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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

CAROL ANN CARTER, et al.,
Petitioners,
v.
VERONICA DEGRAFFENREID, in her official capacity
as Acting Secretary of the Commonwealth of
Pennsylvania, et al.,
Respondents.

No. 132 MD 2021

**MEMORANDUM IN OPPOSITION TO THE
APPLICATION FOR LEAVE TO INTERVENE BY
CERTAIN VOTERS OF THE COMMONWEALTH OF PENNSYLVANIA**

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Respondents, Acting Secretary of the Commonwealth Veronica Degraffenreid and Director of the Bureau of Election Services and Notaries Jessica Mathis, file this Memorandum in Opposition to the Application for Leave to Intervene (“App.”) of certain Voters of the Commonwealth of Pennsylvania (“Proposed Voter Intervenors”).

I. INTRODUCTION

In this case, a group of Pennsylvania voters allege that Pennsylvania’s current congressional district map has become unconstitutionally malapportioned over a decade of population shifts. The Petitioners ask this Court to enjoin Respondents from using this map, and to schedule prompt Congressional redistricting to ensure that Petitioners’ votes will have the same weight as other Pennsylvanians’ votes in upcoming Congressional elections. They ask the Court to put procedures in place for mapping the Commonwealth’s Congressional districts in the event that Pennsylvania’s political branches are unable to agree on a map in time for the 2022 primary election.

Several Pennsylvania voters have filed the instant Application to Intervene, stating that they seek to enforce the rights of the General Assembly to carry out its constitutionally mandated duties. According to Proposed Voter Intervenors, they voted for members of the General Assembly, and therefore have a legally enforceable interest in ensuring that the General Assembly can carry out its

functions. Proposed Voter Intervenors' Application to Intervene ("App.") ¶¶ 42-44. Proposed Voter Intervenors also assert an interest in a specific partisan outcome: they allege that "Democrat Justices" on the State Supreme Court should not infringe on the abilities of the "duly elected Republican-majority General Assembly" to legislate, even if the General Assembly and the Commonwealth's executive branch arrive at an impasse. *Id.* ¶ 43.

The Court should deny Proposed Voter Intervenors' Application. First, under Pennsylvania and Federal law, voting for members of a legislature does not confer a legally enforceable interest in the legislature's right to carry out its duties. Second, Proposed Voter Intervenors assert no basis for the contention that their interests will be harmed by the alleged partisan makeup of Pennsylvania's appellate courts. Finally, even if Proposed Voter Intervenors could show that they have a legally cognizable interest that is implicated here, the Court should deny intervention, because Proposed Voter Intervenors' interests are adequately represented by others and permitting their intervention would encourage partisan contentiousness that would impair the orderly resolution of this case.

II. BACKGROUND

A. The Allegations of the Petition for Review

In the Petition for Review,¹ a group of Pennsylvania voters allege that the results of the 2020 Census confirmed that due to significant population shifts, Pennsylvania's congressional districts are unconstitutionally malapportioned. Pet. ¶¶ 22-28. Petitioners further claim that they are Pennsylvania voters who reside in overpopulated and malapportioned congressional districts, which must be redistricted in order to prevent the unconstitutional dilution of their votes. *Id.* Petitioners allege concern that this redistricting will not happen in a timely fashion because Pennsylvania's executive and legislative branches are likely to reach an impasse. *Id.* at ¶¶ 29-33. Consequently, Petitioners ask the Court to, *inter alia*, set a deadline for the political branches to agree on a map; if the political branches do not do so, Petitioners contend, the Court should draft a map that complies with all relevant law. *Id.* at ¶ 21.

Importantly, Petitioners do not ask the Court to issue a redistricting map that favors one party or the other. Although they allege that they intend to vote for Democratic candidates, *id.* ¶ 11, they do not contend that their interest in this lawsuit is to ensure that such candidates are elected, and they do not ask this Court to ensure a particular political outcome. Indeed, it would be improper for

¹ Respondents' Answer or Preliminary Objections to the Petition are due on July 1, 2021. At this point, Respondents express no opinion on the Petition's merits or procedural propriety.

Petitioners to advocate for purely partisan goals, because it would be improper for this Court to advance such goals.

