

# In the Supreme Court of the United States

---

Michael C. Turzai, Speaker of the Pennsylvania House of Representatives, *et al.*,  
*Applicants,*

v.

League of Women Voters of Pennsylvania, *et al.*,  
*Respondents.*

---

On Emergency Application for Stay  
Pending Appeal to the Supreme Court of the United States

MOTION FOR LEAVE TO FILE AMICUS BRIEF, MOTION FOR LEAVE TO  
FILE BRIEF ON 8 1/2 BY 11 INCH PAPER, AMICUS BRIEF FOR MIKE KELLY,  
SCOTT PERRY, GLENN THOMPSON, RYAN COSTELLO, PATRICK MEEHAN,  
BILL SHUSTER, TOM MARINO, LOU BARLETTA, KEITH ROTHFUS,  
CHARLES DENT, and LLOYD SMUCKER AS AMICI CURIAE IN SUPPORT OF  
APPLICANTS

To the Honorable Samuel A. Alito Jr.  
Associate Justice of the United States and  
Circuit Justice for the Third Circuit

---

Matthew H. Haverstick  
*Counsel of Record*  
Mark E. Seiberling  
Joshua J. Voss  
KLEINBARD LLC  
1650 Market Street, 46<sup>th</sup> Floor  
Philadelphia, PA 19103  
Phone: (215) 568-2000  
Fax: (215) 568-0140  
mhaverstick@kleinbard.com  
mseiberling@kleinbard.com  
jvoss@kleinbard.com  
*Counsel for Amici Curiae*

---

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

MOTION FOR LEAVE TO FILE AMICUS BRIEF ..... 1

MOTION FOR LEAVE TO FILE BRIEF ON 8½ X 11 INCH PAPER ..... 3

STATEMENT OF INTEREST OF AMICI CURIAE ..... 5

ARGUMENT ..... 6

I. THIS COURT SHOULD STAY THE PCO OF THE STATE COURT  
BECAUSE, ABSENT SUCH A STAY, AMICI MEMBERS AND  
PENNSYLVANIA VOTERS WHO HAVE ENGAGED IN THE  
POLITICAL PROCESS IN REASONABLE RELIANCE ON THE  
CURRENT DISTRICTS WILL BE IRREPARABLY HARMED. .... 8

II. THE EQUITIES OF THIS CASE MILITATE IN FAVOR OF STAYING  
THE DECISION OF THE STATE COURT. .... 15

CONCLUSION..... 20

## TABLE OF AUTHORITIES

### Cases

<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976) .....	10
<i>Butcher v. Bloom</i> , 203 A.2d 556 (Pa. 1964).....	12
<i>Eu v. San Francisco Cty. Democratic Cent. Comm.</i> , 489 U.S. 214 (1989) .....	10
<i>Hollingsworth v. Perry</i> , 558 U.S. 183 (2010) .....	8, 16
<i>League of Women Voters of Pa. v. Commonwealth of Pennsylvania</i> , No. 159 MM 2017 (Pa. Jan. 22, 2018) ( <i>per curiam</i> ) .....	12, 18
<i>Munro v. Socialist Workers Party</i> , 479 U.S. 189 (1986) .....	16
<i>Purcell v. Gonzalez</i> , 549 U.S. 1 (2006) .....	16, 19
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964) .....	11, 16
<i>Williams v. Rhodes</i> , 393 U.S. 23 (1968) .....	16

### Statutes

25 P.S. § 2621 .....	15
25 P.S. § 2753(a) .....	13
25 P.S. § 2868.....	6, 13
25 P.S. § 2873(d) .....	6, 13

## Other Authorities

- Steve Esack and Laura Olson, *Confused About the Pennsylvania Congressional Map Ruling? Here's a Primer*, *The Morning Call* (Jan. 24, 2018), available at: <http://www.mcall.com/news/nationworld/pennsylvania/mc-nws-congressional-districts-explained-20180123-story.html>..... 20
- Jonathan Lai, *Judge's Early Recommendation: Pa. Congressional Map Partisan But Not Unconstitutional*, *Pittsburgh Post-Gazette* (Dec. 29, 2017), available at: <http://www.post-gazette.com/news/politics-state/2017/12/29/gerrymandering-Pa-congressional-map-partisan-not-unconstitutional-Judge-Brobson/stories/201712290201> ..... 19, 20
- Natasha Lindstrom, *Democrat Austin Davis Wins State House Special Election in Mon Valley*, *TribLive* (Jan. 23, 2018), available at: <http://triblive.com/politics/politicalheadlines/13215388-74/democrat-austin-davis-wins-state-house-special-election-in-mon-valley> ..... 17
- Pennsylvania Department of State, *Running for Office*, available at: <http://www.dos.pa.gov/VotingElections/CandidatesCommittees/RunningforOffice/Pages/default.aspx#.VBMGyvldUQ0>..... 15

