IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Barbara Diamond, *et al.*,	:	
	:	
Plaintiffs,	:	**Civil Action No. 5:17-cv-05054**
	:	
v.	:	
	:	
Robert Torres, *et al.*,	:	
	:	
Defendants.	:	
	:	

REPLY IN FURTHER SUPPORT OF MOTION TO INTERVENE

Plaintiffs[1] oppose Applicants' Motion to Intervene because Plaintiffs clearly would prefer to litigate against passive defendants who will not move to dismiss their claims, move to stay their claims, or otherwise vigorously defend the constitutionality of Pennsylvania's 2011 Plan. (*See* Plaintiffs' Opposition to Legislators' Motion to Intervene (the "Opposition") at 2, 4, ECF No. 27.) Plaintiffs seek to litigate solely against two of the three Executive Branch Defendants (the "Executive Defendants") who, in the related *Agre, et al. v. Wolf, et al.* action (the "*Agre* action"), conducted no discovery, presented no evidence (in fact, asked not a single question) at trial, and then devoted their entire closing to arguing *in support* of the *Agre* plaintiffs' position.[2]

However, Plaintiffs have it backwards. It is precisely because Applicants will raise different factual and legal arguments and fairly test the merits of Plaintiffs' case that this Court should grant Applicants' Motion—just as it granted Applicants' intervention motion in *Agre*. Indeed, absent the inclusion of Applicants as parties in this matter, Executive Defendants'

[1] Unless otherwise noted herein, capitalized terms shall have the meanings afforded such terms in Applicants' Memorandum of Law in Support of their Motion to Intervene (ECF No. 26-2).

[2] *See* Transcript of Trial Day 4, P.M. Session, Before the Honorable D. Brooks Smith, Chief Judge, the Honorable Michael M. Baylson, the Honorable Patty Shwartz, United States Judges ("12/7/2017 Trial Tr.") at 39-55, *Agre, et al. v. Wolf, et al.*, No. 17-cv-04392 (Dec. 7, 2017).

performance in *Agre* makes clear that no existing party will protect Applicants' interests or the interests of the Commonwealth in defending one of its duly-enacted laws.

Moreover, Plaintiffs' principal argument, i.e., that Applicants lack standing to intervene as defendants, completely ignores one critical fact: if Plaintiffs should prevail, it will be Applicants' duty in the first instance to re-draw Pennsylvania's Congressional map. Put differently, the outcome of this case will directly impact Applicants. None of the decisions cited by Plaintiffs in opposition to Applicants' Motion rebut this simple reality.

Plaintiffs also misapply the U.S. Supreme Court's decision in *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645 (2017), to this case. Specifically, even assuming *arguendo* that Applicants lack independent standing, they can nevertheless intervene as defendants, because they do not seek new or different relief: Applicants merely seek to uphold the 2011 Plan. By virtue of the Executive Defendants' placement in the caption, Applicants' requested relief is at least nominally the same as that sought by the Executive Defendants. In advancing their *Town of Chester* argument, Plaintiffs conflate the distinct concept of "relief" with "argument" or "defense"—the fact that Applicants would raise different *arguments and defenses* does not mean that Applicants seek different *relief* from the Court. On the contrary, as Plaintiffs must acknowledge, "[t]he Legislators seek the same outcome as the existing Executive Defendants: the maintenance of the 2011 Plan." (Opposition at 8.)

Finally, Plaintiffs' contention that intervention is inappropriate because Applicants will delay trial has been largely, if not entirely mooted by the Court's Orders of November 22, 2017 (ECF No. 40), December 7, 2017 (ECF No. 48), and December 21, 2017 (ECF No. 50), staying this action until January 8, 2018 and setting a status and scheduling conference for January 9,

2018.[3] But in any event, the Court should reject this contention along with Plaintiffs' other contentions because, at its core, it amounts to nothing more than a generalized objection to meaningful and fair adversarial litigation—that Applicants advocated for a different pretrial schedule (or for a different outcome for this case) simply does not "prejudice" Plaintiffs' rights (particularly when Plaintiffs waited years to commence this litigation).

