

**No. 18-1816**

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**IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

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On Appeal from the United States District Court  
for the Middle District of Pennsylvania  
No. 1:18-cv-443-CCC-KAJ-JBS (Three-Judge Panel)

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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)

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**BRIEF OF APPELLEES CARMEN FEBO SAN MIGUEL *ET AL.***

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## JURISDICTIONAL STATEMENT

This Court lacks jurisdiction to hear Mr. Cutler’s appeal for two independent reasons. First, this case concerned the apportionment of Pennsylvania’s congressional districts, and the District Court therefore convened as a three-judge panel pursuant to 28 U.S.C. § 2284. JA5. An appeal from the denial of an injunction by a three-judge panel lies directly to the United States Supreme Court, not the Court of Appeals. *See* 28 U.S.C. § 1253; *Page v. Bartels*, 248 F.3d 175, 185 (3d Cir. 2001). Accordingly, this Court lacks jurisdiction over the appeal.

Second, because Mr. Cutler was not a party to the proceedings below, this Court does not have jurisdiction to consider his appeal. After the entry of judgment, Mr. Cutler filed a motion to intervene, JA613-21, which the District Court denied “with prejudice” as “both untimely and without merit,” JA30. Mr. Cutler has not appealed from the order denying his motion to intervene.

“Ordinarily, those who were not parties to the proceeding below may not appeal the district court’s judgment.” *Binker v. Pennsylvania*, 977 F.2d 738, 745 (3d Cir. 1992). On rare occasions, this Court has permitted a nonparty to “bring an appeal when three conditions are met: (1) the nonparty has a stake in the outcome of the proceedings that is discernible from the record; (2) the nonparty has participated in the proceedings before the district court; and (3) the equities favor the appeal.” *Northview Motors, Inc. v. Chrysler Motors Corp.*, 186 F.3d 346, 349 (3d Cir.

1999) (citing *Binker*). Mr. Cutler has not shown and cannot show that even one of these conditions is met, let alone all three. He therefore cannot appeal the District Court's judgment.

### STATEMENT OF THE ISSUES

1. Whether this Court has jurisdiction to hear the appeal.
2. Whether this Court should reverse the district court's decision not to enjoin the use of Pennsylvania's new congressional districting plan for the 2018 election cycle.

### STATEMENT OF RELATED PROCEEDINGS

This Court has previously denied motions filed by Mr. Cutler in this matter. Order, dated May 9, 2018; Order, dated June 1, 2018.

The underlying state court proceedings have concluded, with the Pennsylvania Supreme Court holding that Pennsylvania's 2011 congressional districting plan violated the Pennsylvania Constitution. *See League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018), and ordering the use of a new districting plan for the May 2018 congressional primaries, *League of Women Voters of Pa. v. Commonwealth*, 181 A.3d 1083 (Pa. 2018). The United States Supreme Court declined to stay the state court's decision. *Turzai v. League of Women Voters of Pa.*, 138 S. Ct. 1323 (2018). A petition for a writ of certiorari remains pending. No. 17-1700 (S. Ct.).

Three other cases involve the same underlying subject matter. First, Senator Joseph B. Scarnati III, one of the parties in the state court action, sought unsuccessfully to remove the proceeding to federal court. The district court remanded the case with prejudice to state court, and it later entered an order awarding counsel fees and costs associated with the removal proceedings. *League of Women Voters of Pa. v. Pennsylvania*, No. 17-5137, 2018 U.S. Dist. LEXIS 63023 (E.D. Pa. Apr. 13, 2018). Senator Scarnati's appeal from the fees and costs order is pending before this Court. No. 18-1838.

Second, in *Agre v. Wolf*, a group of Pennsylvania citizens filed suit in the United States District Court for the Eastern District of Pennsylvania, seeking a declaratory judgment that the 2011 plan violated the Elections Clause of the United States Constitution. 284 F. Supp. 3d 591, 592 (E.D. Pa. 2018). On January 10, 2018, the three-judge district court entered judgment for the defendants. *Id.* at 594. The plaintiffs appealed to the U.S. Supreme Court, which dismissed the appeal as moot on May 29, 2018. *Agre v. Wolf*, 138 S. Ct. 2576 (Mem.) (2018).

Finally, in *Diamond v. Torres*, other Pennsylvanians filed suit in the United States District Court for the Eastern District of Pennsylvania, challenging the 2011 plan under both the Elections Clause and the First and Fourteenth Amendments to the United States Constitution. Complaint at 17-20, No. 5:17-cv-5054 (E.D. Pa.

Nov. 9, 2017). On April 9, 2018, the court dismissed the case pursuant to a joint stipulation. Order at 1, No. 5:17-cv-5054 (E.D. Pa. Apr. 9, 2018).

