

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

_____)	
League of Women Voters of Pennsylvania,)	
)	
<i>et al.</i> ,)	
)	Civ. No. 261 MD 2017
<i>Petitioners,</i>)	
)	
v.)	
)	
The Commonwealth of Pennsylvania,)	
)	
<i>et al.</i> ,)	
<i>Respondents.</i>)	
_____)	

[PROPOSED] ORDER

AND NOW, this _____ day of _____, 2017, upon consideration of Petitioners’ Motion in Limine to Exclude Intervenors’ Testimony, it is hereby ORDERED that the Motion is GRANTED and accordingly, Intervenors are **BARRED** from introducing testimony concerning their political activities as candidates for Congress, County Committee Chairpersons, and active volunteers.

BY THE COURT:

J.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

League of Women Voters of Pennsylvania, *et al.*,

Petitioners,

v.

Pennsylvania General Assembly, *et al.*,

Respondents.

No. 261 MD 2017

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

Petitioners respectfully move the Court *in limine* for entry of an order barring Intervenors from introducing testimony regarding their political activities as candidates for Congress, County Committee Chairpersons, and active volunteers. The reasons and grounds for this motion are set forth in the accompanying Memorandum of Law which is incorporated by reference as if fully set forth herein.

Dated: December 10, 2017

Respectfully submitted,

/s/ Mary M. McKenzie

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**PETITIONERS' MEMORANDUM OF LAW
IN SUPPORT OF MOTION IN LIMINE
TO EXCLUDE INTERVENOR WITNESS TESTIMONY**

In this lawsuit, Petitioners claim that Pennsylvania's current congressional map violates the free expression and association clauses and the equal protection guarantees of the Pennsylvania Constitution. Petitioners seek to have the current map declared unconstitutional and a new congressional map enacted that complies with the Pennsylvania Constitution. Petition for Review, Counts I, II. In contrast, Intervenor seek to preserve the current congressional map. Their proposed testimony concerns the various ways their political activities may be disrupted if the current congressional map is declared unconstitutional. However, the consequences to Intervenor if the map is found to violate the constitution are

irrelevant to the questions the Court must decide. Accordingly, Intervenors' testimony should be excluded under Pa.R.E. 402.

Alternatively, should Intervenors' proposed testimony have some limited relevance on remedy and the importance of enacting a new map quickly should the current map be declared unconstitutional, its admission should be limited under Pa.R.E. 403 to the extent that the testimony is cumulative.

BACKGROUND

At last count, Intervenors are thirty-six (36) registered Republicans who seek to uphold Pennsylvania's existing congressional map so as not to disrupt their "rights to vote, to express political opinions, to organize, to work to elect candidates of choice, [and] to run for political office." Intervenors' Pretrial Memorandum at 7-8. To do so, Intervenors aim to call six fact witnesses to describe their existing campaign activities and efforts:

Mark J. Harris
Jacqueline D. Kulback
James R. Means, Jr.
Carol Lynne Ryan
Scott C. Uehlinger
Thomas Whitehead

Intervenors' Pretrial Memorandum at 1-5.

According to Intervenors, these proposed six witnesses reflect three categories: candidates for Congress, county committee chairpersons, and active

volunteers for the Republican party. Their proposed testimony is to describe their political activities, the degree to which they rely on the current congressional map, and the disruption to their activities should the Court find the map unconstitutional. Intervenor's Pretrial Memorandum at 1-5.

ARGUMENT

A. Intervenor's Testimony Should Be Excluded Under Pa.R.E. 402 Because It Is Irrelevant

Evidence must be relevant. The Court may properly restrict the evidence to be presented at trial to evidence that is germane to the questions the Court must decide and avoid time-consuming and wasteful side issues that are not properly before the Court. *See* Pa.R.E. 402. The Pennsylvania Supreme Court has made clear “[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.” *Albert v. 2001 Legislative Reapportionment Comm’n*, 790 A.2d 989, 995 (Pa. 2002); *Erfer v. Commonwealth*, 794 A.2d 325, 330 (Pa. 2002). Under Petitioners’ free expression and association claims as well as Petitioners’ equal protection claim, this Court must make determinations regarding the intent of the General Assembly in creating Pennsylvania’s map and the effect of that map. Petitioners’ Statement in Response to the Court’s December 5, 2017 Order. Intervenor’s testimony is not relevant to either of those inquiries and thus should be excluded.

