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

JACOB CORMAN, et al., Plaintiffs, v. ROBERT TORRES, et al., Defendants, and CARMEN FEBO SAN MIGUEL, et al., Intervenor-Defendants.	No. 1:18-cv-00443-CCC Circuit Judge Jordan Chief Judge Conner Judge Simandle (*filed electronically*)

PLAINTIFFS' REPLY BRIEF IN FURTHER SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION (DOC. 2)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION

Plaintiffs submit this brief to highlight various deficiencies in the arguments submitted in opposition to Plaintiffs' Motion for Preliminary Injunction (the "Motion"). In the interest of brevity – and particularly because Defendants Torres and Marks ("Executive Defendants") advance arguments that are substantially similar to those raised by Intervenors (collectively, with Executive Defendants, "Defendants") – Plaintiffs, in accordance with this Court's Order, submit a single omnibus reply brief. *See* Dkt. No. 98.

In their initial brief in support of the Motion for Preliminary Injunction (the "Motion"), Plaintiffs clearly established that they are entitled to injunctive relief because the four relevant factors to award an injunction weighed decisively in their favor. Defendants largely avoid addressing Plaintiffs' *actual* arguments; instead they repeatedly mischaracterize Plaintiffs' positions and ultimately offer a prolix rebuke of a distorted version of those arguments. Defendants also rely on a similarly warped understanding of the standard by which courts faced with a request for a preliminary injunction assess the public interest and weigh the potential harm to the various parties. While perhaps effective in refuting the exaggerated – and, in some cases, fabricated – claims Defendants ascribe to Plaintiffs, their response utterly fails to undermine the conclusion that this Court should, as a matter of law, enjoin Executive Defendants from implementing the

Court Drawn Plan. Accordingly, this Court should reject Defendants' arguments and grant Plaintiffs' Motion.

ARGUMENT

I. Plaintiffs Are Likely To Succeed On The Merits

A. Defendants' Procedural, Doctrinal and Jurisdictional Arguments Do Not Withstand Scrutiny

Preliminarily, Defendants contend that Plaintiffs are unlikely to succeed on their claims because certain threshold considerations bar this Court from considering the present challenge. These issues – primarily centered on various iterations of preclusion, abstention, estoppel and standing – are also raised in Executive Defendants' Motion to Dismiss and Intervenors' Motion for Judgment on the Pleadings (collectively, "Defendants' Motions"). To avoid unnecessary repetition, Plaintiffs rely on their Omnibus Brief in Opposition to Defendants' Motions, which is being filed contemporaneously herewith.

B. The Criteria And Procedures Imposed By The Pennsylvania Supreme Court Were Legislative In Nature And Violated The Elections Clause

Turning to the merits of Plaintiffs' claims, Defendants argue that Plaintiffs are unlikely to succeed on their claim that implementation of the Court Drawn Plan drafted by the Pennsylvania Supreme Court, as opposed to the 2011 Plan, would violate the Elections Clause. The bulk of Defendants' argument in this regard is that a state court is the final arbiter of its state constitution and has the authority to

invalidate a congressional districting plan that violates state law. While that is undoubtedly true, it is also irrelevant because Plaintiffs have never challenged the Pennsylvania Supreme Court's authority to interpret Pennsylvania law.

Rather, what Plaintiffs challenge here is the Pennsylvania Supreme Court's violation of the Elections Clause by creating from whole cloth mandatory redistricting criteria and procedures that can be found nowhere in the Pennsylvania Constitution or any Pennsylvania statute or regulation. Based on these newly-invented criteria and procedures, the court invalidated the 2011 Plan and imposed the Court Drawn Plan. In doing so, the Pennsylvania Supreme Court violated the plain language and meaning of the Elections Clause by usurping the General Assembly's absolute and unrestricted authority to oversee legislation related to congressional districting. If Defendants were to implement the Court Drawn Plan they, too, would violate the U.S. Constitution.

Defendants dismiss these substantial constitutional concerns as mere "inflammatory rhetoric" and submit that, "Plaintiffs basically argue that the Elections Clause permits state courts to strike down state districting plans under the state constitution unless a federal court thinks the state court misinterpreted the state constitution." Int. Br. at 19-20. But that is simply not the case. There is a fundamental difference between a federal court review of a state court's

interpretation of state law and an examination of whether the state court's action violates the U.S. Constitution.

With this distinction in mind, it is clear that interposing congressional redistricting criteria purportedly drawn from a state constitutional provision that, by its very terms, *only* applies to state legislative reapportionment, was plainly lawmaking by the court. Moreover, the criteria and procedures adopted by the Pennsylvania Supreme Court are not based on any Pennsylvania Constitutional provision or statute. They are legislative in the most basic sense.

Defendants try to escape this inevitable conclusion by relying on *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015) for the proposition that state legislatures are not the only body authorized to prescribe regulations for congressional redistricting under the Elections Clause. Int. PI Opp. Br. at 18. But, *Ariz. State Legis*. does not support Defendants' position – it contradicts it.

Ariz. State Legis. did not involve a court-drawn plan, but rather was a challenge brought by the Arizona State Legislature against the independent redistricting commission that had been put into place by a people's referendum. The U.S. Supreme Court rejected the challenge because it found that the legislative power in Arizona includes the initiative process that is controlled by the people. Thus, the people's decision to take redistricting out of the hands of the state

legislature and vest it in an independent commission was legislative and not a violation of the Elections Clause. *Id*. at 2659, 2661.

In issuing its decision, the Court reaffirmed that "[r]edistricting involves lawmaking in its essential features and most important aspect." *Id*. at 2667 (internal quotation marks omitted). Further, it found "that redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking." *Ariz. State Legis*., 135 S. Ct. at 2668. While five Justices in Arizona State Legislature construed "prescriptions for lawmaking" broadly enough to include "the referendum," and four believed only the state's formal legislature qualifies, (compare *id.* with *id.* at 2677-92 (Roberts, C.J., dissenting)), all the Justices agreed that redistricting is legislative in character. Most importantly for present purposes, no Justice suggested that state courts might share in that legislative function.

The majority opinion in *Ariz. State Legis.* drove home the legislative nature of redistricting in holding that the initiative process that established a new redistricting regime in Arizona was justified as "[d]irect lawmaking by the people." 135 S. Ct. at 2659 (emphasis added). Specifically, the majority opinion held that the "[Elections] Clause doubly empowers the people" to "control the State's lawmaking processes in the first instance" or to "seek Congress' correction of regulations prescribed by state legislature." *Id*. at 2677 (emphasis added); *id*. at

2671-72 (emphasizing "the people of Arizona"); *see also id*. at 2658 (emphasizing the "endeavor by Arizona voters"), *id.* at 2659 (emphasizing the "[d]irect lawmaking by the people"); *id*. at 2659 n.3 (emphasizing "the people's sovereign right to incorporate themselves into a State's lawmaking apparatus"); *id*. at 2660 (emphasizing "direct lawmaking" under the "initiative and referendum provisions" of the Arizona Constitution); *id*. (emphasizing the role of the "electorate of Arizona as a coordinate source of legislation"); *id*. at 2661 (emphasizing "the people's right…to bypass their elected representative and make laws directly").

Here, by contrast, the Pennsylvania Supreme Court is vested with zero lawmaking authority. *See Watson v. Witkin*, 22 A.2d 17, 23 (Pa. 1941) ("[T]he duty of courts is to interpret laws, not to make them."). Its ill-advised venture into legislative territory thus finds no support in *Ariz. State Legis*. as that case does not support the notion that a state judiciary, an antonym of both "people" and "legislature," may seize the lawmaking power from both.

Defendants' reliance upon *Growe v. Emison*, 507 U.S. 25 (1993) is similarly misplaced. Defendants cite *Growe* for the proposition that federal courts should not interfere with state courts that have fashioned their own redistricting plan. Int. PI Opp. Br. at 16. But *Growe* is inapposite because, unlike the Elections Clause violation here, in *Growe* the Court concluded there was nothing about the state court's redistricting plan that violated the U.S. Constitution. *Id.* at 31, 39. *Growe*

thus does not stand for the proposition that federal courts lack authority to intervene where a state court plan violates the U.S. Constitution. *See id.*

At bottom, Defendants argue that state courts should be vested with unlimited prerogative to create congressional-election rules through non-appealable, unchallengeable and wide-open "interpretation" of its own constitution. Such a proposition would frustrate the Elections Clause's manifest purpose to allocate what are fundamentally policy decisions to the branches best disposed to make policy. The Framers clearly intended to make such an allocation of duties. As explained in the Federalist Papers, Defendants fail to acknowledge that legislation and interpretation are fundamentally different: in exercising the interpretive function, "courts must declare the sense of the law" in an act of "JUDGMENT"; in lawmaking, by contrast, the legislature exercises "WILL." THE FEDERALIST No. 78 (Alexander Hamilton). When courts "exercise WILL instead of JUDGMENT, the consequence would be the substitution of their pleasure to that of the legislative body." *Id.*

If Defendants are right that this Court can do nothing about the Pennsylvania Supreme Court's clear violation of the Elections Clause, it would mean that there would be no limitation to a state supreme court's ability to legislate in violation of the Elections Clause. For example, a state supreme court could mandate that 75% of districts be drawn to ensure the election of Republican candidates, in obvious

violation of the Elections Clause, but thereafter avoid review by a federal court because, after all, that court is the ultimate arbiter of that state's laws. A state supreme court could likewise mandate that a district contain at least 500 buildings and avoid review. This cannot be the law.

There can be no doubt here that the Pennsylvania Supreme Court engaged in legislation when it invalidated the 2011 Plan and implemented the Court Drawn Plan. For this reason, Plaintiffs' chances of success on the merits are more than enough to meet the standard for preliminary injunctive relief.[1]

C. The PCO Did Not Give The General Assembly Sufficient Time To Have An Adequate Opportunity To Enact A Remedial Plan

Defendants offer various arguments that the General Assembly was afforded an adequate opportunity to pass a remedial map. But none of these arguments pass muster.

Preliminarily, Intervenors posit that Plaintiffs may not seek to enjoin a violation of the Elections Clause because there is no separate "cause of action" for asserting the General Assembly's right to an adequate opportunity to craft a redistricting plan. Under the *Ex Parte Young* Doctrine, however, there is "an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution or laws." *Burgio & Campofelice,*

[1] *See also* Plaintiffs' Brief in Opposition to Defendants' Motions at 50-61 (discussing the Pennsylvania Supreme Court's constitutional violations).

Inc. v. New York State Dep't of Labor, 107 F.3d 1000, 1006 (2d Cir. 1997) (citing *Ex Parte Young*, 209 U.S. 123 (1908); *see also Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324, 333-34 (5th Cir. 2005). As such, because Plaintiffs are seeking to enjoin the Executive Defendants from violating the Elections Clause, they need not rely on any authority "recognizing a cause of action . . . to challenge the amount of time" provided to the legislature. Int. Br. at 20.[2]

Along these same lines, Intervenors assert that "it is dubious whether [the] General Assembly was constitutionally entitled to any time at all[,]" Int. Br. at 21 n.7, and in support of this contention, cite *Hays v. State*, 936 F. Supp. 360 (W.D. La. 1996). Intervenors are, once again, wrong. Although the *Hays* court invalidated a congressional districting plan and simultaneously issued its own map, Intervenors neglect to mention that the state legislature in *Hays* had enacted *three* redistricting plans since the decennial census and each of them had been invalidated on equal protection grounds. Seeing no prospect that a *fourth* plan in as many years would comply with the established guidelines familiar to the state legislature, the federal court assumed the map-making responsibility. Accordingly,

[2] To the extent Defendants suggest that the Elections Clause is somehow separate and distinct from the "adequate opportunity" requirement, that argument is similarly unpersuasive, since that rubric is directly tied to the Elections Clause and is a necessary product of its central tenet – i.e., that redistricting is primarily a legislative task. *See, e.g.*, *Wise v. Lipscomb*, 437 U.S. 535, 539–40 (1978).

Hays is inapposite to the circumstances here because the General Assembly, unlike the state legislature in *Hays*, had no opportunity to draft a remedial plan that complied with the Pennsylvania Supreme Court's directive.

Next, Defendants argue that the General Assembly was in fact afforded an "adequate opportunity" to enact a remedial redistricting plan, as required by the Elections Clause. *Reynolds v. Sims*, 377 U.S. 533, 586 (1964); *see also Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (court must give the legislature a "reasonable opportunity" to adopt a remedial plan). This claim is inaccurate by any measure.

Defendants' argument is premised almost entirely on the supposition that the General Assembly had 18 days to devise and enact remedial legislation, rather than the *two* days actually afforded it. In this regard, Defendants assert that the PCO,[3] which included a threadbare recitation of the criteria and procedure that would ultimately be detailed in the Majority Opinion, provided the General Assembly with the requisite information to enact a plan. In support of this argument, Defendants argue that the criteria announced in the Majority Opinion did not conflict at all with the criteria described in the PCO. Def. PI Opp. Br. at 18. While that may be technically true, it misses the point.

[3] Capitalized terms used herein and not otherwise defined are ascribed the meanings given to them in the Complaint.

As detailed in the Motion, regardless of whether the PCO was consistent with the directives that were ultimately set forth in the Majority Opinion, the PCO simply did not provide enough information to understand the process that the General Assembly was required to follow. Indeed, as detailed in the Motion, critical aspects of the Majority Opinion, which were necessary to draft any remedial redistricting plan, were not included in the PCO. For example, the PCO did not provide any indication of the constitutional provision that had purportedly been violated; it did not provide any of the benchmarks or parameters regarding how to comply with the PCO's mandate that districts must be compact; and it did not give any explanation for why the 2011 Plan was invalidated. Moreover, the PCO did not give any explanation of whether traditional districting criteria, not mentioned in the PCO, such as incumbency, could be considered when drafting a remedial map. Defendants do not, because they cannot, even attempt to explain how a final remedial map could have been drawn without these details.[4] It was simply impossible for the General Assembly to draft a remedial redistricting plan without the benefit of the Majority Opinion.

[4] Defendants seek to rely on a representation by respondents' counsel in the *LOWV* Action that the General Assembly would need three weeks to pass a remedial plan. But that representation is irrelevant here because it assumed that the General Assembly would have the benefit of the full criteria and procedure required to implement such a plan. Because the Majority Opinion, which contained the critical criteria and procedure was not revealed until two days before the remedial plan needed to be submitted, counsel's representation is meaningless.

As a fallback position, Defendants argue that the Majority Opinion was not essential to devising new congressional boundaries because the criteria provided by the PCO had been previously applied in *state* legislative districting. That argument, too, must be rejected. The fact that the guidelines were derived from some existing legal principles applied in the *state* reapportionment process is not in dispute. But it does not follow that the application of those principles in the *congressional* redistricting context was in any way apparent from the PCO.[5] In the end, the PCO simply did not provide enough information for the General Assembly to draft a final remedial map.[6]

---

[5] Intervenors' suggestion that these criteria were not novel in the *congressional* districting context is baseless. In *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992), which Intervenors herald as the authority for this proposition, the Pennsylvania Supreme Court adopted its own congressional redistricting map because the political branches had failed to agree on a new map following the decennial census. In doing so, the Court explained that it would use the criteria traditionally used in state legislative redistricting. The Court did not, as Intervenors appear argue, establish any mandatory redistricting criteria. Subsequently, in *Erfer v. Commonwealth*, 794 A.2d 325, 334 n.4 (Pa. 2002), the court clarified that, "[i]n the . . . context of Congressional reapportionment . . . there are no analogous, direct textual references to such neutral apportionment criteria."

[6] In arguing that the PCO did not provide sufficient information to allow the General Assembly to create and pass a final remedial map, Plaintiffs do not intend to suggest that the Pennsylvania Supreme Court's PCO was inconsequential to the legislative effort or that members of the General Assembly did not attempt to comply with the court's order. The General Assembly took all constructive action it could prior to the issuance of the Majority Opinion. *See* Declaration of Joe Scarnati, annexed hereto as Exhibit A (detailing efforts by General Assembly leadership to create map legislatively, including negotiation with Governor Wolf,

Moreover, even assuming, as Defendants do, that the PCO's limited guidance was somehow sufficient to enable the General Assembly to begin devising a remedial map, the Pennsylvania Supreme Court nevertheless failed to afford the requisite "adequate opportunity." The PCO gave the General Assembly a mere eighteen days to pass a new plan, an utterly inadequate time in which to draft, debate and pass a plan. In addition to the requirement in the Pennsylvania Constitution that every bill be considered on three different days in each House, a redistricting plan, like any statute, must go through the normal legislative process including review in both chambers. And the General Assembly must go through the arduous process of obtaining votes, which often involves extensive back-and-forth as compromises are made. Demanding that the General Assembly analyze

---

who opined that the PCO did not require actual legislation and that the General Assembly only needed to informally give the Governor "something" for his review). On January 29, notwithstanding the Pennsylvania Supreme Court's continued failure to issue an opinion in support of its PCO, a shell bill was introduced in the General Assembly to dispense with the initial procedural hurdles attendant in the legislative process and to facilitate the efficient enactment of a remedial map, once the Pennsylvania Supreme Court issued an opinion detailing the full procedures and criteria that needed to be followed. Certain leaders of the Republican Caucus also developed a proposed remedial map based on the limited criteria contained in the PCO, and it presented it to the Governor. But, in the end, the process of drafting a final remedial map that complied with the detailed procedures and criteria set forth in the 137-page Majority Opinion could not have been drafted based on the limited direction contained in the PCO.

the detailed criteria set forth in the Pennsylvania Supreme Court's Majority Opinion and legislate accordingly was, in practice, not possible.[7]

Indeed, this proposition is detailed in the Declaration of Mark Corrigan ("Corrigan"), who for over 30 years was the non-partisan Secretary-Parliamentarian of the Senate of Pennsylvania. *See* Corrigan Declaration, annexed hereto as Exhibit B. As Corrigan explains, it is not only the legalistic requirements of the Pennsylvania Constitution that dictate the timetable of legislation. *See* Corrigan Dec. at 8-11. Just as critical to the democratic process is the debate, negotiation and deliberation in which legislators must engage to create constitutional legislation, and "[t]hese efforts take time." *Id* at 14. Corrigan, who observed the creation of several Congressional maps via legislation, opines that the 18 days afforded to the General Assembly to legislate in this instance was not adequate in any real measure to allow for the drafting and passage of a constitutional legislative map. *Id.* at 24.

Executive Defendants, for their part, cite a handful of cases in which courts have given state legislatures three weeks or less to adopt a new districting plan. Their offered cases, however, are the exception, and not the rule. Indeed, in the vast majority of recorded cases, courts have recognized the authority of state

[7] The Pennsylvania Supreme Court itself said that the necessary analysis was "complex and nuanced." Maj. Op. at 4 n. 9.

legislatures and have given them significantly longer to enact new plans than what the General Assembly was afforded here by the Pennsylvania Supreme Court. *See, e.g.*, *Long v. Avery*, 251 F. Supp. 541 (D. Kan. 1965) (three months); *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552 (E.D. Va. 2016) (court gave legislature three months to enact a new plan and only took up the task when the legislature failed to act); *Bone Shirt v. Hazeltine*, 387 F. Supp. 2d 1035 (D.S.D. 2005), *aff'd*, 461 F3d 1011 (8th Cir. 2006) (court gave legislature 47 days to enact a new plan; on remand it gave the legislature 30 more days and issued its own remedial plan only when the legislature advised that it would not submit a plan); *DeGrandy v. Wetherell*, 794 F. Supp. 1076 (N.D. Fla. 1992) (three months); *Jeffers v. Clinton*, 756 F. Supp. 1195 (E.D. Ark. 1990) (41 days); *Major v. Treen,* 574 F. Supp.325 (E.D. La. 1983) (four months); *Johnson v. Mortham,* 926 F. Supp. 1460 (N.D. Fla. 1996) (five weeks); *Sincock v. Gately*, 262 F. Supp. 739 (D. Del. 1967) (one year); *Drum v. Seawell,* 249 F. Supp. 877 (M.D.N.C. 1965), *aff'd,* 383 US 381 (1966) (*per curiam*) (two months); *U.S. v. Osceola County*, 474 F. Supp. 2d 1254 (M.D. Fla. 2006) (34 days); *Long v. Avery*, 251 F. Supp. 541 (D. Kan. 1965) (three months).

More fundamentally still, the cases cited by the Executive Defendants in which a district court gave the legislature a very short time to enact a remedial plan involved vastly different facts and circumstances than are present here. For

instance, *Common Cause v. Rucho*, 279 F. Supp. 3d 587 (M.D.N.C. 2018), which the U.S. Supreme Court has stayed, is distinguishable from this case in three ways: (1) a state statute prescribed two weeks as the required length of time for the legislature to conduct a reapportionment; (2) the challenged plan was itself a remedial plan designed to correct decades of racial gerrymandering and the court believed that the state was not entitled to another chance to get it right; and (3) the court issued a long, extremely detailed opinion explaining the infirmities in North Carolina's plan before giving the legislature two weeks to enact a new one. Similarly, in *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *Harris v. McCrory,* 159 F. Supp. 3d (M.D.N.C. 2016), *Stephenson v. Bartlett*, 582 S.E.2d 247 (N.C. 2003), and *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672 (M.D. Pa. 2002), the short deadlines were given in detailed opinions by those respective courts that provided the legislature with appropriate guidance.