For these reasons, for the reasons explained in Applicants' Motion to Intervene, and for the reasons this Court granted Applicants' Motion to Intervene in the *Agre* action, this Court should grant Applicants' pending Motion to Intervene.

I. APPLICANTS' INTERESTS ARE NOT ADEQUATELY REPRESENTED BY EXECUTIVE DEFENDANTS

Plaintiffs' Opposition serves as a concession that Applicants' interests are not adequately represented by Executive Defendants. Nor could it be otherwise. To satisfy the inadequacy of representation prong for intervention under Fed. R. Civ. P. 24(a), the applicant need only show "that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972).

Here, Plaintiffs devote the better part of their Opposition to pointing out how Executive Defendants have not and will not mount an effective defense. (*See, e.g.*, Opposition at 2-3 ("In *Agre*, the Legislators proceeded to assert different defenses than the Executive Defendants, moving to dismiss on abstention grounds … and moving to stay the action pending the resolution

[3] Applicants also note that *League of Women Voters, et al. v. Wolf, et al.* is set for oral argument before the Pennsylvania Supreme Court on January 17, 2018. That case advances claims nearly identical to the claims advanced in this matter—although advanced under the co-extensive analogous provisions of the Pennsylvania Constitution with respect to equal protection and free speech and association. Should the Pennsylvania Supreme Court find the 2011 Plan unconstitutional, this case will likely become moot.

of *Gill v. Whitford* … among other grounds. The Executive Defendants sought neither abstention nor a stay."); *id.* at 4 ("[I]f the Legislators' intervention motion is granted they will move this court to dismiss Plaintiffs' complaint", but by contrast "the Executive Defendants [will] answer the complaint as they did in *Agre*.").)

But the Court need not take Plaintiffs solely at their word; the Court is already well-aware of the likely quality of Executive Defendants' defense. As noted above, the same Executive Defendants in the *Agre* action conducted no discovery, called no witnesses, posed no questions, presented no evidence at trial, and in their closing argued *in support* of the *Agre* plaintiffs' case and *against* the 2011 Plan.[4] Indeed, counsel for Executive Defendants conceded that he let "the record develop as the parties themselves thought it should develop and not interfering and not intervening" so as to give "our legislative coordinate branch the opportunity to defend its work."[5] To say that there are serious doubts about the adequacy of Executive Defendants' representation of Applicants' and the Commonwealth's interests could only be a gross understatement.[6]

Then attempting to seize upon this reality, Plaintiffs contend that "[b]ecause the Legislators assert defenses unlikely to be raised by the named defendants, they cannot intervene as of right." (Opposition at 1.) But, Plaintiffs have it backwards. The fact that Executive

[4] *See* 12/7/2017 Trial Tr. at 39-55.

[5] *Id.* at 39

[6] Plaintiffs' claim that Applicants "have not made the required showing that the Executive Defendants will not adequately represent their interests" is, in a word, baseless. (Opposition at 8.) *See Crossroads Grassroots Policy Strategies v. Federal Election Com'n*, 788 F.3d 312, 314 (D.C. Cir. 2015) ("'[A] doubtful friend is worse than a certain enemy.' Recognizing that doubtful friends may provide dubious representation, we have often concluded that governmental entities do not adequately represent the interests of aspiring intervenors.") (citations omitted).

Similarly, Plaintiffs devote a portion of their Opposition to suggest that Pennsylvania's Attorney General will defend the 2011 Plan. (Opposition at 7-8). In fact, Pennsylvania's Attorney General has not entered his appearance in this action and, as the Court is aware, he did not defend the 2011 Plan in the *Agre* action.

