IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ILLINOIS EASTERN DIVISION

DAN McCONCHIE, in his official capacity as Minority Leader of the Illinois Senate and individually as a registered voter, *et al.,* Plaintiffs, v. IAN K. LINNABARY, *et al.,* Defendants.	Case No. 1:21-CV-03091 Circuit Judge Michael B. Brennan Chief Judge Jon E. DeGuilio Judge Robert M. Dow, Jr. Three-Judge Court Pursuant to 28 U.S.C. § 2284(a) Magistrate Beth W. Jantz

McCONCHIE PLAINTIFFS' RESPONSE IN OPPOSITION TO ANGELICA GUERRERO-CUELLAR'S PETITION TO INTERVENE

Angelica Guerrero-Cuellar's ("Petitioner") Petition to Intervene, Dkt. #140 (the "Petition") – whether by right or by permission – fails as a matter of law on a number of grounds and should be denied. First, the Petition is untimely. Second, Petitioner fails to demonstrate a sufficient interest in the case to intervene or that any interest will be impaired if intervention is denied. Third, even if Petitioner had a sufficient interest to intervene, the existing Defendants adequately represent her interests.

Indeed, as is made clear at the end of the Petition, Petitioner's end goal is improper in that she is seeking a unilateral right to draw her own district. But this is not something that the Court can grant to her since that power is vested in the General Assembly *as a whole* rather than to any individual legislator. The fact that this case might be in a remedial phase does not change this reality in that the Court cannot grant individual legislators rights they do not otherwise possess under the guise of intervention in a lawsuit. To do so would grant Petitioner a right greater than her 117 colleagues in the House, members of the Senate, and the Governor. To the extent that

Petitioner wanted to have a say in how her district was drawn, her opportunity was through the *legislative* process, not by intervening during the remedial phase of litigation.

For all of these reasons, the Court should deny the Petition.

I. PETITIONER MAY NOT INTERVENE AS OF RIGHT.

Four criteria exist for intervention as a matter of right: (1) the motion must be timely; (2) the proposed intervenor must claim an interest relating to the property or transaction at issue; (3) the disposition of the action, as a practical matter, may impair or impede the ability to protect that interest; and (4) that interest is not adequately represented by existing parties. *Am. Nat'l Bank & Tr. Co. of Chicago v. City of Chicago*, 865 F.2d 144, 146 (7th Cir. 1989). The proposed intervenor has the burden of proving each element, and lack of even one element requires denial of the motion. *Keith v. Daley,* 764 F.2d 1265 (7th Cir. 1985), certiorari denied, 474 U.S. 980, 106 S.Ct. 383.

A. The Petition Is Untimely.

The Petition is untimely given the unique circumstances of this case. The timeliness requirement of Rule 24(a)(2) is a flexible one and is determined by considering the totality of the circumstances, leaving much to the sound discretion of the Court. *Cavelle v. Chicago Transit Auth.*, 17-CV-5409, 2020 WL 6681344, at *3 (N.D. Ill. Nov. 12, 2020). A prospective intervenor should file "as soon as * * * [it] knows or has reason to know that [its] interests might be adversely affected by the outcome of the litigation…" *Id.* In determining whether a motion to intervene is timely, courts consider four factors: "(1) the length of time the intervenor knew or should have known of his interest in the case; (2) the prejudice caused to the original parties by the delay; (3) the prejudice to the intervenor if the motion is denied; [and] (4) any other unusual circumstances. *Id.*

Recognizing the exigencies and circumstances of this case, the Court has maintained a compressed schedule for this case and accelerated the case as much as possible. Both *McConchie* Plaintiffs and *Contreras* Plaintiffs filed their Second Amended Complaints on October 1, 2021. See *McConchie* Dkt. #116; *Contreras* Dkt. # 98. As of that date, Petitioner knew of her purported interest in the case based on Plaintiffs' claims. Nevertheless, she waited over 30 days to seek to intervene. Curiously, Petitioner waited until after the Court issued its October 19, 2021 Opinion and Order granting Plaintiffs' Summary Judgment motion and ordering the parties to begin the remedial phase of the case. Given the unique circumstances of this case, and in particular the extremely expedited schedule imposed by the Court, Petitioner could have and should have filed the Petition soon after the Second Amended Complaints were filed. Waiting until the *remedial* phase of litigation to seek to intervene is a textbook case of untimeliness. The Petition, therefore, is untimely and should be denied.

