

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

JACOB CORMAN, in his official capacity as Majority Leader of the Pennsylvania Senate, MICHAEL FOLMER, in his official capacity as Chairman of the Pennsylvania Senate State Government Committee, LOU BARLETTA, RYAN COSTELLO, MIKE KELLY, TOM MARINO, SCOTT PERRY, KEITH ROTHFUS, LLOYD SMUCKER, and GLENN THOMPSON,

Plaintiffs,

v.

ROBERT TORRES, in his official capacity as Acting Secretary of the Commonwealth, and JONATHAN M. MARKS, in his official capacity as Commissioner of the Bureau of Commissions, Elections, and Legislation,

Defendants,

and

NATIONAL DEMOCRATIC
REDISTRICTING COMMITTEE,

(Proposed)
Intervenor-Defendant.

Civil Action No. 1:18-cv-00443-CCC

Circuit Judge Jordan
Chief Judge Conner
Judge Simandle

REPLY IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANT

INTRODUCTION

In opposing the National Democratic Redistricting Committee’s (“NDRC”) Motion to Intervene, Plaintiffs ignore rulings from this Court, which recognize the right of an organization to intervene in lawsuits that affect its core mission. NDRC falls squarely into this category of intervenors. As a political organization that is focused primarily on redistricting reform to make redistricting systems fair, and to remedy the extreme partisan gerrymandering that resulted in the unconstitutional dilution of Democratic votes, NDRC is far from an outside observer. To the contrary, a substantial portion of NDRC’s core activities are directed specifically toward redistricting efforts in Pennsylvania, which is one of the organization’s 12 target states. Accordingly, NDRC has clearly demonstrated a legal interest sufficient to intervene as of right.

And despite Plaintiffs’ claims that the current Defendants are “prepared, willing, and able to adequately represent [NDRC’s interests],” (Pls.’ Opp. To the NDRC’s Motion to Intervene as Def. (“Pls.’ Opp.”) ECF No. 31 at 2) pleadings from the state court proceedings show that they took a more neutral role in keeping with the constraints of their official roles.. There, Defendants Robert Torres, Acting Secretary of the Commonwealth, and Jonathan M. Marks, Commissioner of the Bureau of Commissions, Elections, and Legislation—both of whom were also defendants in the trial court—stated that they “neither attacked nor defended the

congressional districting plan at issue . . .” because they “understood that their appropriate roles at trial were to . . . prevent disruption of the 2018 elections” Proposed Findings of Fact & Conclusions of Law of Respondents Wolf, Torres & Marks, *League of Women Voters, et al. v. Commonwealth of Pennsylvania, et. al.*, No. 261 MD 2017 at 2 (Commw. Ct. PA Dec. 18, 2017) (attached as Exhibit 1) Neither Defendant should be expected to represent NDRC’s interests adequately at trial.

Finally, Plaintiffs’ standing arguments lack merit because they ignore Third Circuit and Supreme Court precedent which make clear that NDRC, as a proposed defendant-intervenor, is not required to prove standing. Even if NDRC were required to establish standing, it clearly meets Article III requirements, because the relief Plaintiffs seek will cause harm to its core mission.

NDRC is entitled to protect its rights in this lawsuit as a defendant-intervenor under Rule 24(a)(2). In any event, this Court should also exercise its discretion to allow NDRC to intervene under Rule 24(b), as its defense will inevitably raise common issues of law or fact, and will assist the court in clarifying the myriad issues raised by Plaintiffs’ claims.

A. NDRC Has a Significant, Protectable Interest in a Lawsuit that Seeks to Enjoin a Congressional Districting Plan That Was Adopted to Remedy Republican-driven Partisan Gerrymandering.

Plaintiffs' Opposition to NDRC's Motion to Intervene ("Opposition") distorts the legal standards applicable to Rule 24(a)(2) intervention; misconstrues the decisions that it cites; and ignores key aspects of NDRC's mission in its wrong-headed attempts to diminish NDRC's significant interests in this lawsuit. Contrary to Plaintiffs' arguments, NDRC need not demonstrate a "property interest in the redistricting process," whatever that would entail, nor is it required to show a "significant stare-decisis effect . . ." on its claims in order to obtain intervention. *See Benjamin ex rel. Yock v. Dep't of Pub. Welfare of Pa.*, 701 F.3d 938, 951 (3d Cir. 2012) ("A proposed intervenor's interest need not be a legal interest, provided that he or she 'will be practically disadvantaged by the disposition of the action.'") (quoting *Benjamin v. Dep't of Pub. Welfare of Pa.*, 432 Fed. Appx. 94, 98 (3d Cir. 2011)). NDRC's legal interest in advancing (and protecting) its core mission, which includes activities specific to Pennsylvania districting plans, is sufficiently weighty to warrant intervention as of right.

