

Tegwyn Hughes, Thomas Whitehead, David Moylan, James R. Means, Jr., Barry O. Christenson, Kathleen Bowman, and Bryan Leib hereby file the following Application of Intervenors for Relief to Stay the Court's January 22, 2018 Order until after this election year.

APPLICABLE STANDARD

Under its plenary jurisdiction powers, this Honorable Court exercises "[a]ll powers necessary or appropriate in aid of its original and appellate jurisdiction which are agreeable to the usages and principles of law." 42 Pa. C.S. § 502. Accordingly, this Court has the power to grant relief by staying its own order. *See Mount Airy #1, LLC v. Pa. Dep't of Revenue*, 154 A.3d 268, 280 (Pa. 2016) (staying the Court's "decision for 120 days in order to afford the General Assembly an opportunity to evaluate potential remedial measures"); *see also In re Amendment to the Pa. Horse Dev. & Gaming Act*, 164 A.3d 492, 492 (Pa. 2017) (extending the *Mount Airy* stay until May 26, 2017). A stay is warranted if:

1. The petitioner makes a strong showing that he is likely to prevail on the merits.
2. The petitioner has shown that without the requested relief, he will suffer irreparable injury.
3. The issuance of a stay will not substantially harm other interested parties in the proceedings.
4. The issuance of a stay will not adversely affect the public interest.

Pa. Pub. Util. Comm'n v. Process Gas Consumers Grp., 467 A.2d 805, 808–09 (Pa. 1983).

ARGUMENT

I. This Honorable Court should stay its Order pending U.S. Supreme Court decisions to avoid further harm to the Intervenors.

The Intervenors make a strong showing that they are likely to prevail after pending U.S. Supreme Court decisions. The Court's Order must be stayed until these decisions are issued, or else the Intervenors will suffer irreparable harm. These factors weigh in favor of a stay.

The Court's Order directly harms the Intervenors' exercise of their constitutional rights. The Court's Order forces the Intervenors to start anew with only a fraction of the time remaining before the May primary. The Intervenors presented evidence that they have been preparing for the 2018 elections since November and December 2016.¹ Recommended Findings of Fact ¶¶ 470, 473,

¹ The Intervenors have the same free speech and association rights claimed by Petitioners—the rights to vote, to express political opinions, to work to elect candidates of choice, and to run for political office are core free expression and free assembly rights. Pa. Const. art. I §§ 7, 20; *see also Working Families Party v. Commonwealth*, 169 A.3d 1247, 1261 (Pa. Commw. 2017) (quoting *In re Street*, 451 A.2d 427, 432 (Pa. 1982) (internal quotation marks omitted) (emphasis added) (“While *the right to associate for the advancement of political beliefs includes the right to advance a candidate who represents those interests, . . . the right of association does not encompass the right to nominate as a candidate a particular individual who fails to meet reasonable eligibility requirements . . .*”).

Already the Intervenors had been communicating with candidates and their committee representatives, generating support for the candidates, reviewing and identifying issues that could affect the campaign, attending events in support of their candidate, and recruiting donors and volunteers for her candidate's campaign. Findings ¶¶ 471, 473 (citing Ex. I-16 ¶ 20; and Ex. I-17 ¶¶ 5, 8–9, 23)).

League of Women Voters of Pa. v. Commonwealth, No. 261 MD 2017 (Pa. Commw. Dec. 29, 2017) ("Findings"). This includes preparations for the May primary. Now, the Intervenors may no longer have the same representatives, the same voters, or the same candidates.²

The United States Supreme Court is currently considering two cases which could further impact the Intervenors' rights—an equal protection partisan gerrymandering claim in *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), *stayed pending disposition*, 137 S. Ct. 2289 (2017), and a First Amendment partisan gerrymandering claim in *Benisek v. Lamone*, 266 F. Supp. 3d 799 (D. Md. 2017), *postponing jurisdictional statement*, No. 17-333 (U.S. Dec. 8, 2017). In light of these cases, the United States Supreme Court stayed a partisan gerrymandering case in North Carolina federal court. *Common Cause v. Rucho*, 2018 U.S. Dist. LEXIS 5191 (M.D.N.C. Jan. 9, 2018), *stayed*, 2018 U.S. LEXIS 758 (U.S. Jan. 18, 2018). Thus, the Intervenors face the possibility that their constitutionally protected participation in the political process will be impacted not once, but twice, this election cycle. To avoid the possibility of added harm to Intervenors, this Honorable Court should stay its Order enjoining the 2011 plan for the 2018 primary until the United States Supreme Court can provide further clarity. *See Order* (Jan. 22, 2018), slip op. at 2.

