

Aria C. Branch
Perkins Coie LLP
700 Thirteenth Street NW, Suite 800
Washington, D.C. 20005-3960
ABranch@perkinscoie.com
T: (202) 654-6200
F: (202) 654-6211

Abha Khanna
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
AKhanna@perkinscoie.com
T: (206) 359-8000
F: (206) 359-9000

Robert J. Clark, No. 308105
Edward D. Rogers, No. 69337
Marcel S. Pratt, No. 307483
Michael R. McDonald, No. 326873
Paul K. Ort, No. 326044
Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
ClarkR@ballardspahr.com
RogersE@ballardspahr.com
PrattM@ballardspahr.com
McDonaldM@ballardspahr.com
OrtP@ballardspahr.com
T: (215) 665-8500
F: (215) 864-8999

Counsel for Petitioners

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

CAROL ANN CARTER; MONICA PARRILLA;
REBECCA POYOUROW; WILLIAM TUNG; ROSEANNE
MILAZZO; BURT SIEGEL; SUSAN CASSANELLI; LEE
CASSANELLI; LYNN WACHMAN; MICHAEL
GUTTMAN; MAYA FONKEU; BRADY HILL; MARY
ELLEN BALCHUNIS; TOM DEWALL; STEPHANIE
MCNULTY; and JANET FEMIN,

Petitioners,

v.

VERONICA DEGRAFFENREID, in her official capacity as
the Acting Secretary of the Commonwealth of Pennsylvania;
JESSICA MATHIS, in her official capacity as Director for
the Pennsylvania Bureau of Election Services and Notaries,

Respondents.

No. 132 MD 2021

**PETITIONERS' MEMORANDUM IN OPPOSITION TO THE
APPLICATION TO INTERVENE BY THE PENNSYLVANIA
REPUBLICAN PARTY AND INDIVIDUAL REPUBLICAN VOTERS**

INTRODUCTION

Petitioners, who live in congressional districts that are currently malapportioned, filed this action to protect their voting rights to ensure a constitutional map would be enacted in time for the 2022 primary elections, asking this Court to implement a redistricting plan should the General Assembly and Governor fail to do so in the first instance. The Republican voters who seek to intervene in this case do not do so to similarly protect their constitutional rights, but to ensure their party's political interests are represented in this litigation. That interest is a policy preference, not a legally enforceable interest as required for intervention. While the Republican Party and Republican candidates also seek to intervene, the Pennsylvania Supreme Court has held that, because the right to vote is personal and individual in nature, only voters can have legally enforceable interests in redistricting litigation—not parties, not candidates, and not politicians. At bottom, the Proposed Intervenors' interest in this litigation is not legal, but political. Because intervention requires a legal stake in the controversy, this Court should deny the Application to Intervene. If the Republican Party or its voters wish to advance their political perspectives, they should do so through an amicus brief.

BACKGROUND

On April 26, 2021, the same day the Census Bureau publicly released its apportionment counts, Petitioners filed this action in the Commonwealth Court. The 2020 Census confirmed that, as a result of significant population shifts in the past

decade, Pennsylvania's congressional districts are now unconstitutionally malapportioned. *See* Pet. ¶ 22-28. Petitioners are registered Pennsylvania voters who reside in now-overpopulated congressional districts and are consequently "deprived of the right to cast an equal vote, as guaranteed to them by the U.S. Constitution and the Pennsylvania Constitution." Pet. ¶ 11-12. Petitioners named as Respondents Acting Secretary Degraffenreid and Director Mathis of the Pennsylvania Bureau of Election Services and Notaries, both of whom are responsible for administering Pennsylvania's elections and enforcing the election code. *See* Pet. ¶ 13-14.

