

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 18-1816

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; GLENN THOMPSON; JEFFREY CUTLER
(Plaintiffs in District Court)

v.

SECRETARY COMMONWEALTH OF PENNSYLVANIA;
COMMISSIONER BUREAU OF COMMISSIONS, ELECTIONS &
LEGISLATION (Defendants in District Court)

and

CARMEN FEBO SAN MIGUEL; JAMES SOLOMON; JOHN GREINER;
JOHN CAPOWSKI; GRETCHEN BRANDT; THOMAS RENTSCHLER;
MARY ELIZABETH LAWN; LISA ISAACS; DON LANCASTER; JORDI
COMAS; ROBERT SMITH; WILLIAM MARX; RICHARD MANTELL;
PRISCILLA MCNULTY; THOMAS ULRICH; ROBERT MCKINSTRY; MARK
LICHTY; LORRAINE PETROSKY (Intervenors in District Court)

and

JEFFREY CUTLER (Appellant)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

**RESPONSE OF INTERVENORS CARMEN FEBO SAN MIGUEL *ET AL.*
TO APPELLANT JEFFREY CUTLER'S EMERGENCY MOTION TO
RECONSIDER**

This is a case about whether the Pennsylvania Supreme Court ran afoul of the United States Constitution when, on solely state constitutional grounds, it invalidated Pennsylvania's 2011 congressional districting plan, *League of Women Voters of Pa. v. Commonwealth*, 175 A.3d 282 (Pa. 2018), and ordered the implementation of a remedial plan, *League of Women Voters of Pa. v. Commonwealth*, No. 159 MM 2017, 2018 Pa. LEXIS 927 (Feb. 19, 2018). The District Court dismissed the complaint on standing grounds and denied Plaintiffs' motion for a preliminary injunction.¹

Appellant Jeffrey Cutler, who did not participate in the proceedings below until after the dismissal of the complaint, filed a Motion for Injunction Pending Appeal on April 23, 2018, and a Motion to Dismiss on May 8. A panel of this Court denied both motions on May 9. On May 10, Mr. Cutler filed an Emergency Motion to Reconsider both denials, requesting review by the Court *en banc*.

The Motion to Reconsider should be denied. As to the Motion to Reconsider's request for an injunction, a familiar framework applies:

“[A] movant for preliminary equitable relief . . . must demonstrate that it can win on the merits (which requires a showing significantly better than negligible but not necessarily more likely than not) and that it is more likely than not to suffer irreparable harm in the absence of preliminary relief,” and, if it makes those showings, the court then considers the balance of the equities and the public interest, and

¹ The District Court's opinion is attached to the April 23 Motion at pages 38-60. It has been reported at 287 F. Supp. 3d 558 (M.D. Pa. 2018).

“determines in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief.”

Adorers of the Blood of Christ v. Fed. Energy Regulatory Comm’n, No. 17-3163, 2017 U.S. App. LEXIS 25215, at *1-2 (3d Cir. Oct. 13, 2017) (alteration and ellipsis in original) (quoting *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017), as amended (June 26, 2017)). The Motion to Reconsider extensively discusses the Affordable Care Act, the death of a federal prosecutor, a real estate eviction, an insurance dispute, and a variety of other matters; but it does not offer any argument or evidence related to congressional redistricting, to principles of standing, or to anything else at issue in this litigation.² Accordingly, Mr. Cutler has made none of the required showings for a preliminary injunction.

In addition, on May 15 Pennsylvania’s voters participated in a primary election under the new U.S. House of Representatives map. Now that the voters have selected candidates for the general election in each of the eighteen new congressional districts, Mr. Cutler’s request for an injunction asks the Court not only to unbreak the egg but to uncook the omelet.

As to the request for dismissal, the Motion to Reconsider states no factual or legal basis for dismissal. The Motion to Reconsider should be denied in its entirety.

² It is difficult to discern the gravamen of Mr. Cutler’s appeal. But if he is appealing from the three-judge panel’s denial of a preliminary injunction, this Court would lack jurisdiction over the appeal. *See* 28 U.S.C. § 1253; *Page v. Bartels*, 248 F.3d 175, 185 (3d Cir. 2001).

Respectfully submitted,

/s/ Benjamin D. Geffen

Mary M. McKenzie

Michael Churchill

Benjamin D. Geffen

PUBLIC INTEREST LAW CENTER

1709 Benjamin Franklin Parkway, 2nd Floor

Philadelphia, PA 190103

267-546-1308 (telephone)

215-627-3183 (fax)

bgeffen@pubintl.org

Counsel for Intervenors Carmen Febo San Miguel et al.

Dated: May 21, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this date, May 21, 2018, I caused the foregoing Response to Motion to be filed and served on all counsel of record by operation of the CM/ECF system for the United States Court of Appeals for the Third Circuit.

I further certify that simultaneously with this filing via CM/ECF, I served the foregoing Response to Motion via First-Class Mail on Appellant, at the following address:

Jeffrey Cutler
P.O. Box 2806
York, PA 17405

/s/ Benjamin D. Geffen
Benjamin D. Geffen