# In the Supreme Court of the United States

---

Michael C. Turzai, Speaker of the Pennsylvania House of Representatives, *et al.*,  
*Applicants,*

v.

League of Women Voters of Pennsylvania, *et al.*,  
*Respondents.*

---

**MOTION FOR LEAVE TO FILE AMICUS BRIEF  
IN SUPPORT OF EMERGENCY APPLICATION FOR STAY  
FOR MIKE KELLY, SCOTT PERRY, GLENN THOMPSON, RYAN  
COSTELLO, PATRICK MEEHAN, BILL SHUSTER, TOM MARINO, LOU  
BARLETTA, KEITH ROTHFUS, CHARLES DENT, and LLOYD  
SMUCKER**

---

Mike Kelly, Scott Perry, Glenn Thompson, Ryan Costello, Patrick Meehan, Bill Shuster, Tom Marino, Lou Barletta, Keith Rothfus, Charles Dent, and Lloyd Smucker (“Amici Members”), all Members of Congress from the Commonwealth of Pennsylvania, respectfully move for leave of Court to file the accompanying amicus brief in support of Applicants’ Emergency Application for Stay.

The Pennsylvania Supreme Court’s *per curiam* Order will inevitably disrupt the 2018 election. The resulting disarray will not only harm many of the Amici Members’ ability to engage in the political process as candidates, but it will limit their constituents’ ability to partake in this process. Furthermore, as a practical matter, the State Legislature simply cannot account for the various considerations and interests of

the citizens within the condensed and unwieldy timeline prescribed by the State Supreme Court. Finally, the state of affairs created by the State Supreme Court will adversely impact constituent services across the districts represented by Amici Members. Given the existence of exigencies specific to Amici Members, they should be permitted to be heard on the issue of Applicants' Emergency Application for Stay and request their motion to file the attached amicus brief be granted.

Consent has been granted by the following: Senator Scarnati, Speaker Turzai, All Intervenors, League of Women Voters—PA, 18 individual Respondents. Consent has been denied by the following: Governor Wolf, Lt. Gov. Stack, Acting Secretary of the Commonwealth Torres, Commissioner Marks.

Respectfully submitted on this 29th day of January, 2018,



Matthew H. Haverstick

*Counsel of Record*

Mark E. Seiberling

Joshua J. Voss

KLEINBARD LLC

1650 Market Street, 46<sup>th</sup> Floor

Philadelphia, PA 19103

Phone: (215) 568-2000

Fax: (215) 568-0140

[mhaverstick@kleinbard.com](mailto:mhaverstick@kleinbard.com)

[mseiberling@kleinbard.com](mailto:mseiberling@kleinbard.com)

[jvoss@kleinbard.com](mailto:jvoss@kleinbard.com)

*Attorneys for Amicus Curiae Members of Congress representing Pennsylvania: Mike Kelly, Scott Perry, Glenn Thompson, Ryan Costello, Patrick Meehan, Bill Shuster, Tom Marino, Lou Barletta, Keith Rothfus, Charles Dent, and Lloyd Smucker*

# In the Supreme Court of the United States

---

Michael C. Turzai, Speaker of the Pennsylvania House of Representatives, *et al.*,  
*Applicants,*

v.

League of Women Voters of Pennsylvania, *et al.*,  
*Respondents.*

---

**MOTION FOR LEAVE TO FILE BRIEF ON 8 1/2 BY 11 INCH  
PAPER FOR MIKE KELLY, SCOTT PERRY, GLENN  
THOMPSON, RYAN COSTELLO, PATRICK MEEHAN, BILL  
SHUSTER, TOM MARINO, LOU BARLETTA, KEITH ROTHFUS,  
CHARLES DENT, and LLOYD SMUCKER**

---

Mike Kelly, Scott Perry, Glenn Thompson, Ryan Costello, Patrick Meehan, Bill Shuster, Tom Marino, Lou Barletta, Keith Rothfus, Charles Dent, and Lloyd Smucker, Members of Congress from the Commonwealth of Pennsylvania, respectfully move for leave of Court to file their amicus brief in support of Applicants' Emergency Application for Stay on 8 ½ by 11-inch paper rather than in booklet form.