Although the standards applied to intervention as of right "ha[ve] not led to a 'precise and authoritative definition' of the interest that satisfies Rule 24(a)(2)," *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 969 (3d Cir. 1998) (quoting *Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 366 (3d Cir.

1995)), courts in this Circuit and elsewhere have repeatedly found that organizations have a right to intervene in suits that threaten to impinge upon matters central to the organization's core interests. In *Land v. Delaware River Basin Commission*, No. 3:16-cv-00897, 2016 WL 4771079 *1 (M.D. Pa. Sept. 12, 2016), for instance, this court held that a not-for-profit organization with a core mission "to protect, preserve, and enhance the Delaware River . . . and communities of the Basin" had a "significantly protectable interest" in litigation involving a landowner-company's plan to drill a natural gas well on its property. *See id.* at *1-2. The court noted in particular, among other reasons, that natural gas exploration "could undermine . . . a fundamental part of [the organization's] work" *Id.* at *1

And in *American Farm Bureau Federation v. U.S. E.P.A.*, this court held that several organizations, which claimed an interest in the restoration and preservation of the Chesapeake Bay as part of their core missions, demonstrated a legally protectable interest sufficient to intervene in a lawsuit involving EPA rules affecting the discharge of nutrients and sediments into the Bay. *Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 278 F.R.D. 98, 107 (M.D. Pa. 2011) ("[T]he proposed intervenors have an interest in efforts affecting the Bay, not only because the groups' individual members utilize the Bay . . . but also because such efforts go to the core mission of the groups.").

Plaintiffs' attempt to distinguish *American Farm* fails to identify any functional difference between the organizational interests that warranted intervention in that case, and NDRC's interests here. The Opposition highlights efforts taken by the organizations in *American Farm* toward their mission, yet ignores NDRC's significant investment of time and resources into ensuring that districting maps more-accurately reflect the will of the people. This includes: mobilizing voters to increase voter engagement in the redistricting process, electing Democrats in targeted seats, enacting fairer redistricting plans, and challenging unconstitutional plans in court, not to mention the organization's specific focus on the redistricting process Pennsylvania—one of its 12 target states. *See* NDRC Mem. in Supp. of Mot. to Intervene, ECF No. 13 at 4-5; *see also* National Democratic Redistricting Committee, <https://democraticredistricting.com/ndrc-announces-2018-electoral-targets/> (Feb. 7, 2018). And just like the organizations in *American Farm*, NDRC's core mission, and its ongoing efforts in support thereof, are plainly sufficient to demonstrate a protectable, legal interest in this action. *See American Farm*, 278 F.R.D. at 107. To equate NDRC's significant stake in this case with outside observers generalized political interest, as Plaintiffs attempt to do, is plainly inconsistent with this Court's prior decisions.

B. The Disposition of Plaintiffs' Lawsuit May Impair NDRC's Ability to Protect its Interests.

NDRC's has established that the disposition of this action may impair the organization's ability to protect its interests. Plaintiffs do not dispute that, absent intervention, it would be all but impossible for NDRC to vindicate its rights in a separate proceeding if this Court were to reinstate the 2011 Plan. Nor do they contest the fact that NDRC would face insurmountable hurdles in obtaining relief before the 2018 primary and general elections, even if it were to prevail in a separate action initiated after this lawsuit. Instead Plaintiffs rely primarily on their flawed argument that NDRC lacks a protectable legal interest in this lawsuit, which, for the reasons discussed in the previous section, are plainly wrong.

Furthermore, Plaintiffs' argument that NDRC's "mission will remain fully intact" even if the Court enjoins the remedial map distorts the legal standards applicable to this factor. *See American Farm*, 278 F.R.D. at 108 ("Plaintiffs' argument that resolution of the narrow legal issues will not adversely affect Movant's interests represents a misinterpretation of the standard."). The Federal Rules require only that the proposed intervenor is "so situated that disposing of the action may as a *practical* matter impair or impede the movant's ability to protect its interest" Fed. R. Civ. P. 24(a)(2) (emphasis added). And federal courts interpret this requirement to be satisfied when the proposed intervenor's interest "*might* become affected or impaired, as a practical matter" *Mountain Top Condo. Ass'n*,

72 F.3d 361 at 368. Indeed, whether NDRC's mission remains intact is immaterial; the relevant question is whether the practical effect of the Court's ruling in this lawsuit would impair NDRC's interests or its ability to advance its mission. *See, e.g., Chester Water Auth. v. Susquehanna River Basin Comm'n*, No. 1:14-cv-1076, 2014 WL 3908186, at *4 (M.D. Pa. Aug. 11, 2014) (“[T]he court is not limited to the consequences of resolving narrowly tailored legal issues . . . the applicant need only show that . . . impairment of a significant legal interest is possible.”).

