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

RICHARD VIETH, *et al.*, Plaintiffs, v. COMMONWEALTH OF PENNSYLVANIA, *et al.*, Defendants. ROBERT J. MELLOW, Senator, 22nd District, Proposed *Amicus Curiae.*	Civil No. 1:CV-01-2439

MOTION OF SENATOR ROBERT J. MELLOW
FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE*

1. Robert J. Mellow, Senator, 22nd District, asks this Honorable Court to grant him permission to participate in this matter as *amicus curiae* for the limited

purpose of supporting Defendants' renewed Motion for a Stay of this Court's Order of April 8, 2002.

2. The reasons supporting this Motion are set forth in Senator Mellow's Memorandum, filed herewith.

3. Senator Mellow respectfully requests that this Court consider this Motion on an expedited basis.

Respectfully submitted,

Dated: April 22, 2002

Lawrence J. Moran
ABRAHAMSEN, MORAN & CONABOY, P.C.
W.C. Carter Building
205-207 North Washington Ave.
Scranton, PA 18503
(570) 348-0200

Mark A. Packman
Lara H. Schwartz
GILBERT HEINTZ & RANDOLPH LLP
1350 I Street, NW, Suite 200
Washington, DC 20005-3324
(202) 772-2200

COUNSEL FOR
SENATOR ROBERT J. MELLOW

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

RICHARD VIETH, *et al.*, Plaintiffs, v. COMMONWEALTH OF PENNSYLVANIA, *et al.*, Defendants. ROBERT J. MELLOW, Senator, 22nd District, Proposed *Amicus Curiae.*	Civil No. 1: CV-01-2439

MEMORANDUM OF
SENATOR ROBERT J. MELLOW
IN SUPPORT OF HIS MOTION FOR LEAVE
TO PARTICIPATE AS *AMICUS CURIAE* AND IN
SUPPORT OF DEFENDANTS' RENEWED MOTION FOR STAY

INTRODUCTION

Movant Robert J. Mellow, as leader of the Senate Democratic Caucus ("Movant"), asks this Court's permission to participate in this matter as *amicus curiae* for the limited purpose of supporting the renewed motion of Defendants Jubelirer and Ryan for a stay of this Court's Order of April 8, 2002, which permanently enjoined implementation of the congressional redistricting plan embodied in Act 1 of 2002. The reason is that, even though the General Assembly has complied with this Court's Order by approving a new plan on April 17, 2002, which the Governor signed into law on April 18 as Act 34 of 2002, there simply is not enough time to hold a primary on May 21, 2002, as scheduled, unless this Court stays its Order and permits Act 1 to be used for the 2002 elections. The election process was already well underway on the date of this Court's April 8 Order; because the new plan moves tens of thousands of people into new districts, the election process would have to be re-initiated, and many steps repeated, if this Court does not grant a stay. Unfortunately, election officials cannot accomplish all these steps in the five weeks remaining before the primary, and to force these

officials to attempt to do so would result in irreparable injury to the election process. On the other hand, delaying the primary would also cause irreparable harm to the taxpayers, voters, and local governments of this Commonwealth. Such a delay also would harm the public interest by confusing voters, depressing turnout, and costing the taxpayers significant sums.

Movant has a significant interest, as a taxpayer, voter, candidate, and elected official who has sworn to protect the interests of this Commonwealth, in securing an orderly, efficient, and fair election process. In addition, Movant brings to this Court a perspective not represented by either the Plaintiffs or the Defendants in this case. Movant believes that a stay and, ultimately, a constitutional plan serves the best interest of all the voters of this Commonwealth, and that irreparable harm will ensue without a stay. Except with regard to a stay, however, Movant does not share Defendants' interests. During legislative consideration of Act 1, Movant proposed an alternative to the congressional redistricting plan ruled unconstitutional by this Court; in response to this Court's Order, Movant also proposed on the floor of the Senate another alternative redistricting plan, which was defeated in favor of the Republican plan on April 15, 2002. As *amicus*, Movant seeks to promote an orderly, efficient election that serves the interests of this Commonwealth, its local governments, voters, and taxpayers.