In support of their motion, Amici Members note that the Emergency Application for Stay filed by State Senator Joseph B. Scarnati, III and State Representative Michael C. Turzai in this matter was filed on January 26, 2018. The expedited nature of the Emergency Application, and the anticipated compressed deadline for any response, prevented Amici Members from being able to get this brief prepared for printing and filing in booklet form. Nonetheless, Amici Members desire to be heard on

the application and request the Court grant this motion and accept the paper filing.

Respectfully submitted on this 29th day of January, 2018,



Matthew H. Haverstick

*Counsel of Record*

Mark E. Seiberling

Joshua J. Voss

KLEINBARD LLC

1650 Market Street, 46<sup>th</sup> Floor

Philadelphia, PA 19103

Phone: (215) 568-2000

Fax: (215) 568-0140

mhaverstick@kleinbard.com

mseiberling@kleinbard.com

jvoss@kleinbard.com

*Attorneys for Amicus Curiae Members of Congress representing Pennsylvania: Mike Kelly, Scott Perry, Glenn Thompson, Ryan Costello, Patrick Meehan, Bill Shuster, Tom Marino, Lou Barletta, Keith Rothfus, Charles Dent, and Lloyd Smucker*



# In the Supreme Court of the United States

---

Michael C. Turzai, Speaker of the Pennsylvania House of Representatives, *et al.*,  
*Applicants,*

v.

League of Women Voters of Pennsylvania, *et al.*,  
*Respondents.*

---

**AMICUS BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR  
STAY FOR MIKE KELLY, SCOTT PERRY, GLENN THOMPSON, RYAN  
COSTELLO, PATRICK MEEHAN, BILL SHUSTER, TOM MARINO, LOU  
BARLETTA, KEITH ROTHFUS, CHARLES DENT, and LLOYD SMUCKER<sup>1</sup>**

---

## STATEMENT OF INTEREST OF AMICI CURIAE

*Amici curiae* are Members of Congress from the Commonwealth of Pennsylvania and, as such, have a central interest in the congressional redistricting ordered by the Pennsylvania State Supreme Court. Specifically, the State Court's directive will forestall and impede the possibility of a full and vigorous campaign in the various congressional districts, which will not only harm the candidacy of many of the Amici

---

<sup>1</sup> Counsel for the *amicus curiae* was one of the counsel of record for Applicant Senator Joseph B. Scarnati, III in the Pennsylvania Supreme Court; however, before Senator Scarnati filed with this Court, the undersigned counsel withdrew their appearance below. Against the foregoing, no other counsel for a party authored this brief in whole or in part. The preparation and submission of this brief was funded by the National Republican Congressional Committee. Consent has been granted by the following: Senator Scarnati, Speaker Turzai, All Intervenors, League of Women Voters—PA, 18 individual Respondents. Consent has been denied by the following: Governor Wolf, Lt. Gov. Stack, Acting Secretary of the Commonwealth Torres, Commissioner Marks.

Members, but will also significantly hamper the ability of the Amici Members' constituents and voters to fully engage in the political process.<sup>2</sup>

## ARGUMENT

The Pennsylvania State Legislature Applicants filed an emergency application seeking to stay the Pennsylvania State Supreme Court's *per curiam* order (the "PCO"), which invalidated the Congressional Redistricting Act of 2011 and directed the Pennsylvania General Assembly to enact a revised congressional redistricting plan on an exceedingly truncated timeline. The PCO, which garnered the approval of only four of the seven State Court justices, was entered on January 22, 2018 – a mere 22 days before the commencement of the statutorily established period for filing nominating petitions and affidavits of candidacy in Pennsylvania, *see* 25 P.S. § 2868, and only 43 days before the closing date for making such submissions. *See id.* at § 2873(d). With the PCO, the Pennsylvania State Supreme Court found that the congressional districts that have been in place since 2011 “clearly, plainly, and palpably violate[] the Constitution of the Commonwealth of Pennsylvania[.]” Of particular relevance to the Amici Members, the State Court further ordered the Pennsylvania State General Assembly to submit a redistricting plan in accordance with the following stringent timeline:

- The State General Assembly is required to submit a new congressional redistricting plan to the Governor for consideration by **February 9, 2018**.

