

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

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, and GLENN THOMPSON,

Plaintiffs,

v.

ROBERT TORRES, in his official capacity as Acting Secretary of the Commonwealth; JONATHAN M. MARKS, in his official capacity as Commissioner of the Bureau of Commissions, Elections, and Legislation,

Defendants.

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: No. 1:18-cv-00443-CCC-KAJ-JBS
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: Three-Judge Panel
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: Pursuant to 28 U.S.C. § 2284(a)
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: Circuit Judge Kent Jordan
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: Chief Judge Christopher Conner
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: District Judge Jerome Simandle
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**SURREPLY BRIEF IN OPPOSITION TO PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION**

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Plaintiffs' Reply Brief in Support of their Motion for Preliminary Injunction (the "Reply") goes far beyond addressing the points made in the Responses to their Motion for Preliminary Injunction; it makes entirely new arguments and claims for relief, attaching new evidence to support these new points. For example, Plaintiffs change the theory underlying Claim II of their Complaint, now arguing that the Election Clause requires courts to give legislatures an unspecified number of months to engage in an optimally inclusive and reasoned version of the democratic process. They request new forms of relief, which require Defendants and the Court to readjust their analysis of the balance of the equities. Finally, they provide 16 declarations and affidavits, many of which raise new issues. In light of the structure of this proceeding, in which all evidence is entering the record via declaration and affidavit, Defendants believe that they should be given the opportunity to counter in writing Plaintiffs' new arguments and evidence. Therefore, Defendants respectfully submit this short Surreply Brief and attached Supplemental Affidavit.

I. PLAINTIFFS' NEW AND DIFFERENT CLAIMS FOR RELIEF

In their Motion for Preliminary Injunction, Plaintiffs ask the Court to order that the May 2018 primary take place under the 2011 Plan. In the face of Defendants' demonstration that the relief they seek is simply impossible, Plaintiffs cast about for alternatives. But none of these alternatives is a viable option either;

each of them will prejudice Defendants, the 182 congressional candidates who are now circulating petitions, candidates for the three statewide positions and hundreds of other positions at stake in the May 2018 primary, and, critically, voters and the integrity of the election itself.

First, Plaintiffs attach a Declaration of Carol Aichele, a former Secretary of the Commonwealth. Former Secretary Aichele states, without any detail, that if this Court orders reinstatement of the 2011 Plan by March 16, the May 15 primary can go ahead with congressional candidates on the ballot. As explained in the attached Supplemental Affidavit of Jonathan Marks, Former Secretary Aichele is incorrect. *See* Supplemental Affidavit of Jonathan M. Marks (“Marks Suppl. Aff.”) attached hereto as Ex. 1, at ¶¶ 2-24.

Second, Plaintiffs contend that “Counsel for Executive Defendants represented before the Pennsylvania Supreme Court at oral argument that congressional primaries could be held as late as September.” Reply at 25. This is an extraordinary mischaracterization of what Defendants’ counsel, Mark Aronchick, actually said.¹ When asked whether the primary could be held in August, Defendants’ counsel replied, “if it became necessary to think about August, we’ll go back to the drawing board and figure out if we can get this all

¹ Plaintiffs also quote Defendants’ counsel as saying that Defendants have “complete power, to order moving the primary.” Reply at 25. Counsel actually stated that the court had that power.

done if the primary was the beginning of August.” *See* Pennsylvania Supreme Court Oral Argument Transcript Excerpts (“Tr.”), attached hereto as Ex. 2, at 37:23-38:2; *see also* Tr. 64:11-16 (“You can change [the primary date] we believe safely, not a problem, until July 31 call it. If you say go back . . . and figure out whether there’s more time into August, we will sit down and come back to you and tell you that with an addendum to our affidavit. . . .”).

Third, Plaintiffs suggest that this Court “has the power to adjust the timelines imposed on the state by the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”).” Reply at 25. Tellingly, however, they cite no authority for that power. Federal courts have altered UOCAVA deadlines in litigation between the United States and individual states over compliance with UOCAVA. *See* Cases Raising Claims under the Uniformed and Overseas Citizens Absentee Voting Act, <https://www.justice.gov/crt/cases-raising-claims-under-uniformed-and-overseas-citizen-absentee-voting-act>. But Defendants are aware of no authority for a federal court to excuse a state’s compliance with UOCAVA in a case where the United States is not a party. The text of the statute itself suggests that such exemptions must be requested from the executive branch, not the judiciary. 52 U.S.C. § 20302(g) (setting forth procedures for requesting a hardship exemption).