Despite Plaintiffs' attempt to re-frame their lawsuit as a narrow legal question, their Complaint makes clear what they refuse to say in the Opposition: Plaintiffs' seek reinstatement of the 2011 Plan. *See* Compl., ECF No. 1 at 40. This is the same plan that the Pennsylvania Supreme Court determined was an unconstitutional partisan gerrymander because it diluted “the power [of Democrats in Pennsylvania] to vote for congressional representatives who represent their views.” Opinion, *League of Women Voters, et. al. v. Commonwealth of Pa., et al.*, No. 159 MM 2017 at 128 (Sup. Ct. PA Feb. 7, 2018). A court decision reinstating the 2011 Plan would significantly impair NDRC's interests in implementing fair maps, and would require NDRC to reallocate and devote more resources to combat the unconstitutional dilution of Democratic votes in Pennsylvania. Therefore, Plaintiffs' attempts to refute the potential impairment of NDRC's interests have no merit.

C. Defendants’ Own Statements Refute Plaintiffs’ Claim That NDRC’s Interests Are Adequately Protected.

In attempting to demonstrate that NDRC’s interests are adequately protected by Defendants Robert Torres, Acting Secretary of the Commonwealth (“Secretary”), and Jonathan Marks, Commissioner of the Bureau of Commissions, Elections, and Legislation (“Commissioner”), Plaintiffs’ Opposition conflates NDRC’s and Defendants’ litigation claims (which might be similar) with their institutional interests (which are divergent). Courts interpreting Rule 24(a)(2) have recognized this distinction, and have repeatedly acknowledged that proposed-intervenors’ and defendants’ interests are not necessarily aligned even when advocating for the same result. *See Land*, 2016 WL 4771079, at *4 (holding that representation of proposed-intervenor may be inadequate, even though proposed-intervenor and defendant-agency had similar interests, because the agency represented broader interests of the public, not just those of proposed-intervenor).

Tellingly, Plaintiffs do not cite a single authority for the proposition that a shared “desire to invalidate the 2011 Plan,” somehow establishes that Defendants will “adequately protect” NDRC’s interests.¹ At most, it creates a rebuttable

¹ Plaintiffs, however, cite a motion to realign parties, filed on behalf of the legislative Intervenor-Defendants in *Diamond v. Torres*, No. 17-5054 (E.D. Pa. Jan. 23, 2018), by the same counsel representing Plaintiffs in this action. The court in *Diamond* has not ruled on the motion, and any arguments asserted in that motion are neither evidence nor authority. Ironically, last month, Intervenor-Defendants in *Diamond* sought and were granted a stay of that case in part on the grounds that the federal

presumption, and imposes only a *light* burden on NDRC to show that its interests may diverge from Defendants. *Chester Water Auth.*, 2014 WL 3908186, at *4 (“[W]hen an agency’s views are necessarily colored by its view of the public welfare rather than the more parochial views of a proposed intervenor whose interest is personal to it, the burden [of demonstrating inadequate representation of interests] is comparatively light.”) (quoting *Kleissler*, 157 F.3d at 972) (internal citations omitted)). Where a proposed-intervenor’s specific, interests may diverge from with a state actor’s broad public interest, this court has acknowledged that the state actor may not adequately represent the proposed intervenor’s interests, notwithstanding their common objectives. *See Am. Farm*, 278 F.R.D. at 110-11 (finding that non-profit group’s interests may not be adequately protected by EPA even though non-profit sought intervention to defend EPA regulations).

Moreover, Plaintiffs’ attempts to equate NDRC’s and Defendants’ interests—and to exaggerate the Secretary’s and Commissioner’s opposition to the 2011 Plan in prior proceedings—are soundly refuted by Defendants’ own statements. Specifically, in their proposed findings of fact and conclusions of law filed in the state court proceedings, the Secretary and Commissioner stated the following:

court should not interfere with the Pennsylvania Supreme Court proceedings in the League case. Defs’ Memo. In Support of Their Mot. To Stay or Abstain, ECF. 69-2 at 2. Now, a month later, unhappy with the decision rendered by the Supreme Court of the Commonwealth, these same counsel return to federal court, albeit in a different district and in front of a different panel, seeking a stay of that Court’s Order.