Defendants have failed and will likely continue to fail to assert appropriate defenses and otherwise vigorously oppose Plaintiffs in this action demonstrates that Executive Defendants *do not* adequately represent Applicants' and the Commonwealth's interests, and that intervention is therefore necessary. Conversely, that Applicants will advance different legal arguments and mount a more vigorous defense constitute the exact reasons why courts *grant* leave to intervene. *See, e.g.*, *Ohio River Valley Envtl. Coal., Inc. v. Salazar*, No. 3:09-0149, 2009 WL 1734420, at *1 (S.D.W. Va. June 18, 2009) (granting intervention as of right where one party had "higher interest in defending the product of the full legislative process of the State of West Virginia" and where "this difference in degree of interest could motivate the WVDEP to mount a more vigorous defense than the current Defendant"); *Nat'l Wildlife Fed'n v. Hodel*, 661 F. Supp. 473, 475 (E.D. Ky. 1987) (granting intervention as of right where "participation by the … intervenors with the Secretary's defense is likely to serve as a vigorous and helpful supplement").

In fact, absent intervention, no existing party in this case will likely protect Applicants' interests or the interests of the Commonwealth of Pennsylvania in defending one of its duly-enacted laws. This outcome that Plaintiffs desire completely ignores the serious "prudential considerations [that] demand the Court insist upon 'that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *United States v. Windsor*, 133 S. Ct. 2675, 2687 (2013) (quoting *Baker v. Carr*, 369 U.S. 186, 205 (1962)); *see also I.N.S. v. Chadha*, 462 U.S. 919, 940 (1983) ("[T]here may be prudential … concerns about sanctioning the adjudication of this case in the absence of any participant supporting the validity of [the statute]. … We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as

a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional.").[7] Consequently, it is particularly important that Applicants be permitted to intervene to do what is not being done: defend the 2011 Plan. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 60 (1973) ("[O]ne of the first principles of constitutional adjudication [is] the basic presumption of the constitutional validity of a duly enacted state or federal law.") (Stewart, J. concurring).

II. APPLICANTS HAVE STANDING

Plaintiffs are incorrect that Applicants lack standing to intervene in this case; Plaintiffs completely fail to acknowledge the unique circumstances of a challenge to a Congressional redistricting plan. Unlike the typical case involving free-standing legislation voluntarily enacted by a state, when a Congressional redistricting plan is struck down, a new one *must* be drawn. And there is no dispute that the U.S. Constitution's Elections Clause and Article II, Sections 16 and 17 of the Pennsylvania Constitution bestow the authority and responsibility to prepare and enact redistricting plans exclusively on the members of Pennsylvania's House of Representatives and Senate.[8] Thus there cannot be any dispute that, if the Court grants Plaintiffs' requested relief and strikes down the 2011 Plan, it will be Applicants' duty in the first instance to draft and pass a new Congressional districting plan. *See, e.g.*, *Growe v. Emison*, 507 U.S. 25, 34 (1993) (holding that "reapportionment is primarily the duty and responsibility of the State through its legislature

[7] It is clear that Plaintiffs seek, instead of a "real, earnest and vital controversy", a "friendly, non-adversary, proceeding … in which a party beaten in the legislature seeks to transfer to the courts an inquiry as to the constitutionality of the legislative act." *Windsor*, 133 S. Ct. at 2687 (corrections, quotations and citations omitted). This Court should not permit Plaintiffs an end-run around both Pennsylvania's political process *and* an authentic testing of Plaintiffs' legal claims by filing suit against friendly defendants and excluding any real adversary, particularly when the Applicants here would be required to act to implement the remedy Plaintiffs' seek.

[8] Count III of Plaintiffs' Complaint, raising claims under the Elections Clause, fails to reference Executive Defendants at all.

or other body rather than of a federal court" and finding that district court erred in not deferring to both the Minnesota state courts and legislature in redistricting); *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) ("When a federal court declares an existing apportionment scheme unconstitutional, it is … appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure".); *Smith v. Beasley*, 946 F. Supp. 1174, 1213 (D.S.C. 1996) (referring the matter of drafting a redistricting plan to "the South Carolina General Assembly for exercise of its primary jurisdiction").