Defendants have consistently taken the position that the primary could be postponed until July (not September). However, they have also consistently warned that any postponement of the primary, especially one that bifurcates the congressional races from other races (as Plaintiffs appear to contemplate), will have enormous drawbacks. *See* Defs PI Opp. at 13-14. Plaintiffs ignore these consequences in their brief. They also ignore the warnings of their own allies, the intervenors in the state court litigation (“State Court Intervenors”), who argued to the Pennsylvania Supreme Court that the added costs and logistical challenges of moving the primary would “constitute serious disruption of orderly state election processes and an inordinate expense for the individual taxpayer who ultimately carries the burden.” State Court Intervenors’ Br. (Pa. Jan. 10, 2018) at 10-11; 29-30. In their effort to obtain a stay from the U.S. Supreme Court, State Court Intervenors specifically criticized the implementation of a two-track circulation period, claiming that this bifurcation would not only result in “chaos” but “violat[ed] the equal protection rights of candidates for Congress.” *See, e.g.*, State Court Intervenors’ App. for Stay (U.S. Jan. 26, 2018) at 2, 17. At oral argument before the Pennsylvania Supreme Court, State Court Intervenors’ counsel further argued:

Having people have primaries in July and August, Your Honor, could end up with people on vacations. You can’t – there is – you change and split this, you are actually making political determinations as to the outcome of the

election and who will be the candidates. . . . Other than the vacation schedule, there's another good reason [for not holding a bifurcated primary in July or August]. To run for Congress, it takes a long time and unfortunately an enormous amount of money. If I think to myself I don't even know if I'm going to be the candidate until September and then I'm going to have to go out and raise \$10 million, I may not choose to run for office because of that. You are changing – this Court would change the calculus of the entire election process.

Defs. PI Opp., Hangley Decl., Ex. 1 at 139:20-141:16.

II. PLAINTIFFS' NEW CONTENTION THAT THE ELECTIONS CLAUSE ENTITLES LEGISLATURES TO TAKE MONTHS TO PURSUE AN IDEALIZED FORM OF THE LEGISLATIVE PROCESS

Throughout this case, Plaintiffs have conceded that eighteen days was enough time for the Pennsylvania General Assembly to draft and vote on a remedial plan. *See* Defs. PI Opp. at 5-10. They contend, however, that the General Assembly could not begin drafting until it received the Pennsylvania Supreme Court's Opinion. *See, e.g.*, Reply at 9-12. This argument has many pitfalls, including that the January 22 Order contained clear criteria that the Opinion did not change, the January 22 Order did not suggest that the General Assembly should wait for an Opinion, the General Assembly would have been able to pass legislation by at least the February 15 deadline even if it had not started until the Opinion issued on February 7 (eight days earlier), and the General Assembly neither asked the Pennsylvania Supreme Court for clarification of the January 22 Order before the Opinion issued, nor asked the court for additional time

after the Opinion issued. *See* Defs. PI Opp. at 17-20; Defs. MTD Reply at 17-20; *see also* PI Mot. at 11. Indeed, Plaintiffs have not submitted any evidence about the Pennsylvania legislative process to contradict Defendants' submissions in opposition to Plaintiffs' Motion. *See* Defs. PI Opp., Ex. A (Dermody Aff.); Ex. D (Costa Aff.).

Perhaps because of these pitfalls, Plaintiffs' Reply introduces a new theory of what the Elections Clause requires: "months" of bipartisan drafting, debate, negotiation, and public input. In support of this theory, they attach a Declaration of Mark Corrigan, former Secretary-Parliamentarian of the Senate. *See* Reply Ex. B. Mr. Corrigan concedes, as he must, that "18 days is mechanically and legalistically sufficient time to pass legislation." Corrigan Decl. ¶ 23. He opines, however, that 18 days is nonetheless "not enough time for legislation of this nature (or, really, any well-thought-out legislation) to become law," because it does not allow for "the democratic process of legislation." *Id.* ¶¶ 22, 24. He states that every instance of Congressional redistricting legislation that he observed "required months of hearings, debate, negotiation and drafting." *Id.* ¶ 24. This process, he observes, includes "a constant back and forth between legislators with different interests," "debate and negotiation . . . between and among members of the two political parties," and "thorough and open debate and analysis – through committee hearings, public meetings and other means [in order] to allow an interested public

the opportunity to weigh in on public policy by influencing the language of putative legislation.” *Id.* ¶¶ 12-13, 15.