² Voters who were previously targeted may no longer remain in the district, and declared candidates may no longer be viable in new constituencies.

The United States Supreme Court's consideration of *Gill v. Whitford* and *Benisek v. Lamone* could affect Pennsylvania jurisprudence. The cases could impose requirements as a matter of federal law that necessarily cabin what Pennsylvania partisan gerrymandering law can or cannot do. The Intervenors now face the possibility of Pennsylvania's congressional districts being redistricted not once but *twice*—first in light of the Court's Order, and second to comply with new U.S. Supreme Court pronouncements in *Gill* and *Lamone* which impact state law.

The possibility of multiple redistricting before the 2018 general election is especially concerning to Intervenors, who need certainty in district boundaries to effectively carry out their political activities by directing those activities to the correct eligible voters. Multiple redistricting would result in the unbelievable and extremely burdensome need to prepare for the 2018 elections under a third iteration of maps. Uncertainty abounds.

II. A stay is in the public interest because this Honorable Court ignored that an imminent primary election is as important as an imminent general election.

The Court's Order enjoins use of the map created by the Congressional Redistricting Act of 2011 in the May 15, 2018 primary election. Order, slip op. at 2. But this Honorable Court's precedent cautions that, in a reapportionment challenge, this Court must consider "whether the imminence of [the primary and] general elections requires the utilization of [a prior plan] notwithstanding [its]

invalidity' or whether a constitutional map 'can practicably be effectuated'" in time for the pending election. Concurring & Dissenting Stmt., slip op. at 2 (Baer, J.) (quoting *Butcher v. Bloom*, 203 A.2d 556, 568 (Pa. 1964)). "As in *Butcher*," Justice Baer recognized that "the dangers of implementing a new map for the May 2018 primary election risks '[s]erious disruption of orderly state election processes and basic governmental functions.' . . . It is naïve to think that disruption will not occur." *Id.* (citation omitted).

Under the Court's Order, the Executive Branch respondents are directed to anticipate a new congressional districting plan by February 19, 2018 and to take all measures, including adjusting the election calendar, to ensure that the May 15, 2018 primary election takes place as scheduled. Order, slip op. at 3. Under the current election calendar, nomination petitions begin circulation on February 13, 2018. Findings ¶ 423 (citing 25 Pa. C.S. § 2868). Accordingly, the nomination petition circulation period will likely be moved and shortened to comply with the Court's Order. *See* Ex. EBD-2 ¶¶ 14–21.

The Court failed to recognize that proper circulation of nomination petitions—the first event of the 2018 election calendar—takes significant effort by state and county government, candidates, and voters. Nomination petitions for Congress must include at least one thousand (1,000) valid signatures of registered and enrolled members of the proper party. 25 Pa. C.S. § 2872.1(12). Candidates

are well advised to obtain a number of signatures well over the required number to reduce the potential for objections to nomination petitions. *See In re Vodvarka*, 140 A.3d 639, 640–41 (Pa. 2016) (noting number of signatures challenged). The Elections Bureau will likely need to add staff and increase staff hours—not to mention the added workload and cost on the Counties. *See* Ex. EBD-2 ¶ 20. Moving and shortening the nomination petition circulation period also severely impacts candidates for Governor, United States Senator, half the Pennsylvania Senate, and all of the Pennsylvania House of Representatives, all of which will be on the 2018 ballot.

United States Supreme Court precedent makes clear that the imminence of an impending primary election may require the use of a plan otherwise deemed invalid. In *Lucas*, the United States Supreme Court remanded a reapportionment case to

determine whether the imminence of the 1964 primary and general elections requires that utilization of the apportionment scheme contained in the constitutional amendment be permitted, for purposes of those elections, or whether the circumstances in Colorado are such that appellants' right to cast adequately weighted votes for members of the State Legislature can practicably be effectuated in 1964.

Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 739 (1964) (emphasis added).

That a general election is farther away than a primary election is no reason to throw an impending primary election into chaos.