In short, it is plain that Applicants' interests will be directly implicated and affected by the outcome of this lawsuit, and that those interests are *distinct* from "a private citizen's general interest in proper government." *Goode v. City of Philadelphia*, 539 F.3d 311, 317 (3d Cir. 2008). Indeed, legislators and legislatures are frequently party to redistricting challenges presumably for this very reason. *See, e.g.*, *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 796 (2017); *Page v. Virginia State Bd. of Elections*, 15 F. Supp. 3d 657, 659-60 (E.D. Va. 2014); *Arrington v. Elections Bd.*, 173 F. Supp. 2d 856, 858-59 (E.D. Wis. 2001); *Daggett v. Kimmelman*, 617 F. Supp. 1269, 1271 (D.N.J. 1985), *aff'd and remanded*, 811 F.2d 793 (3d Cir. 1987). This Court previously recognized the same when it granted Applicants' motions to intervene in the related *Agre* action.[9] Order, *Agre, et al. v. Wolf, et al.*, No. 17-cv-04392 (Oct. 25, 2017). The cases cited by Plaintiffs to the contrary, none of which involve redistricting or comparable circumstances, are inapposite. (*See* Opposition at 3-6.)

[9] And again, as discussed above, this Court's experience in the *Agre* action demonstrates the critical importance of Applicants' participation in this case to the full development of the legal and factual record.

III. APPLICANTS DO NOT SEEK DIFFERENT RELIEF FROM EXECUTIVE DEFENDANTS

Plaintiffs misapply the U.S. Supreme Court's decision in *Town of Chester* to this case—Plaintiffs conflate the distinct concepts of "relief" and "argument". In *Town of Chester*, the Supreme Court held that "an intervenor of right must have Article III standing *in order to pursue relief that is different from that which is sought by a party with standing*."[10] 137 S. Ct. at 1651 (emphasis added); *see also United States Dep't of Justice v. Utah Dep't of Commerce*, No. 2:16-CV-611-DN-DBP, 2017 WL 3189868, at *4 (D. Utah Jul. 27, 2017) (stating that "intervenors must independently satisfy the test for standing *if their interests do not align with those of a party with standing*") (emphasis added). But Applicants, moving to intervene as defendants, *do not seek* relief different than that purportedly sought by Executive Defendants: Plaintiffs aim to invalidate the 2011 Plan; Applicants merely seek to defend the constitutionality of the 2011 Plan. As Plaintiffs themselves acknowledge, "Legislators seek the same outcome as the existing Executive Defendants: the maintenance of the 2011 Plan."[11] (Opposition at 8.)

Plaintiffs' only argument to the contrary seems to be that Applicants will "assert defenses unlikely to be raised by the named defendants". (*Id.* at 1; *see also id.* at 4.) But, this argument reflects a misunderstanding of the distinct concepts of "relief" and "argument" (or in this case

[10] *Town of Chester* involved proposed plaintiff-side intervention by a real estate development company (Laroe) asserting regulatory takings claims regarding certain land that it had contracted to buy. 137 S. Ct. at 1649. After announcing the aforementioned principle, the Supreme Court reasoned that the disposition of the case depended on what relief the proposed plaintiff Laroe sought—money damages for the legal owner of the land or money damages on behalf of itself. *Id.* at 1651. If Laroe only sought the former—the same ultimate relief as the legal owner—then it would not require independent Article III standing, but if it sought the latter—ultimate relief different from the legal owner—then it *would* require independent standing. *Id.* at 1652.

By its own terms, *Town of Chester* did not wholly abrogate *King v. Governor of the State of New Jersey*, 767 F.3d 216, 244-46 (3d Cir. 2014), as Plaintiffs claim, but rather, only abrogated *King* in those specific circumstances where intervenors seek different ultimate relief from the parties with independent standing.

[11] Executive Defendants are nominally "defending" the 2011 Plan, but, as explained above, there can only be serious doubts as to the adequacy and effectiveness of that defense.