Mr. Corrigan’s vision of the democratic ideal, while appealing, has no resemblance to the Pennsylvania General Assembly’s actual redistricting legislation, including that passed while Mr. Corrigan was in office. There was no inter-party negotiation or public debate of the 2011 Plan, which was rammed through the legislative process in 16 days with no public participation. *See* Defs. PI Opp. at 7. The process in 2001 fell similarly short of Mr. Corrigan’s Athenian ideal; according to the plaintiffs who challenged the 2001 congressional redistricting plan,

[P]rominent national figures in the Republican party . . . began pressuring Governor Schweiker, a Republican, and the Republican members of the General Assembly to adopt the Senate redistricting plan as a punitive measure against Democrats for having enacted apparently pro-Democrat redistricting plans in other states. In response, Republican members of the state House and Senate began working together to reach an agreement. In the process, *they effectively ignored all Democratic members of the General Assembly, including members of the Conference Committee appointed to resolve the impasse between the competing plans.* . . . The Democratic members of the Conference Committee had no input on [the final version of the plan]. . . . [A]ll Democratic members of the Conference Committee voted against the version, and all Republicans voted in favor.

Vieth v. Pennsylvania, 188 F. Supp. 2d 532, 535 (M.D. Pa. 2002) (emphasis added). And in 2018, President Pro Tempore Scarnati and Speaker Turzai appear

to have been perfectly satisfied with the prospect of a redistricting plan that represented the input of only two men – hardly the deliberative legislative process that Mr. Corrigan appears to have in mind.²

Plaintiffs’ new argument that the Elections Clause requires a court to give the General Assembly an unspecified number of months to engage in reasonable deliberation, public outreach, and bipartisan cooperation (an ideal that appears to have no resemblance to the General Assembly’s reality) simply makes Defendants’ point: Plaintiffs’ Elections Clause “adequate opportunity” theory is necessarily a fact-specific inquiry for which Plaintiffs have offered *no* workable standards. “Nor have Plaintiffs yet explained why federal courts are better suited to the task than state courts, which have greater knowledge of the intricacies of the state political process and elections system.” Defs. MTD Reply at 17, n.5.

² In the Declaration attached to the Reply as Exhibit A, President Pro Tem Scarnati attempts to blame Governor Wolf for the General Assembly’s failure to pass legislation as contemplated by the January 22 Order, stating that Governor Wolf “indicated that the [January 22 Order] did not require the General Assembly to present [Governor Wolf] with actual legislation adopting a new Congressional plan.” Reply Ex. A ¶ 4. Even if Governor Wolf had said this – Defendants do not believe that he did – it would not be relevant. Governor Wolf does not speak for the Pennsylvania Supreme Court, and has no authority to overrule its Orders. If President Pro Tempore Scarnati and Speaker Turzai had any doubt about what the January 22 Order meant, they should have raised it with the court, not with the Governor. Moreover, two paragraphs later in the same Declaration, President Pro Tempore Scarnati makes it clear that he understood exactly what the January 22 Order meant. *See id.* ¶ 6 (“[I]n a good faith effort to begin the process of *enacting a new Congressional [map] as instructed by the [January 22 Order] . . .*”) (emphasis added).

III. PLAINTIFFS' LEGAL FICTION THAT THE 2011 PLAN IS THE "STATUS QUO" DOES NOT CHANGE THE REAL WORLD FACT THAT GRANTING THE RELIEF PLAINTIFFS SEEK WILL BE ENORMOUSLY DISRUPTIVE

Plaintiffs argue that the Court should treat the 2011 Plan as the "status quo" because it was "the last, peaceable, uncontested status of the parties." Reply at 30. But that language, like nearly all of Plaintiffs' citations regarding the "status quo," comes from cases weighing a question that is academic here: whether the burden for granting a preliminary injunction should be extremely high or even higher than that. *See, e.g., Bennington Foods LLC v. St. Croix Renaissance Corp., LLP*, 528 F. 3d 176, 179 (3d Cir. 2008). It does not mean that a court must disregard reality when deciding whether an injunction will harm the public interest by derailing an election. Here, the reality is that the Current Plan is in place, and replacing it will disrupt the 2018 primary election.³

³ Plaintiffs argue that the Current Plan is causing confusion and chaos, Reply at 27, 31-32, but provide paltry support for that contention. Exhibit E1 to the Reply is the affidavit of a political consultant who pored over 8 million voter records to find the relative handful of records that – as the Department has acknowledged – had not yet been captured in counties' database updates. *See* Marks Suppl. Aff. ¶¶ 27-29. The affiant is the *only* person, out of the tens of thousands of people involved in the upcoming election, to have complained about this lag in certain database updates. *Id.* ¶ 37. And it blinks reality to suggest, as Plaintiffs do, that making *another* change to the congressional map and to the election schedule at this late date would *reduce* such confusion rather than multiplying it.