---

<sup>2</sup> While not all of the Amici Members are running for re-election in 2018, all of the Amici Members have joined in this brief because they believe the integrity of the political process is paramount to their constituents and the voters of Pennsylvania.

- Should the Governor approve of the new proposal, he is required to submit the plan to the State Supreme Court by **February 15, 2018**.
- If the foregoing deadlines are not complied with, or if the Governor does not approve of the State General Assembly’s proposal, the State Supreme Court will adopt a redistricting plan of its own.
- Finally, the State Court explained a new congressional districting plan will be available by **February 19, 2018** and instructed the State Executive Branch, which is in charge of administering elections in Pennsylvania, “to take all measures, including adjusting the election calendar if necessary, to ensure that the May 15, 2018 primary takes place as scheduled[.]”

While this condensed timeline for running a campaign is disconcerting on its own, the full measure of the harm to the Amici Members is further illuminated upon a contextual examination. These factors, which are explored below, include: (a) the extended period of reasonable reliance on the current congressional districts, coupled with the challenger-Respondents’ inexplicable and unreasonable delay in bringing their objections at such a late date; (b) the March 13, 2018 special election to fill the vacancy in the 18th congressional district, which is moving forward unabated; and (c) the confusion created by conflicting rulings rendered by different courts addressing the same Pennsylvania congressional districts.

Against this backdrop, Amici Members respectfully submit this action should be stayed pending disposition of the State Legislature Applicants’ appeal for at least three reasons. *First*, absent a stay from this Court, Amici Members and other congressional candidates, as well as Pennsylvania voters who have been engaged in

the political process, will suffer irreparable harm. *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (explaining that “[t]o obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show[,]” *inter alia*, “a likelihood that irreparable harm will result from the denial of a stay”). *Second*, on balance, the equities in this case militate in favor of staying the State Court’s PCO pending further review by this Court. *See id.* (“In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent.”). *Third*, as to the merits of the underlying action, not only is there a “reasonable probability” that this Court will grant certiorari, but there is also “a fair prospect” that it will reverse the State Court’s PCO below. *Id.*

**I. THIS COURT SHOULD STAY THE PCO OF THE STATE COURT BECAUSE, ABSENT SUCH A STAY, AMICI MEMBERS AND PENNSYLVANIA VOTERS WHO HAVE ENGAGED IN THE POLITICAL PROCESS IN REASONABLE RELIANCE ON THE CURRENT DISTRICTS WILL BE IRREPARABLY HARMED.**

This Court should stay the PCO of the Pennsylvania State Supreme Court in order to prevent irreparable harm to Amici Members, their constituents, and other candidates for Congress who have relied on the current congressional district boundaries since they were implemented at the conclusion of the decennial census in 2011. Such reliance, moreover, was justified under any reasonable approach, given that the congressional districts were not challenged by Respondents until more than six years later in the summer of 2017. Many of the Amici Members and other congressional candidates in Pennsylvania have raised close to \$12 million and have exhausted considerable time and resources in preparing for this year’s election and making their case to the voters – all in reasonable anticipation that the district

boundaries would not be altered before the 2018 election. If a stay is not entered and the redistricting proceeds in accordance with the State Supreme Court's dictate, not only will a substantial portion of the time and money invested by many of the Amici Members and other candidates be rendered a waste, but those same candidates will now be forced to expend additional time and money to become acquainted with their potential new district and introduce themselves to their potential new voters.

Concomitantly, thousands of Pennsylvanians already have engaged in the political process and supported various candidates for Congress to represent them, including Amici Members, under the logical assumption that the current congressional district boundaries would not be summarily dissolved virtually overnight. Although the support of these individuals is difficult to quantify, at least one method of gauging political involvement is accepted as indicative of voter engagement. In the 2018 election cycle, Pennsylvanians contributed over \$1.2 million specifically to congressional candidates running in their congressional districts. Conventional wisdom and common experience dictate that a significant portion of these contributors donated as an expression of support for a candidate to represent *them* in Congress. If the State Court's PCO is not stayed, the effort and monetary contributions of many Pennsylvanians will have been made to support individuals who do not and/or cannot represent them in Congress.

