have to show that the redistricting plan is retaliatory by discriminating against them for engaging in political speech. Pet’rs’ Statement in Resp. to the Court’s Dec. 5, 207 Order ¶¶ 2–3. Courts have held that plaintiffs cannot show a First Amendment violation from partisan gerrymandering where plaintiffs were prevented from “expressing a political view, endorsing and campaigning for a candidate, contributing to a candidate, or voting for a candidate.” *E.g., League of Women Voters v. Quinn*, Civ. No. 11-5569, 2011 U.S. Dist. LEXIS 125531, at *13–*14 (N.D. Ill. Oct. 28, 2011). These are the same legally enforceable interests claimed by the Intervenors.

Moreover, Pennsylvania Democrats are already engaged in protected political activities to contest vigorously the same seats that Petitioners claim they cannot win. For example, five Democratic candidates have registered with the Federal Election Commission to run in the 7th District in 2018. Joint Stip. of Facts ¶ 219. Four Democratic candidates have registered with the Federal Election

Commission to run in the 12th District. *Id.* ¶ 220. Similarly, Democratic candidate Chrissy Houlahan has raised \$810,649.55 in her campaign for the 6th District in 2018. *Id.* ¶ 221. One Democratic candidate has raised over \$100,000 to challenge an incumbent in the 16th District. *Id.* ¶ 222.

Petitioners are concerned about weighing their rights against the Intervenors. But Intervenors intervened only to protect their legally enforceable interests. Petitioners do not want this Court to consider the effect of their requested relief on other Pennsylvanians. By contrast, the Intervenors want everyone to be heard.

III. Each witness offers different testimony.

Intervenors' witnesses are not cumulative because each offers different testimony. For example, Scott Uehlinger is a candidate for Congress. He is testifying as to the effect that the current congressional districts had on his decision to run for Congress. He is not testifying that he has any right to the 15th Congressional District. Rather, he is testifying that he has expended time, money, and effort into his decision to run in his Congressional District under whatever lines it had when he decided to run.

Jacqueline Kulback and Thomas Whitehead are County Party Committee Chairs. Kulback, from Cambria County, will testify as to the effect of Petitioners' relief on western Pennsylvania; Whitehead, from Monroe County, will testify as to the effect on eastern Pennsylvania. Moreover, Kulback has witnessed changing

voting patterns in Cambria County. In November 2016, Cambria County had 52.25 percent registered Democrats, but President Trump won 67.00 percent of the vote in Cambria County. Joint Stip. of Facts ¶ 214. Whitehead has a different experience. He is the County Party Chair of a split county, represented by Republican Representative Tom Marino in the 10th District and Democrat Matt Cartwright in the 17th District. Mark Harris a former County Chair from Snyder County in north-central Pennsylvania. His County could be placed in a number of Congressional Districts if relief is granted now.

Carol Lynne Ryan and James R. Means, Jr. are active Republicans. Ryan, from the 3rd District, will testify as to her experience as to the political dynamics on the ground, including changing voting patterns in northeastern Pennsylvania and why Representative Kelly ran unopposed in 2016. Means lives in the 18th Congressional District, which will hold a special election in March 2018. Joint Stip. of Fact ¶ 223. He will testify about the voter confusion that could result from the impact of changing districts for November 2018, involving the circulation of nomination petitions for a new district before the special election for the old district is even held.

CONCLUSION

WHEREFORE, the Intervenor respectfully request this Honorable Court to deny Petitioners' Motion in Limine to Exclude Intervenor Witness Testimony.

Respectfully submitted,

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