Defendants contend that the short time frame to draft a new map was sufficient because the Pennsylvania Supreme Court had no choice but to act precipitously because of the imminence of the 2018 primary election. Defendants neglect to mention, however, that the Court had another option: allow the 2018 election to proceed under the 2011 Plan while requiring adoption of a new plan for future elections. The U.S. Supreme Court has permitted elections to take place under unconstitutional apportionment plans where there was no reasonable

opportunity to enact a new plan prior to the next scheduled election. *See, e.g.*, *Kilgarlin v. Hill*, 386 U.S. 120, 121 (1967); *Ely v. Klahr*, 403 U.S. 108 (1971); *Wells v. Rockefeller*, 394 U.S. 542, 547 (1969) ("Since the 1968 primary election was only three months away on March 20, we cannot say that there was error in permitting the 1968 election to proceed under the plan despite its constitutional infirmities"); *see also White v. Weiser*, 412 U.S. 783, 789 (1973) (noting that it had granted a stay of an order of a district court finding a state plan unconstitutional, with the result that the intervening election was conducted under the existing plan). The U.S. Supreme Court specifically cautioned in *Reynolds* that "equitable considerations" may justify a court in withholding immediate relief. The U.S. Supreme Court explained that lower courts "should consider the proximity of a forthcoming election" and reasonably endeavor to avoid "a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree." 377 U.S. at 585. That is exactly what the Pennsylvania Supreme Court failed to do here. For all of these reasons, the timeline provided for in the PCO was simply insufficient for the General Assembly to have an adequate opportunity to draft a remedial plan in accordance with the Elections Clause.

D. The PCO Deprived The General Assembly Of Its Opportunity To Implement A Remedial Plan By Ordering Implementation Of A Plan Outside The Legislative Process

Additionally, as Plaintiffs' opening brief explained (at 10-11, 13-16), the PCO deprived the General Assembly of an adequate opportunity to craft a remedial plan, and thus violated the Elections Clause, by ordering the implementation of a plan outside of the legislative process established by the Pennsylvania Constitution. Specifically, the legislative process requires that the Governor be provided with ten days to consider the legislation, that the public be provided with notice of the status of legislation via the legislative journal, and that the legislature be provided with the opportunity to reconsider the legislation in light of the executive's objections. The PCO circumvented all of these requirements, eliminating the standard legislative process and plainly violating the Elections Clause. *Smiley v. Holm*, 285 U.S. 355, 367 (1932) (under the Elections Clause, "the exercise of the [legislative] authority must be in accordance with the method which the state has prescribed for legislative enactment.").

Executive Defendants do not contest this point, and Intervenors' rejoinder on this point is entirely meritless. First, Intervenors argue that circumventions of legislative process under *Smiley* do not create an Elections Clause claim. But this wrong. Discussing the authority conferred by the Elections Clause, the *Smiley*

Court concluded, "[a]s the authority is conferred for the purpose of making laws for the state, it follows, in the absence of an indication of a contrary intent, that the exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments." 285 U.S. at 367.

Intervenors further argue that the Pennsylvania Supreme Court's interference with the gubernatorial veto is excusable because the Governor has not objected to the interference, and because Plaintiffs allegedly lack standing. This is also wrong. The fact that the Governor does not object to the encroachment of his constitutional power is of no moment. Constitutional safeguards designed to maintain the balance of power between the branches cannot be disturbed by one branch acquiescing to the arrogation of its authority. *See New York v. United States*, 505 U.S. 144, 182 (1992) ("The Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment.").[8] Similarly, Intervenors' standing argument must also fail

[8] *Buckley v. Valeo*, 424 U.S. 1, 118–137 (1976) (holding infringement on President's appointment power under the U.S. Constitution could not be excused merely because the President had agreed to it); *INS v. Chadha*, 462 U.S. 919, 944–959 (1983) (holding "legislative vetoes" violated the U.S. Constitution, despite the President's approval of such provisions); *Clinton v. City of New York*, 524 U.S. 417, 445-46 (1998) (holding the Line Item Veto Act exceeded the power granted to the President under the U.S. Constitution and, thus, was invalid, despite Congress' overwhelming approval of the statute).

because the Governor does not have exclusive standing when the diminution of his power causes otherwise cognizable harm to others. *See, e.g.*, *Clinton*, 524 U.S. at 434-36 ("Once it is determined that a particular plaintiff is harmed by the defendant, and that the harm will likely be redressed by a favorable decision, that plaintiff has standing—regardless of whether there are others who would also have standing to sue."). Intervenors' attempt to downplay the requirement that the Governor must be afforded ten days to consider a bill is also unpersuasive, since that timetable is required by the plain language of the Pennsylvania Constitution, one of the "manifest" purposes of which is to "provide the Governor with suitable time to consider the legislation[.]" *Scarnati v. Wolf*, 173 A.3d 1110, 1125 (Pa. 2017).

Finally, in an attempt to ignore the Pennsylvania Supreme Court's elimination of the General Assembly's right to override a gubernatorial veto, Intervenors aver that "[t]he Pennsylvania Supreme Court never suggested that a remedial map could not be enacted pursuant to a veto override." That is simply false. The Pennsylvania Supreme Court's PCO, by its very terms, provided that if the Governor did not approve the General Assembly's proposal, the Pennsylvania Supreme Court would assume the mapmaking task. *See* Compl. Ex. B at 2 ("should the Governor not approve the General Assembly's plan on or

before February 15, 2018, this Court shall proceed expeditiously to adopt a plan…").

II. Plaintiffs Will Suffer Irreparable Harm In The Absence Of An Injunction

Defendants attempt to refute Plaintiffs' showing of irreparable harm in two ways. First, they argue that Plaintiffs have no cognizable injury. Second, they assert that Plaintiffs' injuries are not redressable because the 2011 Plan is a "dead letter." Defendants are wrong on both points.

Plaintiffs have demonstrated concrete, particularized and imminent harm that can be redressed by this Court. Among other things, Federal Plaintiffs have demonstrated cognizable injury in the potential loss of their congressional seats and the loss of the benefits of incumbency, campaign efforts, and expenditures they made prior to the Pennsylvania Supreme Court's radical restructuring of the congressional map. Similarly, State Plaintiffs have shown injury to their legislative authority to apportion Congressional districts, which, as described in detail in Plaintiffs' Opposition Brief to Defendants' Motions, is cognizable harm in this Circuit.

In addition, Defendants contend that the harm that Plaintiffs will suffer in the absence of injunctive relief cannot be redressed by this Court because the 2011 Plan is invalid and cannot be restored. Def. Opp. Br. at 20. This is simply

incorrect. The U.S. Supreme Court has routinely permitted elections to take place under unconstitutional apportionment plans when there was no reasonable opportunity to enact a new plan prior to the next scheduled election. *See infra* at 23-25.

Intervenors, for their part, claim that the 2011 Plan "is a dead letter" based on 2 U.S.C. § 2a(c) – a rarely-utilized statute that has remained largely dormant over the decades. Specifically, Intervenors, as well as Common Cause as *amicus curiae,* assert that if this Court were to enjoin the Court Drawn Plan, it would be bound to order at-large congressional elections under Section 2a(c). Intervenors' argument fails for at least three reasons.

First, Section 2a(c)(5) is a provision of last resort that is inapplicable to this situation on its face. The statute provides, in relevant part, that "if there is a decrease in the number of Representatives" after an apportionment, the "Representatives … shall be elected" at-large "[u]ntil a State is redistricted in the manner provided by the law thereof." 2 U.S.C. § 2a(c)(5). Furthermore, the U.S. Supreme Court has confirmed that Section 2a(c) "is inapplicable *unless* the state legislature, and state and federal courts, have failed to redistrict pursuant to § 2c." *Branch v. Smith*, 538 U.S. 254, 275 (2003) (emphasis in original); *see also Ariz. State Legis. v. Ariz. Indep. Redistricting Commission*, 135 S. Ct. 2652, 2670 (2015). In this case, the General Assembly did not fail to redistrict after an

apportionment. Pennsylvania did, in fact, enact a map in 2011 after the last census and the loss of a seat. And, although the Pennsylvania Supreme Court struck down the 2011 Plan, that does not change the analysis that the 2011 Plan was adopted in the procedural manner provided by Commonwealth law (i.e., as normal legislation, reviewed and signed into law by the Governor). Thus, Section 2a(c) on its face does not apply.

Second, the U.S. Supreme Court and other federal courts have ruled that holding elections under an unconstitutional plan is preferable to disrupting the electoral process. *See, e.g.*, *Upham v. Seamon*, 456 U.S. 37, 44 (1982). Even if 2011 Plan were defective under the Pennsylvania Constitution, it should nonetheless be applied in the upcoming primary elections rather than using the Court Drawn Plan or at-large elections. Notwithstanding Section 2a(c), federal courts have regularly ordered that elections be conducted under unconstitutional maps rather than be conducted at-large. *See, e.g.*, *Upham v. Seamon*, 456 U.S. 37, 44 (1982) ("It is true we have authorized District Courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to the legal requirements, even constitutional requirements."); *Reynolds v. Sims*, 377 U.S. 533, 586 (1964) (affirming district court's decision to conduct elections under its own temporary apportionment plan that itself was a violation of the Constitution); *Kilgarlin v. Hill*, 386 U.S. 120, 121 (1967)

(affirming a district court's order conducting state legislative elections under the current "constitutionally infirm" apportionment law); *Toombs v. Fortson*, 241 F. Supp. 65, 71 (N.D. Ga. 1965), *aff'd,* 384 U.S. 210 (1966); *Perez v. Texas*, 891 F. Supp. 2d 808, 810-11 (W.D. Tex. 2012) (conducting congressional elections under unconstitutional plan); *Flanagan v. Gillmor*, 561 F. Supp. 36, 50 (S.D. Ohio 1982) (allowing a congressional election to be conducted when there are open one-person one-vote questions and noting that the "plan is the product of the elected representatives of Ohio citizens…we believe that deference to the legislatively enacted plan is appropriate because there is doubt about the controlling constitutional standard."); *Smith v. Beasley*, 946 F. Supp 1174, 1213 (D.S.C. 1996) (permitting state legislative elections under unconstitutional map but setting special elections for the following year); *Covington v. North Carolina*, 317 F.R.D. 117, 177 (M.D.N.C. 2016) (the district court "regrettably concluded" that there was insufficient time to draw new maps and therefore ordered the state legislative elections to proceed under old maps despite "severe constitutional harms"). As such, this Court can and should order that the 2018 elections proceed under the 2011 Plan until the General Assembly is given adequate time to enact a remedial plan. As long as the Court orders restoration of the 2011 Plan by March 16, 2018, it will be possible to conduct the congressional primary on May 15, 2018, in a

manner consistent with state law. *See* Declaration of Carol Aichele, annexed hereto as Exhibit C.

Third, it is within this Court's and the Executive Defendants' power to order that the 2018 primary election cycle be temporarily postponed to afford the General Assembly an adequate opportunity to draw new congressional maps, in accordance with its constitutionally granted authority. Executive Defendants, as they have made clear, have "complete power, to order moving the primary" and to adjust the election time frames to suit any judicial decision. Counsel for Executive Defendants represented before the Pennsylvania Supreme Court at oral argument that congressional primaries could be held as late as September, and the Secretary of the Commonwealth was able to have petitions available for circulation a mere eight days after the Court Drawn Plan was imposed. *See* Transcript of January 17, 2018 Oral Argument, Exhibit A to Intervenors' Brief In Opposition To Plaintiffs' Motion For A Preliminary Injunction, at 35:6-38:7. In addition, unlike the state courts, this Court also has the power to adjust the timelines imposed on the state by the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), *see* 52 U.S.C. §§ 20301 *et seq.*, including delaying the deadline for mailing military and overseas ballots to less than 45 days before the primary elections, while simultaneously extending the deadline for the return of absentee ballots.

There can be little question that the harm to Plaintiffs' protected interests will be irreparable if injunctive relief is not promptly granted, and Defendants do not seriously dispute this point. *See* Federal Plaintiffs' Declarations, annexed hereto as Exhibit D (describing, among other things, efforts spent campaigning in now substantially altered districts). Because the Court Drawn Plan will alter voting districts and election results, the potential harm to candidates is, by definition, irreparable. *Loftus v. Twp. of Lawrence Park*, 764 F. Supp. 354, 359 (W.D. Pa. 1991) ("The election is a single event incapable of repetition, and it is of such paramount importance to both the candidate and his community, that denying a candidate his effective participation in it is … of great, immediate, and irreparable harm[.]"(internal quotation marks omitted)); *see also Connecticut Dep't of Envtl. Prot. v. O.S.H.A.*, 356 F.3d 226, 231 (2d Cir. 2004) ("[V]iolations of constitutional rights are presumed irreparable[.]" (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). At least some of the Federal Plaintiffs are almost certain to lose their seats – after all, this was the purpose of the Court Drawn Plan.[9]

[9] See John Verhovek and Adam Kelsey, *New Pennsylvania congressional map could impact balance of power in the US House*, ABC News (Feb. 21, 2018) (quoting redistricting expert stating that "[i]f the Pennsylvania map changes, it's hard to imagine how the Republicans hold control of the house. . . ."), *available at* http://abcnews.go.com/Politics/pennsylvania-congressional-map-impact-balance-power-us-house/story?id=53197211 (last visited Mar. 4, 2018).

The Court Drawn Plan and the speed of its implementation have created significant confusion and concern for the citizens of Pennsylvania, congressional candidates from both parties and, most importantly for this motion, Federal Plaintiffs. To add to the confusion, the Court Drawn Plan inexplicably renumbers all of Pennsylvania's congressional districts.

The primary is in two and a half months.[10] But everything that the voters, the candidates, and the political parties believed to be true was overturned in the blink of an eye by the Court Drawn Plan, undoing all of the actions that the candidates and their supporters have done over the last two years to prepare for the 2018 elections. *See* Brief of *Amici Curiae* Brian McCann, *et al.* (Doc. 66) at 4 (describing the proposed testimony of *amicus* Thomas Whitehead, Chair of the Monroe County Republican Committee). The electorate and the candidates, including the Federal Plaintiffs, are left confused as to who is running in which congressional district, in which congressional district they reside, and for whom they can vote in the primary. If the Court Drawn Plan is implemented, Federal Plaintiffs will be forced to campaign under radically altered circumstances in an

[10] The Supreme Court has recognized the threat of imminent harm caused by reapportionment on the eve of a primary. *See Wells v. Rockefeller*, 394 U.S. 542, 547 (1969) (affirming conduct of elections under a map struck down because the "primary election was only three months away"); *Kilgarlin v. Martin*, 386 U.S. 120, 121(1967) (per curiam); *Klahr v. Williams*, 313 F. Supp. 148, 152 (D. Ariz. 1970), *aff'd sub nom.*, *Ely v. Klahr*, 403 U.S. 108 (1971) (similar timing).

unreasonable time period, thereby subjecting them to imminent and irreparable harm.

III. Injunctive Relief Will Not Adversely Affect The Public Interest.

Defendants argue that injunctive relief would adversely affect the public interest. Before turning to Defendants' specific arguments, it is important to correct the broader framework within which Defendants present their argument. Reciting the familiar doctrine that the aim of preliminary injunctions is to preserve the status quo, Executive Defendants repeatedly suggest, without explanation, that a preliminary injunction would "disturb, rather than maintain, the status quo[.]" Def. Br. at 15. As such, Executive Defendants conclude, Plaintiffs must meet the higher burden faced by parties who seek to change the status quo. The predicate to this argument, of course, is that the Court Drawn Plan, which had been in place for a mere four days prior to the initiation of this action, is the status quo, rather than the 2011 Plan, under which seven congressional elections had been conducted and on which Federal Plaintiffs had reasonably relied for over a year in planning for their campaign. This premise, however, is in direct conflict with settled precepts because "[t]he status quo to be preserved by a preliminary injunction . . . is not the circumstances existing at the moment the lawsuit or injunction request was actually filed, but the last uncontested status between the parties which preceded the

controversy."[11] *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 378 (4th Cir. 2012); *accord Opticians Ass'n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187, 197 (3d Cir. 1990) ("[O]ne of the goals of the preliminary injunction analysis is to maintain the status quo, defined as the last, peaceable, noncontested status of the parties") (citations omitted).[12] Defendants cannot seriously dispute that the 2011 Plan was the last uncontested status prior to the controversy.[13]

When Executive Defendants' warped interpretation of the "status quo" is replaced with the proper understanding of the term, most of their arguments

---

[11] Executive Defendants also accuse Plaintiffs of undue delay, arguing the relief "is particularly inappropriate in light of Plaintiffs' inexcusable delay in seeking an injunction." Def. Br. at 27. Plaintiffs filed their Complaint, along with their Motion and supporting brief a mere *four days* after the Court Drawn Plan was released, which is the point at which the harm to Plaintiffs became legally cognizable.

[12] *See also N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc*., __ F.3d __, __, n.5, 2018 WL 1021223, at *3 n.5 (2d Cir. Feb. 23, 2018) (noting "[t]he 'status quo' in preliminary-injunction parlance is really a 'status quo ante,' and concluding that "[t]his special 'ante' formulation of the status quo in the realm of equities shuts out defendants seeking shelter under a current 'status quo' precipitated by their wrongdoing"); *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1013 (10th Cir. 2004) (en banc) (*per curiam*) (explaining that the heightened standard is not appropriate when "requir[ing] a party who has recently disturbed the status quo to reverse its actions" because "[s]uch an injunction restores, rather than disturbs, the status quo ante"); *Am. Can Co. v. Local Union 7420, United Steelworkers of Am.*, 350 F. Supp. 810, 812 (E.D. Pa. 1972) ("status quo is the last uncontested status which precedes the pending controversy").

[13] Indeed, the 2011 Plan was the uncontested state of affairs for over five years and three election cycles until it was challenged in June 2017 by Intervenors.

relative to public policy are unsustainable. For instance, Executive Defendants seek to avail themselves of various decisions that caution against upsetting the electoral process when an election is imminent. These cases, however, stand for the unremarkable proposition that courts should be especially careful to maintain the status quo – *i.e.*, the last, peaceable, uncontested status of the parties – in the context of elections. Accordingly, the authority that they cite rebuking interference with the status quo in the face of an impending election only strengthens Plaintiffs' argument.

Along these same lines, Defendants also urge that it would be against public policy to conduct another election under the 2011 Plan because it has been found unconstitutional. In this regard, Defendants lament the possibility that a fourth election could be conducted under an unconstitutional districting map. Even if the 2011 Plan is unconstitutional, Plaintiffs recourse to equity should not be countenanced. It is axiomatic that "equity favors the vigilant and looks with disfavor on the dilatory suitor[,]" *Biophone Corp. v. W. Elec. Co.*, 91 F.2d 727, 727 (3d Cir. 1937), and this principle applies with equal force in the context of elections. *See Valenti v. Mitchell*, 962 F.2d 288, 299 (3d Cir. 1992) (affirming district court's denial of relief to candidate who was not diligent in bringing challenge to claim because "[e]quity aids the vigilant, not those who rest on their rights"). Here, Intervenors waited nearly six years to assert their rights, while

Executive Defendants conducted seven elections under the 2011 Plan, before deciding that an eighth time would be impermissible. Thus, as the "dilatory suitor," they should be forced to bear the burden of their delay.

Moreover, equitable principles aside, Executive Defendants' argument would also contravene legal precepts. Again, assuming *arguendo* that the 2011 Plan is constitutionally defective, Intervenors are asking this Court to permit a violation of the U.S. Constitution, so as to avoid a violation of the Pennsylvania Constitution. Subordinating the U.S. Constitution to the Pennsylvania Constitution in this manner would plainly violate the Supremacy Clause. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 584 (1964) ("When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls.").

Against this backdrop, and stripped of improper recourse to the concept of "status quo," Executive Defendants' assertion that the public interest militates against entrance of preliminary injunction is spurious. First, their argument concerning voter confusion and disturbance to the electoral process is pure conjecture and, while Executive Defendants may have expert knowledge of certain technical aspects of administering elections, neither their official job descriptions nor the background information provided in their Affidavits provides any indication that they have any specialized knowledge of the concerns and reactions expressed by the actual voters. The various individuals who have

submitted Declarations on Plaintiffs' behalf, on the other hand, are local officials and community leaders with first-hand knowledge of the Court Drawn Plan's impact on ordinary voters. Although their descriptions differ in various respects, the common thread running through all of the Declarations is that the Court Drawn Plan has engendered mass chaos. *See* Exhibit E (various citizen declarations). And although many of them recognize that adjusting the calendar further is not ideal for various reasons, the benefits of restoring the status quo, even if it means proceeding under an amended timetable, would far outweigh the detriments.

Second, the relief Plaintiffs seek can be granted without the parade of evils suggested by Defendants. Specifically, Executive Defendants aver that revising the calendar any further would require postponing the primary to comply with federal requirements on transmitting absentee ballots under UOCAVA. Although Executive Defendants are correct that the statute generally imposes a 45-day period, federal courts faced with similar circumstances routinely craft plans that permit an election to be held as scheduled, while also requiring elections administrators to implement additional measures to protect the rights of overseas voters. Most often, courts order state and county officials to extend the deadline for accepting absentee ballots. *See Department of Justice, CASES RAISING CLAIMS UNDER THE UNIFORMED AND OVERSEAS CITIZEN ABSENTEE*

VOTING ACT, available at https://www.justice.gov/crt/cases-raising-claims-under-uniformed-and-overseas-citizen-absentee-voting-act (collecting cases). Applying that remedy here, the primary can be held as scheduled, with the only delay being the official certification of the election results. Particularly given that Pennsylvania's primary is relatively early, a short postponement in this respect will not be disruptive. Thus, it would be entirely feasible to revert to the 2011 Plan without violating the federal statute.