B. The Applications to Intervene

More than a month ago, on June 1, 2021, two groups of allegedly interested persons filed applications to intervene. First, four Republican leaders of the Pennsylvania House and Senate (the “Legislator Intervenors”) applied to intervene, arguing that they have a cognizable interest in protecting their roles as legislators in the redistricting process. Respondents submitted a response stating that they take no position on the Legislator Intervenors’ application. Second, the Republican Party of Pennsylvania and individual Republican voters (the “Republican Party Intervenors”) filed a separate application to intervene, arguing that they had a cognizable interest in advocating for an outcome that would further Republican interests. Respondents opposed the Republican Party Intervenors’ application on the following grounds: (1) the desire to aggrandize a party’s political power, without more, is not an interest that the courts can recognize or protect, (2) assertions of harm based on unsupported and improper assumptions that Pennsylvania’s appellate courts will not rule in accordance with Pennsylvania law were purely speculative, and (3) even if the Republican Party Intervenors could show that they have a legally cognizable interest, the Court should deny intervention because the Republican Party Intervenors’ interests are adequately

represented by others and intervention would create a partisan sideshow. *See* Respondents’ Opposition to the Application to Intervene of the Republican Party and Republican Voters.

Proposed Voter Intervenors’ Application contains elements of both of the previously filed Applications to Intervene. First, Proposed Voter Intervenors contend that they have a legally cognizable interest in enforcing the right of Pennsylvania’s General Assembly to conduct congressional redistricting following the 2020 Census. App. ¶¶ 38-52. Second, Proposed Voter Intervenors claim that allowing a judiciary that is purportedly dominated by members of the Democratic party to carry out congressional redistricting will in effect nullify their votes cast in the 2020 election for Republican local officials. App. ¶¶ 43-44. Proposed Voter Intervenors suggest that Respondents cannot represent their interests in this action. App. ¶ 56.

III. ARGUMENT

A. The Proposed Voter Intervenors’ Asserted Interests Do Not Meet the Criteria for Intervention Set Forth in Pa. R. Civ. P. 2327

In order to establish a right to intervene, Proposed Voter Intervenors must first show that they meet one of the four threshold criteria set forth in Pennsylvania Rule of Civil Procedure 2327. *See In re Phila. Health Care Trust*, 872 A.2d 258, 261 (Pa. Commw. Ct. 2005) (“if the petitioner does not show himself to be within one of the four classes described in Rule 2327, intervention must be denied”)

(emphasis omitted)). Proposed Voter Intervenors contend that this Court must grant their application to intervene because they meet two of the Rule 2327 criteria: that they “could have joined as an original party in the action or could have been joined therein,” Pa. R. Civ. P. 2327(3), and that the determination of this action may affect a legally enforceable interest that they hold, Pa. R. Civ. P. 2327(4).² App. ¶ 34. Contrary to Proposed Voter Intervenors’ assertions, they could not have joined as original parties in this action, and Proposed Voter Intervenors’ purported interest in ensuring that the General Assembly carry out its duties is not a “legally enforceable interest” for purposes of the Rule, and does not permit them to intervene.

1. Proposed Voter Intervenors Could Not Have Joined as Original Parties in This Action

Proposed Voter Intervenors argue that they represent the “mirror-image” of Petitioners because both groups are “Pennsylvania registered voters” who intend to advocate for candidates from their respective political parties in the 2022 primary and general elections. App. ¶ 41. On this basis, Proposed Voter Intervenors state that intervention is “uniquely appropriate.” *Id.* ¶ 40. But Proposed Voter

² Prospective Voter Intervenors do not contend that any of Rule 2327’s other categories apply here. *See* Pa. R. Civ. P. 2327(1) (authorizing intervention where “the entry of a judgment ... or the satisfaction of such judgment will impose any liability upon [the intervenor] to indemnify in who or in part the party against whom judgment may be entered”); Pa. R. Civ. P. 2327(2) (authorizing intervention by a “person ... so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof”).

Intervenors plainly could not have joined as petitioners because they directly oppose the relief sought in the Petition.

Indeed, Proposed Voter Intervenors have submitted proposed Preliminary Objections arguing that the Petition should be dismissed on the alleged grounds that, *inter alia*: Petitioners lack standing; Petitioners' claims are not ripe and thus not justiciable; and the Court cannot lawfully grant the relief requested.

[Proposed] Voter [Intervenors'] Preliminary Objections ¶¶ 3-37. *See* Pa. R. Civ. P. 2229(a) (to be properly joined as a plaintiff/petitioner, a party must assert a “right to relief ... in respect of the [transaction or occurrence pled in the complaint/petition]” that raises a “common question of law or fact affecting the rights to relief of all [plaintiffs/petitioners]”).

Proposed Voter Intervenors also could not have been originally joined as respondents because the Petition does not allege any wrongdoing by the Proposed Voter Intervenors nor seek to compel any action from them. *See* Pa. R. Civ. P. 2229(b) (only persons against whom the plaintiff “asserts a[] right to relief” may be joined as defendants/respondents). Accordingly, Pa. R. Civ. P. 2327(3) provides no basis for granting Proposed Voter Intervenors' application.