Importantly, these pernicious consequences are not merely a matter of inconvenience, but rather, implicate core principles of the political system and, thus, a stay is the only adequate remedy. Turning, initially, to the potential institutional assault on the electoral system, far from being an ancillary issue, or an accidental

product of the political system, a full and vigorous campaign is a central aspect of American democracy, whereby the candidates are forced to explain their position on issues that the electorate find important. *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (“We have recognized repeatedly that debate on the qualifications of candidates is integral to the operation of the system of government established by our Constitution.” (internal citations, quotation marks and brackets omitted)). Indeed, it is through this process that the voters assess the competing views of the candidates and cast their vote for the person that they believe is best-suited to represent their interests.

Furthermore, while much of the harm is stated in monetary terms, which is typically not considered irreparable, the diminution of campaign funds involve special considerations that are palpably distinct from other financial damages. As this Court has recognized, the reality of political campaigns is such that the ability of candidates to provide a complete exposition of their ideas and positions is largely dependent on the amount of money they can spend. *See Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (“[V]irtually every means of communicating ideas in today’s mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event.”). Of course, this is not to say that campaign expenditures are the sole factor in elections, or that they are necessarily dispositive of success; but, as acknowledged by this Court, they are determinative of the quantity of a campaign’s communication. *See id.* (“A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces

the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”). Thus, the potential harm here is more properly characterized as implicating free speech concerns rather than mere quantifiable financial loss.

In light of the central role played by campaigns in the modern political system, it is perhaps unsurprising that this Court has cautioned against reflexive and immediate invalidation of electoral districts, even where a constitutional infirmity is discernable. *See Reynolds v. Sims*, 377 U.S. 533, 585 (1964). As explained in *Reynolds*, in determining whether “withholding ... immediately effective relief in a legislative apportionment case” is appropriate, a court should consider various equitable factors, including “the proximity of a forthcoming election” and the potential for “disruption of the election process[.]” *Id.*

Consistent with such constructs, three of the seven Pennsylvania State Supreme Court justices issued responsive dissenting statements to the PCO, specifically disagreeing with the hurried approach adopted by the majority of their colleagues. Importantly, the concerns they expressed on this subject were not merely ancillary observations made as part of a broader disagreement with the majority’s ultimate holding, but rather, were the central focal point of their opinions. For instance, Chief Justice Saylor acknowledged the “substantial concerns as to the constitutional viability of Pennsylvania’s current congressional districts,” but explained that “at this juncture[.]” he “would not ... upset those districts, in such an extraordinarily compressed fashion, and without clarifying – for the benefit of the General Assembly and the public – the constitutional standards by which districting

is now being adjudged in Pennsylvania.” *League of Women Voters of Pa. v. Commonwealth of Pennsylvania*, No. 159 MM 2017, *slip op.* at 3 (Pa. Jan. 22, 2018) (*per curiam*) (Saylor, C.J., dissenting); *see also id.*, *slip op.* at 2 (Mundy, J., dissenting) (“I am ... troubled by the order striking down the 2011 Congressional map on the eve of our midterm elections[.]”). Justice Baer, for his part, authored a concurring and dissenting statement *expressly agreeing* with the Court’s constitutional pronouncement, but “believe[d] it more prudent to apply [the] holding in this case to the 2020 election cycle,” in part, because it would “provid[e] candidates and their supporters the opportunity to campaign in their newly established districts[.]” *Id.*, *slip op.* at 3 (Baer, J., concurring and dissenting). Indeed, his dissent succinctly captures the irreparable harm that is certain to result from superimposing new congressional boundaries at this late stage of the 2018 election:

I believe the dangers of implementing a new map for the May 2018 primary election risks ‘[s]erious disruption of orderly state election processes and basic governmental functions.’ It is naïve to think that disruption will not occur. Prospective candidates, incumbents and challengers alike, have been running for months, organizing, fundraising, seeking their party’s endorsements, determining who should be on canvassing and telephone lists, as well as undertaking the innumerable other tasks implicit in any campaign - all with a precise understanding of the districts within which they are to run, which have been in place since 2011. The change of the districts’ boundary lines at this time could result in candidates, again incumbents and challengers alike, no longer living in the districts where they have been carrying out these activities for a year or more.