Petitioners' suit is not novel. Pennsylvania courts have previously heard such malapportionment suits following the decennial census. *See, e.g., Mellow v. Mitchell*, 530 Pa. 44, 607 A.2d 204 (1992) (hearing petition asking court to declare Pennsylvania's congressional districts unconstitutional after 1990 census and expected impasse in redistricting). Just as in *Mellow*, Petitioners in this action ask the court "to declare Pennsylvania's current congressional district plan unconstitutional; enjoin Respondents from using the current plan in any future elections; [and] implement a new congressional district plan that adheres to the constitutional requirement of one-person, one-vote should the General Assembly and Governor fail to do so." Pet. ¶ 1.

Five weeks after Petitioners filed this action, 28 proposed intervenors, including the Republican Party of Pennsylvania, potential Republican candidates,

and Republican voters (the “Proposed Intervenors”), filed the instant Application to Intervene. The Proposed Intervenors allege a variety of nebulous interests in this litigation, most prominently among them ensuring that Pennsylvania’s highest court has no input on Pennsylvania’s congressional maps. *See* App. ¶ 93 (“The Republican Party of Pennsylvania has reason to believe that its competitive interests may be diminished if the Supreme Court of Pennsylvania controls redistricting because the Court’s composition is majority Democratic.”); App. ¶ 103 (“If control over redistricting is ultimately placed in the hands of the Supreme Court of Pennsylvania, a map will be drawn that could harm the interests of Individual Republican Voters.”). The Proposed Intervenors further indicate they “will assert defenses to Petitioners’ claims but will not raise claims against the named Respondents.” *See* App. ¶ 126. The same day the Proposed Intervenors applied to intervene, the Pennsylvania Republican Legislative Leadership filed a separate Application to Intervene, to which Petitioners have responded in a separate memorandum.

LEGAL STANDARD

Applications to intervene are evaluated under Rules 2327 and 2329 of the Pennsylvania Rules of Civil Procedure. To intervene, Proposed Intervenors must establish that “the determination of [this] action may affect any legally enforceable

interest” of the Proposed Intervenors.¹ *See* Pa. R.C.P. 2327(4). In determining whether a party has a “legally enforceable interest” for purposes of intervention, courts look to principles governing legal standing. *See Markham v. Wolf*, 635 Pa. 288, 297, 136 A.3d 134, 140 (2016) (“[W]hether Appellants were properly denied intervenor status . . . turns on whether they satisfy our standing requirements.”); *Application of Biester*, 487 Pa. 438, 443, 409 A.2d 848, 851 (1979) (vacating order granting intervention where applicant lacked standing to advance the actions).

A party has standing where they have “a substantial, direct, and immediate interest in the matter.” *Markham*, 635 Pa. at 298. “The fact that the proceeding may, in some way, affect the proposed intervenor is not sufficient to invoke a ‘legally enforceable interest.’” *In re L.J.*, 450 Pa. Super. 685, 700, 691 A.2d 520, 527 (Pa. Super. 1997) (citing *In re Subpoena of Pa. Crime Comm’n*, 453 Pa. 513, 309 A.2d. 401 (1973) (denying intervention where interest was too general and indirect to support intervention); *Pa. R.R. Co. v. Hughart*, 422 Pa. 615, 619, 222 A.2d 736, 739 (1966) (denying intervention where applicants’ interest was “too tangential” to the

¹ The Proposed Intervenors do not contend that they qualify to intervene under subsections (1) and (2) of Rule 2327. The Proposed Intervenors do contend, in one sentence in their Application, that they also qualify under subsection (3) of Rule 2327—that they “could have joined as an original party in the action or could have been joined therein.” App. ¶ 37. The Proposed Intervenors then neglect to pursue this argument in their Application, instead resting only on Rule 2327(4) as a basis for intervention. Thus, they have waived this argument. In any event, for the reasons explained throughout this memorandum, because the Proposed Intervenors have not shown a “legally enforceable interest” in this litigation, they could not have been original Petitioners to this action, nor could they have plausibly been joined as Respondents as they are not state actors and therefore not responsible for implementation or enforcement of an apportionment plan.

proceedings)). Accordingly, “a mere general interest in the litigation, or an interest in the issue that is collateral to the basic issues in the cause, or an indirect economic interest or motive with respect to the litigation, is not a sufficient basis for intervention pursuant to [Rule 2327].” *Bauder v. Bauder*, No. 2012-40250 (Pa. D. & C. Mar. 17, 2014) (citing 7 Goodrich Am Ram 2d, § 2327:8).