B. Petitioner Lacks A Sufficient Interest To Intervene.

Petitioner lacks a sufficient interest to intervene. Intervention requires a "significantly protectable interest." *Donaldson v. United States*, 471 U.S. 517, 531 (1971). The interest must be direct, substantial and legally protectable. *Id.* A party without standing cannot intervene as of right. *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 798 (7th Cir. 2019).

A legislator has no legally cognizable interest in the composition of their district. *Corman v. Torres*, 287 F. Supp. 3d 558, 569 (M.D. Pa. 2018). Furthermore, a representative has no legal interest in representing any particular constituency, and "a legislative representative suffers no cognizable injury when the boundaries of his district are adjusted by reapportionment." *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 672 (E.D. Pa. 1980).

Where a prospective intervenor would lack standing, the intervenor also lacks a sufficient interest to intervene. *Planned Parenthood of Wisconsin, Inc.*, 942 F.3d at 798; *Chiles v. Thornburgh*, 865 F.2d 1197, 1212 (11th Cir. 1989); *Johnson v. Mortham*, 915 F. Supp. 1529 (N.D. Fla. 1995). Thus, one who lacks standing to challenge a redistricting map also lacks standing to intervene in the challenge. *Johnson*, 915 F. Supp. at 1536. In *Johnson*, plaintiffs challenged Florida's congressional redistricting map. *Id.* at 1533. Several people, including members of Congress, sought to intervene. The court permitted legislators from the challenged districts to intervene, but did not permit legislators or others living in districts other than the challenged districts to intervene. *Johnson*, 915 F. Supp at 1536-38. The court found that those living in districts other than the challenged district lacked standing to challenge the map and thus lacked a sufficient interest to intervene. *Id.* A generalized interest in the map and districts other than the district in which the petitioner lives does not rise to the level of a direct, substantial and legally protectable interest. *Id.*

Petitioner represents and votes in District 22. (Petition, p. 2) However, neither the *McConchie* Plaintiffs nor the *Contreras* Plaintiffs challenge District 22. Thus, Petitioner lacks a sufficient interest to intervene. Recognizing this problem, Petitioner argues that the *McConchie* Plaintiffs' having identified one potential remedy which could involve District 22 constitutes a challenge to District 22. Petitioner fails to support this leap of logic – nor is there any such support. Further, Petitioner misrepresents these allegations in the *McConchie* Second Amended Complaint. Even a cursory review of Paragraph 76 (cited by Petitioner) reveals that it merely demonstrates what *could* be done to remediate the deficiencies in the map, not what must or should occur. *McConchie* Dkt. #116, ¶ 76. Likewise, the *Contreras* Second Amended Complaint merely

states that the areas around Petitioner's district are characterized by racially polarized voting; they do not request that District 22 be severed. *Contreras* Dkt. # 98, ¶¶ 74, 76-88, 99.

That Petitioner is an elected official does not excuse her from meeting the requirements to intervene. *Johnson*, 915 F. Supp. 1537. Protecting incumbency is not a sufficient interest. Petitioner does not have a right to re-election as she asserts (Petition, p. 6) and does not have a sufficient interest where her district is not challenged. Petitioner wrongly interprets *Johnson* on this point. In *Johnson*, the court found that an elected official *from the challenged district* had a direct, substantial and protectible interest in the litigation and in the office "when the district they represent is subject to a constitutional challenge." *Id.* at 1538. There is no dispute that Petitioner does not represent or vote in a challenged district. Thus, she lacks an interest that must be protected by intervention.

C. Petitioner's Interest Will Not Be Impaired If Intervention Is Denied.

Even if Petitioner had a sufficient interest, her interest will not be impaired if intervention is denied. An interest is "impaired" when the decision would, as a practical matter, foreclose the proposed intervenor's rights in a subsequent proceeding. *Shea v. Angulo*, 19 F.3d 343, 347 (7th Cir. 1994).

Petitioner offers no facts regarding how her interest would be impaired if intervention is denied, nor is there any manner in which it would be impaired. Petitioner does not claim that she could not vote or that her vote would be diluted in District 22. Petitioner does not claim that she could not run for reelection in District 22. Petitioner does not even claim that she would lose her constituency. Moreover, Petitioner fails to allege any facts that she would be foreclosed from future proceedings regarding the map. Petitioner claims only that she might find it more difficult to win reelection. Petition, p. 8. Even if this were a sufficient interest (it is not), Petitioner has

offered no facts that this interest would be impaired if she is not permitted to intervene. As it is Petitioner's burden to establish each of the elements to intervene, this failure requires denial of the Petition.