*Id.* at 2 (quoting *Butcher v. Bloom*, 203 A.2d 556, 568 (Pa. 1964); *see also id.*, *slip op.* at 2 (Saylor, C.J., dissenting) (“I hold the view that restraint is appropriate, particularly in light of the timing of the present challenge to a congressional



redistricting plan that was enacted in 2011 and the proximity of the impending 2018 election cycle.”).

Aside from Justice Baer’s cogent exposition of the potential harm that will occur from disrupting campaigns that, as a practical matter, have been under way for some time, the interplay between the Pennsylvania State Election Code and the timeline prescribed by the State Court’s PCO creates further difficulties. According to the State Court, the congressional boundaries will be set by February 19, 2018 – 85 days before the primary *must be held*. See 25 P.S. § 2753(a) (“There shall be a General primary preceding each general election which shall be held on the third Tuesday of May in all even-numbered years...”). Of course, requiring candidates to introduce themselves to voters – and also expecting voters to make an informed decision – in less than three months is an exercise in futility.

Quite apart from that, but equally troubling, however, is that under the State Election Code, the first day for circulating petitions to gather the requisite signatures to earn a place on the ballot is February 13, 2018, see 25 P.S. § 2868 (“No nomination petition shall be circulated prior to the thirteenth Tuesday before the primary[.]”), and the last day is March 6, 2018. See *id.* at § 2873(d) (“All nomination petitions shall be filed on or before the tenth Tuesday prior to the primary.”). Thus, even if one were to operate under the highly unrealistic assumption that the congressional candidates and the volunteers on whom they rely to circulate such petitions will be able to effectively undertake this task immediately on February 19, 2018, many of the Amici Members and other congressional candidates would have only 15 days to obtain the 1,000 signatures needed to appear on the ballot, instead of the 21 days that is

traditionally afforded by state statute. Six days may seem *de minimis* in the grand scheme of things, but in this context, it constitutes nearly one-third of the time that is normally available to secure a ballot position. And this harm is not merely speculative; indeed, the Pennsylvania Department of State recently posted the following guidance on nominating petitions, showing the chaos introduced by the State Supreme Court's PCO:

**IMPORTANT NOTICE REGARDING NOMINATION PETITION FILING**

In light of the Supreme Court's ruling on Pennsylvania's Congressional Reapportionment Plan, nomination petition forms and instructions for the office of Representative in Congress are not available at this time.

The Department of State is making nomination petition forms available online for all candidates **EXCEPT CANDIDATES FOR REPRESENTATIVE IN CONGRESS.**

Candidates for Representative in Congress should check the Department of State's website for additional information in the coming weeks regarding the availability of nomination petition forms, as well as information about the revised schedule for circulating and filing nomination petitions for the office of Representative in Congress. **The Department will make nomination petition forms and instructions available for the office of Representative in Congress as soon as possible after a new Congressional Reapportionment Plan is approved.**

The dates and deadlines for nomination petition filing published in the 2018 Election Calendar apply **ONLY** to candidates for the following offices:

- United States Senator
- Governor
- Lieutenant Governor
- Senator in the General Assembly
- Representative in the General Assembly
- Democratic State Committee Member
- Republican State Committee Member

If you have any questions, please call the Bureau of Commissions, Elections and Legislation toll-free at 1-877-868-3772.

Pennsylvania Department of State, *Running for Office* (emphasis in original), available at: <http://www.dos.pa.gov/VotingElections/CandidatesCommittees/RunningforOffice/Pages/default.aspx#.VBMGyvldUQ0> (last visited Jan. 25, 2018).

Notably, insofar as the State Court's PCO directs the State Executive Branch "to take all measures, including adjusting the election calendar if necessary, to ensure that the May 15, 2018 primary takes place as scheduled[,]" the State Executive Branch does not have the authority to adjust this specific aspect of the calendar as it statutorily prescribed. Not only are these matters expressly governed by the aforementioned statutory provisions set forth by the State Legislature, but this power cannot be fairly regarded as being subsumed within the powers and duties delegated to the executive agency charged with administering elections. *See* 25 P.S. § 2621. Accordingly, absent a legislative enactment to the contrary, *March 6, 2018 will remain the deadline for filing nominating petitions* and, whatever adjustments the State Executive Branch deems necessary to implement the new redistricting plan smoothly, *it cannot* reset that window.