Finally, even if Proposed Intervenors satisfy Rule 2327(4), this Court may still deny intervention if their interests are already adequately represented in the litigation, or if the intervention would “unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.” Pa. R.C.P. 2329; *Wilson v. State Farm Mut. Auto. Ins. Co.*, 512 Pa. 486, 492, 517 A.2d 944, 947 (1986) (explaining, under Rules 2327 and 2329, “a mere prima facie basis for intervention is not enough . . .” and that Rule 2329 can otherwise preclude intervention to a party who has already shown a legally enforceable interest).

ARGUMENT

- I. The Proposed Intervenors have no legally enforceable interests in this action.**
 - A. Neither the Pennsylvania Republican Party nor Republican candidates have a legally enforceable interest in this action.**

In their Application to Intervene, the Republican Party of Pennsylvania and Republican candidates gloss over a fundamental tenet of Pennsylvania redistricting litigation: entities other than individual voters do not, as a matter of law, have a

“substantial, direct and immediate” interest in challenges to reapportionment plans. *See Albert v. 2001 Legislative Reapportionment Comm’n*, 567 Pa. 670, 678-79, 790 A.2d 989, 994 (2002); *Erfer v. Commonwealth*, 568 Pa. 128, 135-36, 794 A.2d 325, 329-30 (2002), *overruled on other grounds by League of Women Voters v. Commonwealth*, 645 Pa. 1, 178 A.3d 737 (2018). In *Albert*, a malapportionment challenge to Pennsylvania’s legislative districts, the Pennsylvania Supreme Court explicitly considered whether non-voting entities (in that case, Chairs of the Republican and Democratic Committees, Boards of Commissions, and Townships) had a direct interest in a redistricting challenge sufficient for standing. In concluding they did not have standing, the Court explained the “subject matter of a reapportionment challenge” is “the right to vote and the right to have one’s vote counted,” and thus, any non-voting entity lacked a direct interest in the outcome of the litigation. *Albert*, 657 Pa. at 678-79. This rule, moreover, was meant to vindicate the “personal and individual” voting rights at stake in the case. *See id.* at 679 (citing *Reynolds v. Sims*, 377 U.S. 533, 544-55, 561 (1964)).

Albert’s holding was soon reaffirmed in *Erfer v. Commonwealth*. In that case, a political gerrymandering challenge to Pennsylvania’s congressional districts, the Pennsylvania Supreme Court rejected the Republican Legislative Leadership’s argument that only the Pennsylvania State Democratic Committee could bring a partisan gerrymandering claim. *See Erfer*, 568 Pa. at 136-37. In fact, in response to

this argument, the Pennsylvania Supreme Court explained it had adopted the “mirror-opposite” position, noting that political committees would not have the requisite direct interest in redistricting litigation sufficient to participate as a party. *See id.*

While the Republican Applicants note that “[c]ourts in Pennsylvania have frequently granted intervention status to [] the Republican Party of Pennsylvania,” App. ¶ 44, the lone case they cite for this proposition, *Pa. Democratic Party v. Boockvar*, No. 133 MM 2020 (Pa. Sept. 3, 2020), was not redistricting litigation, but instead litigation challenging specific rules for mail-in voting. In all respects, *Albert*, a malapportionment challenge to Pennsylvania districts which held that non-voting entities did not have a direct interest in the litigation, is far more applicable to Petitioners’ present malapportionment claim.²

The Proposed Intervenors’ Application fails to grapple with *Albert* and *Erfer*’s holdings entirely, instead arguing the Pennsylvania Supreme Court has “recognized a political party is injured in redistricting cases when the enacted map causes one political party to be so disadvantaged that it lacks political power.” App. ¶ 79 (citing

² It is true that in *League of Women Voters v. Commonwealth*, 645 Pa. 1 (2018), a partisan gerrymandering challenge under the Pennsylvania Constitution, the Commonwealth Court permitted Republican candidates for Congress to intervene, but those candidates were also self-described registered voters in Pennsylvania. *See id.* at 741 n.5. The natural assumption, therefore, is this intervention was proper based on the candidates’ status as voters, particularly because the Commonwealth Court otherwise held that non-voting entities (such as the League of Women Voters of Pennsylvania) did not have standing to remain in the case. *Id.* at 741 n.3.