CONCLUSION

Wherefore, for the reasons set forth herein and in the Motion, Plaintiffs respectfully request that the Court grant the Injunction.

Dated: March 7, 2018

Respectfully submitted,

/s/Matthew H. Haverstick

Brian S. Paszamant (PA 78410)
Jason A. Snyderman (PA 80239)
BLANK ROME LLP
One Logan Square
130 N. 18th Street
Philadelphia, PA 19103
Ph: (215) 569-5791
Fax: (215) 832-5791
Email: paszamant@blankrome.com
snyderman@blankrome.com

Jason Torchinsky*
Shawn Sheehy*
Phillip M. Gordon*
HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186
Ph: (540) 341-8808
Fax: (540) 341-8809
Email: jtorchinsky@hvjt.law
ssheehy@hvjt.law
pgordon@hvjt.law

Counsel for State Plaintiffs

Matthew H. Haverstick
(PA 85072)
Mark E. Seiberling (PA 91256)
Paul G. Gagne (PA 42009)*
Shohin H. Vance (PA 323551)
KLEINBARD LLC
One Liberty Place, 46th Floor
1650 Market Street
Philadelphia, PA 19103
Ph: (215) 568-2000
Fax: (215) 568-0140
Email: mhaverstick@kleinbard.com
mseiberling@kleinbard.com
pgagne@kleinbard.com
svance@kleinbard.com

Joshua J. Voss (PA 306853)
KLEINBARD LLC
115 State Street, 2nd Floor
Harrisburg, PA 17101
Ph: (717) 836-7492
Fax: (215) 568-0140
Email: jvoss@kleinbard.com

Counsel for Federal Plaintiffs

* *admitted pro hac vice*

WORD COUNT CERTIFICATION

I hereby certify that the foregoing brief complies with the word-count limitation set forth in this Court's Order dated March 5, 2018 (Doc. 98), granting Plaintiffs leave to file a single omnibus reply brief, totaling 10,000 words. Based on the word count feature of the word-processing system used to prepare this brief, I certify that it contains 7866 words, exclusive of the cover page, tables, and the signature block.

Dated: March 7, 2018 /s/Matthew H. Haverstick

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2018, a true and correct copy of the foregoing Plaintiffs' Reply Brief in Further Support of Motion for Preliminary Injunction was electronically filed with the Court and served upon all counsel and parties of record via the CM/ECF system.

Dated: March 7, 2018 /s/Matthew H. Haverstick

EXHIBIT A

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

JACOB CORMAN, *et al.*, Plaintiffs, v. ROBERT TORRES, *et al.*, Defendants.	No. 1:18-cv-00443-CCC Circuit Judge Jordan Chief Judge Conner Judge Simandle (*filed electronically*)

DECLARATION OF JOSEPH B. SCARNATI, III

I, JOSEPH B. SCARNATI III, declare:

1. I am over the age of twenty one, competent to make this declaration, and have personal knowledge of the matters stated herein.

2. I am President pro tempore of the Pennsylvania Senate, one of two chambers in the Pennsylvania General Assembly.

3. On February 6, 2018, I along with Michael C. Turzai, the Speaker of Pennsylvania's House of Representatives, met with Governor Thomas Wolf, at the Governor's request, to discuss the General Assembly's submission of a new Congressional districting plan in compliance with the Pennsylvania Supreme Court's Order dated January 22, 2018 (the "PCO").

4. During our conversation, Governor Wolf indicated that, in his view, the PCO did not require the General Assembly to present him with actual legislation adopting a new Congressional plan; rather, he shared his view that the PCO merely required the General Assembly to "give him something" to consider.

5. As requested by Governor Wolf, Speaker Turzai and I presented the Governor with a new proposed plan on Friday, February 9, 2018.

6. Simultaneously, in a good faith effort to begin the process of enacting a new Congressional as instructed by the PCO, I introduced Senate Bill 1034 ("SB 1034").

7. SB 1034 was created to serve as a legislative vehicle for any potential new Congressional plan. There was no substance pertaining to an actual new map included in SB 1034.

8. SB 1034 was voted out of the Senate State Government Committee, passed by the Senate unanimously and sent to the House of Representatives. The full House did not have sufficient time on or before February 9 to amend and vote on SB 1034.

9. Neither the Democratic Caucus of the Pennsylvania Senate, the Democratic Caucus of the Pennsylvania House of Representatives, nor any member thereof introduced any legislation in an effort to comply with the PCO.

I declare under penalty of perjury under the laws of the United States of America and pursuant to 28 U.S. Code § 1746 that the foregoing is true and correct.

/s/ Joseph B. Scarnati, III

EXHIBIT B

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

JACOB CORMAN, et al. Plaintiffs, v. ROBERT TORRES, et al. Defendants.	No. 18-cv-00443-CCC (*filed electronically*)

DECLARATION OF MARK R. CORRIGAN

I, MARK R. CORRIGAN, declare as follows:

1. My name is Mark R. Corrigan. I was admitted to the practice of law in 1979 and am a member of the Pennsylvania Bar.

2. Since 2012 I have been the Vice Chairman of the Pennsylvania State Ethics Commission.

3. Prior to that, from 1981-2012, I was the Secretary-Parliamentarian of the Senate of Pennsylvania.

4. The Secretary-Parliamentarian is a non partisan official who assists in conducting the business of the Senate.

5. Among other duties, the Secretary-Parliamentarian: (a) directs the amendment of bills; (b) prepares and publishes the Senate calendar; (c) distributes bills to the chairman of the committee to which each bill is referred; and (d) transmits all bills, joint resolutions and concurrent resolutions to the House of Representatives.

6. The Secretary-Parliamentarian naturally performs the duties of a parliamentarian as well.

7. One of the more important duties the Secretary-Parliamentarian is to answer queries from Senators or otherwise consult regarding the constitutionality of draft legislation.

8. Over the more than 30 years I served as Secretary-Parliamentarian, I became thoroughly and intimately familiar with the legislative process; that is, both the Constitutional process by which a bill becomes a law, as well as the democratic process by which laws are made.

9. Article III of the Constitution sets forth the minimum amount of time bills must be considered in each house of the legislature before passage into law.

10. Article III also sets forth other Constitutional parameters for bills. For instance, bills may not be amended so that their original purpose is obviated. Nor may bills contain more than a single subject.

11. Legislating requires more than an application of formalistic rules, however.

12. Legislating in a democracy involves a constant back and forth between legislators with different interests, whether those interests differ due to party, policy objectives, regional goals or bias, or any number of reasons no two legislators ever approach a bill with precisely the same outlook.

13. These differences require debate, negotiation and compromise to cause any bill to become law. The debate and negotiation must occur between and among members of the two political parties, members of the House and Senate, and with the Governor.

14. No bill, regardless of its simplicity, is immune from this back and forth. *These efforts take time.*

15. The time it takes for a bill to become a law is not occasioned only by the needs of legislators. Indeed, the point of thorough and open debate and analysis – through committee hearings, public meetings and other means – is to allow an interested public the opportunity to weigh in on public policy by influencing the language of putative legislation.

16. The legislative pace is therefore intended, in our democratic society, to be *deliberative* – not obstructively elongated, to be sure, but never rushed, artificially shortened or cut off to create a particular outcome that otherwise would not occur but for the lack of deliberation.

17. In my more than 30 years as Secretary-Parliamentarian, I participated directly, and more often than I can count, in the process by which complex legislative efforts turned into law. Redistricting of Congressional districts – a legislative process that occurred four times during my tenure – is one of those complex efforts that simply cannot be done without significant deliberation, negotiation and participation.

18. I am aware of the Pennsylvania Supreme Court's January 22, 2018 Per Curiam Order, which invalidated the Congressional district maps created legislatively in 2011 and required the General Assembly to legislatively draw new Congressional district maps within 18 days, upon pain of the Supreme Court taking over the map drawing.

19. I am also aware that the Supreme Court did not issue an Opinion explaining the reason the 2011 legislation was unconstitutional, and articulating how a map would pass constitutional muster, did not materialize until 16 days into the 18 allotted the General Assembly to craft remedial legislation.

20. Given these short deadlines, in my opinion the Supreme Court made it impossible for the General Assembly to pass legislation leading to a new Congressional district map.

21. First, without guidance as to what a constitutional map would look like, members would not know how to craft valid legislation. Indeed, had I been Secretary-Parliamentarian, and a member had asked for constitutional guidance on crafting remedial legislation, I would have been unable to perform such an analysis until at a minimum 16 days into the 18 days allotted by the Supreme Court. Therefore, I could not have performed an important job function as Secretary-Parliamentarian until such time as it would have been Constitutionally impossible to turn a bill into law.

22. But more fundamentally, 18 days is not enough time for legislation of this nature (or, really, any well-thought-out legislation) to become law.

23. While it is true that 18 days is mechanically and legalistically sufficient time to pass legislation, *practically* it is wholly insufficient.

24. Over my three decades as Secretary-Parliamentarian, several times I observed Congressional redistricting legislation become law. Every single time required months of hearings, debate, negotiation and drafting. I can say without hesitation that the Pennsylvania Supreme Court's Jan. 22 Per Curiam Order did not give the General Assembly an adequate amount of time to pass remedial legislation, insofar as the Supreme Court did not acknowledge that the democratic process of legislation cannot be condensed into such an artificially and unnecessarily short time span.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Mark R. Corrigan

Executed on March 7, 2018

EXHIBIT C

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

JACOB CORMAN, et al.,	:	
	:	
Plaintiffs,	:	No. 18-cv-00443-CCC
	:	
v.	:	*(filed electronically)*
	:	
ROBERT TORRES, et al.,	:	
	:	
Defendants.	:	
	:	
	:	
	:	
	:	

DECLARATION OF CAROL AICHELE

I, CAROL AICHELE, declare as follows:

1. I am an adult individual residing in Pennsylvania. I served as the Secretary of the Commonwealth from April 2011 to January 2015.

2. The Pennsylvania Department of State, through the Bureau of Commissions, Elections and Legislation, oversees the Commonwealth's electoral process as well as campaign finance and voter registration.

3. I am familiar with the schedule and deadlines that must be met prior to a congressional election and the Commonwealth's processes and procedures for implementing them, including for complying with the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA").

4. Prior to serving as Secretary of the Commonwealth, I was a member of the Chester County Board of Commissioners from January 2004 to January 2011.

5. Counties are responsible for voter registration and the conduct of elections. The commissioners serve as the County Board of Elections and perform all duties imposed upon them at the state level by the Pennsylvania Election Code and at the federal level by the National Voter Registration Act ("NVRA") and the Help America Vote Act ("HAVA").

6. I am familiar with the processes and procedures employed by Pennsylvania counties with respect to preparation for, and conduct of, elections, including congressional elections.

7. The county bears the full cost of the primary and general elections.

8. The next Pennsylvania congressional primary is scheduled for May 15, 2018.

9. I am familiar with the congressional map (the "Court Drawn Map") and congressional primary election schedule adopted by the Pennsylvania Supreme Court on February 19, 2018.

10. I understand that defendants in this action, Robert Torres and Jonathan Marks, have taken steps to comply with the Supreme Court's new primary election schedule using the court Drawn Map.

11. I am aware that the U.S. District Court is conducting proceedings to determine whether the May 2018 primary will be conducted in accordance with the Court Drawn Map or the congressional map that has been employed by Pennsylvania since 2011 ("2011 Plan").

12. Based on my experience as both a member of the Chester County Board of Commissioners and the Secretary of the Commonwealth, it is my opinion that if the District Court orders the conduct of the 2018 congressional primary under the 2011 Plan by March 16, 2018, it will be possible to conduct the congressional primary on May 15, 2018 consistent with state law.

13. Specifically, consistent with Commissioner Marks' previous testimony in state court, counties could fully prepare for the primary election in six weeks, and nomination petitions could be circulated in two weeks instead of three. Findings of Fact ¶¶ 450, 452, League of Women Voters of Pa. v. Commonwealth, No. 261 MD 2017 (Pa. Commw. Ct. Dec. 29, 2017). Thus, nomination petition circulation period can begin on March 20, 2018 and end on April 3, 2018, six weeks before the May 15, 2018 primary election.

14. I am aware that it is Defendants' position that voter confusion would result from conducting the May 2018 primary under the 2011 Plan. While there will be some confusion, much greater confusion will result from imposition of the Court Drawn Plan and the speed of its implementation so close to the primary.

15. Campaigns for congressional seats begin almost as soon as the prior election is completed. Thus, the candidates and parties have undertaken various campaign-related activities for nearly two years in connection with the 2018 congressional elections, including recruiting candidates, volunteers, and donors; organizing grassroots activities; creating public political communications in support of congressional candidates; and, allocating campaigning activities and county committee resources amongst other candidates on the ballot. Much of this activity is designed to get voters to identify and become familiar with the incumbents and candidates in their districts. The Court Drawn Map will mean that much of this activity will have been meaningless. Voters will have to overcome the knowledge and expectations of two years in less than three months.

16. Prior to February 19, 2018, voters knew what district they lived in and the identity of the candidates in their district. Many of these voters will lose representatives whom they have known for years. To add to the confusion, the Court Drawn map renumbers all of Pennsylvania's congressional districts.

17. Voter and candidate confusion will best be minimized if the 2011 Plan is reinstated before much activity has taken place in connection with the Court Drawn Plan.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Carol Aichele

Executed on March 7, 2018

EXHIBIT D

1.

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

JACOB CORMAN, et al.,	:	
	:	No. 1:18-cv-00443-CCC
Plaintiffs,	:	
	:	*(filed electronically)*
v.	:	
	:	
ROBERT TORRES, et al.,	:	
	:	
Defendants.	:	

DECLARATION OF RYAN COSTELLO

I, Ryan A. Costello, declare as follows:

1. I currently serve as a member of the United States House of Representatives for the 6th District of Pennsylvania under the 2011 Congressional Districting Plan enacted by Pennsylvania's state legislature (the "2011 Map").

2. I was first elected in November 2014 and have served since January 2015.

3. I began raising funds for the 2018 election during the first quarter of 2017.

4. From that time to the end of January 2018, I traveled throughout the 6th District under the 2011 Map to become better known to constituents and voters and often participated in various community related activities and nonprofit fundraisers on evenings and weekends with personal

funds to support the good works of people and groups throughout the district. I have invested significant personal time and money into my campaign efforts.

5. The remedial map ordered by the Pennsylvania Supreme Court on January 22, 2018 (the "remedial map") abolishes the district that I represent. I must now reach voters who were not in my district under the 2011 map, and I have lost the benefit of reaching voters who will not be in my district under the remedial map.

6. Since the end of January 2018, I have spent time on my campaign to prepare for the November 2018 election by reviewing consulting agreements, leasing office space and reviewing proposed changes to congressional districts.

7. As the Pennsylvania Supreme Court abolished the existing Congressional Districts, my ability to campaign effectively has been affected by the need to identify the location of new voters, particularly when the Pennsylvania Supreme Court map was imposed only eight days prior to the need to begin circulating petitions for my candidacy.

8. Under the remedial map, the following municipalities in my district are split: Berks and Chester.

9. The SURE system is supposed to match electors' residences to the new congressional districts, but has not been properly updated.

10. I have numerous ongoing projects ranging from facilitating interactions between local nongovernmental organizations and local governments and the Federal government to assisting constituents on highly detailed and sensitive issues ranging from Social Security, Medicare, Veterans, IRS and other federal matters. I believe that handing off such constituent interactions to another representative in a different district will unnecessarily interfere and delay and prejudice the resolution of such matters. Redistricting typically happens every ten years, constituents should not have to encounter more frequent changes in their congressional district.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Ryan Costello

Executed on March 7, 2018

2.

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

JACOB CORMAN, et al.,	:	
	:	No. 1:18-cv-00443-CCC
Plaintiffs,	:	
	:	*(filed electronically)*
v.	:	
ROBERT TORRES, et al.,	:	
Defendants.	:	

DECLARATION OF Mike Kelly

I, Mike Kelly, declare as follows:

1. I currently serve as a member of the United States House of Representatives for the 3rd District of Pennsylvania under the 2011 Congressional Districting Plan enacted by Pennsylvania's state legislature (the "2011 Map").

2. I was first elected in November 2010 and have served since January 2011.

3. I began raising funds for the 2018 election during the first quarter of 2017.

4. From that time to the end of January 2018, I traveled throughout the 3rd District under the 2011 Map to become better known to constituents and voters and often participated in various community related activities and nonprofit fundraisers on evenings and weekends with personal

funds to support the good works of people and groups throughout the district. I have invested significant personal time and money into my campaign efforts.

5. The remedial map ordered by the Pennsylvania Supreme Court on January 22, 2018 (the "remedial map") abolishes the district that I represent. I must now reach voters who were not in my district under the 2011 map, and I have lost the benefit of reaching voters who will not be in my district under the remedial map.

6. Since the end of January 2018, I have spent time on my campaign to prepare for the November 2018 election by reviewing consulting agreements and reviewing proposed changes to congressional districts and since March 1, 2018, meeting with prospective voters to obtain signatures on ballot petitions.

7. As the Pennsylvania Supreme Court abolished the existing Congressional Districts, my ability to campaign effectively has been affected by the need to identify the location of new voters, particularly when the Pennsylvania Supreme Court map was imposed only eight days prior to the need to begin circulating petitions for my candidacy.

8. Under the remedial map, the following townships and precincts in my district are split: Cranberry Township: (PART, Districts East [PART,

Divisions 01, 02 (all blocks except 2009, 2010, 2011, 2012, 2013, 2014, 2015 and 2016 of tract 912301 and block 1001 of tract 912304) and 03 (only block 1034 of tract 912303 and blocks 1035, 1036, 1037, 1043, 1044, 1045, 1046, 1047 and 1048 of tract 912304)], West [PART, Division 02 (all blocks except 2008, 2013 and 2018 of tract 912001 and blocks 2000, 2001, 2002, 2003 and 2012 of tract 912002)] and West [PART, Division 01 (all blocks except 1027, 1028 and 1029 of tract 912001)])

Jefferson Township: (PART, Districts I (only blocks 2011, 2013, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026 and 2027 of tract 911501) and Ii (only blocks 4001, 4009, 4010, 4012, 4013, 4014, 4015, 4017, 4018, 4019, 4020, 4021, 4022, 4023, 4024, 4025, 4026, 4027, 4028, 4029, 4030, 4031, 4032, 4033, 4034 and 4035 of tract 911501)).

9. The SURE system is supposed to match electors' residences to the new congressional districts, but has not been properly updated.

10. I have numerous ongoing projects ranging from facilitating interactions between local nongovernmental organizations and local governments and the Federal government to assisting constituents on highly detailed and sensitive issues ranging from Social Security, Medicare, Veterans, IRS and other federal matters. I believe that handing off such constituent interactions to another representative in a different district will

unnecessarily interfere and delay and prejudice the resolution of such matters. Redistricting typically happens every ten years, constituents should not have to encounter more frequent changes in their congressional district.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Mike Kelly

Executed on March 7, 2018

3.

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

JACOB CORMAN, et al.,	:	
	:	No. 1:18-cv-00443-CCC
Plaintiffs,	:	
	:	*(filed electronically)*
v.	:	
	:	
ROBERT TORRES, et al.,	:	
	:	
Defendants.	:	

DECLARATION OF THOMAS MARINO

I, Thomas Marino, declare as follows:

1. I currently serve as a member of the United States House of Representatives for the 12th District of Pennsylvania under the 2011 Congressional Districting Plan enacted by Pennsylvania's state legislature (the "2011 Map").

2. I was first elected in November 2012 and have served since January 2013.

3. I began raising funds for the 2018 election during the first quarter of 2017.

4. From that time to the end of January 2018, I traveled throughout the 10th District under the 2011 Map to become better known to constituents and voters and often participated in various community related activities and nonprofit fundraisers on evenings and weekends with personal

funds to support the good works of people and groups throughout the district. I have invested significant personal time and money into my campaign efforts.

5. The remedial map ordered by the Pennsylvania Supreme Court on January 22, 2018 (the "remedial map") abolishes the district that I represent. I must now reach voters who were not in my district under the 2011 map, and I have lost the benefit of reaching voters who will not be in my district under the remedial map.

6. Since the end of January 2018, I have spent time on my campaign to prepare for the November 2018 election by reviewing consulting agreements, leasing office space and reviewing proposed changes to congressional districts and since March 1, 2018, meeting with prospective voters to obtain signatures on ballot petitions.

7. As the Pennsylvania Supreme Court abolished the existing Congressional Districts, my ability to campaign effectively has been affected by the need to identify the location of new voters, particularly when the Pennsylvania Supreme Court map was imposed only eight days prior to the need to begin circulating petitions for my candidacy.

8. Under the remedial map, the following townships and precincts in my district are split: Lycoming, .

9. The SURE system is supposed to match electors' residences to the new congressional districts, but has not been properly updated.

