

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

SENATOR DOMINIC PILEGGI,  
REPRESENTATIVE MICHAEL  
TURZAI, AND LOUIS B.  
KUPPERMAN,

CIVIL ACTION

No. 2:12-cv-00588-RBS

Plaintiffs,

v.

CAROL AICHELE, IN HER CAPACITY  
AS SECRETARY OF THE  
COMMONWEALTH OF  
PENNSYLVANIA,

**MOTION TO INTERVENE**

Defendant.

Filed on Behalf of Senator Jay Costa and  
Representative Frank Dermody:

Of Counsel:

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SENATOR DOMINIC PILEGGI,	)	CIVIL ACTION
REPRESENTATIVE MICHAEL TURZAI,	)	
AND LOUIS B. KUPPERMAN,	)	No. 2:12-cv-00588-RBS
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
CAROL AICHELE, IN HER CAPACITY	)	
AS SECRETARY OF THE	)	
COMMONWEALTH OF	)	
PENNSYLVANIA,	)	
	)	
Defendant.	)	

**MOTION TO INTERVENE**

Senator Jay Costa and Representative Frank Dermody (collectively, “Intervenors”) file the following Motion to Intervene under Rule 24 of the Federal Rules of Civil Procedure.

Senator Costa and Representative Dermody move to intervene in their capacity as (a) members of Pennsylvania’s 2011 Legislative Reapportionment Commission; (b) (in the case of Senator Costa) petitioner in one of the reapportionment appeals that remains within the jurisdiction of the Pennsylvania Supreme Court; (c) minority leaders of the Senate and House, respectively; (d) members of the General Assembly; and (e) voters in Pennsylvania.

1. This action arose from the Pennsylvania Supreme Court’s rejection of a reapportionment plan that emerged from the state’s 2011 Legislative Reapportionment Commission (the “LRC”). See January 25, 2012 Order in *Holt et al. v. 2011 Legislative Reapportionment Commission*, --- A.3d ----, 7 MM 2012 (Pa. Feb. 3, 2012).

2. The Pennsylvania Supreme Court found that the plan violated the state Constitution and remanded the plan to the LRC with a directive to reapportion the Commonwealth in a manner consistent with the Supreme Court's opinion. *Id.*

3. Significantly, the Pennsylvania Supreme Court also ordered the following:

**The 2001 Legislative Reapportionment Plan**, which this Court previously ordered to “be used in all forthcoming elections to the General Assembly until the next constitutionally mandated reapportionment shall be approved,” *Albert v. 2001 Legislative Reapportionment Commission*, 790 A.2d 989, 991 (Pa. 2002) (quoting *per curiam* order), **shall remain in effect until a revised final 2011 Legislative Reapportionment Plan having the force of law is approved.** Pa. Const. art. II, § 17(e).

*Id.* at 6-7 (emphasis added).

4. The constitutional provision the Supreme Court cited mandates the use of an existing reapportionment plan until a new plan having the force of law is approved.

5. Both the Pennsylvania Constitution provision and the Pennsylvania Supreme Court's Order are consistent with and supported by United States Supreme Court precedent.

6. Despite the clear order from the highest court in the Commonwealth, which rests on a solid constitutional foundation, Plaintiffs filed the instant action to prevent the state from using the existing plan while the new plan is being devised. Moreover, Plaintiffs are trying to use this Court to interfere with the April 24, 2012 primary elections—elections that not only are imminent, but are already in progress.

7. Plaintiffs Pileggi and Turzai are the Republican leaders from the state Senate and House, respectively. Senator Pileggi and Representative Turzai are the members of the LRC who formulated the plan that the Pennsylvania Supreme Court rejected.

8. Intervenors Costa and Dermody are the Democratic leaders from the state Senate and House, respectively. Senator Costa and Representative Dermody are members of the LRC.

Senator Costa is a petitioner in one of the reapportionment appeals that resulted in the rejection of the LRC's proposed final plan.

9. For the reasons set forth in detail in the supporting brief filed contemporaneously herewith, which is incorporated herein, Intervenors are entitled to intervene in this action as a matter of right under Fed. R. Civ. P. 24(a).

10. In the alternative, for the reasons set forth in detail in the supporting brief filed contemporaneously herewith, which is incorporated herein, Intervenors seek leave to intervene by permission under Fed. R. Civ. P. 24(b).

WHEREFORE, Senator Costa and Representative Dermody respectfully request that the Court grant their motion to intervene.