At trial, Respondents Governor Thomas W. Wolf, Acting Secretary of the Commonwealth Robert Torres, and Commissioner Jonathan Marks, in their official capacities (together, “Respondents”), neither attacked nor defended the congressional redistricting plan at issue (the “2011 Plan”). Respondents understood that their appropriate roles at trial were to allow the Legislative Respondents, who created the 2011 Plan, to defend it as they saw fit; to provide the Court with information where necessary, including information about parallel proceedings; and to prevent disruption of the 2018 elections by keeping the Court and the other parties apprised of election schedules and potential alterations to those schedules.

Exhibit 1 at 2. While the Secretary and Commissioner also expressed their belief that the 2011 Plan was “intentionally partisan,” they declined to “propose findings regarding the details of the evidence or the constitutionality of the 2011 Plan” *Id.* Instead, they “provide[d] the Court with information on potential remedies and the timing of those remedies, in order to ensure that the 2018 elections proceed under a constitutional plan with minimal disruption.” *Id.*

These statements, along with others cited in NDRC’s opening brief, demonstrate that Defendants’ primary concern is election administration. Consequently, Defendants’ approach to litigating this claim, including the specific arguments raised, and the decision whether to appeal an unfavorable ruling, may advance their interest in election administration, yet diverge from NDRC’s interest in ensuring fair maps for Democratic voters. *See Kleissler*, 157 F.3d at 973-974 (acknowledging that agency’s decision not to appeal adverse ruling may give

“legitimate pause to [proposed intervenors’] confidence in adequate representation by [the agency].”).

NDRC has demonstrated that it has a significant, legally protected interest in this lawsuit, the resolution of which will impair its interest in ensuring fair districting maps for Democratic voters in Pennsylvania. The current Defendants have made clear on multiple occasions that their primary focus is election administration, and, as government officials charged with implementing the General Assembly’s laws, Defendants cannot adequately represent NDRC’s specific interests. As a result, NDRC is entitled to intervention under Rule 24(a)(2).

D. In the Alternative, The Court Should Exercise Its Discretion and Permit NDRC to Intervene Under Rule 24(b).

This Court should reject Plaintiffs’ invitation to collapse intervention as of right, under Rule 24(a)(2), and permissive intervention, under 24(b) because this Court has made clear that “[i]f a party fails to meet the requirements of Rule 24(a) to intervene as a matter of a right, that party nonetheless may be granted permission to intervene under Rule 24(b).” *Audi of Am., Inc. v. Bronsberg & Hughes Pontiac, Inc.*, No. 3:16-CV-2470, 2017 WL 2118285, at *1-2 (M.D. Pa. May 16, 2017) (citation omitted). Under Rule 24(b), anyone with “a claim or defense that shares with the main action a common question of law or fact” may permissively intervene “[o]n timely motion.” *Chester v. Wetzel*, No. 1:08-CV-1261, 2014 WL 6066146, at *2 (M.D. Pa. Nov. 13, 2014) (citing Fed.R.Civ.P. 24(b)(1)(A)-(B)). Unlike

intervention as of right, whether to grant permissive intervention is soundly “within the discretion of the district court.” *Brody By & Through Sugzdinis v. Spang*, 957 F.2d 1108, 1125 (3d Cir. 1992); *see also Audi of Am., Inc.*, 2017 WL 2118285, at *2.

Although NDRC is entitled to intervene as of right, it has also met the requirements for permissive intervention. NDRC’s motion is timely, and its defense against Plaintiffs’ lawsuit inevitably involves common questions of law or fact. Specifically, NDRC will argue in favor of the Pennsylvania Supreme Court’s authority to enjoin the 2011 Plan and implement the remedial map, and will also defend against any attempt to reinstate the unconstitutionally gerrymandered districts in the 2011 Plan.