"defense"). "Relief" refers to "[t]he redress or benefit, esp. equitable in nature (such as an injunction or specific performance), that a party asks of a court". *Relief*, BLACK'S LAW DICTIONARY (10th ed. 2014). "Argument" refers to "[a] statement that attempts to persuade by setting forth reasons why something is true or untrue, right or wrong … esp., the remarks of counsel in analyzing and pointing out or repudiating a desired inference, for the assistance of a decision-maker." *Argument*, BLACK'S LAW DICTIONARY (10th ed. 2014). And "defense" refers to "[a] defendant's stated reason why the plaintiff … has no valid case". *Defense*, BLACK'S LAW DICTIONARY (10th ed. 2014).

The fact that Applicants are likely to employ different arguments as means to defend the constitutionality of the 2011 Plan does not change the fact that Applicants and Executive Defendants seek the same ultimate "relief". *See Guideone Elite Ins. Co. v. Mount Carmel Ministries*, No. 2:17-CV-37-KS-MTP, 2017 WL 2908866, at *2 (S.D. Miss. July 7, 2017) ("'Article III does not require intervenors to independently possess standing where the intervention is into a subsisting and continuing Article III case or controversy and *the ultimate relief* sought by the intervenors is also being sought by at least one subsisting party with standing to do so.' The Supreme Court confirmed this statement of the law in *Town of Chester*".) (emphasis added) (quoting *Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998)); *also compare U.S. Dep't of Justice*, 2017 WL 3189868, at *4-*5 (finding intervenors did not need independent standing where they sought "identical relief—to require a valid warrant for the DEA to access [Utah's Controlled Substance Database]") *with Oregon Prescription Drug Monitoring Program v. U.S. Drug Enf't Admin.*, 860 F.3d 1228, 1234 (9th Cir. 2017) (finding intervenors needed independent standing where they sought different injunctive relief—requiring the DEA to obtain

a warrant rather than a subpoena to access Oregon's Prescription Drug Monitoring Program).

Because, as Plaintiffs concede, Applicants seek the exact same ultimate relief as Executive Defendants, *Town of Chester* is simply inapposite, and does not bar Applicants from intervening or from raising any argument in defense of the 2011 Plan's constitutionality.[12]

IV. INTERVENTION WILL NOT PREJUDICE PLAINTIFFS

Plaintiffs' contention that intervention will prejudice them by delaying trial in this matter has been largely, if not entirely, mooted by the Court's Orders of November 22, 2017 (ECF No. 40), December 7, 2017 (ECF No. 48), and December 21, 2017 (ECF No. 50), staying this action until January 8, 2018 and setting a status and scheduling conference for January 9, 2018. In other words, intervention can no longer affect whether Plaintiffs receive their proposed expedited pretrial schedule—because they cannot. But more broadly, this Court should not entertain this contention (or the rest of Plaintiffs' Opposition), because it amounts to little more than a generalized objection to a robust, adversarial process, in which their claims are tested against a vigorous defense. The fact that Applicants took a different position from Plaintiffs regarding the scheduling of this case did not "prejudice" Plaintiffs in the same way that Applicants' adverse position on the merits of Plaintiffs' case does not "prejudice" Plaintiffs.

V. APPLICANTS ARE ENTITLED TO PERMISSIVELY INTERVENE

For substantially the same reasons as those detailed above, Applicants are entitled to permissively intervene. Intervention will not unduly delay or prejudice the adjudication of this matter, but rather, intervention is necessary for a full and robust presentation and development of the difficult constitutional issues brought before this Court. *See Windsor*, 133 S. Ct. at 2687.

[12] Again, Plaintiffs' Opposition appears to be primarily motivated by a desire to avoid a fair and vigorous defense—Plaintiffs appear to argue that Applicants can intervene so long as they do not raise any arguments separate and distinct from those advanced (or not advanced) by Executive Defendants. (*See, e.g.*, Opposition at 1-2, 9-10.)

VI. CONCLUSION

In the interests of a fair and full adjudication of this matter of great concern, and for the reasons expressed in Applicants' Motion to Intervene and Memorandum of Law attendant thereto, this Court should grant Applicants' Motion to Intervene.