Respectfully Submitted,

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AS SECRETARY OF THE  
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**BRIEF IN SUPPORT OF MOTION TO  
INTERVENE**

Defendant.

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Senator Pileggi and Representative Turzai are the Republican leaders from the state Senate and House, respectively. Senator Pileggi and Representative Turzai are the members of the LRC who formulated the plan that the Pennsylvania Supreme Court rejected.

Intervenors Senator Costa and Representative Dermody are the Democratic leaders from the state Senate and House, respectively. Senator Costa and Representative Dermody are also members of the LRC and Senator Costa is a petitioner in one of the reapportionment appeals that resulted in the rejection of the proposed final plan.

For the reasons set forth below, Senator Costa and Representative Dermody are entitled to intervene in this action as a matter of right under Fed. R. Civ. P. 24(a). In the alternative, Senator Costa and Representative Dermody should be granted permission to intervene under Fed. R. Civ. P. 24(b).

### ARGUMENT

#### **I. SENATOR COSTA AND REPRESENTATIVE DERMODY ARE ENTITLED TO INTERVENE AS OF RIGHT UNDER FED. R. CIV. P. 24(A).**

The requirements for intervening as of right are set forth in Rule 24(a) of the Federal Rules of Civil Procedure. Rule 24(a) provides in relevant part:

Intervention of Right. On timely motion, the court must permit anyone to intervene who:

\* \* \*

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a).

The Third Circuit has stated that this rule entitles a party to intervene where:

(1) the motion to intervene is timely;

- (2) the movant has a sufficient interest in the litigation;
- (3) the movant's interest may be affected or impaired, as a practical matter, by the disposition of the litigation; and
- (4) the movant's interest is not adequately represented by an existing party in the litigation.

*Kleisser v. U.S. Forest Serv.*, 157 F.3d 964, 869 (3d Cir. 1998); *Brody v. Spang*, 957 F.2d 1108, 1115 (3d Cir. 1992). Intervenors satisfy each of these requirements.

**A. *The Motion Is Timely.***

The motion is timely. Plaintiffs commenced this action by filing their complaint on Friday, February 3, 2012. Intervenors have filed their motion to intervene before Monday, February 6, 2012—the next business day. *See Brody*, 957 F.2d at 1115 (motion to intervene filed one day after complaint was unquestionably timely).

**B. *Intervenors Have a Sufficient Interest in the Litigation.***

Courts have not define the precise nature of an interest that meets this standard. *Kleisser*, 157 F.3d at 969. Instead, the Third Circuit has stated that a determination under Rule 24 “demands flexibility” and that, in making such a determination, it is appropriate to rely on “pragmatic considerations.” *Id.* at 972. Intervenors have a strong interest in the instant litigation in three respects. First, Senator Costa has an interest because Plaintiffs are attempting to circumvent an order that was entered in the reapportionment appeal in which he participated as a petitioner. Second, as members of the LRC, Senator Costa and Representative Dermody have an interest because they are directly involved in the reapportionment process at issue.<sup>2</sup> Third, as

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<sup>2</sup> Senator Costa and Representative Dermody do not have a mere generalized interest in Plaintiffs' attempt to control the reapportionment plan that the state will apply. On the contrary, Senator Costa and Representative Dermody have a direct, substantial and legally protectable interest because, among other things, they are members of the LRC and as such they are directly involved in the process of developing a constitutional reapportionment plan in accordance with the

Pennsylvania voters, Senator Costa and Representative Dermody have an interest because Plaintiffs are attempting to interfere with their right to vote by adversely affecting or delaying the upcoming election.

The nature of Intervenors' interest in the present case arises directly from the Pennsylvania Supreme Court's remand to the LRC to allow for the formulation of a reapportionment plan that is constitutionally sound. The Pennsylvania Supreme Court has ordered that, until it finally approves a new plan, the 2001 Legislative Reapportionment Plan ("2001 Plan") shall remain in effect. The Court's order is consistent with clear provisions of the Pennsylvania Constitution, which mandate the use of an existing reapportionment plan until a new reapportionment plan is approved and has the force of law. Through this requirement, the Constitution ensures a seamless process which does not allow for any "gaps" of time without cognizable voting districts in the Commonwealth.

In this action, however, Plaintiffs ask the Court to enjoin the use of the 2001 Plan for the April 24, 2012 primary elections (or any other elections in 2012). The elimination of the 2001 Plan would create a gap because no plan of districts exists that could take its place.