Dated: March 8, 2018

Thomas P. Howell
Office of General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17101
Tel: (717) 783-6563
Fax: (717) 787-1788
thowell@pa.gov

Timothy E. Gates
Kathleen M. Kotula
Pennsylvania Department of State
Office of Chief Counsel
306 North Office Building
Harrisburg, PA 17120
Tel: (717) 783-0736
tgates@pa.gov
kkotula@pa.gov

/s/ Mark A. Aronchick

Mark A. Aronchick
Michele D. Hanglely
Hanglely Aronchick Segal Pudlin & Schiller
One Logan Square, 27th Floor
Philadelphia, PA 19103
Tel: (215) 568-6200
Fax: (215) 568-0300
maa@hanglely.com
mdh@hanglely.com

Neal Kumar Katyal (*admitted pro hac vice*)
Colleen Roh Sinzduk (*admitted pro hac vice*)
Reedy C. Swanson (*admitted pro hac vice*)
Hogan Lovells US LLP
555 Thirteenth Street NW
Washington, DC 20004
Tel: (202) 637-5600
neal.katyal@hoganlovells.com

Thomas P. Schmidt (*admitted pro hac vice*)
Hogan Lovells US LLP
875 Third Avenue
New York, NY 10022

Sara Solow (*admitted pro hac vice*)
Hogan Lovells US LLP
1735 Market St., 23rd Floor
Philadelphia, PA 19103

*Attorneys for Acting Secretary Torres and
Commissioner Marks*

CERTIFICATE OF SERVICE

I, Mark A. Aronchick, certify that on March 9, 2018, a true and correct copy of the foregoing Surreply Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction was electronically filed with the Court and served via the CM/ECF system which will provide notice to all counsel and parties of record.

/s/ Mark A. Aronchick

Mark A. Aronchick

EXHIBIT 1

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capacity as Majority Leader of the
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SUPPLEMENTAL AFFIDAVIT OF JONATHAN M. MARKS

Jonathan M. Marks, being duly sworn, deposes and says:

1. I submit this Supplemental Affidavit to correct or clarify statements in two of the affidavits attached to Plaintiffs' Reply Brief in Further Support of Motion for Preliminary Injunction and to respond to a proposed remedy raised by Intervenors.

Declaration of Former Secretary Aichele

2. Former Secretary of the Commonwealth Carol Aichele has submitted a Declaration concluding that it would be possible to conduct the congressional primary on May 15 if a court reinstates the 2011 Plan by March 16. *See* March 7, 2018 Declaration of Carol Aichele, Ex. C to Plaintiffs' Reply ("Aichele Decl.") ¶ 12.

3. Former Secretary Aichele is incorrect. I emphatically reiterate the statement I made in paragraph 70 of my March 2 affidavit: It will not be possible to hold the 2018 congressional primary as scheduled if it must proceed under any map other than the Current Plan.

4. Former Secretary Aichele's conclusion overlooks important legal requirements and practical realities of election preparation.

5. First, Former Secretary Aichele assumes that if a court ordered the reinstatement of the 2011 Plan on March 16, the Department could have petition

packages ready in time for candidates to begin circulating them on March 20. *Id.* ¶ 13.

6. While the Department might be able to use the 2011 Plan's stored data to have petition packages available within this short time frame, the Department has never attempted to use stored data in this fashion. *See* my March 2, 2018 Affidavit ("March 2 Aff.") ¶ 76. Therefore, it may not be possible to begin a petition period on March 20.

7. After the Current Plan was issued, the Department posted nomination petitions on its website five days before the petition circulation period began. *Id.* ¶ 30. During the five days between the posting and the start of the petition circulation period, 125 candidates created and downloaded petitions. In my experience, candidates prefer to download their petitions far enough in advance of the start of the circulation period to make copies and distribute the petitions to the people who will circulate them.

8. Under Former Secretary Aichele's plan, however, candidates will likely have less than 24 hours between the time that they can download petitions and the time that they may begin to circulate them.