In sum, a stay is the only mechanism for preventing the irreparable harm to the electoral process, which (arguably) is the most important central tenant of American democracy.

## II. THE EQUITIES OF THIS CASE MILITATE IN FAVOR OF STAYING THE DECISION OF THE STATE COURT.

Because a stay is principally an equitable remedy, where appropriate, the Court will also balance the equities to determine whether the circumstances warrant

such relief. See *Hollingsworth*, 558 U.S. at 190. Recourse to such analysis is particularly appropriate in the context of a court order affecting an imminent election, such as the one presently at issue. Indeed, as explained by this Court, “[i]n awarding or withholding immediate relief, a court should ... act and rely upon general equitable principles.” *Reynolds v. Sims*, 377 U.S. 533, 585 (1964), but should remain mindful, of “considerations specific to election cases[.]” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). One such precept that is unique to election cases is that courts should avoid fashioning relief that is likely to confuse voters. See *Williams v. Rhodes*, 393 U.S. 23, 35 (1968) (acknowledging a constitutional violation in a state’s election statute, but refraining from ordering a last minute change that would risk confusion); *Purcell*, 549 U.S. at 5 (recognizing that preventing voter confusion is a sound basis for abstaining from immediately invalidating electoral districts); *Munro v. Socialist Workers Party*, 479 U.S. 189, 194 (1986) (explaining that states have a compelling interest in reducing voter confusion). This Court’s particular aversion to interposing last-minute changes in the context of election cases is premised on the fact that confusion almost invariably results in lower turnout. See, e.g., *Purcell*, 549 U.S. at 4-5 (2006) (explaining that voter confusion is an “incentive to remain away from the polls”).

Presently, in addition to the self-evident confusion that would ordinarily result from promulgating new congressional districts less than three months before the election, two circumstances that are unique in this action further amplify the potential confusion.

The first issue is the March 13, 2018 special election to fill the vacancy in the 18th congressional district. According to the State Supreme Court’s PCO, that

election must proceed in accordance with the existing congressional boundaries; i.e., the ones the PCO just declared unconstitutional. While at first glance, excluding the special election from the operation of the PCO appears to make the ruling more manageable, the State Court's handling of this issue, in fact, further exacerbates the confusion. Aside from the immense hardship on the candidates from the 18th district, who likely will be forced to run in a reconfigured version of the 18th district a mere two months after the special election, the formulation adopted by the State Court is bound to throw the Southwestern part of Pennsylvania into sheer chaos and further depress what will likely be low voter turnout in the off-cycle, off-month special election. See Natasha Lindstrom, *Democrat Austin Davis Wins State House Special Election in Mon Valley*, TribLive (Jan. 23, 2018) (noting voter turnout for January 2018 special election for vacant Pennsylvania State House seat in Southwestern Pennsylvania was just 10.6 percent), available at: <http://triblive.com/politics/politicalheadlines/13215388-74/democrat-austin-davis-wins-state-house-special-election-in-mon-valley> (last visited Jan. 25, 2018).

Congressional candidates whose new district may include areas that are currently part of the 18th district will be forced to campaign in such areas alongside the current candidates for the special election. Thus, given the proximity of the March special election to the May primary, it is not only plausible, but quite likely that voters will be simultaneously exposed to appeals for votes from different candidates running for Congress in different districts. Those voters will be eligible to vote for one of the candidates in March, and the other in May because they will be, in effect, eligible voters in *two different districts at the same time*. On the other hand, voters

who had no part in the March special election, will be asked to vote in a primary that includes the candidates from that election in May. Again, Justice Baer's dissenting statement to the State Court's PCO articulates this difficulty aptly:

[T]he 18th Congressional District in southwestern Pennsylvania is worthy of specific mention. A special election will be held there on March 13, 2018. If a new map is indeed implemented for the 2018 election, voters in this district would be electing a representative in March in one district while nomination petitions would be circulating for a newly-drawn district, which may or may not include the current candidates for the special election. Again and respectfully, I find the likelihood for confusion, if not chaos, militates strongly against my colleagues' admittedly admirable effort to correct the current map prior to the May 15, 2018 primary election

*League of Women Voters of Pa. v. Commonwealth of Pennsylvania.*, No. 159 MM 2017, *slip op.* at 2 (Pa. Jan. 22, 2018) (*per curiam*) (Baer, J., concurring and dissenting).