STATEMENT OF FACTS

On April 8, 2002, this Court issued an order (the "Order") declaring Act 1, the congressional redistricting plan enacted by the General Assembly and signed into law by the Governor, unconstitutional. The Order permanently enjoined the Defendants from implementing Act 1 and gave the Pennsylvania General Assembly three weeks to prepare, enact, and submit for review and approval by this Court a constitutional congressional redistricting plan. In an opinion accompanying the Order (the "Opinion"), the Court explained that Act 1 violated the "one person, one vote" rule because the proposed districts had a total deviation of 19 people, which the Defendants failed to justify.

On April 9, Republicans in the State Senate introduced Senate Bill 1234, a congressional redistricting plan designed to remedy the deficiencies in Act 1. On April 15, Democrats in the State Senate proposed a competing redistricting plan as an amendment to Senate Bill 1234. The Senate's Republican majority voted down the Democratic alternative on a party-line vote. On April 17, the Senate, on a party-line vote, passed House Bill 2545, a Republican-supported plan that subsequently passed the House. On April 18, Governor Schweiker signed House Bill 2545 into law as Act 34 of 2002.

Meanwhile, on April 11, 2002, Defendants asked this Court to stay the Order pending an appeal to the United States Supreme Court. On April 12, this Court denied the motion. On April 18, Defendants renewed their motion. For the reasons set forth below, Movant supports the relief sought by that motion.

ARGUMENT

A court weighs four factors in considering a motion for a stay: (1) the likelihood that the applicant for a stay will succeed on the merits; (2) the likelihood of irreparable injury from denying the stay; (3) the likelihood of substantial injury to the non-moving party; and (4) the public interest. *See* [Defendants'] Memorandum of Law Supporting Renewed Motion for Stay, Pending Appeal, Of Order Granting Declaratory Judgment and Injunction and for Expedited Consideration at 5 (filed April 18, 2002).

Movant seeks leave to participate in this matter to demonstrate that the public interest strongly favors a stay and that the Commonwealth and its local governments, voters, and taxpayers will suffer irreparable injury if the Court denies the requested relief.

Irreparable injury can take many forms. Chief Justice Rehnquist has stated that "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Board v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J.,

sitting as Circuit Justice). In staying the order of a three-judge court that had struck down a redistricting plan for violating the "one person, one vote" rule, Justice Brennan stated, "applicants would plainly suffer irreparable harm were the stay not granted. Under the District Court order the legislature must either adopt an alternative redistricting plan before [the District Court's deadline] or face the prospect that the District Court will implement its own redistricting plan." *Karcher v. Daggett*, 455 U.S. 1303, 1306 (1982) (Brennan, J., sitting as Circuit Justice). And, in granting a stay in another redistricting case (this one involving the Voting Rights Act of 1965), Justice Powell opined that irreparable harm can result when compliance with the lower court's order would moot the appeal. *McDaniel v. Sanchez*, 448 U.S. 1318, 1322 (1980) (Powell, J., sitting as Circuit Justice).

All of these types of irreparable injury are present here. This Court has enjoined the Commonwealth from implementing a statute "enacted by representatives of its people." *New Motor Vehicle Board*, 434 U.S. at 1351. Under this Court's Order, defendants must "either adopt an alternative redistricting plan before [the deadline set by this Court] or face the prospect that the District Court will implement its own redistricting plan." *Karcher*, 455 U.S. at 1306. And

submission of a new plan, in compliance with this Court's Order, may, if the Court approves the new plan, moot the defendants' appeal. *See McDaniel*, 448 U.S. at 1322.

Movant, however, focuses on a different form of irreparable harm, illustrated by *Gaffney v. Cummings*, 407 U.S. 902 (1972). In *Gaffney*, the district court invalidated a reapportionment plan for violating the "one person, one vote" rule. Defendants sought a stay, and the Supreme Court granted it. *Id.* Even Justice Douglas, who dissented from the grant of a stay, noted that irreparable injury can occur "if the court's order striking down a state apportionment is handed down so near the upcoming election that it is administratively impractical to implement an orderly election." *Id.* at 903.

Consistent with Justice Douglas's view of irreparable harm in *Gaffney,* the Supreme Court has long held that courts in redistricting cases have the discretion to withhold immediate injunctive relief even after declaring a redistricting plan unconstitutional.

> [W]e 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. Necessity has been the motivating factor in these situations.