9. Former Secretary Aichele's proposed schedule also makes it impossible for counties to comply with state and federal statutory deadlines that

require counties to begin delivering military-overseas absentee ballots 45 days before an election. *See* March 2 Aff. ¶ 57.

10. Under Former Secretary Aichele's proposed timeline, the deadline for filing nomination petitions would fall on April 3, *see* Aichele Decl. ¶ 13, which is seven days after the date by which the Secretary must send the counties a list of congressional candidates known to exist at the time, seven days after the first deadline of March 26 for remote military-overseas voters, and three days after the second deadline of March 30 for all other military-overseas voters.

11. As a result, candidates will still be circulating petitions, and counties will not know who is running for congressional seats, when the military absentee ballots are deployed. Instead, these ballots will have to be mailed out with no names of congressional candidates at all, but rather instructions on how to obtain candidate information at a later time.

12. Former Secretary Aichele's proposed timeline also requires candidates to collect the statutorily established 1,000 signatures without any advance preparation, and in an abbreviated circulation period of two weeks, rather than the usual three. *Id.* ¶ 13. If the proposed timeline is adjusted to allow counties to comply with military absentee deadlines, the circulation period shrinks to just one week.

13. In my experience, shortening the circulation period so significantly and giving candidates so little time to prepare will generate voluminous litigation by putative candidates who believe they were not given sufficient time to obtain the requisite signatures.

14. The proposed timeline is also very likely to jeopardize the critical period that counties need in order to adequately prepare for the primary.

15. I believe, and stated in my December 14, 2017 affidavit, that counties need six to eight weeks after the close of the nomination petition period to prepare for a primary election. *See* March 2 Aff. Ex. 1 ¶ 16.

16. The schedule currently in place, which I believe to be the most compressed schedule possible, gives counties eight weeks between the close of the nominations period and the primary date.

17. Under Former Secretary Aichele's proposed timeline, counties will need to begin programming ballots and testing voting systems before the objections period even begins. Under the Election Code, objections do not have to be filed until April 10, *see* 25 P.S. § 2937, after which the Commonwealth Court must adjudicate, and the Pennsylvania Supreme Court must review, any objections made. *See* 42 Pa.C.S. § 764; *see also* Pa.R.A.P. 903(c)(1)(ii); Pa.R.A.P. 1101.

18. Former Secretary Aichele's proposed timeline also overlooks other deadlines that will impact counties' ability to prepare ballots in the six weeks

between April 3 and May 15, including the candidate withdrawal deadline and the ballot lottery, which determines ballot order of the candidates. The counties cannot program voting machines until these details are determined.

19. Former Secretary Aichele's timeline also threatens to affect civilian absentees' access to the ballot box. Although counties are not statutorily required to mail out civilian absentee ballots until May 1, many counties prepare ballots in advance of this deadline in order to compensate for the realities of the U.S. Postal Service's transit time. Even short delays in this timeline would make it impossible for absentee voters outside the Commonwealth to timely return their voted ballots. Civilian absentee ballots must be received by the counties – not merely postmarked – by 5:00 PM on the Friday before the election, or they cannot be counted.

20. Former Secretary Aichele suggests that her proposed changes should be made "before much activity has taken place in connection with" the Current Plan. Aichele Decl. ¶ 17. But as set forth in my previous affidavit, a tremendous amount of effort has already been expended to implement the Current Plan. March 2 Aff. ¶¶ 26-48. Counties are continuing to move forward with ballot notices and have already published their newspaper advertisements. The Department of State has engaged in an unprecedented voter and candidate education campaign. To date, 182 candidates have downloaded and begun to circulate nomination petitions. Unraveling these efforts would come at a great cost.

21. Moreover, Former Secretary Aichele's proposed schedule places additional severe strains on the 2018 election cycle.

22. When, back in December 2017, I and my team considered whether it would be possible to amend the elections calendar to accommodate a new congressional map, we carefully analyzed the impact that each potential administrative adjustment and deadline change might have on voters', candidates', and counties' ability to participate in a fair, orderly primary. Based on these calculations, we determined that a two-week shift in certain early deadlines was the maximum feasible adjustment, and accordingly, concluded that any new map needed to be put into place no later than February 20.

23. Former Secretary Aichele suggests starting the clock over again almost a month after that date. This proposed timeline is so compressed that it creates an unacceptable level of risk of error, confusion, and ultimately voter disenfranchisement.