### **STATEMENT OF THE CASE**

This was 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); 178 A.3d 737 (Pa. 2018), and ordered the implementation of a remedial plan, 181 A.3d 1083 (Pa. 2018). The District Court dismissed the complaint on standing grounds and denied Plaintiffs' motion for a preliminary injunction. JA5-28. Plaintiffs have not pursued any appeal.

Appellant Jeffrey Cutler now asks this Court to reverse the denial of a preliminary injunction. As discussed *supra*, this Court lacks jurisdiction to hear an appeal from a three-judge district court panel, and it lacks jurisdiction to hear an appeal from a nonparty. And even if the Court had jurisdiction, it should find that Mr. Cutler's arguments on appeal have no merit.

### **SUMMARY OF ARGUMENT**

This Court does not have jurisdiction over Mr. Cutler's appeal. Even if jurisdiction existed, the District Court correctly concluded that Plaintiffs below lacked standing to obtain an injunction. Mr. Cutler presents no arguments that

weigh in favor of disturbing that judgment. And because Pennsylvania’s voters have already participated in primary elections according to the new congressional districting plan, it is too late to revisit the issue.

### **STANDARD OF REVIEW**

“When reviewing a district court’s [denial] of a preliminary injunction, [this Court] review[s] the court’s findings of fact for clear error, its conclusions of law de novo, and the ultimate decision . . . for an abuse of discretion.” *Reilly v. City of Harrisburg*, 858 F.3d 173, 176 (3d Cir. 2017) (first alteration in original) (quotation marks and citation omitted).

### **ARGUMENT**

This Court lacks jurisdiction, as detailed in the Jurisdictional Statement. For this reason, the Court should reject the appeal. Even if the Court were to consider the merits of the appeal, it should affirm the decision and order below.

Mr. Cutler requests, inter alia, that the Court reverse the district court’s denial of a preliminary injunction and “enjoin the enforcement of the revised voting map.” Appellant’s Brief at 29. A familiar framework applies:

A party seeking a preliminary injunction must show: (1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief.



*Arrowpoint Capital Corp. v. Arrowpoint Asset Mgmt., LLC*, 793 F.3d 313, 318-19 (3d Cir. 2015) (quotation marks and citation omitted).

Mr. Cutler also requests for the Court to “grant his Permanent Injunction.” Appellant’s Brief at 29. This framework is also familiar:

[A] plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

*eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

Mr. Cutler’s brief extensively discusses tax collection in East Lampeter Township, an Amtrak derailment, the Affordable Care Act, a DUI arrest, a criminal sentence, 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. Consequently, Mr. Cutler has made none of the required showings for a preliminary or permanent injunction.

In addition, on May 15 Pennsylvania’s voters participated in a primary election under the new congressional districting plan. Now that the voters have selected candidates for the general election in each of the eighteen new congressional districts, it would be impossible to modify the district boundaries without re-running congressional primaries statewide, a costly and disruptive

exercise that would create serious confusion and harm for voters. For this reason, Mr. Cutler’s request for an injunction asks the Court not only to unbreak the egg but to uncook the omelet. *See generally Garcia v. 2011 Legislative Reapportionment Comm’n*, 938 F. Supp. 2d 542, 552 (E.D. Pa. 2013) (“[A] special election is a drastic remedy and one that would disrupt the orderly electoral process contemplated by the Pennsylvania Constitution.”), *aff’d*, 559 F. App’x 128 (3d Cir. 2014).

### CONCLUSION

For the foregoing reasons, the Court should reject the appeal and affirm the decision and order of the District Court.

Dated: August 14, 2018

Respectfully submitted,

/s/ Benjamin D. Geffen

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**CERTIFICATE OF COMPLIANCE WITH LAR 28.3(d)**

The undersigned hereby certifies that the following attorneys whose names appear on this brief are active members of the bar of this court:

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Michael Churchill  
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Dated: August 14, 2018

*/s/ Benjamin D. Geffen*  
\_\_\_\_\_

Benjamin D. Geffen

## CERTIFICATE OF COMPLIANCE

1. The foregoing brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(A) because it does not exceed 30 pages.
2. The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.
3. Pursuant to Local Rule 31.1(c), I certify that the text of the electronic brief is identical to the text in the paper copies.
4. The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, and according to that program, the submissions are free of viruses.

Dated: August 14, 2018

/s/ Benjamin D. Geffen  
Benjamin D. Geffen

**CERTIFICATE OF SERVICE**

I hereby certify that on this date, I caused the foregoing Brief 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 Brief via First-Class Mail on Appellant, at the following address:

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Dated: August 14, 2018

/s/ Benjamin D. Geffen  
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