10. I have numerous ongoing projects ranging from facilitating interactions between local nongovernmental organizations and local governments and the Federal government to assisting constituents on highly detailed and sensitive issues ranging from Social Security, Medicare, Veterans, IRS and other federal matters. I believe that handing off such constituent interactions to another representative in a different district will unnecessarily interfere and delay and prejudice the resolution of such matters. Redistricting typically happens every ten years, constituents should not have to encounter more frequent changes in their congressional district.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Thomas Marino

Executed on March 9, 2018

4.

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

JACOB CORMAN, et al.,	:	
	:	No. 1:18-cv-00443-CCC
Plaintiffs,	:	
	:	(*filed electronically*)
v.	:	
	:	
ROBERT TORRES, et al.,	:	
	:	
Defendants.	:	

DECLARATION OF SCOTT PERRY

I, Scott Perry, declare as follows:

1. I currently serve as a member of the United States House of Representatives for the 4th District of Pennsylvania under the 2011 Congressional Districting Plan enacted by Pennsylvania's state legislature (the "2011 Map").

2. I was first elected in November 2012 and have served since January 2013.

3. I began raising funds for the 2018 election during January 2016.

4. From that time to the end of January 2018, I traveled throughout the 4th District under the 2011 Map to continue my outreach with constituents and voters, and participated in various/numerous community related activities and nonprofit fundraisers on evenings and weekends with personal funds to support the good works of people and groups throughout the district. As for time spent "campaigning," every, single day I must continue earn the confidence and vote of my constituents in the performance of my official, congressional duties. The trust and good will that I've engendered and continued to try to earn in the 4th District under the 2011 map is now for naught.

5. The remedial map ordered by the Pennsylvania Supreme Court on January 22, 2018 (the "remedial map") abolishes the district that I represent. I must now reach voters who were not in my district under the 2011 map, and have lost the benefit of reaching voters who will not be in my district under the remedial map.

6. Since the end of January 2018, I have spent time on my campaign to prepare for the November 2018 election by reviewing consulting agreements, leasing office space, doing campaign volunteer outreach and reviewing proposed changes to congressional districts, and since March 1, 2018, meeting with prospective voters to obtain signatures on nominating petitions.

7. As the Pennsylvania Supreme Court abolished the existing Congressional Districts, my ability to campaign effectively has been affected by the need to identify the location of new voters, particularly when the Pennsylvania Supreme Court map was imposed only eight days prior to the need to begin circulating petitions for my candidacy.

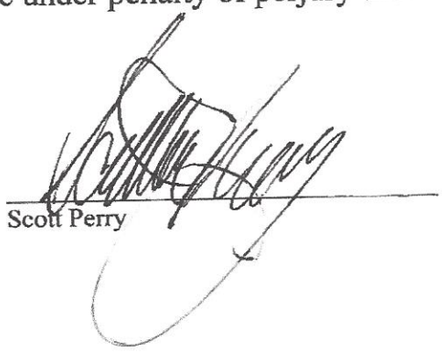
8. Under the remedial map, the following townships and precincts in my district are split: York Township (approx. 28,000 people) and North Middleton Township (approx. 11,000).

9. The SURE system is supposed to match electors' residences to the new congressional districts, but has not been properly updated. The information that briefly was available several days ago was incorrect, and subsequent "new" information posted was also outdated/incorrect. We have spent an inordinate amount of time calling the PA Department of State for guidance, only to be put on hold for extended periods of time and then told that "someone will get back with you at lunch" – which never happened; we followed up hours later only to be told that no one was available to assist and to call back. One of my staff called three days in a row trying to get answers/guidance, and continued to try to log into the SURE System on her own, only to see the computer message that "the system is down." Our volunteers are becoming increasingly frustrated at the lack of reliable information and disinterested in helping

until the district boundaries are clear. We are wasting precious time and good will – and to date still have not been able to confirm the boundaries of North Middleton Township.

10. Handing off constituent matters to another representative in a different district will unnecessarily interfere, delay and prejudice the resolution of such matters. The remedial map completely removes Adams County and the majority of York County, the 2011 map's population center. Since January 2017 alone, I've opened hundreds of new constituent cases in Adams County and the portion of York County removed in the remedial map. We have worked with these constituents on highly detailed and sensitive issues regarding Social Security, Medicare, VA, IRS and other programs – many of which take months, if not years, to resolve, and these citizens will be impacted significantly if they're forced to start over with a new representative; as I discovered when I first took office, constituent files cannot be transferred to a new Member – in many cases, the constituent must start anew. I've also worked for months with small businesses, local governments and non-profit organizations on countless community development programs, including firefighter grants, library funding, job training and workforce development funds and agricultural initiatives. The proposed changes would invalidate countless time, taxpayer funds, planning and resources spent by these organizations. Redistricting typically happens every ten years, constituents should not have to encounter more frequent changes in their congressional district.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.



Scott Perry

Executed on March 9, 2018

5.

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

JACOB CORMAN, et al.,	:	
	:	No. 1:18-cv-00443-CCC
Plaintiffs,	:	
	:	*(filed electronically)*
v.	:	
	:	
ROBERT TORRES, et al.,	:	
	:	
Defendants.	:	

DECLARATION OF KEITH ROTHFUS

I, Keith Rothfus, declare as follows:

1. I currently serve as a member of the United States House of Representatives for the 12th District of Pennsylvania under the 2011 Congressional Districting Plan enacted by Pennsylvania's state legislature (the "2011 Map").

2. I was first elected in November 2012 and have served since January 2013.

3. I have been raising funds for the 2018 election since the first quarter of 2017.

4. From that time to the end of January 2018, I traveled throughout the 12th District under the 2011 Map to become better known to constituents and voters and often participated in various community-related activities and nonprofit fundraisers on evenings and weekends with personal

funds to support the good works of people and groups throughout the district.

5. The remedial map ordered by the Pennsylvania Supreme Court on January 22, 2018 (the "remedial map") abolishes the district that I represent. I must now reach new voters who were not in my district under the 2011 map, and I have lost the benefit of the efforts I expended over the past year in reaching voters who will now not be in my district under the remedial map.

6. Since the end of January 2018, I have spent time on my campaign to prepare for the November 2018 election by reviewing consulting agreements, leasing office space and reviewing proposed changes to congressional districts and since March 1, 2018, meeting with prospective voters to obtain signatures on ballot petitions.

7. As the Pennsylvania Supreme Court abolished the existing Congressional Districts under the 2011 Map, my ability to campaign effectively has been affected by the need to identify the location of new voters, particularly when the Pennsylvania Supreme Court map was imposed only eight days prior to the need to begin circulating petitions for my candidacy.

8. Under the remedial map, the following municipalities in my district are split: Penn Hills, Cranberry Township, and South Fayette Township.

9. The SURE system is supposed to match electors' residences to the new congressional districts but has not been properly updated.

10. I have numerous ongoing projects ranging from facilitating interactions between local nongovernmental organizations and local governments and the Federal government to assisting constituents on highly detailed and sensitive issues ranging from Social Security, Medicare, Veterans, IRS and other Federal matters. I believe that handing off such constituent interactions to another representative in a different district will unnecessarily interfere, delay and prejudice the resolution of such matters. Redistricting typically happens every ten years, constituents should not have to encounter more frequent changes in their congressional district.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Keith Rothfus

Executed on March 7th, 2018

6.

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

JACOB CORMAN, et al.,	:	
	:	No. 1:18-cv-00443-CCC
Plaintiffs,	:	
	:	*(filed electronically)*
v.	:	
	:	
ROBERT TORRES, et al.,	:	
	:	
Defendants.	:	

DECLARATION OF GLENN THOMPSON

I, Glenn Thompson, declare as follows:

1. I currently serve as a member of the United States House of Representatives for the 5th District of Pennsylvania under the 2011 Congressional Districting Plan enacted by Pennsylvania's state legislature (the "2011 Map").

2. I was first elected in November 2008 and have served since January 2009.

3. I began raising funds for the 2018 election during the first quarter of 2017.

4. From that time to the end of January 2018, I traveled throughout the 5th District under the 2011 Map to become increasingly known to constituents and voters and often participated in various community related activities and nonprofit fundraisers on evenings and

weekends with personal funds to support the good works of people and groups throughout the district. I have invested significant personal time and money into my campaign efforts.

5. The remedial map ordered by the Pennsylvania Supreme Court on January 22, 2018 (the "remedial map") abolishes the district that I represent. I must now reach voters who were not in my district under the 2011 map, and I have lost the benefit of reaching voters who will not be in my district under the remedial map.

6. Since the beginning of January 2018, I have spent time on my campaign to prepare for the November 2018 election by traveling throughout the 16 counties that comprise the 5th District of Pennsylvania, an area slightly larger than the state of New Jersey, and since March 1, 2018, meeting with prospective voters to obtain signatures on ballot petitions.

7. As the Pennsylvania Supreme Court abolished the existing Congressional Districts, my ability to campaign effectively has been affected by the need to identify the location of new voters, particularly when the Pennsylvania Supreme Court map was imposed only eight days prior to the need to begin circulating petitions for my candidacy.

8. Under the remedial map, the following townships within the 15th Congressional District are split: 1. Butler County, Jefferson,

Pennsylvania. 2. Cambria County, East Taylor, Pennsylvania. 3. Centre County, Half Moon Township, Pennsylvania.

9. Under the remedial map, the following voting precincts within the 15th Congressional District are split: JEFFERSON TWD VTDII, EAST TAYLOR TWD VTD01, EAST TAYLOR TWD VTD03, EAST TAYLOR TWD VTD04, HALF MOON TOWNSHIP Voting District.

10. The SURE system is supposed to match electors' residences to the new congressional districts, but has not been properly updated.

11. I have numerous ongoing projects ranging from facilitating interactions between local nongovernmental organizations and local governments and the Federal government to assisting constituents on highly detailed and sensitive issues ranging from Social Security, Medicare, Veterans Affairs, IRS and other federal matters. I believe that handing off such constituent interactions to another representative in a different district will unnecessarily interfere and delay and prejudice the resolution of such matters. Redistricting typically happens every ten years, constituents should not have to encounter more frequent changes in their congressional district.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Glenn Thompson

Executed on March 7, 2018

EXHIBIT E

1.

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

JACOB CORMAN, et al.,	:	
	:	No. 1:18-cv-00443-CCC
Plaintiffs,	:	
	:	*(filed electronically)*
v.	:	
ROBERT TORRES, et al.,	:	
Defendants.	:	

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA)
) ss
COUNTY OF NORTHAMPTON)

I, Cheryl H. Corsa, being duly sworn, do herby depose and state as follows:

1. As a political consultant, I purchase voter registration lists from the SURE system through the Department of State on a regular basis in order to provide accurate lists of voters to candidates and campaign committees who are my clients.

2. As per the PA Supreme Court's remedial congressional district plan, the new plan was put into place on February 19, 2018.

3. I purchased the SURE Full Voter Export at 9:07 AM on Monday. February 26th. I have attached an invoice showing the date and time of my purchase. Ex. 1.

4. I attempted to compile voter lists by processing several counties from the SURE data dated 2/26/2018. After looking at only 5 of the counties, I found many voters assigned to inaccurate congressional districts. I wrote an email to the SURE people to complain. My email correspondence with them is attached as Ex. 2. SURE placed the

blame on the counties and told me that the congressional district information would be available "later this week."

5. After I purchased the 2/26/2018 voter file for the whole state, SURE took down the list from its website and replaced it with last week's list dated 2/19/2018. This conversion to the "old" data file was confirmed by the SURE email I received. I have attached a screen shot of the SURE webpage for 2/26/2018 after they replaced the file I received early in the morning with the 2/19/2018 voter file. Ex. 3.

6. The SURE webpage on 2/27/2018 was identical to the 2/26/2018 SURE webpage. I have attached a screen shot of that page. Ex. 4.

7. The SURE webpage during the day of 2/28/2018 was identical to the 2/26/2018 SURE webpage. I did not take a screen shot.

8. The SURE webpage was updated late in the day on 2/28/2018. They had again put up a Full Voter Export with flawed congressional district information and the webpage acknowledged the flaw. I have attached a screen shot of that webpage. Ex. 5.

9. The SURE webpage was updated early on March 1, 2018. SURE provided access to a Full Voter Export with flawed congressional district information, but this time with a statement acknowledging the flaws: "*The FVE reflects system updates that were made as of the posting of this data to conform to the 2018 Congressional Remedial Plan. 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. A list of the counties and splits is attached at the end of the 2018 Congressional Remedial District Verbal Descriptions.*" I have attached a screen shot of the 3/1/2018 SURE webpage. Ex. 6.

10. I once again purchased the Full Voter Export from SURE at 8:54 AM on 3/1 to see if there are differences between this 3/1 file and the one I purchased on 2/26. I have attached an invoice showing the date and time of my purchase. Ex. 7.

11. Though the highlighted wording from the SURE website quoted above in paragraph 9 says the only remaining flaws are in "2 townships and 29 wards within 14 counties," this is not correct. For example, Clarion County, which is NOT split according to the remedial plan, shows voters residing in both the 5th and 15th congressional districts. They all should be in the 15th Congressional District.

12. To add to the confusion, various documents on the PA Dept. of State website state alternately that 13 counties are split and that 14 counties are split. The Dept. of State attributes this to a GIS non-contiguous census block in Chester County located in Delaware County.

13. The 2018 Congressional Remedial District Verbal Descriptions (the certified text document) dated 2/22/2018 describes split precincts and districts by census tracts and blocks, but does not assign residential addresses to Congressional districts. It appears that the task of dividing residential addresses into Congressional Districts based on census blocks has proved to be technically more difficult than anticipated.

14. Meanwhile congressional candidates are now in their 3rd day of attempting to collect petition signatures from voters in their districts, without having accurate voter lists showing the voters living in their districts.

15. Based on my interactions with the campaigns for which I consult, I believe that voters themselves, especially along split precinct borders, are confused as to who their congressional candidates are.

16. Once the petition process is concluded, it is my opinion, based on my experience as a campaign consultant, that there will be numerous challenges to signatures collected, due to the fact that congressional candidates are not as of now provided with accurate lists of voters in their districts.

17. The confusion surrounding collecting petition signatures may result in a candidate being removed from the ballot as a result of inaccurate/incomplete voter lists.

18. In a document dated 2/26/2018 and titled "Answer of Respondents Governor Thomas W. Wolf, Acting Secretary Robert Torres, and Commissioner Jonathan Marks to Legislative Respondents' and Intervenors' Applications for STAY OF COURT'S ORDERS of February 19, 2018 and January 22, 2018." I have provided a copy of this document. Ex. 8. In this document, Mr. Torres says through his attorney that:

> "The Department of State has also taken many other steps to implement the Remedial Plan, *including updating the Department of State's statewide computer voter database* to reflect the Remedial Plan... ." [emphasis added]

This statement was not correct when it was made. As of 3/1/2018, the statewide computer voter database still does NOT reflect the Remedial Plan. The document also declares: "...the Remedial Plan is in place, the nomination petition circulation period is about to begin, and no 'chaos' has ensued." Contrary to the statement that there is no chaos, many voters in split counties do not know in which congressional district they reside, and congressional candidates in split counties do not know precisely the voters who reside their district. In addition, voters in the 20 split voting districts are being denied the opportunity to sign a nomination petition.

19. As of March 1, 2018, I have confirmed with SURE that the SURE voter database is still flawed. Ex. 9.

20. The foregoing statements are true to the best of my information, knowledge and belief, and are made subject the penalty of perjury.

Cheryl H. Corsa

Cheryl H. Corsa
1290 Stark Road
Bethlehem, PA 18017
610-730-5002
cherylcorsa@gmail.com

Sworn to and subscribed
before me this 5th day of
March, 2018.

Notary Public

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
Jessica Solliday, Notary Public
Freemansburg Boro, Northampton County
My Commission Expires May 27, 2020
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES

Cheryl H Corsa

From: "PA BCEL VOTER LIST" <noreply@gge4mailer.com>
Date: Monday, February 26, 2018 9:07 AM
To: <cherylcorsa@gmail.com>
Subject: Transaction Receipt from PA BCEL VOTER LIST

This is the receipt for your purchase at PA Voter Services Payment Page.

Order Information

Quantity	Item	Unit		Price
1	**PA Full Voter Export (All Counties)**	20.00	USD	20.00
		Total	**USD**	**20.00**

This order is now complete. Transaction approved!

Here is your receipt:

```
========== TRANSACTION RECORD ==========
PA BCEL VOTER LIST
401 NORTH ST 308 NOB
HARRISBURG, PA 17120
United States
WWW.DOS.PA.GOV/RUNNINGFOROFFICE

TYPE: Purchase

ACCT: Visa                    $ 20.00 USD

CARDHOLDER NAME : Cheryl H Corsa
CARD NUMBER     : ############3624
DATE/TIME       : 26 Feb 18 09:07:20
REFERENCE #     : 003 0023327 M
AUTHOR. #       : 98845D
TRANS. REF.     :

    Approved - Thank You 100


Please retain this copy for your records.

Cardholder will pay above amount to
card issuer pursuant to cardholder
agreement.
=========================================
```

EXHIBIT
tabbies
1

3/1/2018

Hi, Courtney,

I purchased the Full Voter Export at 9:00 this morning. It has NEW congressional districts listed – but many are inaccurate as described in my previous email.

The PA Dept. of State website shows that PETITION circulation for congressional districts begins TOMORROW – Feb. 27.

How am I supposed to present my clients with accurate lists of voters in their congressional districts so they can begin tomorrow to collect signatures?

YES – please let me know when a new, updated, accurate file (Full Vote Export) becomes available.

In the meantime – this is a MESS.

Thank you,

Cheryl

From: ST, Sure_Helpdesk
Sent: Monday, February 26, 2018 12:57 PM
To: Cheryl H Corsa
Cc: Fuhrman, Zachary ; ST, Sure_Helpdesk ; ST, Elections
Subject: RE: SURE Full Data export - link not received

Hello Cheryl,
My name is Courtney and I am a member of the SURE Help Desk. I am unsure as to when you purchased the copy of the Full Voter Export but this morning, we took the current version down to replace with last week's version that includes the old district information.

We would like to give the counties a chance to update all of their information within their systems so that an accurate report will be available for you later this week.

With that being said, once we receive notification that the congressional districts are up to date in the county election offices, I would like to offer you the new file. Would that be acceptable to you?

Thanks,
Courtney
SURE Help Desk

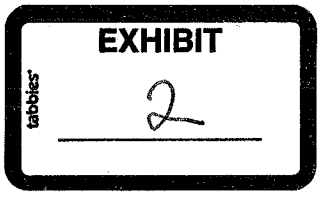
From: Cheryl H Corsa [mailto:cherylcorsa@gmail.com]
Sent: Monday, February 26, 2018 12:54 PM
To: ST, Sure_Helpdesk <STSVCSure_Helpdesk@pa.gov>
Cc: Fuhrman, Zachary <zfuhrman@pa.gov>; ST, Sure_Helpdesk <STSVCSure_Helpdesk@pa.gov>
Subject: Re: SURE Full Data export - link not received

Hi, Folks at SURE:

I purchased the Full Voter Export today. The files are dated 2/26/2018

There are glaring errors in the Congressional District information.

I have run Cambria and Butler in preparation of providing lists of voters to candidates running for Congress.



Here are a FEW examples of what I've found so far:

Butler:

The certified TEXT version of the new Congressional Districts filed 2/22/2018 says Jefferson Twp 1 in Butler County is split into Cong. District 15 and Cong. District 16, and Jefferson Twp 2 in Butler County is split into Cong. District 15 and Cong. District 16..

The VTD splits lists report in Court Remedial Plan 2 19 shows ONLY Jefferson Twp 2 split into Cong. District 15 and 16, not district 1.

The SURE data file downloaded today (2/27/2018) shows ALL voters in Jefferson Twp 1 and Jefferson Twp 2 in Cong. District 16.

In Cranberry Twp – we again see problems between the certified TEXT of the congressional districts and the way voters are identified in the SURE data. The ward splits are WRONG in the SURE data if the certified TEXT posted by the Secretary of the Commonwealth on 2/22 is RIGHT.

Cambria:

East Taylor 2 is shown in Cong. District 13. According to the text, parts of East Taylor 1, 3, and 4 should be in Cong. District 13. East Taylor 2 show up in the SURE file as belonging to Cong. District 13. East Taylor 1, 3 and 4 are in the SURE file as belonging to Cong. District 15. The Remedial Plan says East Taylor 1, 3 and 4 should be split between Cong. District 13 and 15.

In the SURE file, Geistown 2 in Cambria County is in the 12th Congressional. No other documentation shows Geistown as being split. It should all be in the 15th Cong. District.

The point is, I cannot prepare accurate voting lists to be used by candidates during the petition process which begins tomorrow.

In just these TWO counties I've looked at, THOUSANDS of voters are listed in the wrong congressional districts.

Recommendations? Solutions?

Cheryl Corsa
cherylcorsa@gmail.com

Screen shot of PA Dept of State – SURE – web page. Taken 1:24 PM on 2/26/2018
This shows the web page that was up at 9 AM has been removed and replaced with this notice.

DEPARTMENT OF STATE English Español HOME OTHER LINKS+

PA Full Voter Export

As provided by 25 Pa.C.S. Section 1404(b)(1) (relating to Public Information Lists), as well as the SURE Regulations at 4 Pa. Code Section 184.14(b) (relating to Public Information Lists), the Department of State will provide the Full Voter Export List to requestors.