24. Based on my years of experience with Pennsylvania elections, I believe that adopting Former Secretary Aichele's proposed timeline would endanger the integrity of Pennsylvania's 2018 congressional primaries, and could have spillover effects that would compromise the integrity of other primary races.

Affidavit of Cheryl Corsa

25. In my March 2, 2018 Affidavit, I described the Department's updates to the voter registration files in the Statewide Uniform Registry of Electors ("SURE"). *See* March 2 Aff. ¶¶ 32-33.

26. The only information in the SURE system that is affected by the changes to voting districts is the voters' congressional districts. The Department is not statutorily required to provide this information in the SURE system. *See* 25 Pa.C.S. § 1404 ("[T]he information provided shall contain the name, address, date of birth and voting history. . . . The list may also include information on voting districts."). Nonetheless, the Department provides this information as a courtesy.

27. As I stated in my Affidavit, the Department completed its updates of the overwhelming majority (8,347,549 out of 8,436,596) of voter registration files on February 23. March 2 Aff. ¶ 32.

28. The remaining voter registration files are in the 14 counties that are split between voting districts. The Department has been working with those counties over the last two weeks to ensure that the remaining files are updated as quickly as possible.

29. As of March 8, eight of the 14 counties had completed their updates. Approximately 29,000 voter records—less than 0.5% of the Commonwealth's voter files – remain to be updated.

30. After the Department completed its bulk updates of the SURE system on February 23, we intended to spend additional time verifying the updates before posting the new data in downloadable form. However, we had the system set up to automatically post updates once a week. Early in the morning of Monday, February 26, such an automatic update took place, resulting in the posting of inaccurate data.

31. As described in her Affidavit, at 9:07 AM, Cheryl Corsa downloaded a Full Voter Export (“FVE”) that contained the inaccurate data. *See* March 7, 2018 Affidavit of Cheryl Corsa, Ex. E.1 to Plaintiffs’ Reply (“Corsa Aff.”) ¶ 3. Ms. Corsa is the only person who ever downloaded that data. By 10:00 AM, the Bureau had spotted the error and removed the data, replacing it with an older version of the data.

32. By Wednesday, February 28, an FVE reflecting the Current Plan was made available online. As Ms. Corsa acknowledges, the FVE website stated that some voter records were still being updated: “Voter records in 2 townships and 29 wards within 14 counties that are split by the Remedial Plan will continue to be updated as those county election offices make necessary changes to reflect the new congressional districts.” Corsa Aff. Ex. 5. The statement explained where users could go to find details regarding those split townships and wards. *Id.*

33. Information that will help candidates match the Current Plan's boundaries to the tiny percentage of voters whose data has not yet been updated is available from many sources other than the Department's FVE. The most important of these are the counties themselves, which are responsible for providing this information in the first place. As Ms. Corsa acknowledges, this information is also reflected in the certified textual descriptions of the districts posted on the Department's website. Corsa Aff. ¶ 13.

34. Ms. Corsa is also correct that at one point, the SURE system displayed incorrect congressional district information for one voting division (approximately 934 voters) in Clarion County. Corsa Aff. ¶ 11. Bureau staff identified that anomaly and corrected it on March 2.

35. I do not believe that the incorrect data for the Clarion County division could have caused problems to any candidate, because all of Clarion County is in District 15.

36. The Bureau has communicated with Ms. Corsa about her concerns, and has given her an extra day of free access to FVE downloads.

37. To my knowledge, no user of the FVE other than Ms. Corsa has called the Help Desk to complain about the small number of voter records in the SURE system that remain to be updated.

38. It is extremely important to me that the data provided by the Department be as up to date and accurate as possible. For that reason, the Bureau is working closely with the counties who have not yet completed their data updates, with the goal of ensuring that all of the millions of records in the SURE system are up to date.

39. The Department is also trying to eliminate any confusion by keeping the SURE system home page updated with warnings that certain townships and wards remain to be updated. Ms. Corsa acknowledges reading these warnings. Corsa Aff. Exs. 4, 5, 6, 9.

The Consequences of an At-Large Election

40. In the event that the Current Plan is stayed, Intervenors suggest that a statewide at-large congressional election might be legally required under 2 U.S.C. § 2a(c).

41. An at-large congressional election would be unprecedented in the Commonwealth. The Election Code does not provide any guidance on how such an election should be organized, and the Department does not have any institutional experience with, or existing guidelines for, running this type of election. New requirements and procedures would have to be developed or adapted to address many aspects of the process: for example, to determine how many signatures the candidates should be required to collect and from where.