First, Intervenors will offer no testimony concerning the crafting and passage of the map in 2011. The scope of their proposed testimony relates solely to campaign activities in and subsequent to the 2016 election and alleged harms to those campaign efforts if the Court finds that the current map violates the Pennsylvania Constitution. Their testimony thus cannot reach the central issue of whether the map was enacted with discriminatory intent.

Second, Intervenors will not testify to any retaliation they have experienced under the free expression and association clauses or any discriminatory effect on them under the equal protection clause. To the contrary, Intervenors represent an identifiable group benefiting from the discriminatory effect of the map and as such have nothing to offer on this front.

Intervenors, in their Pretrial Memorandum, imply that their testimony concerning “[s]erious disruption of orderly state election processes” would be relevant to whether Petitioners would be entitled to relief in time for the 2018 elections.¹ Intervenors’ Pretrial Memorandum at 7. That is the basis for a legal

¹ Intervenors’ reliance on *Butcher v. Bloom*, 203 A.2d 556, 564 (Pa. 1964), a case involving legislative reapportionment in 1964, is misplaced. There the Pennsylvania General Assembly could not act to reapportion itself in the short time remaining before the election of November 3, 1964, and months after the April 28, 1964 primary election. In the current case there is sufficient time to enact a map in compliance with the constitution before the 2018 primary in May. Indeed, Executive Respondents stated in their pretrial memorandum that they were willing to “work diligently with the parties and the Court to take appropriate measures -- including by making adjustments to the current election schedule, where possible -- in order to ensure that new districts can be put in place and Pennsylvania’s elections can proceed fairly and efficiently. Wolf, Torres, and Marks Pretrial Memorandum at 2-3.

argument, not testimony. Moreover, Intervenors have no support for that claim. Litigation involving voting and election laws causes uncertainty. Indeed, legal challenges to candidate qualifications, nomination petition disputes, recounts, challenges to ballot initiatives and referenda, and redistricting lawsuits, all introduce some disruption to the election cycle. But that interference is not anything that this Court can consider in determining whether the current map violates the Pennsylvania constitution. *Erfer v. Commonwealth*, 794 A.2d at 330

Intervenors also suggest that the disruption to their political activities should be weighed against Petitioners' right to vote and to have their votes counted. Intervenors' Pretrial Memorandum at 7. They cite no authority for such a balancing test and none exists. No voter has a right to perpetuate unconstitutional congressional districts because they would prefer to vote under the current unconstitutional map or because a change will cause inconvenience with respect to political activities.² If that were the case, no relief from unconstitutional districts –

² One of the Intervenor witnesses, Scott Uehlinger, is a current congressional candidate from the 15th District. In various contexts, Pennsylvania courts have specifically held that a congressional representative does not have a legally enforceable interest in any particular boundaries. Indeed, “[a] legislative representative suffers no cognizable injury, in a due process sense or otherwise, when the boundaries of his district are adjusted by reapportionment... While the voters in a representative's district have an interest in being represented, a representative has no like interest in representing any particular constituency. It is only the voters, if anyone, who are ultimately harmed.” *City of Phila. v. Klutznick*, 503 F. Supp. 663, 672 (E.D. Pa. 1980) (holding that a U.S. House representative had no standing in a lawsuit challenging the accuracy of the census). Here, Mr. Uehlinger' only legal interest is in having congressional district boundaries that comply with the constitution. The fact this lawsuit may impact his pursuit of office is not relevant in the

even because of unequal population or racial discrimination – would ever be available.

B. Admission of Intervenors’ Testimony Should Be Limited Under Pa.R.E. 403 To The Extent That It Is Cumulative

Alternatively, to the extent Intervenors’ proposed testimony has some limited relevance as to remedy and the importance of enacting a new map quickly should the current map be declared unconstitutional, its admission should be limited. Under Pa.R.E. 403, the Court can exclude even relevant evidence where “its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” All six of the proposed Intervenors’ proffered testimonies regurgitate statements regarding campaign efforts and largely repeat each other. Because Intervenors’ testimony is cumulative and would waste time in a hearing that is already facing a demanding schedule, their testimony should only be permitted if there is sufficient time at the end of trial.

CONCLUSION

In sum, Intervenors’ proposed testimony would take the Court far afield from the claims at issue in a redistricting challenge. Their testimony is irrelevant

Court’s analysis as to the constitutionality of the 2011 map, and his testimony should be precluded.

to the questions the Court must answer and should be barred under Pa.R.E. 402.

Alternatively, to the extent their testimony has any relevance on remedy, its

admission should be limited under Pa.R.E. 403 as it is cumulative.

Dated: December 10, 2017

Respectfully submitted,

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