Erfer and *League of Women Voters of Pennsylvania*). But the Pennsylvania Supreme Court has done no such thing. As previously discussed, the *Erfer* Court explicitly disclaimed any political party's potential injury in partisan gerrymandering litigation, instead placing the focus on voters, *see* 568 Pa. at 136-37. The *League of Women Voters* Court similarly put the focus on voters, not political parties. *See League of Women Voters*, 45 Pa. at 117 (explaining, "for our form of government to operate as intended, each and every Pennsylvania voter must have the same free and equal opportunity to select his or her representatives" and holding that "partisan gerrymandering dilutes *the votes* of those who in prior elections voted for the party not in power to give the party in power a lasting electoral advantage") (emphasis added). In any event, Petitioners do not bring a partisan gerrymandering challenge to Pennsylvania's districts; they bring a malapportionment challenge. Any potential injury to a political party from partisan gerrymandering is thus immaterial in this litigation.

B. The Republican Voter Applicants have not alleged a legally enforceable interest in this action.

While the Republican Voter Applicants are not categorically barred from intervening in this litigation like the Republican Party and its candidates, their Application fails to allege any harm or legally enforceable interest arising from the instant litigation.

At the outset, the Republican Voter Applicants' assertion that, "[i]f this Court finds that Petitioners have standing, then the individual Proposed Intervenors must also have standing in this matter," App. ¶ 101, is untenable given that the Petitioners and Republican Voter Applicants have not alleged remotely similar harms. Petitioners, for example, are Pennsylvania voters residing in over-populated congressional districts, and their asserted harm is specifically that their votes will be diluted compared to other Pennsylvania voters who live in now under-populated districts. *See* Pet. ¶ 12 (because Petitioners reside in "overpopulated relative to other districts in the state . . . they are deprived of the right to cast an equal vote, as guaranteed to them by the U.S. Constitution and the Pennsylvania Constitution"). This is a concrete harm under Pennsylvania law. *See, e.g., League of Women Voters*, 645 Pa. at 117 ("It is axiomatic that a diluted vote is not an equal vote, as all voters do not have an equal opportunity to translate their votes into representation."). The Republican Voter Applicants have alleged no such harm; indeed, they have expressly renounced any such claims against the Respondents. *See* App. ¶ 126. For this reason, Petitioners' interests are simply not the same as the Republican Voter Applicants' interests, who, of course, attempted to intervene in this litigation as *respondents*, not as petitioners claiming injury to their voting rights.

In truth, the interest the Republican Voter Applicants have put forward in this litigation is their interest in ensuring a Republican-controlled Legislature draws

congressional district lines, rather than, in their words, a “Democratic-majority” controlled judiciary. App. ¶ 93; *see also* App. ¶ 103 (“If control over redistricting is ultimately placed in the hands of the Supreme Court of Pennsylvania, a map will be drawn that could harm the interests of Individual Republican Voters.”). But this argument (1) rests on a mischaracterization of Petitioners’ claims and relief sought, and (2) improperly attempts to transform a policy preference into a legal interest.