42. The Commonwealth and the counties would also face significant logistical challenges, many of which are not yet even knowable, in implementing such a novel remedy. For example, the Department would be required to adjust existing voting machines and balloting systems to accommodate the large number of names that would appear on every ballot in both the primary and general election. It is unclear whether the voting systems currently certified for use in the Commonwealth can all accommodate such a high volume of candidates.

43. Any outside machines leased by the Commonwealth would need to be inspected and certified by the state certification system and be compliant under the Americans with Disabilities Act in time for the primary. It is unclear whether there would be sufficient time to get new voting systems certified and whether vendors will be able to meet the increased demand for voting systems.

44. An at-large election would also require a massive training and education effort to ensure that poll workers and voters understand the new ballot and voting systems.

45. An at-large format also poses risks to the integrity of the election. For example, although this list is by no means exclusive, an at-large format would favor candidates with the largest financial resources who can advertise statewide or target large cities. There will be no way to ensure a reasonable distribution of candidates, geographically or otherwise, potentially resulting in an

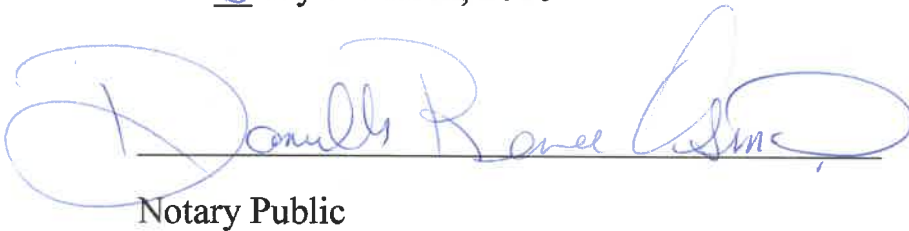
unrepresentative congressional delegation. Because the ballot requires candidates from the party of the governor (Democratic) to be listed first, an at-large ballot would also disadvantage Republican and third-party candidates in the general election, where they will be listed 19th and below.



Jonathan M. Marks

Sworn to and subscribed before me

This 8 day of March, 2018



Notary Public

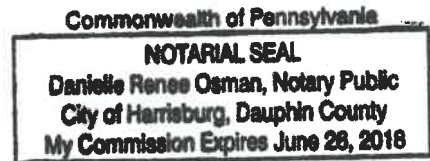


EXHIBIT 2

1 but we -- haste make waste. We want to make
2 sure that if we were to order that, we're not
3 ordering the impossible or something that
4 would just end up being more difficult down
5 the road faced with challenges.

6 MR. ARONCHICK: I understand that and I
7 will address at least our views on that, can
8 it be done, can it be done properly.

9 Then the second basket of remedy issues
10 is once it's done, can the election proceed
11 smoothly for the congressional primaries,
12 let's say for the May 15th primary, assuming
13 this Court wouldn't be entertaining moving,
14 which is a possibility, all of the primaries
15 in order to get things done right.

16 FEMALE JUSTICE: I thought the Executive
17 Branch was recommending that as a
18 possibility?

19 MR. ARONCHICK: There are two
20 possibilities. We're recommending that if
21 the map is in place by February 20 or before,
22 that we can show you that we can run this
23 election. We can run the congressional
24 portion of the primary and all the
25 up-and-down ballot seats by May 15th, and I

PENNSYLVANIA SUPREME COURT

audiotaped hearing of

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA et al.,

Petitioners,

v.

THE COMMONWEALTH OF PENNSYLVANIA et al.,

Respondents.

BEFORE: CHIEF JUSTICE THOMAS SAYLOR and the
JUSTICE PANEL

A P P E A R A N C E S:

DAVID GERSCH, ESQUIRE

for Petitioners

MARK ARONCHICK, ESQUIRE

for Governor Wolf

CLIFFORD LEVINE, ESQUIRE

for Lieutenant Governor Stack

KEITH MARC BRADEN, ESQUIRE

for Speaker Turzai

JASON TORCHINSKY, ESQUIRE

for President Pro Tem of the Senate

Lawrence Davis, ESQUIRE

MR. TABAS, ESQUIRE,

for Intervenors

1 will show you that and I'll answer any
2 questions.

3 But if it can't be done and the map be
4 put in place by February 20, we are saying
5 that you have the ample power, complete
6 power, to order moving the primary. In fact,
7 you can move the primary as late as the end
8 of July if you wanted to and still run -- and
9 we can still run the general election in the
10 proper fashion as long as the primary was
11 completed then.