In Pennsylvania, the case is even stronger. Under the Pennsylvania Election Code, it makes no difference whether the primary or the general election is imminent. An “election’ shall mean any general, municipal, special or primary election unless specified otherwise.” 25 Pa. C.S. § 2602(f). A primary is no less an election under Pennsylvania law. We are on the eve of the 2018 primary election, a situation analogous to *Butcher* which was decided on the eve of the 1964 general election.

III. A stay is in the public interest because this Honorable Court's Order creates a conflict between the special election in the "old" 18th District and the circulation of nomination petitions for the "new" 18th District.

The Court's Order expressly directs that "the March 13, 2018 special election for Pennsylvania's 18th Congressional District, which will fill a vacancy in an existing congressional seat for a term of office which ends in 11 months, shall proceed under the Congressional Redistricting Act of 2011 and is unaffected by this Order." Order, slip op. at 3. The practical reality of this directive is that nomination petitions for a "new" 18th District will now be circulated before the special election under the "old" 18th District is even held. As Justice Baer recognized, "electing a representative in March in one district while nomination petitioners would be circulating for a newly-drawn district, which may or may not include the current candidates for the special election" will result in "likelihood for confusion, if not chaos." Concurring & Dissenting Stmt., slip op. at 3 (Baer, J.).

Governor Wolf issued a writ mandating that a special election for the vacancy in the 18th District be held on March 13, 2018. Findings ¶ 466. The special election will be held a mere twenty-eight days after the scheduled commencement of petition circulation for the May primary for the 18th District. Findings ¶ 467. Thus, the special election campaign will take place during the circulation of nomination petitions for the primary election, but the districts may not be the same. The confusion that this would create amongst voters during an ongoing special election for a federal office with different district lines is unfathomable.

The Court's Order directs the Executive Branch respondents to anticipate a new congressional districting plan by February 19, 2018. Order, slip op. at 3. Now—notwithstanding that nomination petition circulators have already started training under the current congressional districts, Ex. I-16 ¶ 16—voters will be asked to sign petitions for new candidates for a new 18th Congressional District in the home stretch of the campaign for special election in the current district.

As Intervenor Carol Lynne Ryan testified, changing congressional districts during the nomination petition circulation period could cause a higher risk that a voter may sign a nomination petition for the wrong district. Ex. I-17 ¶ 18. Ryan believes that there is not enough time to inform voters of a change in congressional districts before nomination petitions begin circulation. Ex. I-17 ¶ 21. She likens a

change in congressional districts to changes in a voter's polling place: it would take time to educate voters of a change in the political and election process, similar to efforts to inform voters when their polling place changes at or near an election. Ex. I-17 ¶ 19. The Court's Order could alter the outcome of the special election for a federal office since voters signing nomination petitions for new congressional districts may believe they are no longer in the 18th District and no longer eligible to vote in the special election, thereby adversely affecting and artificially decreasing voter turnout. These concerns are especially acute in the 18th Congressional District, on the eve of the special election.

IV. A stay will not substantially harm the Petitioners, who have already waited since 2011 to bring their claims.

A stay will not substantially harm the Petitioners. Instead of challenging the 2011 Plan after it became law, Petitioners waited three election cycles and almost seven years to bring their claims. Ex. I-16 ¶ 23; Ex. I-17 ¶ 26. In other redistricting cases—*Erfer* and *Holt*, for example—plaintiffs filed actions before the first elections under the new plan were held. The Pennsylvania Supreme Court has criticized delay, which limits court review of a reapportionment plan before the next election. *Holt v. 2011 Legis. Reapportionment Comm'n*, 38 A.2d 711, 721–22 (Pa. 2012).

Three election cycles have passed since Petitioners knew or should have known they had claims. Even their experts relied on election data available at the

time the 2011 Plan became law. Tr. 186:19–187:9. They could have raised their claims before the Intervenors started working on the 2018 elections. *Cf. Sprague v. Casey*, 550 A.2d 184, 188 (Pa. 1988). In sum, Petitioners will not face substantial harm, as they did not face substantial harm to bring their claims earlier in the decade.

CONCLUSION AND RELIEF REQUESTED

WHEREFORE, Intervenors respectfully request this Honorable Court to stay its January 22, 2018 Order until after this election year.

Respectfully submitted,

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The undersigned certifies that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

The undersigned verifies that the preceding Brief does not contain or reference exhibits filed in the Commonwealth Court under seal. Therefore, the preceding Brief does not contain confidential information.

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