2. Proposed Voter Intervenors Fail to Identify a Legally Enforceable Interest in This Action

Proposed Voter Intervenors incorrectly contend that the General Assembly's ability to draw congressional district map confers a “legally enforceable interest”

sufficient to support intervention in this matter. This Court described the nature of the requisite legal interest for intervention in *In re Philadelphia Health Care Trust*, 872 A.2d 258 (Pa. Commw. Ct. 2005). In affirming the trial court’s denial of a motion to intervene, this Court observed that the proposed intervenors had failed to demonstrate “an interest which is substantial, direct, and immediate.” *Id.* at 262 (quoting *In re Francis Edward McGillick Found.*, 642 A.2d 467, 469 (Pa. 1994)). As the Court explained, a legally enforceable interest is one that would be sufficient to establish standing. *Id.*; *see also Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016) (observing that “whether Appellants were properly denied intervenor status ... turns on whether they satisfy our standing requirements”). In particular, to qualify as “substantial,” the interest at issue must be “peculiar” and “individualized,” *Pittsburgh Palisades Park, LLC v. Commonwealth*, 888 A.2d 655, 600 (Pa. 2005); “there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law,” *In re Phila. Health Care Trust*, 872 A.2d at 262; *accord Markham*, 136 A.3d at 143 (explaining that “a generalized grievance regarding the workings of government that all citizens share[.]” is insufficient to confer standing). Proposed Voter Intervenors do not satisfy this requirement.

Here, the Proposed Voter Intervenors’ alleged grievance is that the relief sought by Petitioners will purportedly violate the Elections Clause of the United

States Constitution, which grants the Legislatures of each state the power to prescribe the “Times, Places and Manner of holding elections for Senators and Representatives.” App. ¶ 22 (citing U.S. Const. art. I, § 4). It is well established, however, that voters lack standing to enforce an alleged interest in the legislature’s carrying out its constitutionally prescribed duties. Indeed, Proposed Voter Intervenor’s allegations present a quintessential example of a generalized grievance insufficient to confer standing. *See Lance v. Coffman*, 549 U.S. 437, 441-42 (2007) (voters lacked standing to bring claim that decision by Colorado Supreme Court had “depriv[ed] the legislature of its responsibility to draw congressional districts” in violation of the Elections Clause of the U.S. Constitution; “[t]his injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government” that is insufficient to establish standing); *see also Corman v. Torres*, 287 F. Supp. 3d 558, 573 (M.D. Pa. 2018) (three-judge panel) (finding that the plaintiffs’ Elections Clause claims, which sought to vindicate “the [alleged] prerogatives of the Generally Assembly” in the congressional redistricting process, “belong, if they belong to anyone, only to the Pennsylvania General Assembly”).

Apparently recognizing that they lack standing, Proposed Voter Intervenor claim that “an individual seeking to intervene in action need only establish an interest of such nature that participation ... may be in the public interest.” App.

¶ 45 (citing *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283 (Pa. Commw. Ct. 2019)). Proposed Voter Intervenors’ reliance on *Sunoco Pipeline* is entirely misplaced. There, this Court did not apply the intervention standards set forth in Pa. R. Civ. P. 2327–2329, which are applicable to civil litigation generally, but instead considered specific regulatory provisions governing proceedings before the Public Utility Commission (PUC). *See Sunoco Pipeline*, 217 A.3d at 1288-89 (quoting 52 Pa. Code §§ 5.72(a)(3) and 5.75(c), which specifically state that a person seeking to intervene in a PUC proceeding need *not* have a “direct interest,” but need only have an “interest of such nature that participation ... may be in the public interest”). That regulatory standard has no application here, and Proposed Voter Intervenors cannot point to any statutory or regulatory provision that would allow them to intervene in this action without establishing a “substantial, direct, and immediate” interest in its outcome. *See Markham*, 136 A.3d at 140 (explaining that “whether Appellants were properly denied intervenor status ... turns on whether they satisfy our standing requirements”).

To the extent Proposed Voter Intervenors assert an interest in the drawing of a redistricting plan that aggrandizes the partisan power of their preferred political party, that alleged interest likewise fails to establish standing. *See Gill v. Whitford*, 138 S. Ct. 1916, 1932 (2018) (finding that the mere assertion of an interest in

“achieving a Democratic majority in the legislature” is insufficient).³ In drawing congressional districts, legislatures and courts alike must adhere to legal principles and not partisan politics. Indeed, when called upon to prepare a lawful congressional redistricting plan following the political branches’ failure to do so, a court must accomplish this task in a manner “free from any taint of arbitrariness or discrimination.” *Connor v. Finch*, 431 U.S. 407 at 415 (quoting *Roman v. Sincock*, 377 U.S. 695, 710 (1964)).