First, while the Republican Voter Applicants claim that the Petitioners seek to wrest control over redistricting from the Republican-controlled Legislature to a “Democratic-majority” judiciary (arguing, “[t]he Petitioners seek to short-circuit an inherently political process vested in the political branches of government and transfer that political authority to this Court,” App. ¶ 80), Petitioners seek no such thing. While Petitioners do contend a redistricting impasse is exceedingly likely given the current divided government, Petitioners do not ask this Court to seize the power to redistrict from the Legislature. Instead, Petitioners ask this Court “to implement a new congressional district plan that adheres to the constitutional requirement of one-person, one-vote *should the General Assembly and Governor fail to do so.*” Pet. ¶ 1 (emphasis added); *see also* Pet. Prayer for Relief (b) (requesting the Court “[e]stablish a schedule that will enable the Court to adopt and implement a new congressional district plan by a date certain should the political branches fail to enact such plan”). Such requests are grounded in the reality that

redistricting plans do not spring from thin air; should the Court need to adopt one, it will need to appoint a Special Master and undertake the fact-intensive task of considering and drafting congressional plans consistent with redistricting principles and constitutional doctrines, including conducting hearings on plans proposed by the various parties and potential amici. This process does not and cannot happen overnight. Asking the Court to recognize this reality does not impermissibly intercede on the Legislature's power to redistrict in the first instance.

More importantly, however, the Republican Voter Applicants do not have a legally enforceable interest in having a Republican-controlled Legislature draw district lines rather than a "Democratic-majority" judiciary. They may have a policy preference in this outcome, but policy preferences are not legally enforceable interests that courts are required to vindicate. The "direct interest" pertinent in redistricting litigation, after all, is the "personal and individual" "right to vote and the right to have one's vote counted," *Albert*, 657 Pa. at 678-679, not the right to have district lines drawn by one's preferred political party.³

³ While Republican voters were granted intervention in *League of Women Voters of Pennsylvania*, see 178 A.3d at 741 n.5, that case concerned a partisan gerrymandering challenge to Pennsylvania's congressional districts, heightening the partisan interests at stake in that case. Such concerns are not present in a malapportionment challenge, such as this one, in which Petitioners do not challenge a plan's favoritism for the opposing political party but rather challenge the State's enforcement of a plan that violates the constitutional (and partisan-neutral) principle of one-person one-vote.

At bottom, the Proposed Intervenors' interest in these proceedings is just that—political, not legal. They simply seek to ensure the “Democratic Petitioner’s” suit does not succeed. *See* App. ¶ 57. But “[t]he interest justifying intervention must be a right or liability recognized and enforceable at law or in equity as distinguished from an . . . interest in seeing one litigant or another prevail in the proceedings.” *Marion Power Shovel Co., Div. of Dresser Indus. v. Fort Pitt Steel Casting Co., Div. of Conval-Penn*, 285 Pa. Super 45, 54, 426 A.2d 696, 701 n.7 (Pa. Super. 1981) (internal citation omitted). Because the Proposed Intervenors have not identified a legally enforceable interest, their application to intervene must be denied. *See* Pa. R.C.P. 2327; *Biester*, 487 Pa. at 443 (vacating order granting intervention where applicant lacked standing).

II. Good cause exists to deny the application.

Even if this Court were to conclude the Republican Voter Applicants established a legally enforceable interest in this litigation, the Court may still deny intervention if the Court concludes the interests of the applicants will be “adequately represented” in the litigation or intervention will “unduly delay, embarrass or

prejudice the trial or the adjudication of the rights of the parties.” Pa. R.C.P. § 2329(2)-(3).⁴

First, this Court should deny the Republican Voter Applicants’ application for intervention because they are already adequately represented by Acting Secretary Degraffenreid. While the Proposed Intervenors attempt to explain why the Republican Party’s and Republican candidates’ interests may diverge from the Secretary, *see* App. ¶¶ 113-120, they make no attempt to explain why voters are not adequately represented by the Secretary, particularly when both seek to defend the litigation. While the Proposed Intervenors do note that, “[o]n information and belief, the named Respondents do not take the same position as the Proposed Intervenors,” App. ¶ 125, a proposed intervenor’s “desire to pursue a preferred litigation strategy or defense theory [is] not an interest entitling [them] to intervene.” *Pa. Ass’n of Rural & Small Schools v. Casey*, 531 Pa. 439, 445, 613 A.2d 1198, 1201 (Pa. 1992).