This version of the Public Information List is a full export of all voters in the county and contains the following fields: voter ID number, name, sex, date of birth, date registered, status (i.e., active or inactive), date status last changed, party, residential address, mailing address, polling place, date last voted, all districts in which the voter votes (i.e., congressional, legislative, school district, etc.), voter history, and date the voter's record was last changed.

The cost of the Full Voter Export list is 20.00. Upon successful payment an email will be sent to the provided email address.

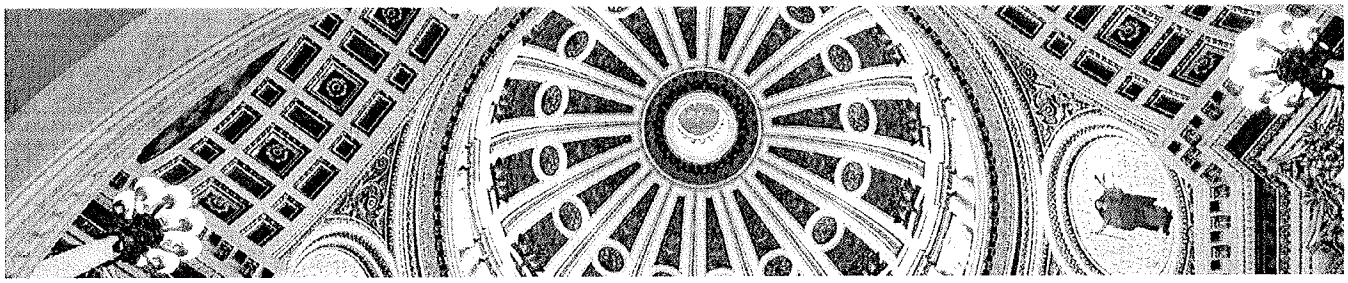
This data is current as of 02/19/2018 and will be refreshed on 02/26/2018 at midnight.

Please note: The Full Voter Export dated, February 19, 2018 DOES NOT reflect the new remedial Congressional District Plan. Please continue to check the website for further information.

Purchase PA FULL Voter Export

PRIVACY POLICY SECURITY POLICY AGENCIES CONTACT US COPYRIGHT © 2011 COMMONWEALTH OF PENNSYLVANIA ALL RIGHTS RESERVED

EXHIBIT
tabbies
3



PA Full Voter Export

As provided by 25 Pa.C.S. Section 1404(b)(1) (relating to Public Information Lists), as well as the SURE Regulations at 4 Pa. Code Section 184.14(b) (relating to Public Information Lists), the Department of State will provide the Full Voter Export List to requestors.

This version of the Public Information List is a full export of all voters in the county and contains the following fields: voter ID number, name, sex, date of birth, date registered, status (i.e., active or inactive), date status last changed, party, residential address, mailing address, polling place, date last voted, all districts in which the voter votes (i.e., congressional, legislative, school district, etc.), voter history, and date the voter's record was last changed.

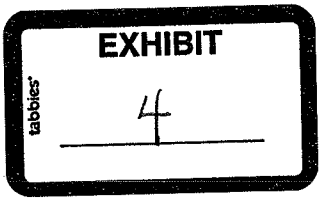
The cost of the Full Voter Export list is 20.00. Upon successful payment an email will be sent to the provided email address.

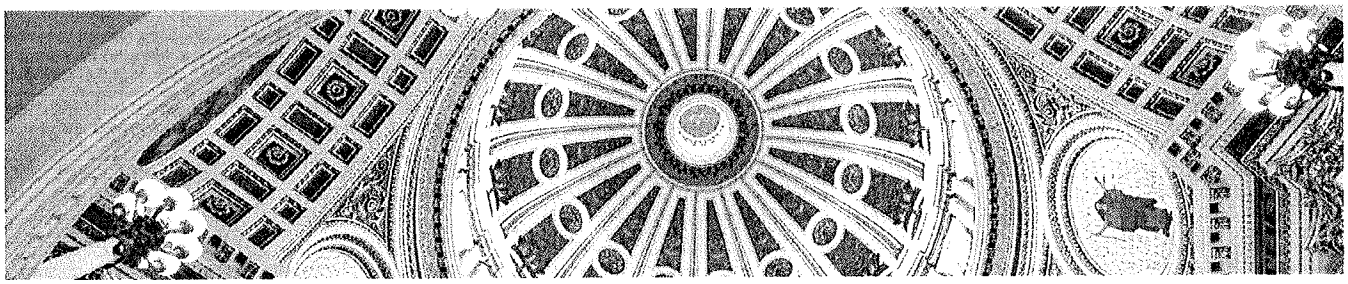
This data is current as of 02/19/2018 and will be refreshed on 02/26/2018 at midnight.

Please note: The Full Voter Export dated, February 19, 2018 DOES NOT reflect the new remedial Congressional District Plan. Please continue to check the website for further information.

Purchase PA FULL Voter Export

This website is compatible with the following browsers:





PA Full Voter Export

As provided by 25 Pa.C.S. Section 1404(b)(1) (relating to Public Information Lists), as well as the SURE Regulations at 4 Pa. Code Section 184.14(b) (relating to Public Information Lists), the Department of State will provide the Full Voter Export List to requestors.

This version of the Public Information List is a full export of all voters in the county and contains the following fields: voter ID number, name, sex, date of birth, date registered, status (i.e., active or inactive), date status last changed, party, residential address, mailing address, polling place, date last voted, all districts in which the voter votes (i.e., congressional, legislative, school district, etc.), voter history, and date the voter's record was last changed.

The cost of the Full Voter Export list is 20.00. Upon successful payment an email will be sent to the provided email address.

This data is current as of 02/28/2018 and will be refreshed on 03/07/2018 at midnight.

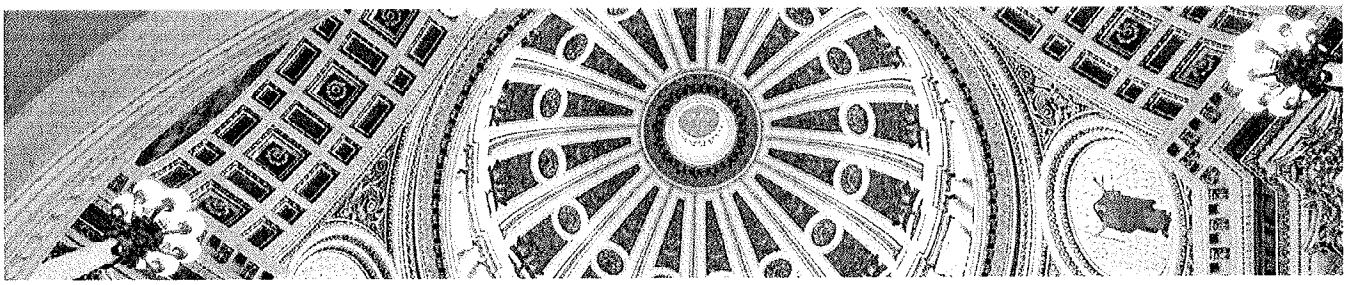
Important Notice: *Due to the increased demand for updated copies of the Full Voter Export (FVE) the Department will be posting FVE updates daily.*

Congressional Districts: *The FVE reflects system updates that were made as of the posting of this data to conform to the 2018 Congressional Remedial Plan. 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. A list of the counties and splits is attached at the end of the 2018 Congressional Remedial District Verbal Descriptions.*

Purchase PA FULL Voter Export

This website is compatible with the following browsers:

EXHIBIT
tabbies
5



PA Full Voter Export

As provided by 25 Pa.C.S. Section 1404(b)(1) (relating to Public Information Lists), as well as the SURE Regulations at 4 Pa. Code Section 184.14(b) (relating to Public Information Lists), the Department of State will provide the Full Voter Export List to requestors.

This version of the Public Information List is a full export of all voters in the county and contains the following fields: voter ID number, name, sex, date of birth, date registered, status (i.e., active or inactive), date status last changed, party, residential address, mailing address, polling place, date last voted, all districts in which the voter votes (i.e., congressional, legislative, school district, etc.), voter history, and date the voter's record was last changed.

The cost of the Full Voter Export list is 20.00. Upon successful payment an email will be sent to the provided email address.

This data is current as of 03/01/2018 and will be refreshed on 03/08/2018 at midnight.

Important Notice: *Due to the increased demand for updated copies of the Full Voter Export (FVE) the Department will be posting FVE updates daily.*

Congressional Districts: *The FVE reflects system updates that were made as of the posting of this data to conform to the 2018 Congressional Remedial Plan. 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. A list of the counties and splits is attached at the end of the 2018 Congressional Remedial District Verbal Descriptions.*

Purchase PA FULL Voter Export

This website is compatible with the following browsers:

EXHIBIT tabbies 6

Cheryl H Corsa

From: "PA BCEL VOTER LIST" <noreply@gge4mailer.com>
Date: Thursday, March 1, 2018 8:54 AM
To: <cherylcorsa@gmail.com>
Subject: Transaction Receipt from PA BCEL VOTER LIST

This is the receipt for your purchase at PA Voter Services Payment Page.

Order Information

Quantity	Item	Unit		Price
1	**PA Full Voter Export (All Counties)**	20.00	USD	20.00
		Total	**USD**	**20.00**

This order is now complete. Transaction approved!

Here is your receipt:

```
========== TRANSACTION RECORD ==========
PA BCEL VOTER LIST
401 NORTH ST 308 NOB
HARRISBURG, PA 17120
United States
WWW.DOS.PA.GOV/RUNNINGFOROFFICE

TYPE: Purchase

ACCT: Visa                    $ 20.00 USD

CARDHOLDER NAME : Cheryl H Corsa
CARD NUMBER     : ##############3624
DATE/TIME       : 01 Mar 18 08:54:13
REFERENCE #     : 003 0962467 M
AUTHOR. #       : 01773D
TRANS. REF.     :

    Approved - Thank You 100


Please retain this copy for your records.

Cardholder will pay above amount to
card issuer pursuant to cardholder
agreement.
=========================================
```

EXHIBIT
7

3/1/2018

Received 2/26/2018 11:42:22 AM Supreme Court Middle District

Filed 2/26/2018 11:42:00 AM Supreme Court Middle District
159 MM 2017

IN THE SUPREME COURT OF PENNSYLVANIA

NO. 159 MM 2017

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, *et al.*,
Petitioners,

v.

THE COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

ANSWER OF RESPONDENTS GOVERNOR THOMAS W. WOLF, ACTING SECRETARY ROBERT TORRES, AND COMMISSIONER JONATHAN MARKS TO LEGISLATIVE RESPONDENTS' AND INTERVENORS' APPLICATIONS FOR STAY OF COURT'S ORDERS OF FEBRUARY 19, 2018 AND JANUARY 22, 2018

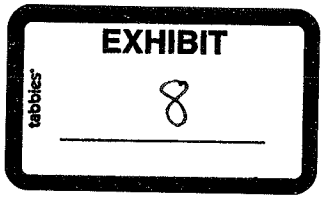
Review of the Commonwealth Court's Recommended Findings of Fact and Conclusions of Law, No. 261 M.D. 2017

Thomas P. Howell, Deputy General Counsel (ID No. 079527)
Office of General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17101
Tel: (717) 783-6563

Timothy E. Gates,
Chief Counsel (ID No. 202305)
Kathleen M. Kotula, Deputy Chief Counsel (ID No. 318947)
Ian B. Everhart, Assistant Counsel (ID No. 318947)
Pennsylvania Department of State
Office of Chief Counsel
306 North Office Building
Harrisburg, PA 17120
Tel: (717) 783-0736

Mark A. Aronchick (ID No. 20261)
Michele D. Hangley (ID No. 82779)
Claudia De Palma (ID No. 320136)
Ashton R. Lattimore (*pro hac vice*)
HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER
One Logan Square, 27th Floor
Philadelphia, PA 19103
(215) 568-6200

Counsel for Respondents



On February 22, 2018, Speaker Turzai and President Pro Tempore Scarnati ("Applicants") submitted an Application for Relief seeking a stay of this Court's February 19, 2018 Order setting forth a constitutionally proper congressional districting plan ("Remedial Plan"), as well as this Court's January 22, 2018 Order. Applicants set forth no new theories or facts, but simply "restate and incorporate by reference" the arguments set forth in their similar application of January 23, 2018, which this Court denied. Because Applicants submit nothing new for this Court's consideration, their request should be summarily denied.

A stay is an extraordinary remedy and is only 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[;] and 4. The issuance of a stay will not adversely affect the public interest." *Pennsylvania Pub. Util. Comm'n v. Process Gas Consumers Grp.*, 467 A.2d 805, 809 (Pa. 1983). Applicants still cannot demonstrate any of these factors, and Executive Respondents renew and incorporate herein the arguments of their January 25, 2018 Answer to the January 23 Application.

Since Applicants last requested a stay, this Court has issued an opinion fully explaining the rationale for its January 22, 2018 Per Curium Order ("PCO"), which was fully consistent with the PCO. Additionally, this Court issued an Order amending the congressional election calendar. As provided in the Court's

February 19 Order, the Department of State has certified the textual description of the Remedial Plan to this Court. *See* February 22, 2018 Torres Certification. The Department of State has also taken many other steps to implement the Remedial Plan, including updating the Department of State's statewide computer voter database to reflect the Remedial Plan, and has provided copies of the Remedial Plan textual description to county election officials. *See* "Department of State Implementing PA Supreme Court's Remedial Congressional Map," Feb. 20, 2018.[1] Further, the Department of State has provided updated candidate petitions in advance of the circulation period, which begins on February 27,[2] and has publicized the Remedial Plan on the Department of State's website and social media.[3] Finally, the Department of State has submitted the textual description of the congressional districts in the Remedial Plan to the Pennsylvania Bulletin for publication, and will submit those descriptions to newspapers across the

---

[1] Available at http://www.media.pa.gov/Pages/State-Details.aspx?newsid=263.

[2] *See* *http://www.dos.pa.gov/VotingElections/CandidatesCommittees/RunningforOffice/Pages/default.aspx*.

[3] *See* *http://www.dos.pa.gov/VotingElections/CandidatesCommittees/RunningforOffice/Pages/remedial-interactive-map.aspx*; https://www.facebook.com/PADepartmentofState/.

Commonwealth for further dissemination. The boundaries of the new plan have been widely publicized, receiving local, statewide and national media coverage.[4]

Granting a stay at this stage would confuse, complicate and undermine these preparations, which the Executive Branch Respondents, and voters, have undertaken pursuant to this Court's PCO and the Remedial Plan. A stay would cause massive chaos and would interfere with the orderly administration of the upcoming primary election. Applicant's unsupportable, "last-ditch" appeal to the United States Supreme Court, their second such effort, does nothing to change this analysis.[5]

In their Response to Applicants' first Application for a Stay, the Executive Respondents demonstrated that as long as a map issued by February 20, 2018, the May 2018 Primaries could proceed smoothly. *See* Answer dated Jan. 25, 2018 at 3-6. Subsequent events have confirmed this—the Remedial Plan is in place, the nomination petition circulation period is about to begin, and no "chaos" has ensued. In contrast, it is Applicants who now seek to upset the status quo and

---

[4] *See*, https://slate.com/news-and-politics/2018/02/the-pennsylvania-supreme-courts-new-map-restores-the-states-democracy.html; https://www.huffingtonpost.com/entry/pennsylvania-new-map_us_5a8b2cb6e4b0a1d0e12c1287

[5] Even if the U.S. Supreme Court were to agree with Applicants that the Remedial Plan was adopted inappropriately – an extremely unlikely outcome, especially given that Justice Alito has already denied one stay application – the Court will likely defer to the lower Courts' decision to keep such plans in place where an election is imminent. *See Upham v. Seamon*, 456 U.S. 37 (1982).

severely and irreparably impair the prospect of the May 15 primary election going ahead as scheduled.

In any event, regardless of Applicants' appeals and entreaties, they do not have the right to proceed under a map that violates others' constitutional rights. The fundamental rights guaranteed by the Pennsylvania Declaration of Rights "cannot lawfully be infringed, even momentarily[.]" *Pap's A.M. v. City of Erie*, 812 A.2d 591, 607 (2002). Petitioners imply that their mere intention to seek review before the United States Supreme Court justifies upending the status quo and imposing an unconstitutional law on the citizens of Pennsylvania. Such argument ignores the public's interest in maintaining (and proceeding under) a constitutional redistricting plan that provides for free and equal elections. None of Applicants' asserted inconveniences can overshadow these fundamental constitutional rights. To the contrary, Applicants seek to impose an unconstitutional enactment upon Pennsylvania's citizens. Such a result should not be countenanced, and this Court should therefore deny the Application for stay, and preserve the status quo established by the Remedial Plan.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

Dated: February 26, 2018

/s/ Mark. A. Aronchick
Mark A. Aronchick (ID No. 20261)
Michele D. Hangley (ID No. 82779)
Claudia De Palma (ID No. 320136)

Ashton R. Lattimore (*pro hac vice*)
One Logan Square, 27th Floor
Philadelphia, PA 19103
Tel: (215) 568-6200
Fax: (215) 568-0300
maa@hangley.com
mdh@hangley.com
cdp@hangley.com
arl@hangley.com

Attorneys for Respondents Governor Thomas W. Wolf, Acting Secretary of the Commonwealth Robert Torres, and Commissioner Jonathan Marks

---

Thomas P. Howell (ID No. 079527)
Office of General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17101
Tel: (717) 783-6563
Fax: (717) 787-1788
thowell@pa.gov
Attorney for Governor Wolf

Timothy E. Gates (ID No. 202305)
Kathleen M. Kotula (ID No. 86321)
Ian B. Everhart (ID No. 318947)
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
ieverhart@pa.gov
Attorneys for Acting Secretary Torres and Commissioner Marks

Cheryl H Corsa

From: "ST, Sure_Helpdesk" <STSVCSure_Helpdesk@pa.gov>
Date: Thursday, March 1, 2018 12:18 PM
To: "Cheryl H Corsa" <cherylcorsa@gmail.com>; "ST, Sure_Helpdesk" <STSVCSure_Helpdesk@pa.gov>
Cc: "Fuhrman, Zachary" <zfuhrman@pa.gov>; "ST, Sure_Helpdesk" <STSVCSure_Helpdesk@pa.gov>; "ST, Elections" <RA-Elections@pa.gov>
Subject: RE: SURE Full Data export - link not received

Cheryl,
It really depends on the timing on whether or not the file will be complete by the end of your 7 day availability for the run. The Elections Department is copied on this email. It is ultimately their decision as to whether or not a new link will be provided if the file wasn't complete after the 7 day availability.

The website will be updated with new wording as soon as it is confirmed that the file is complete.
Here is the current wording on the site:
Important Notice: *Due to the increased demand for updated copies of the Full Voter Export (FVE) the Department will be posting FVE updates daily.*

Congressional Districts: *The FVE reflects system updates that were made as of the posting of this data to conform to the 2018 Congressional Remedial Plan. 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. A list of the counties and splits is attached at the end of the 2018 Congressional Remedial District Verbal Descriptions.*

Please let me know if you would like a current link that will be available (and updated) daily for the next 7 days or if you would like to wait for a response from the Elections Department concerning your question about obtaining a new link after the 7 days.

Thanks,
Courtney

From: Cheryl H Corsa [mailto:cherylcorsa@gmail.com]
Sent: Thursday, March 1, 2018 12:14 PM
To: ST, Sure_Helpdesk <STSVCSure_Helpdesk@pa.gov>
Cc: Fuhrman, Zachary <zfuhrman@pa.gov>; ST, Sure_Helpdesk <STSVCSure_Helpdesk@pa.gov>; ST, Elections <RA-Elections@pa.gov>
Subject: Re: SURE Full Data export - link not received

Hi, Courtney,

Thank you for your email.

I believe you are telling me that you don't expect to have the completed updates within the next several days. Is that correct?

EXHIBIT
tabbies
9

If I opt to have you send me the link today, does that mean that I will eventually be able to download the Full Voter Export that shows the complete updates without having to purchase it again?

And will the SURE webpage eventually declare that the updates have been completed?

Thank you

Cheryl Corsa
From: ST, Sure_Helpdesk
Sent: Thursday, March 1, 2018 9:14 AM
To: Cheryl H Corsa ; ST, Sure_Helpdesk
Cc: Fuhrman, Zachary ; ST, Sure_Helpdesk ; ST, Elections
Subject: RE: SURE Full Data export - link not received

Cheryl,
At the present time, the county election offices are making the congressional updates in their computer systems. The full voter export is pulled from that system.
Not all of the counties have updated their information at this time but are continuing to do so daily.

Would you like a link to download the current Full Voter Export? The link is valid for several days and you can download the updated file every day, if you like.
Or would you rather have a new link once all of the counties have updated their district information?

Thanks,
Courtney

From: Cheryl H Corsa [mailto:cherylcorsa@gmail.com]
Sent: Monday, February 26, 2018 1:04 PM
To: ST, Sure_Helpdesk <STSVCSure_Helpdesk@pa.gov>
Cc: Fuhrman, Zachary <zfuhrman@pa.gov>; ST, Sure_Helpdesk <STSVCSure_Helpdesk@pa.gov>; ST, Elections <RA-Elections@pa.gov>
Subject: Re: SURE Full Data export - link not received

Hi, Courtney,

I purchased the Full Voter Export at 9:00 this morning. It has NEW congressional districts listed – but many are inaccurate as described in my previous email.