D. The Existing Defendants Adequately Represent Petitioner.

The Petitioner is adequately represented by the existing Defendants. Adequacy of representation can be presumed when the party on whose behalf the applicant seeks intervention is a governmental body or officer charged by law with representing the interests of the proposed intervenor. *Am. Nat'l Bank & Tr. Co. of Chicago*, 865 F.2d at 148, citing *Keith,* 764 F.2d at 1270. Adequacy of representation is also presumed where the proposed intervenors and a party to the suit have the same ultimate objective. *Id.*; *Planned Parenthood of Wisconsin, Inc.*, 942 F.3d at 799. This presumption is even stronger where the existing party is a governmental body charged with protecting the interests of the proposed intervenor. *Id*.

As Petitioner concedes, the existing Defendants are defending the map and opposing any redrawing of the map. Petition, p. 8. Counsel for Defendants confirmed this during the November 5, 2021 status hearing. Moreover, the Petitioner seeks the same objective as the existing Defendants – implementation of the September Map without revisions. Thus, Petitioner's interests are adequately represented by the existing Defendants.

Petitioner nevertheless claims that the existing Defendants will not defend *District 22* to her liking. This is insufficient because a legislator has no legally cognizable interest in the composition of the district he or she represents or in any particular constituency. *Corman*, 287 F. Supp. 3d at 569; *Klutznick*, 503 F. Supp. at 672.

The end goal of the Petition is to permit Petitioner to draw her own district regardless of the remainder of the map. This is finally revealed on page 10 of the Petition, where Petitioner

states that she wants to interpose her own responses and objections to any proposed revisions submitted by the Plaintiffs "in regard to the 22nd District." In essence, Petitioner wants to sidestep her 117 other colleagues in the House, the Senate and the Governor, and be given a Court-sanctioned license to offer her own preferred district, irrespective of the remainder of the map or the effects of her proposed District 22 on the remainder of the map. This is not a proper basis for intervention. Petitioner's opportunity to influence her district was through the *legislative* process, not through coming in at the end of litigation in the remedial phase and being given a blank canvas on which to draw her preferred district.

II. PETITIONER MAY NOT INTERVENE BY PERMISSION.

Petitioner may not intervene permissively. A district court "may permit anyone to intervene who ... has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24 (b)(1). *Planned Parenthood of Wisconsin, Inc.*, 942 F.3d at 803. Petitioner fails to meet this standard.

A. The Petition Is Untimely.

For the reasons stated in Section I.A above, the Petition is untimely.

B. There Are Not Sufficient Common Questions Of Law Or Fact.

Petitioner states that she "has a defense that shares with the main action a common question of law and fact" in that she "seek[s] to defend the 22nd District against constitutional attacks." But no Plaintiff has challenged the 22nd District, so she cannot share a common interest of law or fact in this regard. While Petitioner shares the same goal as Defendants – implementation of the September Map without revision – she wishes to raise her own issues of law and fact that are specific to District 22 notwithstanding that District 22 is not at issue in any of the Complaints in the case.

Petitioner also states she seeks to protect the right to vote and a fair opportunity to elect candidates of choice and avoid vote dilution. Again, District 22 is not at issue in any of the Complaints in this case, so these issues cannot constitute common questions of law or fact with respect to District 22.

C. Intervention May Delay the Proceedings.

Petitioner has stated that she will abide by all deadlines imposed by the Court. Assuming this to be true, this factor is neutral.

III. PETITIONER MAY NOT INTERVENE FOR A LIMITED PURPOSE.

Perhaps recognizing that she fails as a matter of law the tests for intervention by right or by permission, Petitioner lastly requests permission to intervene "for the limited purpose of submitting her responses and objections, in regard to the 22nd District…" Although Petitioner cites several cases where intervention for a limited purpose was allowed, Petitioner provides no explanation for why she should be permitted to intervene, even for a limited purpose, where she has no legally cognizable interest at stake and where existing Defendants are presumed to adequately represent her interests. Indeed, Petitioner's plea to intervene for a limited person is nothing more than a rehash of her prior arguments for intervention by right and permission. Because she fails both of those tests, as demonstrated above, she also fails the satisfy the extraordinary "limited purpose" exception as well.

CONCLUSION

For the reasons set forth herein, the Petition to Intervene should be denied.

Dated: November 5, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on November 5, 2021, the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system, which will provide notice to all counsel of record in this matter.

/s/ Phillip A. Luetkehans
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