Second, this Court should deny intervention to the Republican Voter Applicants because adding 27 more Respondents to the litigation will unnecessarily complicate a case that already has numerous parties. *See E. Am. Transp. & Warehousing, Inc. v. Evans Conger Broussard & McCrea, Inc.*, No. 2187, 2002 WL 1803718, at *4 (Pa. Ct. Com. Pl. July 31, 2002) (denying intervention under Rule

⁴ Because the Republican Party and Republican candidates are categorically barred from intervening in this litigation for the reasons discussed *supra* at 6-9, Petitioners address the Rule 2329 factors only as they apply to the Republican Voter Applicants.

2329(3) where there were already many parties in the case and allowing intervention “would unnecessarily delay and complicate” the case). The need to move swiftly is particularly important in redistricting litigation. Drawing a reapportionment plan is no small task and must often be completed in a matter of months, if not mere weeks, or even days. *See, e.g., Erfer*, 568 Pa. at 132 (Pennsylvania Supreme Court ordered Commonwealth Court to hear redistricting claims on an expedited basis and produce findings of fact and conclusions of law within two weeks of the Court’s order). Including the Republican Voter Applicants as parties in this case (who are already attempting to modify the schedule before being granted intervention) will likely only increase the discovery disputes and briefing to which all the parties must respond on an already expedited timeline.⁵ For that reason, too, the Court should exercise its discretion under Rule 2329 to deny leave to intervene.

Finally, denying the Republican Voter Applicants leave to intervene does not necessarily mean that the Republican Party’s interests will be wholly excluded from this case. Petitioners suggest that, as non-parties interested in the questions involved in this case, the Proposed Intervenors seek leave to participate as amici curiae, *see* Pa.R.A.P. 531—a request Petitioners would not oppose.

⁵ Proposed Intervenors have already complicated this litigation by, for example, filing an Application for Extraordinary Relief—to which Petitioners were required to respond—before the Republican Voter Applicants were permitted to intervene in this litigation, and by refusing to agree to a briefing schedule in response to the Petition that aligns with the Court’s order regarding Respondents’ deadline. *See* Proposed App. for Extraordinary Relief, June 1, 2021, 10:39 AM.

CONCLUSION

For these reasons, Petitioners respectfully request this Court deny Proposed Intervenor leave to intervene.

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Dated: June 17, 2021

Aria C. Branch
Perkins Coie LLP
700 Thirteenth Street NW, Suite 800
Washington, D.C. 20005-3960
ABranch@perkinscoie.com
T: (202) 654-6200
F: (202) 654-6211

Abha Khanna
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
AKhanna@perkinscoie.com
T: (206) 359-8000
F: (206) 359-9000

Respectfully submitted,

/s/ Edward D. Rogers
Robert J. Clark, No. 308105
Edward D. Rogers, No. 69337
Marcel S. Pratt, No. 307483
Michael R. McDonald, No. 326873
Paul K. Ort, No. 326044
Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
ClarkR@ballardspahr.com
RogersE@ballardspahr.com
PrattM@ballardspahr.com
McDonaldM@ballardspahr.com
OrtP@ballardspahr.com
T: (215) 665-8500
F: (215) 864-8999

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CERTIFICATE OF COMPLIANCE

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

Submitted by: Edward D. Rogers

Signature: /s/ Edward D. Rogers

Name: Edward D. Rogers

Attorney No.: 69337

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CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I caused the foregoing Memorandum in Opposition to the Application to Intervene by the Republican Party of Pennsylvania and Individual Republican Voters to be served upon the following parties and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

By PACFile:

All counsel of record

By First Class Mail:

Jeffrey Duffy, Esq.
BakerHostetler LLP
2828 Arch Street
Philadelphia, PA 19104
Counsel for Proposed Intervenors
Bryan Cutler and Kerry Benninghoff

Dated: June 17, 2021

/s/ Edward D. Rogers
Edward D. Rogers, No. 69337
Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
RogersE@ballardspahr.com
T: (215) 665-8500
F: (215) 864-8999