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

Louis Agre, William Ewing, Floyd Montgomery, Joy Montgomery, and Rayman Solomon,	:	
Plaintiffs,	:	**Civil Action No. 2:17-cv-4392**
v.	:	
Thomas W. Wolf, Governor of Pennsylvania, Pedro Cortes, Secretary of State of Pennsylvania, and Jonathan Marks, Commissioner of the Bureau of Elections, in their official capacities,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE BY MICHAEL C. TURZAI, SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, and JOSEPH B. SCARNATI III, PENNSYLVANIA SENATE PRESIDENT PRO TEMPORE

Proposed Intervenors Michael C. Turzai, in his official capacity as Speaker of the Pennsylvania House of Representatives, and Joseph B. Scarnati III, in his official capacity as Pennsylvania Senate President Pro Tempore (collectively, "Applicants"), by and through their undersigned counsel, respectfully submit the within Memorandum of Law in Support of their Motion to Intervene as named Defendants in this action pursuant to Federal Rule of Civil Procedure 24(a)(2) (the "Motion").

I. INTRODUCTION

On October 2, 2017, Louis Agre, William Ewing, Floyd Montgomery, Joy Montgomery, and Rayman Solomon (collectively, "Plaintiffs") filed a Complaint (ECF No. 1) seeking declaratory and injunctive relief based on the claim that the Congressional districting plan adopted in 2011 (the "2011 Plan") is unconstitutional under 42 U.S.C. § 1983 and the Elections

Clause of the United States Constitution, Article I, Section 4. Plaintiffs claim that by continuing to implement the 2011 Plan, Defendants have deprived Plaintiffs of their rights under the Privileges and Immunities Clause and the Equal Protection Clause of the Fourteenth Amendment, and of their rights under the First Amendment to the Constitution. Plaintiffs seek to enjoin the further implementation of the 2011 Plan in the upcoming congressional elections scheduled for 2018, and further request that the Court order the submission of proposed revisions to the 2011 Plan. On October 5, 2017, Plaintiffs filed a request that a three Judge panel be appointed to hear this matter, (ECF No. 3), and the three Judge panel was seated on October 19, 2017. (ECF No. 38.)

Applicants file their Motion seeking leave of this Court to intervene in this matter based on established Supreme Court precedent, Applicants' significant interests in this litigation, and because none of the currently named parties adequately represent Applicants' interests in this proceeding. Applicants were an integral part of the process of drawing and enacting the 2011 Plan. Accordingly, Applicants have a substantial interest in this litigation and the redrawing of the 2011 Plan should the Court ultimately so order. Moreover, Applicants' interests cannot be adequately and fairly represented by any other existing party to this action. Permitting Applicants to intervene will promote and ensure the presentation of complete and proper evidence and legal arguments, and lend finality to the Court's adjudication on the merits.

For these reasons, as more fully discussed *infra*, Applicants request leave of the Court to intervene as Defendants in this matter in order to protect their interest in the outcome of this litigation and the impact such an outcome will have, if any, on the 2011 Plan.

II. APPLICANTS ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT

Pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure, intervention as a matter of right is appropriate when, upon a timely motion, a party:

> Claims an interest relating to the property or transaction that is the subject of the actions, 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)(2). The United States Court of Appeals for the Third Circuit has recognized that "intervention controversies arise in many different contexts, and require the court to consider the pragmatic consequences of a decision to permit or deny intervention." *Harris v. Pernsley*, 820 F.2d 592, 596 (3d. Cir. 1987). As a result, the Third Circuit has avoided establishing strict legal standards by which courts can measure applications under Rule 24(a)(2). *Id.* at 597.

While there is no strict legal standard, the Third Circuit has provided the following four (4) pragmatic criteria to be considered on an application to intervene under Rule 24(a)(2):

> (1) the application must be timely;
>
> (2) the applicant has a sufficient interest in the litigation;
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> (3) the interest may be affected or impaired by disposition of the action; and
>
> (4) the interest is not adequately represented by an existing party to the litigation.

Id. at 596; *United States v. Terr. of the V.I.*, 748 F.3d 514, 519 (3d Cir. 2014); *Estate of Kelly ex rel. Gafni v. Multiethnic Behavioral Health, Inc.*, Civ. A. No. 08-3700, 2009 U.S. Dist. LEXIS 82385, at *15-16 (E.D. Pa. Sept. 9, 2009). For the reasons discussed below, Applicants readily meet each of the four (4) criteria, thereby entitling them to intervene in this matter.

A. Applicants' Motion to Intervene Has Been Timely Filed

It cannot be disputed that Applicants' Motion seeking intervention has been timely filed. The timeliness of a motion to intervene is "determined from all the circumstances' and, in the first instance, 'by the [trial] court in the exercise of it sound discretion.'" *In re Fine Paper Antitrust Litigation*, 695 F.2d 494, 500 (3d Cir. 1982) (citing *NAACP v. New York*, 413 U.S. 345, 366, 37 L. Ed. 2d 648, 93 S. Ct. 2591 (1973)). The Third Circuit has outlined three (3) factors to be considered when assessing the timeliness of a motion to intervene: (1) the stage of the proceeding; (2) the prejudice that delay may cause the parties; and (3) the reason for the delay. *Mt. Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 369 (3d. Cir. 1995) (citing *In re Fine Paper Antitrust Litigation*, 695 F.2d at 500). Concerning the assessment of the stage of the proceeding, the critical inquiry is the degree to which any proceedings of substance on the merits have occurred. *Mt. Top*., 72 F.3d. at 369. The prejudice inquiry is related, as the later in the proceedings the motion to intervene is filed, the greater the likelihood of prejudice to the opposing parties. *See, generally*, *In re Fine Paper Antitrust Litigation*, 695 F.2d 494.