The PA Dept. of State website shows that PETITION circulation for congressional districts begins TOMORROW – Feb. 27.

How am I supposed to present my clients with accurate lists of voters in their congressional districts so they can begin tomorrow to collect signatures?

YES – please let me know when a new, updated, accurate file (Full Vote Export) becomes available.

In the meantime – this is a MESS.

Thank you,

Cheryl

From: ST, Sure_Helpdesk
Sent: Monday, February 26, 2018 12:57 PM
To: Cheryl H Corsa
Cc: Fuhrman, Zachary ; ST, Sure_Helpdesk ; ST, Elections
Subject: RE: SURE Full Data export - link not received

Hello Cheryl,
My name is Courtney and I am a member of the SURE Help Desk. I am unsure as to when you purchased the copy of the Full Voter Export but this morning, we took the current version down to replace with last week's version that includes the old district information.

We would like to give the counties a chance to update all of their information within their systems so that an accurate report will be available for you later this week.

With that being said, once we receive notification that the congressional districts are up to date in the county election offices, I would like to offer you the new file. Would that be acceptable to you?

Thanks,
Courtney
SURE Help Desk

From: Cheryl H Corsa [mailto:cherylcorsa@gmail.com]
Sent: Monday, February 26, 2018 12:54 PM
To: ST, Sure_Helpdesk <STSVCSure_Helpdesk@pa.gov>
Cc: Fuhrman, Zachary <zfuhrman@pa.gov>; ST, Sure_Helpdesk <STSVCSure_Helpdesk@pa.gov>
Subject: Re: SURE Full Data export - link not received

Hi, Folks at SURE:

I purchased the Full Voter Export today. The files are dated 2/26/2018

There are glaring errors in the Congressional District information.

I have run Cambria and Butler in preparation of providing lists of voters to candidates running for Congress.

Here are a FEW examples of what I've found so far:

Butler:

The certified TEXT version of the new Congressional Districts filed 2/22/2018 says Jefferson Twp 1 in Butler County is split into Cong. District 15 and Cong. District 16, and Jefferson Twp 2 in Butler County is split into Cong. District 15 and Cong. District 16..

The VTD splits lists report in Court Remedial Plan 2 19 shows ONLY Jefferson Twp 2 split into Cong. District 15 and 16, not district 1.

The SURE data file downloaded today (2/27/2018) shows ALL voters in Jefferson Twp 1 and Jefferson Twp 2 in Cong. District 16.

In Cranberry Twp – we again see problems between the certified TEXT of the congressional districts and the way voters are identified in the SURE data. The ward splits are WRONG in the SURE data if the certified TEXT posted by the Secretary of the Commonwealth on 2/22 is RIGHT.

Cambria:

East Taylor 2 is shown in Cong. District 13. According to the text, parts of East Taylor 1, 3, and 4 should be in Cong. District 13. East Taylor 2 show up in the SURE file as belonging to Cong. District 13. East Taylor 1, 3 and 4 are in the SURE file as belonging to Cong. District 15. The Remedial Plan says East Taylor 1, 3 and 4 should be split between Cong. District 13 and 15.

In the SURE file, Geistown 2 in Cambria County is in the 12th Congressional. No other documentation shows Geistown as being split. It should all be in the 15th Cong. District.

The point is, I cannot prepare accurate voting lists to be used by candidates during the petition process which begins tomorrow.

In just these TWO counties I've looked at, THOUSANDS of voters are listed in the wrong congressional districts.

Recommendations? Solutions?

Cheryl Corsa
cherylcorsa@gmail.com

2.

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

JACOB CORMAN, et al.,	:	
	:	No. 1:18-cv-00443-CCC
Plaintiffs,	:	
v.	:	
ROBERT TORRES, et al.,	:	
Defendants.	:	

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA)
) ss
COUNTY OF CAMBRIA)

I, Jacqueline D. Kulback, being duly sworn, do herby depose and state as follows:

1. I am a qualified and registered Republican voter of Cambria County.

2. I currently reside in the 12th Congressional District, represented by Representative Keith Rothfus. Cambria County lies partly in the 12th District and party in the 9th District represented by Representative Bill Shuster.

3. Under the remedial map ordered by the Pennsylvania Supreme Court on January 22, 2018 (the "remedial map"), I would reside in the 13th Congressional District, while most of Cambria County would lie in the 15th Congressional District.

4. I am the Chair of the Republican Party of Cambria County. I have a substantial interest in this litigation as a result of my duties and responsibilities as Chair of the County Committee.

5. As part of my role as the Chair of the County Committee, my duties and responsibilities include overseeing the activities of the County Committee members and campaigns for all elected offices in the County (including for Congress); and the recruitment of candidates for

elected office, including Congress. My duties as the Chair also include coordinating the collection of signatures for petitions and petition-signing events, fundraising for candidates and for the County Committee (which supports candidates on the Republican ticket in the County), organizing and supervising grassroots campaign activities for the elections (including lawn signs, palm cards, and slate cards to support the candidates, including the congressional candidate), recruiting of volunteers to support the candidates, and communicating and coordinating campaign activities with the congressional campaign and candidate, the state party, and others. I am responsible for various Election Day activities and coverage at the polls in the County, including recruiting volunteers to work the polls.

6. I have been performing and I am continuing to perform the duties and responsibilities described in this Affidavit in connection with the 2018 election for Congress in my County since November 2016. Campaigns for members of Congress start far in advance of the year of the election, and often begin as soon as the day after the previous election for Congress.

7. Since the elections in November 2016, I have consulted on a regular basis with the current members of Congress in my County as to various issue and matters in connection with their campaigns for 2018. Activities which I have performed to date in connection with the 2018 elections include the following: assisting with fundraising, including hosting a fundraising event; soliciting and encouraging people to contribute to the campaign of my congressman, Representative Rothfus; working on a regular basis with the representatives of campaign committees in planning for the 2018 election; meeting with congressmen and other groups in support of their 2018 campaigns; setting up meetings with Representative Rothfus and Young Republicans and High School Republicans who can serve as volunteers for his campaign; and inviting Representative Rothfus to be the featured guest speakers at County Committee

fundraisers and events. I have also started to acquire grassroots material including lawn signs for the campaign, which I currently have in storage. I have attended various political events in which Representative Rothfus can meet volunteers and voters, including a fundraising with the Speaker of the House of Representatives, Paul Ryan.

8. Under the remedial map, no part of Cambria County would remain in the same congressional district with the same member of Congress, and no part will be represented by Representative Rothfus.

9. Currently, I am working to circulate nomination petitions for candidates for Congress.

10. The new congressional districts have caused confusion among voters and great uncertainty for campaigns for Congress.

11. I can no longer use voter records for the current congressional districts for nomination petition circulation.

12. I have experienced difficulty determining the line between the new 13th and the new 15th Districts in Cambria County.

13. The Department of State website has not provided me with sufficient guidance to determine which Cambria County voters will be in which congressional district.

14. I reviewed the "Important Notice – Revised Petition Filing Calendar for Congressional Candidates," including the interactive map, but the maps do not provide sufficient detail at the street level to determine which voters fall in which congressional district.

15. The verbal descriptions of the congressional districts do not provide sufficient detail when precincts are divided at the census block level.

16. I cannot locate sufficient and accurate information on the Department of State website to be certain which Cambria County voters fall in which congressional district.

17. Because of the confusion surrounding the new congressional districts, I have advised voters to sign nomination petitions in both the new 13th and the new 15th Districts, with full knowledge that at least one of the signatures will be stricken, in the hope that one signature will count as valid on one of the petitions.

18. I have had difficulty explaining the new district numbers to voters.

19. In my experience, I have witnessed voters who have refused to sign nomination petitions for new congressional candidates, insisting on signing nomination petitions only for their current congressperson.

20. In addition, candidates for Congress are circulating nomination petitions after the end of the circulation period for other candidates.

21. I believe these factors place congressional candidates at a disadvantage in petition circulation.

Jacqueline D. Kulback

Sworn to and subscribed
before me this 6th day of
March, 2018.

Notary Public

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
Robert Gerard Nies Jr., Notary Public
City of Johnstown, Cambria County
My Commission Expires June 22, 2019
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES

3.

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

JACOB CORMAN, et al.,	:	
	:	No. 1:18-cv-00443-CCC
Plaintiffs,	:	
v.	:	
ROBERT TORRES, et al.,	:	
Defendants.	:	

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA)
) ss
COUNTY OF DAUPHIN)

I, Andrew Lewis, being duly sworn, do herby depose and state as follows:

1. I am a qualified and registered Republican voter of Dauphin County.

2. I currently reside in the 11th Congressional District, most of which extends northeast from Dauphin County. Lou Barletta is the incumbent Congressman from that District.

3. On October 12, 2017, I announced my candidacy to succeed Congressman Barletta as the Representative from the 11th District.

4. As a candidate for the 11th Congressional District, I relied on the existing boundaries of the district to campaign for office.

5. Since October, my campaign for Congress raised more than $200,000.

6. Since October, my campaign expended approximately $100,000 on behalf of my candidacy for Congress.

7. Until the Pennsylvania Supreme Court ordered new congressional districts, my campaign was on a strong upward trajectory with national and in-state endorsements coming in.

8. Litigation over Pennsylvania's congressional districts ceased almost all momentum as we waited for weeks to find out which district we would be running in and who our opponents would be.

9. As soon as the Pennsylvania Supreme Court ruled that the districts were unconstitutional and ordered new districts, most donors stopped donating because no one knew which district anyone was running in or who they would be running against.

10. Under the remedial map ordered by the Pennsylvania Supreme Court (the "remedial map"), Dauphin County is no longer in a congressional district to its northeast. Instead, Dauphin County is in the new 10th Congressional District, including parts of Cumberland and York Counties to the south and west of Dauphin County.

11. Representative Scott Perry lives in the new 10th Congressional District.

12. Because I now live in a district with an incumbent Republican congressman, the Pennsylvania Supreme Court's remedial plan forced us to suspend the campaign, wasting months of time, effort, and treasure.

13. Countless voters and volunteers from across the district who had voiced their support for our campaign were left disappointed and confused by the court's redraw.

Andrew Lewis

Sworn to and subscribed
before me this 07th day of
March, 2018.
Mara Nicole Thalhauser
Notary Public

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
MARA NICOLE THALHAUSER
Notary Public
LOWER PAXTON TWP, DAUPHIN COUNTY
My Commission Expires May 15, 2019

4.

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

JACOB CORMAN, et al.,	:	
	:	No. 1:18-cv-00443-CCC
Plaintiffs,	:	
v.	:	
ROBERT TORRES, et al.,	:	
Defendants.	:	

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA)
) ss
COUNTY OF MERCER)

I, Cynthia Ann Robbins, being duly sworn, do herby depose and state as follows:

1. I am a qualified and registered Republican voter of Mercer County.

2. I currently reside in the 3rd Congressional District. Mike Kelly is the incumbent Congressman from that District.

3. Under the remedial map ordered by the Pennsylvania Supreme Court on January 22, 2018 (the "remedial map"), I would reside in the 16th Congressional District.

4. As a registered voter, I take interest in political campaigns and candidates, and regularly exercise my voting rights to support the candidates of my choosing.

5. I have been actively involved in supporting candidates for public office for many years and have played and continue to play a very active role in political campaigns, including those for Congress. I have and continue to hold political party office.

6. I volunteer my time and resources to recruit, support, and organize campaign activities for candidates of my choice, including for Congress.

7. I have been actively involved in election activities, including races for Congress in 2018. Before the remedial map was issued, some of those activities included inviting Congressman Kelly to attend events in Mercer County to meet voters, volunteers, and potential donors; communicating with Congressman Kelly and his campaign committee regarding events that will support his campaign for Congress; and working with the Mercer County Republican Committee to support his campaign.

8. In most election years, I circulate nomination petitions for candidates for Congress together with candidates for other offices to take advantage of petition-circulation events.

9. Due to the delay in the circulation period for nomination petitions for candidates for Congress, I could not circulate nomination petitions for candidates for Congress together with petitions for candidates for other offices.

10. Now, candidates for Congress must circulate nomination petitions after the circulation period for other candidates.

11. The different circulation period for candidates for Congress has caused confusion among petition circulators and voters.

12. In my experience, it will be harder to recruit circulators for nomination petitions for Congress after they have already circulated petitions for other offices.

13. In my experience, voters do not understand the change in congressional district numbers. They have been less willing to sign petitions for an unfamiliar congressional district number.

14. Due to this confusion, candidates for Congress will need to secure even more nomination petition signatures than a typical year to account for incorrect signatures.

15. For these reasons, candidates for Congress are disadvantaged by the change in congressional districts and the change in nomination petition circulation periods.

16. The change in congressional districts has caused confusion among voters.

Cynthia Ann Robbins

Cynthia Ann Robbins

_____ (street)

16125 (zip)

Sworn to and subscribed
before me this 6 day of
March, 2018.

Notary Public

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
SHEILA REED FLICKINGER, Notary Public
Harrisburg City, Dauphin County
My Commission Expires May 31, 2019

5.

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

JACOB CORMAN, et al.,	:	
	:	No. 1:18-cv-00443-CCC
Plaintiffs,	:	
v.	:	
ROBERT TORRES, et al.,	:	
Defendants.	:	

DECLARATION

I, Joel L. Sears, do hereby declare and state as follows:

1. I am a qualified and registered Republican voter of York County.

2. I had been a resident of the 4th Congressional District and my address was almost squarely in the middle of that district.

3. I had intended to support and volunteer for my Congressman, Scott Perry, in his re-election in 2018; however, when the Pennsylvania Supreme Court struck down the 2011 Map which we have used for many election cycles, I had to wait to see who my Congressman would be.

4. Unfortunately, after the remedial map was created by the Pennsylvania Supreme Court ("Remedial Map"), I could not even determine in which district I resided since my address was right on the boundary line.

5. I had to wait until the textual information was issued by the Department of State and then had to study that information to try to determine what District I was in; however, the information was confusing and so I had to call Congressman Perry's office for assistance.

6. I have since concluded after much effort, that I reside in the newly formed 10th District.

7. Last election cycle, I ran for state representative. As a result, I know the time, money, effort, work, planning and strategy that go into running for office. Not a moment or a penny can be wasted in reaching voters and disseminating your message.

8. A change in the districts results in a change in the demographics, geography, voters, message, strategy, and targeted voters.

9. Lists that had been purchased or compiled over the years for voters in the 4th Congressional District are now worthless.

10. It has been difficult to secure accurate information regarding which voters are in which districts because the Department of State has not completely updated the lists and there is no central repository for this type of information.

11. As a result of this last minute change to the Congressional Districts, I know that candidates who had already created mailers and secured voter contact lists had to throw away some or all of their materials, thereby losing money and opportunity to connect with voters.

12. As a result of these sweeping changes, candidates have to figure out how to secure accurate information regarding the voters in their districts. This is going to require a lot of time, money and resources which negatively impacts and disfavors candidates who are not independently wealthy and capable of self-funding their campaigns.

13. People – including myself—have been reluctant to make donations to candidates because we did not know who our candidates were until a week ago.

14. Before the Remedial Map, all seven of York's state representatives had Scott Perry as their Congressman, and had forged good working relationships with Congressman Perry for the betterment of their constituents and communities. However, under the Remedial Map, half of the representatives are in the new 11th Congressional District and approximately one-half are in

the new 10th District. York County now has to start over forging relationships with different Congressman and educating their Congressman on their communities' unique needs and interests.

15. The York County Republican Committee now has to divide their funds between two Congressional Districts and two Congressional candidates since the County is no longer intact and wholly within one Congressional District.

16. The circulation period for all candidates other than congressional candidates is almost completed. Congressional candidates have just started circulating their nomination petitions and are encountering reluctant voters who do not understand this "second round" of petitions.

17. I have found the average voter is confused by the change in districts and is unaware of who their Congressman is and what district they are in.

18. Voters do not know the candidates, and have very little time and opportunity prior to the May Primary to determine crucial information regarding the candidates. As a result, voters do not know who they are voting for and candidates are at a disadvantage.

19. People are going to blindly vote for candidates or voting based upon sparse and incomplete information. The lack of an educated voting public does not bode well for electing the most beneficial Congressmen for a District.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct pursuant to 28 U.S.C. §1746.

Dated: March 7, 2018

Joel L. Sears

6.

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

JACOB CORMAN, et al.,	:	
	:	No. 1:18-cv-00443-CCC
Plaintiffs,	:	
v.	:	
ROBERT TORRES, et al.,	:	
Defendants.	:	

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA)
) ss
COUNTY OF MONROE)

I, Thomas Whitehead, being duly sworn, do herby depose and state as follows:

1. I am a qualified and registered Republican voter of Monroe County.

2. I currently reside in the 17th Congressional District. Monroe County lies partly in the 17th Congressional District represented by Representative Matt Cartwright and partly in the 10th Congressional District represented by Representative Tom Marino.

3. Under the remedial map ordered by the Pennsylvania Supreme Court on January 22, 2018 (the "remedial map"), Monroe County will lie partly in the new 7th Congressional District and the new 8th Congressional District.

4. I am the Chair of the Republican Party of Monroe County.

5. My duties and responsibilities as Chair of the County Committee are set forth in the rules and bylaws adopted by the County Committee.

6. As part of my role as the Chair of the County Committee, my duties and responsibilities include (1) overseeing the activities of the County Committee Members; (2) overseeing

campaigns for all elected offices in the County, including for Congress; (3) recruiting candidates for elected office, including Congress; (4) fundraising for candidates and for the County Committee (which supports the candidates on the Republican ticket in the County); (5) organizing and supervising grassroots campaign activities for the elections (including lawn signs, palm cards, slate cards to support the candidates, including the Congressional candidate); (6) recruiting of volunteers to support the candidates; and (7) communicating and coordinating campaign activities with the Congressional campaign and the candidate, the state party, and others. I am also responsible for various Election Day activities and coverage at the polls in the County, including recruiting volunteers to work the polls.

7. I have been performing and I am continuing to perform my duties and responsibilities in connection with the 2018 election for Congress in Monroe County since November 2016. Campaigns for Members of Congress start far in advance of the year of the election, and often begin as soon as the day after the previous election for Congress.

8. Since the elections in November 2016, I have consulted on a regular basis with Republican County Chairs in the other Counties in the 10th and 17th Congressional Districts about the 2018 campaign.

9. In the 17th District I actively recruited candidates to run against the incumbent Democratic Congressman, Matt Cartwright.

10. As part of my recruiting efforts, I met with potential candidates and interviewed them about their campaign strategies and their positions on issues. I invited them to County Committee meetings throughout the year to meet the members, as well as the Spring and Fall dinners and other events sponsored by the Committee and Republican club meetings. I have advised them on other activities and events that they can attend. I encouraged them to meet

with the College Republicans and the Monroe County Young Republicans. I personally invested a great deal of time and effort in these activities.

11. In the 10th Congressional District, I am also the Campaign Manager for Bradford County Commissioner Doug McLinko, a primary challenger to the incumbent Republican Congressman.

12. Under the remedial plan, two-thirds of the precincts in Monroe County are in new congressional districts. Monroe County is no longer divided between two northeastern Pennsylvania-based districts (the 10th and the 17th) but is instead divided between one northeastern Pennsylvania-based district (the 8th) and a Lehigh Valley-based district (the 7th).

13. The new districts have confused voters. In my experience, voters do not know their new congressional district.

14. For example, Representative Cartwright lives in the current 17th District and the new 8th District. It has been difficult to explain to voters that the 8th District is Representative Cartwright's seat, because the 8th District is not the same as the 17th District. Some parts of Monroe County that were not previously represented by Representative Cartwright may be part of his new district if he wins re-election, while parts of Monroe County that were previously represented by him no longer will be, win or lose.

15. As a result of the remedial plan, the candidates in the districts are changing, and some candidates have dropped out.

16. The remedial plan has severely disadvantaged candidates for Congress in nomination petition circulation.

17. I can no longer use many circulators for nomination petitions who are located in places that are no longer part of the district.

18. With respect to Doug McLinko's campaign, we had limited nomination petition circulation to Bradford County, his home county, because we did not know whether the Pennsylvania Supreme Court would order new congressional districts and we did not know in which district Mr. McLinko would live.

19. It has been difficult to recruit circulators for candidates for Congress because they have already circulated petitions for other offices.

20. The recent storms have added to candidates' challenges for nomination petitions. Circulators cannot explain new districts to voters and circulate petitions during the storms.

21. In my experience, it would be less confusing to stay the remedial plan and use the existing congressional districts because candidates have already campaigned in the existing congressional districts.

Thomas Whitehead
72 Iroquois Rd (street)
Albrightsville, PA 18210 (zip)

Sworn to and subscribed
before me this 6th day of
March, 2018.

Notary Public

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
Renee Smithkors, Notary Public
Towanda Boro, Bradford County
My Commission Expires July 26, 2019
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES

Commonwealth of Pennsylvania
County of Bradford
Sworn and subscribed before me this
6th day of March 2018.
Renee Smithkors
Notary Public's Signature
Personally known ✓ or
Type of ID Produced

7.

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

JACOB CORMAN, et al.,	:	
	:	No. 1:18-cv-00443-CCC
Plaintiffs,	:	
v.	:	
ROBERT TORRES, et al.,	:	
Defendants.	:	

DECLARATION

I, Mark Harris, do hereby declare and state as follows:

1. I am a qualified and registered Republican voter of Snyder County.

2. I used to reside in the 10th Congressional District which had been my District number for the last twenty years.

3. Under the Pennsylvania Supreme Court's new map, I now reside in the 12th Congressional District.

4. Congressman Tom Marino represents my District, and I have been volunteering to help Congressman Marino get re-elected.