Plaintiffs argue that sufficient time remains before the April 24, 2012 primary elections for the LRC and the Pennsylvania Supreme Court to approve a new reapportionment plan. In fact, however, that is impossible. The Pennsylvania Supreme Court described the schedule that applies following the remand:

[O]nce the LRC approves a new preliminary plan, the Constitution affords persons aggrieved by the new plan a right to object, before the plan is finally approved by the LRC, and to a subsequent right to appeal to this Court.

---

Supreme Court's directives. Significantly, of the three other members of the LRC, two of them are Plaintiffs in this action.

*See Slip. Op.* at p. 87, n. 40.<sup>3</sup> The Constitution prescribes a 30-day period both to object to the preliminary plan and to appeal from the final plan. Pa. Const. art. II, § 17. Thus, for the sake of argument, assuming that (a) the LRC approves a preliminary plan two weeks from today (which almost certainly is overly optimistic); and (b) the Pennsylvania Supreme Court approves the final plan ten days after the appeal period expires, the most expedited schedule for obtaining a new reapportionment plan is likely to look like this:

February 20, 2012	preliminary plan approved by LRC
March 21, 2012	deadline for objecting to preliminary plan; LRC approves final plan
April 20, 2012	deadline for filing appeals to the final plan;
April 30, 2012	final plan approved by Pennsylvania Supreme Court

Of course, given the Supreme Court's 87-page Opinion and guidance, the more the LRC seeks to expedite a preliminary plan, without public process, the more likely it is that the Supreme Court will again reject the plan as being unconstitutional.

Even accepting these assumptions, an election could not take place on April 24, 2012 or any date soon thereafter. The Pennsylvania Election Code prescribes the election process and requires, among other things, circulating and filing nomination petitions as well as ruling on objections to those petitions. A candidate can only begin circulating petitions after a new plan is finally approved. Under the Code, the process to circulate nomination petitions must begin 13 weeks before the primary. *See* 25 P.S. §§ 2861 and 2865.<sup>4</sup> Assuming that the election process begins as soon as the final plan is approved by the Pennsylvania Supreme Court (again, an overly optimistic assumption), the primary could not take place until 13 weeks later, on July 30, 2012.

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<sup>3</sup> Plaintiffs might not have seen the Pennsylvania Supreme Court's Opinion prior to filing their papers, but they should have been aware of the Constitutional requirements referred to therein.

In short, there is no conceivable way that an election could take place on April 24, 2012, using a new reapportionment plan. To grant the relief Plaintiffs are requesting, therefore, this Court would have to postpone the April 24, 2012 primary election to at least July 30, 2012. Moreover, if any of the above assumptions does not hold true—for example, if the Supreme Court does not finally approve the new plan or if the LRC engages in meaningful deliberation, it would be impossible to conduct a primary before the Presidential conventions.

Consequently, Plaintiffs are seeking relief that will needlessly delay Senator Costa and Representative Dermody's right to vote. The delay will affect their right to vote, not only for candidates that are affected by the reapportionment process, but also for candidates who are not affected by that process. The April 24, 2012 election includes a number of statewide races, including the primary for State Attorney General and State Treasurer, as well as the primary for a U.S. Senate seat, federal congressional seats and delegates for national presidential conventions. Senator Costa and Representative Dermody's right to vote for those positions will be suspended and placed at risk until the reapportionment process is completed if Plaintiffs are given the relief they demand.

As the Pennsylvania Supreme Court recognized in its remand order, the election process already has begun. Circulation of nomination petitions began on January 26, 2012. Those petitions must be filed by February 16, 2012, and objections and hearings on the objections also are scheduled to take place in February and March. For candidates who have been engaged in the process, their efforts will be wasted if the Court grants the relief Plaintiffs is requesting. The candidates will be relegated to an election purgatory where they cannot know what rules apply.

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<sup>4</sup> The schedule for the process mandated by the Election Code is discussed in the Intervenor's Brief in Support of Motion to Dismiss, accompanying this motion to intervene.

**C. *The Intervenors' Interest May Be Affected or Impaired by the Disposition of the Litigation.***

Granting the relief Plaintiffs have requested unquestionably will affect or impair the interests of Senator Costa and Representative Dermody. As explained above, preventing the use of the 2001 reapportionment plan will postpone the April 24 election to some uncertain date, possibly far in the future. That will needlessly delay Senator Costa and Representative Dermody's right to vote for all of the candidates who will appear on the ballot for that election, including both candidates for offices in the General Assembly and candidates for statewide or federal positions who are not affected by the reapportionment process.