12 We would be recommending that you in
13 that case move the complete primary rather
14 than bifurcating, run it all together,
15 whatever the new date is, if it's in June or
16 a few weeks later a month later, or whatever
17 you choose --

18 FEMALE JUSTICE: Well, the cost of
19 having separate primaries would be
20 astronomical.

21 MR. ARONCHICK: Well, it's not
22 astronomical. It's \$20 million shared both
23 at the state and county levels.

24 JUSTICE WECHT: Why would they have to
25 be separate? Number one, why would there

1 have to be any separate primaries, why
2 couldn't we just move all the primaries?

3 MR. ARONCHICK: That's what we --

4 JUSTICE WECHT: And by the way, why
5 can't they move to August if necessary?

6 MR. ARONCHICK: Well, Justice Wecht, if
7 you start to move it into August, we run into
8 the military ballot problems and mailing for
9 the general election.

10 We've submitted an affidavit and --
11 uncontested by the way, from Mr. Marks in the
12 record that demonstrates why the end of July
13 would be --

14 JUSTICE WECHT: There are states that
15 have primaries in August. I think there's a
16 state or two that have primaries in
17 September, I could be wrong. I'm just
18 exploring the outer bounds here, assuming
19 other dates -- reporting and other dates the
20 secretary states. The police can also be
21 moved back.

22 MR. ARONCHICK: Let me recommend this to
23 you, Justice Wecht, that if it became
24 necessary to think about August, we'll go
25 back to the drawing board and figure out if

1 we can get this all done if the primary was
2 the beginning of August.

3 When we looked at this and looked at it
4 carefully, we thought the end of July we know
5 we can do that. If you say you need us to go
6 back and sharpen our pencils up a little bit
7 more, I guarantee you we'll do this.

8 Because one pledge that we're making
9 here is that the experts that know how to run
10 these elections, not the people throwing
11 darts but the one who know how to run these
12 elections, will do everything possible to
13 accommodate an order directing that we
14 finally have a constitutional map that
15 voters, if there was ever a time in our
16 democracy, could vote on --

17 MALE JUSTICE: In fact, your position --
18 I'm sorry, Mr. Aronchick, just to follow up.
19 Your position would be in fact that there are
20 constitutional maps that have already been
21 done in profusion here in the form of the
22 experts that Judge Brobson saw.

23 MR. ARONCHICK: So let me go to the
24 first basket of --

25 FEMALE JUSTICE: Excuse me, before you

1 FEMALE JUSTICE: \$200 million.

2 MALE JUSTICE: I mean, there's nothing
3 holy -- is there something holy about May 8
4 or May 7, or May 15?

5 MR. ARONCHICK: No, no, no. If you
6 decide -- you asked in connection with that
7 remedy. The second proposal that we make to
8 you is just that, you can change the primary
9 date. We're early in the country, as you
10 said. You can change the primary date for
11 all races. You can change it we believe
12 safely, not a problem, until July 31 call it.

13 If you say go back, I'm telling you,
14 Justice Wecht, and figure out whether there's
15 more time into August, we will sit down and
16 come back to you and tell you that with an
17 addendum to our affidavit.

18 MALE JUSTICE: There must be, because I
19 know for a fact Connecticut votes in August.
20 I think New York is later.

21 MR. ARONCHICK: I understand that.
22 Nobody below asked us to do that, so there
23 was no contest in what we put into the
24 record.

25 So if you, of course, the Supreme Court,

1 asks us to pull out the pencils and take a
2 second look at that, we will certainly do
3 that rapidly. We'll comply, we'll submit our
4 report to you rapidly.

5 MALE JUSTICE: Thank you.

6 MR. ARONCHICK: Thank you very much.

7 One last comment, please, just to wrap up and
8 that is what I said before, I really mean.
9 We were the pride of the country with our
10 Constitution. We're not now with the way
11 we're running this part of our democracy.
12 Please in as broad based as possible, as
13 steadfastly as possible, please correct that.
14 Thank you.

15 CHIEF JUSTICE SAYLOR: Mr. Levine on
16 behalf of the respondent lieutenant governor,
17 what's the different interests between the
18 governor and the lieutenant governor?

19 MR. LEVINE: Well, the lieutenant
20 governor actually has the role both with the
21 Senate and the Executive Branch. The
22 lieutenant governor has felt that it's
23 important also to have a special master
24 involved in this process as a remedy for that
25 reason. The lieutenant governor has