5. The District boundary lines have changed drastically overnight and at the 11th hour before the Primary Election. As a result, there is great confusion among not only the candidates but also the voters.

6. Voters are not sure what District they are in because the lines have been skewed so far in such a short period of time without warning. Usually when redistricting occurs after a census, the voters and candidates are expecting a change, guidance, and time to absorb and understand the new boundaries. None of that occurred here.

7. There was insufficient and lack of timely communication regarding the changes to the Congressional map.

8. I am assisting with the circulation of nomination petitions for Congressman Marino; however, we lost valuable time and circulators while we were waiting to confirm the district boundaries and the district voters.

9. Due to the delay in the circulation period for nomination petitions for candidates for Congress and confusion regarding who resides in which District, we expect that candidates for Congress will need to secure even more nomination petition signatures than a typical year to account for incorrect signatures.

10. The Pennsylvania Supreme Court's last-minute and drastic changes to the Congressional map has negatively impacted the orderly process of Congressional elections and guaranteed the skewing of the results of the election, perhaps intentionally.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct pursuant to 28 U.S.C. §1746.

Dated: 03/07/2018

Mark Harris

Mark Harris

2018 WL 1021223
Only the Westlaw citation
is currently available.
United States Court of
Appeals, Second Circuit.

NORTH AMERICAN SOCCER LEAGUE, LLC, Plaintiff–Appellant,
v.
UNITED STATES SOCCER FEDERATION, INC., Defendant–Appellee.

Docket No. 17-3585
|
August Term 2017
|
Argued: December 15, 2017
|
Decided: February 23, 2018

Synopsis

Background: Men's professional soccer league brought antitrust action under Sherman Act against non-profit national soccer federation, alleging that federation, in adopting and applying its standards designating three divisional levels of play for professional soccer leagues, conspired to entrench two other leagues as sole leagues in top two designated divisional levels. The United States District Court for the Eastern District of New York, Brodie, J., 2017 WL 5125771, denied league's motion for preliminary injunction. League appealed.

[Holding:] The Court of Appeals, Wesley, Circuit Judge, held that league failed to show clear likelihood of success on merits, and thus preliminary injunction was not warranted.

Affirmed.

West Headnotes (19)

[1] Federal Courts
Abuse of discretion in general

Federal Courts
Preliminary injunction; temporary restraining order

Appellate court reviews a district court's legal rulings de novo and its ultimate denial of a preliminary injunction for abuse of discretion; a district court abuses its discretion when it rests its decision on a clearly erroneous finding of fact or makes an error of law.

Cases that cite this headnote

[2] Injunction
Preservation of status quo

Injunction
Mandatory preliminary injunctions

Courts refer to preliminary injunctions as prohibitory or mandatory; prohibitory injunctions maintain the status quo pending resolution of the case, and mandatory injunctions alter it.

Cases that cite this headnote

[3] Injunction

Grounds in general;multiple factors

A party seeking a preliminary injunction must show (1) irreparable harm; (2) either a likelihood of success on the merits or both serious questions on the merits and a balance of hardships decidedly favoring the moving party; and (3) that a preliminary injunction is in the public interest.

Cases that cite this headnote

[4] Injunction

Mandatory injunctions; restoration of status quo

Because mandatory injunctions disrupt the status quo, a party seeking one must meet a heightened legal standard by showing a clear or substantial likelihood of success on the merits.

Cases that cite this headnote

[5] Injunction

Preservation of status quo

The purpose of a preliminary injunction is to preserve the relative positions of the parties.

Cases that cite this headnote

[6] Antitrust and Trade Regulation

Preliminary

Men's professional soccer league failed to show clear likelihood of success on merits of antitrust claim under Sherman Act against non-profit national soccer federation, alleging that federation, in adopting and applying its standards designating three divisional levels of play for professional soccer leagues, conspired to entrench two other leagues as sole leagues in top two designated divisional levels, and thus preliminary injunction requiring designation of league for middle level of federation's divisional designations was not warranted; league failed to show that there was contract, combination, or conspiracy amongst federation and other leagues, and even assuming league showed conspiracy, league failed to show that agreement was unreasonable restraint on competition. Sherman Act § 1, 15 U.S.C.A. § 1.

Cases that cite this headnote

[7] Antitrust and Trade Regulation

Cartels, Combinations, Contracts, and Conspiracies in General

For an arrangement to be a conspiracy under Sherman Act, it must embody concerted action;

concerted action exists where there is an agreement between separate economic actors pursuing separate economic interests. Sherman Act § 1, 15 U.S.C.A. § 1.

Cases that cite this headnote

[8] Antitrust and Trade Regulation
Cartels, Combinations, Contracts, and Conspiracies in General

To constitute concerted action, as required for arrangement to be conspiracy under Sherman Act, the fact that co-conspirators are capable, due to their separateness, of acting in concert is not sufficient; proof of a conspiracy is required. Sherman Act § 1, 15 U.S.C.A. § 1.

Cases that cite this headnote

[9] Antitrust and Trade Regulation
Cartels, Combinations, Contracts, and Conspiracies in General

Antitrust and Trade Regulation
Restraints and misconduct in general

To show antitrust conspiracy, plaintiff must offer direct or circumstantial evidence that reasonably tends to prove a conscious commitment to a common scheme designed to achieve an unlawful objective. Sherman Act § 1, 15 U.S.C.A. § 1.

Cases that cite this headnote

[10] Antitrust and Trade Regulation
Cartels, Combinations, Contracts, and Conspiracies in General

Courts often must evaluate circumstantial evidence of a conspiracy by weighing plus factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy under Sherman Act. Sherman Act § 1, 15 U.S.C.A. § 1.

Cases that cite this headnote

[11] Antitrust and Trade Regulation
Cartels, Combinations, Contracts, and Conspiracies in General

Organizational decisions do not inherently constitute concerted action under Sherman Act. Sherman Act § 1, 15 U.S.C.A. § 1.

Cases that cite this headnote

[12] Antitrust and Trade Regulation
Cartels, Combinations, Contracts, and Conspiracies in General

When a Sherman Act plaintiff establishes the existence of an illegal contract or combination, the plaintiff can proceed to demonstrate that the agreement

constituted an unreasonable restraint of trade. Sherman Act § 1, 15 U.S.C.A. § 1.

Cases that cite this headnote

[13] Antitrust and Trade Regulation
Antitrust Law and Trade and Professional Associations

In action alleging antitrust conspiracy among members of trade association, plaintiff must present evidence tending to show that association members, in their individual capacities, consciously committed themselves to common scheme designed to achieve unlawful objective. Sherman Act § 1, 15 U.S.C.A. § 1.

Cases that cite this headnote

[14] Antitrust and Trade Regulation
Cartels, Combinations, Contracts, and Conspiracies in General

Direct evidence of an illegal contract, combination, or conspiracy satisfies Sherman Act's concerted-action requirement. Sherman Act § 1, 15 U.S.C.A. § 1.

Cases that cite this headnote

[15] Antitrust and Trade Regulation
Per se

Antitrust and Trade Regulation
Rule of reason

Courts use one of two tests to determine whether unreasonable restraints on competition violate Sherman Act; restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be per se unreasonable, or because it violates the "Rule of Reason." Sherman Act § 1, 15 U.S.C.A. § 1.

Cases that cite this headnote

[16] Antitrust and Trade Regulation
Rule of reason

Antitrust and Trade Regulation
Presumptions and burden of proof

Under three-step rule-of-reason framework in action under Sherman Act, first, a plaintiff bears the initial burden of demonstrating that a defendant's challenged behavior can have an adverse effect on competition in the relevant market; second, if the plaintiff satisfies this initial burden, the burden shifts to the defendant, who must demonstrate the procompetitive effects of the challenged restraint, and third, if the defendant provides that proof, the burden shifts back to the plaintiff to show that these legitimate competitive benefits could have been achieved through less restrictive means. Sherman Act § 1, 15 U.S.C.A. § 1.

Cases that cite this headnote

[17] Antitrust and Trade Regulation
Rule of reason

The true test of legality under Sherman Act is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. Sherman Act § 1, 15 U.S.C.A. § 1.

Cases that cite this headnote

[18] Antitrust and Trade Regulation
Rule of reason

Under the first step of the rule of reason, in action under Sherman Act, a plaintiff must demonstrate that the alleged restraint has an adverse effect on competition; the plaintiff can do this directly, by showing an actual adverse effect on competition as a whole in the relevant market, or the plaintiff can make her case indirectly, by showing that the defendant has sufficient market power to cause an adverse effect on competition. Sherman Act § 1, 15 U.S.C.A. § 1.

Cases that cite this headnote

[19] Antitrust and Trade Regulation
Rule of reason

Under the first step of the rule of reason, in action under Sherman Act, plaintiffs seeking to show adverse effect indirectly must demonstrate both the defendant's market power and other grounds for believing the challenged restraint harms competition these other grounds might include price increases, reduced output or market quality, significantly heightened barriers to entry, or reduced consumer choice. Sherman Act § 1, 15 U.S.C.A. § 1.

Cases that cite this headnote

Appeal from a November 4, 2017 order of the United States District Court for the Eastern District of New York (Brodie, *J.*).

Attorneys and Law Firms

JEFFREY L. KESSLER, Winston & Strawn LLP, New York, NY (David G. Feher, New York, NY; Steffen N. Johnson, Heather L. Kafele, Christopher E. Mills, Washington, D.C., on the brief), for Plaintiff–Appellant.

GREGORY G. GARRE, Latham & Watkins LLP, Washington, D.C. (Lawrence E. Buterman, New York, NY; Christopher S. Yates, San Francisco, CA, on the brief), for Defendant–Appellee.

Before: Parker, Wesley, and Chin, Circuit Judges.

Opinion

Wesley, Circuit Judge:

***1** After the denial of its requested Division II designation for the 2018 season of men's professional soccer, the North American Soccer League, LLC ("NASL") filed an antitrust suit against the United States Soccer Federation, Inc. ("USSF"). NASL also moved for a preliminary injunction, seeking designation as a Division II league pending resolution of the suit. This opinion addresses that motion. We conclude NASL has not demonstrated a clear likelihood of success on the merits of its antitrust claim under the heightened standard applicable to mandatory preliminary injunctions. Accordingly, we affirm the judgment of the United States District Court for the Eastern District of New York, *N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.* ("*NASL*"), No. 17-CV-05495, — F.Supp.3d —, 2017 WL 5125771 (E.D.N.Y. Nov. 4, 2017) (Brodie, *J.*), denying NASL's motion for a preliminary injunction.

I

As the regional governing body for soccer in the United States and Canada, USSF designates leagues as Division I, II, or III according to USSF's Professional League Standards (the "Standards"). The Standards establish requirements that a league must meet to gain a divisional designation—also called a sanction—for a season of play. The more competitive the division, the higher the bar. For example, the 2008 Standards required that a Division I league have a minimum of ten teams distributed in at least three time zones; a Division II league have a minimum of eight teams in at least two time zones; and a Division III league have a minimum of eight teams, with no time-zone requirement.

Soccer leagues apply to USSF to receive annual designations for the upcoming season of play by submitting reports demonstrating their compliance, or plans for compliance, with the Standards. Leagues may submit requests for waivers from compliance with the Standards' requirements. The USSF Board votes on divisional designations after reviewing the recommendations of USSF's Professional League Task Force ("Task Force"). The Board is composed of fifteen directors, two of whom are chosen by the professional leagues.

The same process applies for revising the Standards; the USSF Board works in conjunction with a Professional League Standards Task Force ("Standards Task Force").[1] Unchanged from 1996 to 2008, the Standards for all divisions were revised in 2008 and 2014, and for only Division II in 2010.[2]

1 Individuals with current ties to any professional league cannot be on the Task Forces and must abstain from USSF Board votes on matters relating to the professional leagues.

2 Amendments proposed in 2015 for Division I, to which NASL objected, never were adopted.

The three most prominent men's professional soccer leagues have historically occupied their respective divisions in isolation. Major League Soccer, LLC ("MLS") has been the only Division I men's soccer league since MLS's start in 1995. NASL has existed since 2009 and has operated as a Division II league since 2011. The United Soccer Leagues, LLC ("USL") ordinarily has filled the Division III slot. According to NASL, it long has harbored aspirations to compete against MLS in Division I; in contrast, USL has been content as an MLS feeder league.

***2** It often pays to be at the top, of course, and MLS has enjoyed competitive benefits as the top-tier league since its inception. Indeed, USSF, when establishing men's soccer in the United States, decided "to not sanction any other league as a [Division I] men's professional outdoor league until MLS had finished its second full season in 1997—to give it a 'runway' of sorts." Gulati Decl. ¶ 64. MLS's top-tier status has economic benefit as well. MLS and USSF have a "business relationship" through which Soccer United Market ("SUM"), a marketing company, has the rights to "bundle[d]" MLS and USSF sponsorship and broadcasting rights. Compl. ¶ 107; Gulati Decl. ¶ 230. [3]

3 Under the agreement, which was extended for an eight-year term in 2015, SUM guarantees an annual amount of marketing revenue, plus additional revenue if SUM hits monetary targets. The bundling financially benefits both USSF and MLS.

Like the other leagues, NASL annually applies to USSF for a divisional designation. It operated as a Division II league for the 2011–2017 seasons, receiving compliance waivers for all but one season. Although NASL made a play for a Division I designation for 2016, its application was denied, and NASL operated as a Division II league (with waivers) for that season. For the 2018 season, NASL applied for a Division II designation, requesting waivers for the minimum-team and time-zone requirements. The USSF Board rejected NASL's Division II application but gave NASL additional time to file for Division III status. NASL filed suit instead.

NASL contends that USSF conspired with its membership and related entities in adopting, amending, and applying its Standards in an anticompetitive manner to preclude NASL and other leagues from competing with MLS in the Division I market. *See* 15 U.S.C. §§ 1–2. NASL requests preliminary injunctive relief in the form of a Division II league designation and permanent relief enjoining USSF from promulgating the Standards to separate leagues into divisions.

NASL's motion for a preliminary injunction is tied to its allegations in the first count of its Complaint—that USSF violated 15 U.S.C. § 1 through a conspiracy to restrain competition. NASL asked the District Court for a preliminary injunction allowing it to operate as a Division II league. In a 49–page decision, the district court made detailed findings of fact and conclusions of law before concluding that NASL had not made a clear showing of entitlement to relief and denying the preliminary injunction. *NASL*, No. 17-CV-05495, — F.Supp.3d at ——,

——, 2017 WL 5125771, at *1, *21. NASL appeals, arguing the District Court abused its discretion in applying the preliminary injunction standard and in finding that NASL had not sufficiently showed its clear likelihood of success on the merits of its § 1 antitrust claim.

II

[1] This Court reviews a district court's legal rulings *de novo* and its ultimate denial of a preliminary injunction for abuse of discretion. *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 867, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005); *Almontaser v. N.Y.C. Dep't of Educ.*, 519 F.3d 505, 508 (2d Cir. 2008). "A district court abuses its discretion when it rests its decision on a clearly erroneous finding of fact or makes an error of law." *Almontaser*, 519 F.3d at 508.

A. Applicable Standard for the Preliminary Injunction

[2] **[3]** **[4]** Courts refer to preliminary injunctions as prohibitory or mandatory. Prohibitory injunctions maintain the status quo pending resolution of the case; mandatory injunctions alter it.[4] *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 34 (2d Cir. 1995) (internal citation omitted). A party seeking a preliminary injunction must show (1) irreparable harm; (2) either a likelihood of success on the merits or both serious questions on the merits and a balance of hardships decidedly favoring the moving party; and (3) that a preliminary injunction is in the public interest. *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015). Because mandatory injunctions disrupt the status quo, a party seeking one must meet a heightened legal standard by showing "a clear or substantial likelihood of success on the merits." *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 294 (2d Cir. 2012) (internal quotation marks omitted). The District Court concluded that NASL was seeking a mandatory injunction and imposed the heightened standard. *NASL*, No. 17-CV-05495, — F.Supp.3d at ——, 2017 WL 5125771, at *7. NASL argues that using the heightened standard was error.

4 We focus on the status quo rather than the "mandatory" and "prohibitory" terminology because "in borderline cases injunctive provisions containing essentially the same command can be phrased either in mandatory or prohibitory terms." *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 835, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994) (" 'Do not strike,' would appear to be prohibitory ... [but] 'Continue working,' would be mandatory."); *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985), *overruled on other grounds by O'Lone v. Estate of Shabazz*, 482 U.S. 342, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987) ("In many instances, this distinction is more semantic[ ] than substantive.").

***3** Because the proposed injunction's effect on the status quo drives the standard, we must ascertain the status quo—that is, "the last actual, peaceable uncontested status which preceded the pending controversy." *Mastrio v. Sebelius*, 768 F.3d 116, 120 (2d Cir. 2014) (per curiam) (quoting *LaRouche v. Kezer*, 20 F.3d 68, 74 n.7 (2d Cir. 1994)).[5] Before this litigation, USSF would regularly evaluate NASL's applications and determine NASL's divisional designation.

The relationship of annual application, assessment, and sanction determination was the last uncontested status between the parties preceding the present controversy. This is how the parties operated, year after year.

5 The "status quo" in preliminary-injunction parlance is really a "status quo ante." *See Holt v. Cont'l Grp., Inc.*, 708 F.2d 87, 90 (2d Cir. 1983) (referring to reinstatement of benefits as "restoration of the *status quo ante*"); *accord O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1013 (10th Cir. 2004) (en banc) (per curiam) ("requir[ing] a party who has recently disturbed the status quo to reverse its actions ... restores, rather than disturbs, the status quo ante, and is thus not an exception" to the ordinary standard for preliminary injunctions). This special "ante" formulation of the status quo in the realm of equities shuts out defendants seeking shelter under a current "status quo" precipitated by their wrongdoing.

NASL seeks to alter this near-decade-long relationship of annual sanctioning between the parties. Although NASL has never received a designation absent the annual process, it now requests a Division II designation for the duration of this litigation. NASL, looking to upend the federation-league sanctioning framework, seeks a mandatory injunction.

NASL argues that applying a heightened standard here would require applying that standard any time a party seeks an injunction to maintain "critical benefits" they have long received. Appellant's Br. 3. This case is different than the benefits-termination cases, however. In those cases, the status quo is one in which the plaintiff continues receiving previously granted benefits. *See Holt v. Cont'l Grp.*, 708 F.2d 87, 90 (2d Cir. 1983) (reinstating benefits restores the status quo ante); *see also Garcia v. Yonkers Sch. Dist.*, 561 F.3d 97, 99–101, 107 (2d Cir. 2009) (permitting suspended students to continue attending school). Here, USSF decides anew each year which divisional designation applies to NASL, if any. NASL's Division II sanctions never last beyond one season of play. Unlike in the benefits-termination cases, the status quo here involves a periodic sanction of limited life.

[5] "The purpose of a preliminary injunction is ... to preserve the relative positions of the parties." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). Conflating status with status quo, the parties center their arguments on NASL's status as a Division II league. However, the status quo is not that NASL regularly received a Division II designation, nor is it NASL's lack of a Division II designation for 2018. The status quo is the parties' pre-controversy position vis-à-vis the other.[6] Directing USSF to grant NASL a divisional designation for 2018 and beyond would alter that relationship.[7] NASL's request for a preliminary injunction was correctly analyzed by the District Court under the heightened standard for a mandatory injunction.[8]

6 Some of our sister circuits have explicitly incorporated this principle into their formulations of the status quo. *See, e.g.*, *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1100 (10th Cir. 1991), *overruled on other grounds by O Centro Espirita*, 389 F.3d at 975 ("The status quo ... is defined by the reality of the existing status and relationships between the parties.") (emphasis omitted); *Stemple v. Bd. of Ed. of Prince George's Cty.*, 623 F.2d 893, 898 (4th Cir. 1980) ("[C]ourts ... will frame any

equitable relief to preserve the last uncontested status between the parties."); *Wash. Capitols Basketball Club, Inc. v. Barry*, 419 F.2d 472, 475 (9th Cir. 1969) ("maintain[ing] the status quo between the litigants") (citing *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738 (2d Cir. 1953)).

7 The case might be different if USSF designated NASL a Division II league and revoked that designation mid-season. There, the status quo between the parties arguably would be NASL's Division II designation for that season, in which case we would evaluate NASL's challenge to USSF's revocation under the ordinary standard for a preliminary injunction.

8 NASL contends that, as an alternative to a showing of a clear or substantial likelihood of success, it can satisfy the higher standard by showing that failure to issue the injunction would result in extreme or very serious damage. It relies on our earlier statement "that a mandatory injunction should issue 'only upon a clear showing that the moving party is entitled to the relief requested, or where extreme or very serious damage will result from a denial of preliminary relief.' " *Tom Doherty*, 60 F.3d at 34 (quoting *Abdul Wali*, 754 F.2d at 1025). Irreparable harm, however, is "indistinguishable" from extreme damage. *Jacobson & Co., Inc. v. Armstrong Cork Co.*, 548 F.2d 438, 441 n.3 (2d Cir. 1977). Therefore, as we have previously noted, the extreme-damage language in our jurisprudence remains "merely a reaffirmation of the traditional reluctance to issue mandatory injunctions ...." *Id.*

B. Clear Likelihood of Success on the Merits

***4 [6]** NASL's claim is anchored in § 1 of the Sherman Act.[9] Section 1 prohibits "[e]very contract, combination ... or conspiracy[ ] in restraint of trade or commerce." 15 U.S.C. § 1; *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 189, 130 S.Ct. 2201, 176 L.Ed.2d 947 (2010). Thus, to establish a clear likelihood of success under its § 1 claim, NASL must show "there is a contract, combination ... or conspiracy amongst separate economic actors pursuing separate economic interests such that the agreement deprives the marketplace ... of actual or potential competition." *Am. Needle*, 560 U.S. at 195, 130 S.Ct. 2201 (internal citations and quotation marks omitted).