Here, the Complaint was only filed approximately three (3) weeks ago on October 2, 2017, and no substantive action has yet been taken on the merits of Plaintiffs' claims. The named Defendants have not yet filed a responsive pleading to the Complaint. During the status conference held by the Court on October 10, 2017, the undersigned counsel for Applicants appeared, with the permission of the Court, and advised the Court and Plaintiffs of Applicants' intention to move to intervene. Put differently, Plaintiffs have known from the outset of this litigation that Applicants intended to seek intervention. Indeed, Applicants have filed their Motion at the earliest possible point in the litigation and in accordance with the Court's scheduling order entered on October 10, 2017 (ECF No. 20).

Consequently, no prejudice to Plaintiffs or the currently named Defendants would result in the event the Court granted Applicants' Motion and permitted them leave to intervene at this very early stage of the case. To the contrary, permitting Applicants to intervene at this point will allow them to assert their defenses without any delay or disruption to the litigation.

For all of these reasons, Applicants' Motion is timely.

B. Applicants Have A Sufficient Interest That May Be Affected By Disposition Of This Litigation Which Is Not Adequately Represented By Any Current Party

Applicants readily satisfy the three (3) remaining criteria for intervention set forth in *Harris, supra*, in that they possess a sufficient interest in the subject of this litigation, which could be affected by the disposition of this matter and which is not adequately represented by any current party. This matter concerns the congressional districting plan enacted and implemented by the Pennsylvania legislature in 2011, which allegedly violates the Privileges and Immunities Clause and the Equal Protection Clause of the Fourteenth Amendment, as well as the First Amendment. (*See* Plaintiffs' Complaint at ¶1). Applicants played an integral part in drawing and enacting the redistricting plan at issue. (*Id.* at ¶ 24). Thus, Applicants have a sufficient interest in the subject matter of this litigation. *See Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 194 (1972) (recognizing that a state legislative body has the right to intervene because the legislative body would be directly affected by a district court's orders.). From a pragmatic perspective, Applicants possess the information regarding the 2011 Plan, which is necessary to this litigation. In this regard, permitting Applicants to intervene could limit the need for cumbersome third-party discovery and serve to streamline the use of judicial resources.

Moreover, in the event that the Court ultimately determines that the 2011 Plan must be redrawn, Applicants' interests would be directly implicated and affected. Indeed, Plaintiffs request, *inter alia*, that the Court order "that defendant State officers develop such plans through a process that has reasonable safeguards," which in effect asks that the 2011 Plan be redrawn. (*See* Plaintiffs' Complaint at ¶ 40). And it is Pennsylvania's House of Representatives and Senate that are the legislative bodies bestowed with the constitutional obligation to prepare and enact redistricting plans. *See* PA. CONST. art. II, §§ 16 and 17. These state governmental bodies, led by Applicants, therefore would be directly affected by any Order of this Court that would require any modification or redrawing of the 2011 Plan.

Additionally, no current party to the litigation adequately represents the interests of Applicants. Plaintiffs' interests are adverse to the current 2011 Plan, and the existing Defendants do not adequately represent Applicants' interests in defending the challenged redistricting plan. While the named Defendants are the parties charged with the implementation of the 2011 Plan, they had no involvement in its creation or enactment. Rather, it was Applicants who were charged with and directly involved in the drawing and enactment of the 2011 Plan. As such, Applicants have a substantial interest in defending the 2011 Plan that is not possessed by any currently named party.

Accordingly, Applicants respectfully request leave of this Court to intervene in this case as a matter of right pursuant to Federal Rule of Civil Procedure 24(a)(2).

III. ALTERNATIVELY, APPLICANTS ARE ENTITLED TO PERMISSIVE INTERVENTION

Alternatively, pursuant to Federal Rule of Civil Procedure 24(b), this Court should permit Applicants to intervene. Rule 24(b) provides for permissive intervention where a party timely files a motion and "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)(B). Intervention under Rule 24(b) is a "highly discretionary decision" left to the judgment of the district court. *Brody v. Spang*, 957 F.2d 1108, 1115 (3d Cir. 1992); *accord Harris*, 820 F.2d at 597. In exercising its broad discretion under this Rule, the Court must consider whether intervention will unduly delay or prejudice the adjudication of the original parties' rights. *See* FED. R. CIV. P. 24(b)(3).

For the same reasons outlined above, Applicants have demonstrated their right to intervene in this matter. Applicants have filed their Motion at the earliest possible time in the litigation, prior to any substantive action on the merits. Applicants possess claims and defenses in line with the 2011 Plan, given that Applicants were directly involved in the drawing and enactment of the 2011 Plan. Further, disallowing Applicants to intervene could prejudice Applicants' interests and rights. This case asks this Court to rule on the validity of the 2011 Plan, and possibly order that it be redrawn – doing so without the input of the parties responsible for creation of the 2011 Plan and any future plan would be inefficient and unjust. The only way to protect the fairness of the litigation and lend credibility and finality to the Court's decision on the merits is to permit Applicants to intervene.

IV. CONCLUSION

For all of the foregoing reasons and authorities, Applicants respectfully request that the Court grant their Motion to Intervene, and allow Applicants to intervene as Defendants in order to protect their interests in the subject matter and outcome of this litigation concerning the constitutionality of the 2011 Plan.

Dated: October 24, 2017

Respectfully submitted,

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