In sum, Proposed Voter Intervenors do not have standing to enforce the alleged rights of the legislature to carry out its duties, nor do they have a cognizable legal interest in aggrandizing the power of a particular political party.

Accordingly, Pa. R. Civ. P. 2327(4) does not authorize Proposed Voter Intervenors’ intervention.

B. Even If Proposed Voter Intervenors Could Satisfy the Criteria in Rule 2327, Their Application Would Properly Be Denied Under Rule 2329

Although failure to come within one of the categories set forth in Rule 2327 necessarily precludes intervention, satisfaction of the Rule is not similarly dispositive. Rule of Civil Procedure 2329 sets forth several factors that give a court discretion to refuse an application for intervention, even if the proposed

³ Proposed Voter Intervenors further assert the thinly veiled notion that the Pennsylvania Supreme Court will ignore the law in favor of partisanship because a majority of its justices are registered as Democrats. App. ¶ 43. Such an unfounded—not to mention irresponsible—assertion cannot serve as the basis for standing to intervene in this matter.

intervenor has made an adequate showing under Rule 2327.

[A]n application for intervention may be refused, if ...

...

(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.

Pa. R. Civ. P. 2329(2), (3). Here, even if Proposed Voter Intervenors could bring themselves within Rule 2327, the factors set forth in paragraphs (2) and (3) would each weigh heavily in favor of a discretionary denial of intervention.

1. Proposed Voter Intervenors' Asserted Interest in Protecting the Integrity of the Redistricting Process Is Well Represented by Respondents

Proposed Voter Intervenors argue that Respondents do not represent their interests in this case because the Respondents are political appointees. *See* App. ¶ 56. Proposed Voter Intervenors further assert that because they voted for Republican candidates in the 2020 election to represent their interests in the redistricting process, the officials appointed by a Democratic-affiliated executive do not represent their interests. *Id.* But as discussed in Respondents' Memorandum of Law in Opposition to the Application for Leave to Intervene of the Republican Party of Pennsylvania and Independent Republican Voters (filed June 15, 2021), *see* § III.A.2.(a), the goal of maximizing partisan political power,

without more, is not a legally enforceable interest that can support intervention. Further, to the extent Proposed Voter Intervenors assert an interest in ensuring that the laws governing the redistricting process are faithfully applied, and in protecting that process from the supposed threat of improper judicial action alleged in Proposed Voter Intervenors' Application, that interest is fully protected by Respondents.

As neutral election administrators, Respondents are charged with impartially executing the law and protecting the integrity of all election-related process. Respondents will vigorously oppose—as they are duty-bound to do—*any* attempt to subordinate the law to partisan goals. To the extent Respondents assert a legitimate interest in protecting the redistricting process from improper partisan motivations, that interest is “already adequately represented” by existing parties to this litigation. Pa. R. Civ. P. 2329(2). Accordingly, Rule 2329(2) provides yet another reason to refuse intervention.

2. The Proposed Intervention Threatens to Disrupt and Delay This Proceeding With Irrelevant Partisan Arguments and Attempts to Undermine Pennsylvania's Court System

While this case has its roots in the political world, the issues that the Court must decide are not in themselves political. The rules of standing, ripeness, and pleading apply equally to parties of all political persuasions, as do the laws governing Congressional redistricting. The Court does not—and cannot—favor

one outcome over the other based on political partisanship. Indeed, Proposed Voter Intervenors make clear that their interests in choosing the candidates who share their preferred political affiliation will be diminished if a Democrat elected judiciary undertakes the drawing of congressional districts. This level of partisanship, with no factual support to establish the contention that the Court will rule based on partisan preference rather than law, or that Respondents will ignore their duty to impartially execute the law, will only serve to “embarrass or prejudice the trial or the adjudication of the rights of the parties.” Pa. R. Civ. P. 2329(3). Here, permitting Proposed Voter Intervenors to intervene would not only introduce a host of additional parties and multiply the pleadings; it would introduce irrelevant and inappropriate elements into the case that would undoubtedly delay and complicate the proceedings, and would likely mire this action in a contest of partisanship. That would not be fair to the Court, the existing parties, or the public. Given this fact, and the fact that whatever legitimate interests the Proposed Voter Intervenors have are adequately represented by others, the Court should also deny the Application on the basis of Rule 2329(3).

IV. CONCLUSION

For the foregoing reasons, Respondents respectfully request that Proposed Voter Intervenors' Application be denied.

Respectfully submitted,

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Dated: July 2, 2021

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CERTIFICATION REGARDING PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Dated: July 2, 2021

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