The following is an illustrative hypothetical, involving a voter who currently resides in the 18th congressional district, but after the State Court's redistricting plan is adopted, will be a resident of the 12th congressional district.<sup>3</sup> On March 3, ten days before the special election, he retrieves a flyer from his mailbox urging him to vote for one of the candidates in the forthcoming special election. As he is walking back to his house, he is stopped by a volunteer, who, eager to collect as many signatures as possible before the March 6 deadline, asks him to sign the nominating petition for one of the candidates in the 12th congressional district. The practical reality is that most voters who find themselves in such a situation will never receive an adequate explanation of what has precisely occurred and, as such, are likely to

---

<sup>3</sup> While the manner in which the districts will be redrawn is not entirely clear at this juncture, suffice it to say that it is difficult (if not impossible) to imagine a scenario in which the 18th district, or any other district, will be unaffected.

either not vote, or assume that they are not eligible to vote or otherwise participate in one or both of the elections. Such a state of voter confusion should not be countenanced.

Further adding to the disarray is the extensive multi-forum litigations that have been filed related to congressional redistricting in Pennsylvania. Because the same fundamental challenge to these boundaries has proceeded in three separate actions filed in state and federal courts, the public has been inundated with information that is ostensibly inconsistent. As this Court explained in *Purcell*, “[c]ourt orders affecting elections, *especially conflicting orders*, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.” *Purcell*, 549 U.S. at 5.

Considering the events of the last month against the backdrop of *Purcell*, it is easy to understand the confusion contemplated by the Court. On December 29, 2017, Judge Kevin Brobson of the Commonwealth Court of Pennsylvania, issued recommended findings of fact and conclusions of law in this case finding the congressional districts constitutional. Given the unique procedural posture of this case, those recommended findings of fact and conclusions of law by the Commonwealth Court judge, unlike most others issued by that tribunal, did not have precedential force and, in fact, were flatly rejected by a majority of the State Supreme Court. Nevertheless, the Commonwealth Court judge’s recommended findings of fact and conclusions of law were potentially understood by the public as legally dispositive based on reporting on the ruling. *See, e.g.,* Jonathan Lai, *Judge’s Early Recommendation: Pa. Congressional Map Partisan But Not Unconstitutional*,

Pittsburgh Post-Gazette (Dec. 29, 2017), *available at*: <http://www.post-gazette.com/news/politics-state/2017/12/29/gerrymandering-Pa-congressional-map-partisan-not-unconstitutional-Judge-Brobson/stories/201712290201> (last visited Jan. 25, 2018). Again, in a widely publicized opinion issued on January 10, 2018, the United States District Court for the Eastern District of Pennsylvania rejected a similar constitutional challenge to Pennsylvania's congressional districts and declined to invalidate those districts. This is precisely the scenario anticipated by the Court in *Purcell*. Not only is the election imminent, but there have also been several ostensibly conflicting orders that have been issued by multiple courts. In sum, voter confusion is not only likely but it is already occurring. *See, e.g.*, Steve Esack and Laura Olson, *Confused About the Pennsylvania Congressional Map Ruling? Here's a Primer*, The Morning Call (Jan. 24, 2018), *available at*: <http://www.mcall.com/news/nationworld/pennsylvania/mc-nws-congressional-districts-explained-20180123-story.html> (last visited Jan. 25, 2018). Thus, the Court should intercede and grant appropriate relief.

### CONCLUSION

For the reasons set forth above, the Amici Members respectfully request the Court grant the Emergency Application for Stay.

Respectfully submitted on this 29th day of January, 2018,



*Matthew H. Haverstick / 105*

Matthew H. Haverstick

*Counsel of Record*

Mark E. Seiberling

Joshua J. Voss

KLEINBARD LLC

1650 Market Street, 46<sup>th</sup> Floor

Philadelphia, PA 19103

Phone: (215) 568-2000

Fax: (215) 568-0140

mhaverstick@kleinbard.com

mseiberling@kleinbard.com

jvoss@kleinbard.com

*Counsel for Amici Curiae*