Preventing the use of the 2001 Plan also will directly thwart the Pennsylvania Supreme Court ruling that was issued in the reapportionment appeal in which Senator Costa was a petitioner.

LM no right to a preliminary

**D. *No Existing Party in the Litigation Adequately Represents Intervenors' Interest.***

No party in this lawsuit would adequately represent the interests of Senator Costa and Representative Dermody. Plaintiffs obviously are adverse to Senator Costa and Representative Dermody, and the only other party in the case is Carol Aichele, who is a nominal defendant in her official capacity as Secretary of the Commonwealth of Pennsylvania. Significantly, Ms. Aichele is not named as a defendant because of any dispute Plaintiffs have with her. Indeed, nothing in the Complaint would dispel the notion that her interests are aligned with the Plaintiffs. The only reason Ms. Aichele is named as a party is because the relief sought falls within her authority as Secretary.

Ms. Aichele was appointed by Republican Governor Tom Corbett, who made no attempt to hide his contempt for the Pennsylvania Supreme Court Order that is at issue. When asked about the order, Governor Corbett, before reviewing the Supreme Court's comprehensive

Opinion, said simply, “It’s stupid. It’s probably unconstitutional.” See Pittsburgh Post-Gazette article dated January 28, 2012, attached hereto as Exhibit A. Given the strong sentiment expressed by the Governor who appointed her, Ms. Aichele should not be expected to take a contrary position. *Hoots v. Commw. of Pennsylvania*, 672 F.2d 1133, 1135 (3d Cir. 1982) (inadequate representation by existing parties where there is collusion between purported representative and opposing party). Consequently, no party currently in the case represents the interests of Senator Costa and Representative Dermody.

For all of the reasons discussed in the preceding sections, Intervenors satisfy the requirements for intervention as of right under Fed. R. Civ. P. 24(a).

**II. IN THE ALTERNATIVE, SENATOR COSTA AND REPRESENTATIVE DERMODY SHOULD BE PERMITTED TO INTERVENE UNDER FED.R.CIV.P. 24(B).**

In the event the Court finds that Intervenors do not satisfy the requirements for intervention as of right, the Court nonetheless should permit Intervenors to intervene under Rule 24(b) of the Federal Rules of Civil Procedure. Rule 24(b) provides in relevant part:

Permissive Intervention.

(1) In General. On timely motion, the court may permit anyone to intervene who:

\* \* \*

(B) has a claim or defense that shares with the main action a common question of law or fact.

\* \* \*

(3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.

Fed. R. Civ. P. 24(b).

Clearly, Senator Costa and Representative Dermody have asserted a defense in the accompanying motion to dismiss that shares common questions of law or fact with the claims in

the instant case. The common questions of law or fact include the reapportionment process, the the Pennsylvania Supreme Court's recent ruling, the imminent April 24, 2012 primary election, and the constitutionality of using the 2001 Plan. All of these questions permeate both the complaint that the Plaintiffs filed and the motion to dismiss that the Intervenors are submitting.

As for the delay/prejudice concern in Rule 24(b), the timeliness of the instant motion is beyond question. Granting the motion will not unduly delay or prejudice the original parties' rights in any way.

When considering whether to grant permissive intervention, "courts should consider whether the intervenors will add anything to the litigation and whether the proposed intervenors' interests are already adequately represented in the litigation." *Heffner v. Murphy*, 2010 WL 2606520 at \*4 (M.D. Pa. 2010). For the reasons explained in the previous section, Senator Costa and Representative Dermody are the only parties who are likely to challenge the Plaintiffs in this action. The Secretary of the Commonwealth does not adequately represent their interests. Consequently, the Court should permit Senator Costa and Representative Dermody to intervene, even if the Court determines that they cannot intervene as of right. Given that Senator Costa and Representative Dermody's counterparts on the LRC—Senator Pileggi and Representative Turzai—are the Plaintiffs here, it is clear that they have competing and important interests and thus should be permitted to intervene.