Plaintiffs contend that the 2011 Plan is not being litigated, and that they do not seek to reargue the merits of the 2011 Plan; but this plainly misstates Plaintiffs’ own pleadings. In its Memorandum in Support of its Motion for Temporary Restraining Order, Plaintiff argued that this Court should enjoin the use of the remedial plan because: “(1) the 2011 Plan was invalidated by application of mandatory criteria found nowhere within Pennsylvania’s Constitution or legislative scheme” Pls.’ Mem. in Supp. of TRO, ECF No. 3 at 4. Worse yet, the entire point of Plaintiffs’ lawsuit is not to secure more time for the General Assembly to pass a different plan, but rather to reinstate the 2011 Plan. *See* Compl., ECF No. 1 at

40. Indeed, Plaintiffs' misleading attempt to re-frame their case illustrates precisely why the presence of intervenors, like NDRC, would be beneficial in clarifying the issues and contributing to the resolution of this case. *See Kleissler*, 157 F.3d at 974 (noting that the "presence of intervenors may serve to prevent errors from creeping into the proceedings [and] clarify some issues."). Therefore, if the Court does not grant intervention as of right, the Court should exercise its discretion to allow NDRC to intervene under Rule 24(b).

E. Although NDRC is Not Required to Prove Standing to Intervene in this Lawsuit, NDRC Has Suffered a Cognizable Injury Sufficient to Demonstrate Article III Standing.

Plaintiffs challenge to NDRC's standing ignores controlling precedent, which establishes that NDRC, as a proposed intervenor-defendant, does not need to prove standing. In *Town of Chester, N.Y. v. Laroe Estates, Inc.*, the United States 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." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) (emphasis added). Yet, in arguing that NDRC lacks standing, Plaintiffs do not cite *Chester*, or any Third Circuit case law, which, even before *Chester*, acknowledged that defendant-intervenors were not required to prove standing. *See King v. Governor of N. J.*, 767 F.3d 216, 222–23 (3d Cir. 2014) (proposed defendant-intervenors not required to show standing to intervene); *Am. Farm Bureau*, 278 F.R.D. at 111 n.6

(granting intervention as defendants and noting “case law in the Third Circuit indicates that Article III standing is not a prerequisite for intervention as a matter of right”). Having spent numerous pages expounding the similarities in NDRC’s and the Defendants’ litigation objectives, namely “to invalidate the 2011 Plan and preserve the Court Drawn Plan.”

Pls.’ Opp. at 13, Plaintiffs provide no basis to require NDRC to prove standing. *See, e.g., U.S. Dep’t of Justice v. Utah Dep’t of Commerce*, No. 2:16-CV-611-DN-DBP, 2017 WL 3189868, at *5 (D. Utah July 27, 2017) (no standing required for defendant-intervenor seeking same relief as original defendant).

In any event, NDRC has suffered a sufficient injury-in-fact to confer Article III standing. An organization has Article III standing when it is forced to divert resources from its principal activities to counteract an action causing it harm. *See e.g., Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (the diversion of resources—“with the consequent drain on the organization’s resources”—is “far more than simply a setback to the organization’s abstract social interests” and constitutes “[s]uch concrete and demonstrable injury to the organization’s activities”); *Pa. Prot. & Advocacy, Inc. v. Houston*, 136 F. Supp. 2d 353, 361 (E.D. Pa. 2001) (direct injury sufficient to support standing where organization was forced to “spend more on advocacy than it normally would” and “divert significant resources” to advocate for its mission); *PennEnvironment v. PPG Indus., Inc.*, 964

F. Supp. 2d 429, 447–48 (W.D. Pa. 2013) (direct injury from interference with groups’ efforts “to conserve, protect and restore Pennsylvania’s waterways”).

NDRC’s injuries include the additional resources, some of which must be reallocated from other target states, required to combat the 2011 Plan’s unconstitutional dilution of Democratic votes in Pennsylvania’s congressional districts; engage in protracted efforts to educate voters on the 2011 Plan; pursue legal relief against its enforcement; and elect Democratic candidates in highly partisan Republican districts, all of which will drain NDRC’s resources from the regular activities to which they are typically devoted. *See e.g., Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff’d*, 553 U.S. 181 (2008) (Democratic Party asserted injury in fact from new photo identification law that “compell[ed] the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote.”). Because NDRC will suffer direct and legally cognizable injuries from the reinstatement of the 2011 Plan, it has standing to intervene in this action.

CONCLUSION

For the reasons stated above, as well as the reasons set forth in NDRC’s Memorandum in Support of Motion to Intervene as Defendant, NDRC respectfully requests that the Court grant its motion to intervene as a matter of right under Rule 24(a)(2) or, in the alternative, permit it to intervene under Rule 24(b).

Dated: February 28, 2018 By: /s/ Kay Kyungsun Yu

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CERTIFICATE OF SERVICE

I certify that on February 28, 2018, I filed the foregoing with the Clerk of the Court using the ECF System which will send notification of such filing to the registered participants as identified on the Notice of Electronic Filing.

Date: February 28, 2018

/s/ Kay Kyungsun Yu