Date: January 4, 2018

Respectfully submitted,

BLANK ROME LLP

/s/ Brian S. Paszamant
BRIAN S. PASZAMANT
JASON A. SNYDERMAN
DANIEL S. MORRIS
One Logan Square
130 N. 18th Street
Philadelphia, Pennsylvania 19103
Phone: 215-569-5791
Facsimile: 215-832-5791
Email: paszamant@blankrome.com
snyderman@blankrome.com
Morris-D@blankrome.com

Attorneys for Legislative Defendant Senator Joseph Scarnati III

CIPRIANI & WERNER PC

/s/ Kathleen Gallagher
KATHLEEN GALLAGHER
CAROLYN BATZ MCGEE
JOHN E. HALL
JASON MCLEAN
RUSSELL D. GIANCOLA
(admitted *Pro Hac Vice*)
650 Washington Road, Suite 700
Pittsburgh, Pennsylvania 15228
Phone: 412-563-4978
Email: kgallagher@c-wlaw.com
cmcgee@c-wlaw.com
jack@jackhallpc.com
jrmclean@c-wlaw.com
rgiancola@c-wlaw.com

Attorneys for Legislative Defendant Representative Michael Turzai

HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC

/s/ Jason Torchinsky
JASON TORCHINSKY (admitted *Pro Hac Vice*)
SHAWN SHEEHY (*Pro Hac Vice* pending)
45 North Hill Drive, Suite 100
Warrenton, Virginia 20186
Phone: 540-341-8808
Facsimile: 540-341-8809
Email: jtorchinsky@hvjt.law
ssheehy@hvjt.law

Attorneys for Legislative Defendant Senator Joseph Scarnati III

BAKER & HOSTETLER LLP

/s/ Patrick T. Lewis
PATRICK T. LEWIS
(admitted *Pro Hac Vice*)
Key Tower
127 Public Square
Suite 2000
Cleveland, OH 441144114
Phone: 216-621-0200
Email: plewis@bakerlaw.com

Robert J. Tucker
(admitted *Pro Hac Vice*)
200 Civic Center Drive, Suite 1200
Columbus, OH 43215
Phone: 614-462-2680
Email: rtucker@bakerlaw.com

Attorney for Legislative Defendant Representative Michael Turzai

CERTIFICATE OF SERVICE

The undersigned certifies that on January 4, 2018, the foregoing was served upon the following Counsel of Record via the Court's ECF system:

Adam C. Bonin, Esquire
The Law Office of Adam C. Bonin
30 S. 15th Street, Floor 15
Philadelphia, PA 19102
Attorney for Plaintiffs

Alexander Tischenko, Esquire
Amanda Rebecca Callais, Esquire
Aria Branch, Esquire
Brian Simmonds Marshall, Esquire
Bruce V. Spiva, Esquire
Caitlin M. Foley, Esquire
Marc E. Elias, Esquire
Perkins Coie LLP
700 – 13th St. NW, Suite 600
Washington, DC 20005
Attorneys for Plaintiffs

Mark A. Aronchick, Esquire
Ashton R. Lattimore, Esquire
Claudia DePalma, Esquire
Michele D. Hangley, Esquire
Hangley, Aronchick, Segal, Pudlin & Schiller
One Logan Square, 27th Floor
Philadelphia, PA 19103
Attorneys for Defendants Robert Torres, Acting Secretary of the Commonwealth of Pennsylvania, and Jonathan Marks, Commissioner of the Bureau of Elections, in Their Official Capacities

Gregory George Schwab, Esquire
Governor's Office of General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17101
Attorney for Defendants Robert Torres, Acting Secretary of the Commonwealth of Pennsylvania, and Jonathan Marks, Commissioner of the Bureau of Elections, in Their Official Capacities

Kathleen Marie Kotula
Timothy E. Gates
Pennsylvania Department of State – Office of Chief Counsel
306 North Office Building
401 North Street
Harrisburg, Pa, 17120
Attorney for Defendants Robert Torres, Acting Secretary of the Commonwealth of Pennsylvania, and Jonathan Marks, Commissioner of the Bureau of Elections, in Their Official Capacities

Dated: January 4, 2018 */s/ Brian S. Paszamant*