### **III. THE ACCOMPANYING MOTION TO DISMISS SATISFIES THE REQUIREMENT IN FED.R.CIV.P. 24(C).**

Subpart (c) of Rule 24 states that a motion to intervene must be accompanied by "a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c). The instant motion is accompanied by a motion to dismiss. A motion to dismiss satisfies the requirement in Rule 24(c). *New Century Bank v. Open Solutions, Inc.*, 2011 WL 1666926

(E.D. Pa. 2011) (Bartle, Chief Judge) (although a motion to dismiss is not technically a pleading within the meaning of Fed. R. Civ. P. 7, the “pleading” requirement in Rule 24(c) has been broadly construed to embrace other filings “as long as the documents filed clearly notify the original parties of the position the applicant intervenor will assert.” 2011 WL 1666926 at \*3 (citations omitted).

The motion to dismiss that accompanies the instant motion unquestionably notifies the parties of the position Senator Costa and Representative Dermody will assert.<sup>5</sup> Accordingly, the accompanying motion to dismiss satisfies the requirement of Rule 24(c).

### CONCLUSION

For all of the reasons set forth above, Senator Costa and Representative Dermody respectfully ask the Court to grant their motion to intervene.

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<sup>5</sup> Like the motion to dismiss in *New Century Bank*, the motion to dismiss here also satisfies the pleading requirement in Rule 24(c) by setting out a “defense” – namely, that the complaint fails to state a claim for which relief can be granted. *New Century Bank*, 2011 WL at \*3 (lack of subject matter jurisdiction is a “defense”).

Respectfully Submitted,

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# **EXHIBIT A**

## Governor and GOP leaders weigh in on redistricting ruling

Saturday, January 28, 2012

By Laura Olson and Tom Barnes, Pittsburgh Post-Gazette

HERSHEY -- Gov. Tom Corbett and state GOP leaders had harsh words today about the state Supreme Court rejection of the new legislative map and the delay in the release of the court's opinion spelling out its problems with the redrawn lines.

The state Supreme Court threw this year's legislative elections into confusion this week when it rejected the newly redrawn districts that were approved in December by the five-member, GOP-controlled Legislative Reapportionment Commission.

The high court sent the new maps back to the commission for further work, but that can't start yet because the court hasn't yet specified what it doesn't like about the proposed 2012 districts. House and Senate Democrats are claiming the districts drawn in 2001-02 will be used for this year's elections.

"We're waiting to see an opinion from the court," Mr. Corbett said. The voters "don't know who's going to represent them. If you're going to do that, fine, get an opinion. What's taking so long?"

As for the Democratic theory that this year's elections should go forward under the 2001-drafted boundaries, he said that's out of the question.

"It's stupid," he said. "It's probably unconstitutional."

"People have moved tremendously in the last 10 years. Ask [House Speaker] Sam Smith - he'll tell you the numbers that have moved in certain areas. I think that's an unconstitutional thought process."

Republican leaders agreed that using the existing maps of House and Senate districts in the 2012 elections would be unconstitutional because they violate the federal "one person, one vote" rule.

Mr. Smith said that because of state population changes over the last decade, state House districts now vary in size from a low of 50,000 people to a high of 85,000. When the existing 203 House districts were drawn in 2001-02, the average population of all

districts was about 60,000 people. Sen. Jake Corman said Senate districts, while larger than House districts, show a similar disparity in population.

They said that if the high court tells the redistricting panel next week what is wrong with the maps, changes could be made and the newly redrawn districts used in 2012.

Mr. Smith said it's very unlikely, but not out of the question, that the state's primary election set for April 24 could be delayed, in order to give more time for tinkering with the House and Senate district lines.

Mr. Corman said that if the high court doesn't release its objections to the new map soon, the state could file an appeal with federal court to get the ruling released.

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COMMONWEALTH OF	)	
PENNSYLVANIA,	)	
	)	
Defendant.	)	

**ORDER**

AND NOW, this \_\_\_\_ day of \_\_\_\_\_, 2012, upon consideration of the Motion to Intervene filed by Senator Costa and Representative Dermody, the Court hereby orders that the motion is GRANTED. The motion to dismiss and supporting brief that accompanied the Motion to Intervene are deemed filed as of this date.

BY THE COURT:

\_\_\_\_\_, J.

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	)	
CAROL AICHELE, IN HER CAPACITY	)	
AS SECRETARY OF THE	)	
COMMONWEALTH OF	)	
PENNSYLVANIA,	)	
	)	
Defendant.	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on February 5, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to all counsel of record.

Respectfully Submitted,

COHEN & GRIGSBY, P.C.

JOHN P. LAVELLE, JR., ESQ.

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