9 The District Court found that NASL had established irreparable harm and that the injunction would not harm the public interest. *NASL*, No. 17-CV-05495, —— F.Supp.3d at —— – ——, ——, 2017 WL 5125771, at *8–9, *21. USSF does not focus on a failure by NASL in either area. Thus, we start and finish with the lower court's determination that NASL had not demonstrated its clear likelihood of success on the merits.

NASL alleges that "USSF and co-conspirators MLS, USL and SUM have entered into a continuing agreement, combination, or conspiracy in restraint of trade with the purpose, intent and effect of restraining horizontal competition among top-tier [and second-tier] men's professional soccer leagues ...." Compl. ¶ 200. NASL asserts that the arrangement "enables MLS to be the only men's top-tier professional soccer league ... by promulgating, revising, manipulating, and selectively granting and denying waivers from anticompetitive Professional League Standards so that MLS, and only MLS, will satisfy the USSF's requirements ... to qualify for men's top-tier Division I sanctioning." Compl. ¶ 201.

1. Contract, Combination, or Conspiracy[10]

10 Because "[t]he question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade," *Am. Needle*, 560 U.S. at 186, 130 S.Ct. 2201, we first examine, pursuant to NASL's allegations, whether USSF, MLS, USL, and SUM conspired within the meaning of § 1 of

> the Sherman Act. Although we ultimately assume the existence of a conspiracy, we address this antecedent question to clarify the framework the lower court must use on remand.

[7] **[8]** For an arrangement to be a conspiracy under § 1, it "must embody concerted action." *Am. Needle*, 560 U.S. at 191, 130 S.Ct. 2201. Concerted action exists where there is an agreement between "separate economic actors pursuing separate economic interests." *Id.* at 195, 130 S.Ct. 2201 (internal quotation marks omitted). The fact that the co-conspirators are capable, due to their separateness, of acting in concert is not sufficient. Proof of a conspiracy is required. *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 545 (2d Cir. 1993).

[9] **[10]** A plaintiff must offer "direct or circumstantial evidence that reasonably tends to prove ... a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray–Rite Serv. Corp.*, 465 U.S. 752, 768, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984). Rarely do co-conspirators plainly state their purpose. As a result, courts often must evaluate circumstantial evidence of a conspiracy by weighing "plus factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy." *United States v. Apple, Inc.*, 791 F.3d 290, 315 (2d Cir. 2015) (citation and internal quotation marks omitted). In *Monsanto*, the Supreme Court noted that courts should look for evidence that "tends to exclude the possibility that the [defendant was] acting independently." *Monsanto*, 465 U.S. at 764, 104 S.Ct. 1464. In *Matsushita*, the Supreme Court elaborated on what this meant: "[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

***5** The District Court concluded that the USSF Board's promulgation of the Standards was not direct evidence of concerted action among USSF, the leagues, and SUM. According to the court, NASL needed to show there was "an agreement to agree to vote a particular way" before the Standards could satisfy the concerted-action requirement. *NASL*, No. 17-CV-05495, —— F.Supp.3d at ——, 2017 WL 5125771, at *10 (emphasis omitted). The court then evaluated circumstantial evidence of a conspiracy. Regarding the USSF Board's votes to adopt and amend the Standards as parallel conduct, the court examined whether there were plus factors demonstrating an antitrust conspiracy. *Id.* at ——, 2017 WL 5125771 at *11. Although acknowledging that the SUM agreement poses "a conflict of interest," and describing as "troubling" USSF's admitted past intent to give MLS a head start in the industry, the District Court concluded that there was insufficient evidence of concerted action because the evidence did not tend to exclude the possibility of independent action. *Id.* at ——, ——, ——, 2017 WL 5125771 at *11, *13, *15.

NASL argues that the District Court erred in applying the *Monsanto* standard for

inferring a conspiracy because the Standards are direct evidence of a conspiracy. We disagree.

The *Monsanto–Matsushita* framework works here. *See Monsanto*, 465 U.S. at 764, 768, 104 S.Ct. 1464; *Matsushita*, 475 U.S. at 588, 106 S.Ct. 1348. Courts use this framework for assessing conspiracies, including those conspiracies provable by direct evidence. *See, e.g.*, *Monsanto*, 465 U.S. at 765, 104 S.Ct. 1464 (finding substantial direct evidence of vertical price-fixing agreement). A plaintiff who can proffer direct evidence of a conspiracy should have no qualms with the *Monsanto–Matsushita* framework because direct evidence by definition shows the requisite concerted action. *See Cosmetic Gallery, Inc. v. Schoeneman Corp.*, 495 F.3d 46, 52 (3d Cir. 2007) (" 'Direct' evidence must evince with clarity a concert of illegal action.").

[11] **[12]** **[13]** Moreover, organizational decisions do not inherently constitute § 1 concerted action. NASL's argument misinterprets the meaning of concerted action in antitrust law. "[Not] every action by a trade association is ... concerted action by the association's members." *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 234 (2d Cir. 1999) (per curiam). Indeed, even though a "trade association by its nature involves collective action by competitors[,] ... a trade association is not by its nature a 'walking conspiracy.' " *Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 293–94 (5th Cir. 1988). Rather, it is when "a § 1 plaintiff establishes the existence of *an illegal* contract or combination" that the plaintiff can "proceed to demonstrate that the agreement constituted an unreasonable restraint of trade." *Capital Imaging*, 996 F.2d at 542 (emphasis added). Evidence should "tend[ ] to show that association members, in their individual capacities, consciously committed themselves to a common scheme *designed to achieve an unlawful objective*." *AD/SAT*, 181 F.3d at 234 (emphasis added).

[14] In fairness to NASL, organizational decisions sometimes are § 1 concerted action. For example, when there is direct evidence of an alleged conspiracy via an association's express regulation of its members' market. In *Associated Press*, the government challenged as illegal a cooperative news association's by-laws that restricted membership and prohibited members from distributing news to nonmembers. *Associated Press v. United States*, 326 U.S. 1, 5, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945). In ruling for the government, the Supreme Court endorsed the district court's conclusion that "[t]he by-laws of AP are in effect agreements between the members .... [They are] contracts in restraint of commerce." *Id.* at 11 n.6, 65 S.Ct. 1416. Similarly, in *Indiana Federation of Dentists*, the Supreme Court found that a federation's policy constituted a collective refusal to deal with insurers and was an illegal agreement. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 457–58, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986). These cases corroborate the obvious—that direct evidence of an illegal "contract, combination, or conspiracy" satisfies § 1's concerted-action requirement. *See Allied Tube & Conduit Corp. v. Indian*

Head, Inc., 486 U.S. 492, 500, 108 S.Ct. 1931, 100 L.Ed.2d 497 (1988) (finding agreement, in violation of § 1, to subvert standard-setting process by packing vote); *see also United States v. Topco Assocs., Inc.*, 405 U.S. 596, 601–02, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972) (by-laws allocating market territory among chain members found anticompetitive); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 462–64, 61 S.Ct. 703, 85 L.Ed. 949 (1941) (Guild's rules and policies found anticompetitive where purpose was to prevent sales and create a monopoly).

***6** If NASL were challenging the Standards themselves—in totality—as violative of the antitrust laws, then the USSF Board's promulgation of them would constitute direct evidence of § 1 concerted action in that undertaking.[11] As for the clearly alleged overarching conspiracy to restrain competition in markets for top- and second-tier men's professional soccer leagues in North America, the promulgation of the Standards is circumstantial evidence of that conspiracy. The District Court properly evaluated the Standards along with other circumstantial evidence of NASL's conspiracy allegations, concluding that NASL had not sufficiently shown the presence of concerted action. *See NASL*, 17-CV-05495, —— F.Supp.3d at —— – ——, 2017 WL 5125771, at *11–15. But even assuming NASL's allegations show a conspiracy, NASL has failed to show that the agreement was an unreasonable restraint on competition under § 1.

11 How NASL is challenging the Standards is unclear. *See* A–135 (the District Court, with NASL's later agreement, summarized NASL's position as: "You're saying standards are okay, Division I, Division II is okay; the manner in which [USSF] set[s] the requirements for each is wrong"); *see also* A–137 (NASL stating "I'm challenging the requirements here ... that a standard setting body should set [the minimum-team requirement] ... [challenging] [t]hat particular rule"). There is room for disagreement as to whether NASL's reference to the Standards, as "effectuat[ing] the USSF's anticompetitive conspiracy," wages war on the Standards or just fires shots at their role in the larger alleged conspiracy. Compl. ¶ 122. *See Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 339–40, 111 S.Ct. 1842, 114 L.Ed.2d 366 (1991) (Scalia, *J.*, dissenting) (describing an alleged agreement to boycott as "not the totality of the conspiracy, but merely the means used to enforce it"). *Compare Wilk v. Am. Med. Ass'n*, 895 F.2d 352, 374 n.9 (7th Cir. 1990) (saying plaintiffs did not directly challenge standards alleged to "*perpetuate[ ]* the boycott"), *with Robertson v. Sea Pines Real Estate Cos., Inc.*, 679 F.3d 278, 283, 288, 289 (4th Cir. 2012) (finding direct evidence of conspiracy where defendants used joint venture as an "instrumentality" and "conduit," saying that "board members conspired in the form of [their] rules, the very passage of which establishes that the defendants convened and came to an agreement").

2. Unreasonable Restraint

[15] Only unreasonable restraints on competition violate § 1 of the Sherman Act. Courts use one of two tests here. "[A] restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be '*per se*' unreasonable, or because it violates what has come to be known as the 'Rule of Reason.' " *Ind. Fed'n of Dentists*, 476 U.S. at 457–58, 106 S.Ct. 2009. Regulation of league sports is a textbook example of when the rule of reason applies. *See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468

U.S. 85, 101, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984).

NASL argues for an abbreviated, "quick look" version of the rule of reason,[12] which applies when "no elaborate industry analysis is required to demonstrate the anticompetitive character of [the challenged] agreement." *Ind. Fed'n of Dentists*, 476 U.S. at 459, 106 S.Ct. 2009 (internal quotation mark omitted). Here, however, far from being obviously anticompetitive, the Standards could be found to have a net procompetitive effect, or no competitive effect at all. *See Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 771, 119 S.Ct. 1604, 143 L.Ed.2d 935 (1999). Indeed, the Standards are seemingly designed to avoid a flaw in the relevant market: implosion of leagues due to minimal consumer demand and teams' financial instability. Because the alleged restraints might avoid a flaw in the market, the full rule-of-reason analysis applies. *See id.* (using three-step rule of reason when reviewing restrictions designed to address deceptive advertising in market prone to information gaps).

12 The parties did not, and do not, dispute the rule of reason's applicability.

***7 [16] [17]** The District Court properly applied the three-step rule-of-reason framework. First, a plaintiff bears the initial burden of demonstrating that a defendant's challenged behavior can have an adverse effect on competition in the relevant market. *United States v. Am. Express Co.*, 838 F.3d 179, 194 (2d Cir. 2016), *cert. granted*, *Ohio v. Am. Express Co.*, —— U.S. ——, 138 S.Ct. 355, 199 L.Ed.2d 261 (2017) (mem.). Second, if the plaintiff satisfies this initial burden, the burden shifts to the defendant, who must demonstrate the procompetitive effects of the challenged restraint. *Id.* at 195. Third, if the defendant provides that proof, the burden shifts back to the plaintiff to show that these "legitimate competitive benefits ... could have been achieved through less restrictive means." *Id.* (internal quotation marks omitted). Ultimately, "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 691, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978) (quoting *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 62 L.Ed. 683 (1918)).

[18] [19] Under the first step of the rule of reason, a plaintiff must demonstrate that the alleged restraint has an adverse effect on competition. *Am. Express*, 838 F.3d at 194. The plaintiff can do this directly, by showing an "actual adverse effect on competition as a whole in the relevant market." *Id.* (emphasis omitted) (internal quotation mark omitted) (giving examples of higher prices or reduced output).[13] Or the plaintiff can make her case indirectly, "by showing that the defendant has sufficient market power to cause an adverse effect on competition." *Id.* (internal quotation marks omitted). Plaintiffs seeking to show adverse effect indirectly must demonstrate both the defendant's market power and "other grounds" for believing the challenged restraint harms competition. *MacDermid Printing Sols. LLC v. Cortron Corp.*, 833 F.3d 172, 183–84 (2d Cir. 2016).

These other grounds might include price increases, reduced output or market quality, significantly heightened barriers to entry, or reduced consumer choice. *Id.* at 183 & n.42, 184, 186 n.56.

13 The District Court found that NASL had not directly shown an actual adverse effect on competition in the market. *NASL*, 17-CV-05495, —— F.Supp.3d at —— & n.41, 2017 WL 5125771, at *18 & n.41 (no customer confusion and no reduced output beyond NASL's own exclusion from Division II).

The District Court did not err in finding that NASL indirectly established an adverse effect on competition in "the market for (1) top-tier and (2) second-tier men's professional soccer leagues located in the United States and Canada." *NASL*, 17-CV-05495, —— F.Supp.3d at —— & n.40, 2017 WL 5125771, at *17 & n.40. [14] USSF's market power is evident in its "power to ... exclude competition" through the Standards. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 100 L.Ed. 1264 (1956). And the ratcheting up of the Standards over the last two decades imposes increasingly "significant barriers to entry" in the relevant soccer market. *CDC Techs., Inc. v. IDEXX Labs., Inc.*, 186 F.3d 74, 80 (2d Cir. 1999); *see also MacDermid*, 833 F.3d at 183–84, 186 n.56.

14 The District Court defined the market as proposed by NASL, and the parties do not contest this definition. In light of that consensus, we regard the relevant market to be the same.

The burden then shifts to USSF to offer evidence of the Standards' procompetitive effects. *See Am. Express*, 838 F.3d at 195. Although fraught with anticompetitive potential, standards promulgated by standard-setting organizations can be flush with "significant procompetitive advantages." *See Allied Tube*, 486 U.S. at 501, 108 S.Ct. 1931. "The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." *Capital Imaging*, 996 F.2d at 543 (quoting *Chi. Bd. of Trade*, 246 U.S. at 238, 38 S.Ct. 242).

***8** The District Court also did not err in finding that USSF offered sufficient evidence of the Standards' procompetitive virtues. *See NASL*, 17-CV-05495, —— F.Supp.3d at —— – ——, 2017 WL 5125771, at *18–19 (considering minimum-team count, time zones, market size, stadium capacity, and financial viability). The court found that the minimum-team requirement increases output through sustained fan interest and provides stability because larger leagues are less likely to collapse. *Id.* at ——, 2017 WL 5125771 at *19. The court further found that the time-zone and market-size requirements generate fan and media interest, and, along with the stadium-capacity requirement, promote league quality. *Id.* The court lastly determined that the financial-viability requirements keep fans interested, stabilize the leagues financially, and prevent free riding. *Id.* These findings by the District Court are not clearly erroneous. *See Almontaser*, 519 F.3d at 508.

The Standards further benefit the market by coordinating necessary competition. As the Supreme Court recognized when

addressing the National Collegiate Athletic Association's ("NCAA") role in regulating intercollegiate athletics, "this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all." *Bd. of Regents*, 468 U.S. at 101, 104 S.Ct. 2948; *see also id.* at 102, 104 S.Ct. 2948 ("[The NCAA's] actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive.").

NASL argues that the District Court erred in finding some of the Standards' requirements justified in part by their procompetitive effects of eliminating free riding and stabilizing the market. However, it is permissible for courts to consider free riding and stability as two potential procompetitive justifications in the standard-setting context.

Eliminating free riders can be a procompetitive advantage of alleged restraints on competition like vertical price agreements. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 889–92, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007) (discussing free riding and other procompetitive justifications). The same holds true in the standard-setting context. Here, the District Court did not err in finding that the Standards reduce leagues' incentive to free ride on USSF's efforts and expenditures without making similar investments to generate fan interest in the sport. *NASL*, —— F.Supp.3d at ——, 2017 WL 5125771, at *19.

Courts can also consider whether evidence of a defendant's stabilizing behavior constitutes a procompetitive benefit of standard-setting. NASL argues that anticompetitive behavior cannot be justified as preventing "[r]uinous competition, financial disaster, [or the] evils of price cutting." *United States v. Socony–Vacuum Oil Co.*, 310 U.S. 150, 221, 60 S.Ct. 811, 84 L.Ed. 1129 (1940). However, that logic is tied to cases where courts were confronted with per se illegal practices. Per se illegal practices, like horizontal price-fixing, are those that "because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958). Though courts might reject the stability rationale where conduct is so anticompetitive as to be beyond redemption, *see Socony–Vacuum*, 310 U.S. at 228, 60 S.Ct. 811, that and other procompetitive justifications still can be relevant elsewhere—as in the sports standards context.

A defendant cannot, of course, justify anticompetitive arrangements by saying an industry's "special characteristics" warrant them. *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 689, 98 S.Ct. 1355. But in the context of a soccer industry historically prone to collapse, the free-rider and stability justifications do not rationalize anticompetitive effects—they evince procompetitive ones. Specifically, as USSF urges, the Standards avoid free riders

on, and lock in consumer interest for, the relevant competitive market. *See Bd. of Regents*, 468 U.S. at 117, 104 S.Ct. 2948 ("[M]ost of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and *therefore procompetitive because they enhance public interest in intercollegiate athletics*.") (emphasis added).

***9** NASL separately argues that the District Court should have concluded NASL was clearly likely to succeed on the merits once the court found problems with the SUM agreement and USSF's early use of the Standards to favor MLS. *NASL*, No. 17-CV-05495, —— F.Supp.3d at ——, ——, 2017 WL 5125771, at *11, *13. As the District Court noted, however, USSF's voting procedures and early history are a far cry from the collusive activity that would warrant per se antitrust analysis. *See Allied Tube*, 486 U.S. at 501, 108 S.Ct. 1931 (excluding product by packing the annual meeting vote); *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 775 (2d Cir. 2016) (acting collusively by circumventing LIBOR-setting rules). NASL has not shown a meaningful financial conflict of interest stemming from the SUM agreement; Board members with ties to professional leagues do not participate in the Task Forces and must abstain from votes regarding the Standards. As for USSF sheltering MLS from competition in the mid-1990s, USSF's alleged co-conspirator leagues did not yet exist. Any anticompetitive promulgation or misuse of the Standards would be attributable to USSF alone. And unilateral action does not violate § 1 of the Sherman Act. *Am. Needle*, 560 U.S. at 190–91, 130 S.Ct. 2201; *see also United States Football League v. Nat'l Football League*, 842 F.2d 1335, 1372 (2d Cir. 1988) (saying prior judgments against defendant, "admitted as evidence of a longstanding conspiracy," were "at best marginally probative of an ongoing intent to exclude competitors").

Because USSF has demonstrated procompetitive effects of the Standards, the burden shifts to NASL to prove that "any legitimate competitive benefits offered by [USSF] could have been achieved through less restrictive means." *Am. Express*, 838 F.3d at 195 (internal quotation mark omitted). Less restrictive alternatives are "those that would be less prejudicial to competition as a whole." *Capital Imaging*, 996 F.2d at 543. The District Court did not err in concluding that NASL failed to demonstrate viable less restrictive alternatives to the current Standards.

NASL points to the earlier renditions of the Standards as less restrictive alternatives to the current version of the Standards. [15] NASL notes, for example, that the Standards' eight-team requirement for Division II is less restrictive than its current twelve-team requirement. Having fewer requirements generally is less restrictive than having more. But NASL fails to show how reverting to earlier versions of the Standards would achieve the same legitimate procompetitive objectives as the Standards' current form. The Standards' evolution could show simply that its earlier renditions were no longer viable. Growing industries have developing

standards; antitrust plaintiffs cannot just point to earlier standards as less restrictive alternatives without additionally showing the equivalent viability of the alternatives proffered.

15 By making this argument, NASL apparently concedes that the earlier Standards had procompetitive justifications.

NASL also urges that eliminating the Standards—using league rules instead of federation rules—is a less restrictive alternative. Again, we fail to see that leagues-based rules would accomplish the same ends as those issued by a federation. As the Supreme Court said of the NCAA's regulating function in intercollegiate sports, "[w]hat the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed." *Bd. of Regents*, 468 U.S. at 102, 104 S.Ct. 2948. The same holds true here.

III

NASL has a case left to make. But we cannot say at this point that NASL has shown a clear likelihood of its success on the merits under 15 U.S.C. § 1. Accordingly, the order of the District Court denying NASL's motion for a preliminary injunction is **AFFIRMED**, and the matter is **REMANDED** for further adjudication of this case on the merits.

All Citations

--- F.3d ----, 2018 WL 1021223

End of Document