Upham v. *Seamon,* 456 U.S. 37, 44 (1982). This statement reaffirmed the

authority of the district courts declared in the seminal redistricting case of *Reynolds v. Sims,* 377 U.S. 533, 585 (1964):

> [U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexity of state election laws and should act and rely upon general equitable principles. With respect to the timing of relief, a court can 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. [1]

Seamon v. Upham, 536 F. Supp. 1030 (E.D. Tex. 1982), illustrates the application of these principles in exigent circumstances quite similar to those present here. In *Upham,* the three-judge court had to choose among (1) allowing the regularly scheduled primary to go forward on May 1, 1982, using a plan that the Supreme Court had invalidated, (2) redrawing the districts to cure the defect found by the Supreme Court and proceeding with the May 1 primary, or (3) redrawing the districts and postponing the primary. Observing that "the people of Texas are entitled" to "a timely and orderly elective process," the Court chose the

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[1] *See also, Wells* v. *Rockefeller,* 394 U.S. 542, 547 (1969) (where primary was only three months away, "we cannot say that there was error in permitting the 1968 election to proceed under the plan despite its constitutional infirmities."); *Kilgarlin* v. *Hill,* 386 U.S. 120 (1967) (District Court properly allowed elections to go forward notwithstanding unconstitutional population variances in plan).

first alternative. *Id.* at 1034. The Court reasoned that because the primary was only 26 days away when the Court rendered its decision, any delay in the primary "would result in substantial damage." *Id.*

> Initially, the monetary cost -- for the candidates, for the political parties, and for the State -- of an entirely separate primary would be considerable. Additionally, late changes in the party primary date, in all likelihood, would produce voter confusion concerning both issues and candidates. It is beyond argument that such a result is counter-productive. Moreover, delayed election dates historically result in diminished voter participation. Such a result is particularly onerous for minority voters and candidates who benefit from high rates of participation. In any event, the system of self-governance is strengthened by enhancing the opportunity for voter participation.

Id.

The Court likewise declined to redraw the districts that the Supreme Court had found defective. The Court reasoned that redrawing these districts without delaying the May 1, 1982, primary "would be too disruptive an alternative. Changing the district configurations from those currently enforced would require time to effectuate broad changes, including accurate voter registration, proper absentee voter application and processing of absentee ballots, apprising voters regarding districts of their residence, and allowing candidates to appraise, evaluate, organize, and take other action necessary to prepare themselves for election." *Id.* The Court went on to state that changing district boundaries "would create, at best, uncertainty," and, at worst, "would create chaos and confusion in the minds of

voters and seriously disrupt the electoral process." *Id.* at 1035.

The facts in *Upham* are remarkably similar to those here. Here, as in *Upham,* the Court faces three choices. As we show, holding the primary on May 21 using new districts would be impossible, and delaying the primary would cause confusion, disruption, and decreased turnout. Consequently, the relief sought is necessary in order to avoid irreparable harm and to promote a significant public interest.

Turning to the "public interest" prong of this Court's inquiry, the public interest favors granting a stay. Black's Law Dictionary defines public interest as: "something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected." Black's Law Dictionary (6th ed.) 856. The members of the public -- both the voters and the public bodies planning for a May 21 primary -- have an interest in a fair and efficient election process, which would be impaired by the denial of a stay. Furthermore, the public has an interest "in enforcement of statutes enacted by the people's legislature." *Fargo Women's Health Org. v. Schafer*, 819 F.Supp 865 (D.N.D. 1993). Pending a final determination regarding Act 1, the public has an interest in going forward with the election for which the Commonwealth had been preparing for months at the time of this Court's Order.

I. IF A STAY IS NOT GRANTED, IT WILL NOT BE POSSIBLE TO HOLD THE PRIMARY ON MAY 21, THE DATE SET BY STATUTE

The primary election will take place on May 21, 2002 – less than five weeks from now. *See* 25 P.S. § 2753. This primary is a "unified" primary; in other words, citizens will vote not only for members of Congress but also for all other state and local offices, including Governor and Lieutenant Governor. The boundaries of congressional districts must be fixed substantially in advance of the May 21 primary for that election to take place in timely fashion. The reason is that the Secretary of the Commonwealth, the 67 County Boards of Election within the Commonwealth, and the candidates themselves must take numerous steps to prepare for the holding of an election, and these steps depend on congressional districts having been drawn.

To begin with, under the election schedule, the period for candidates to circulate petitions for nomination began on February 19, 2002 – two months ago. *See* 25 P.S. § 2868. The new redistricting plan signed into law this week by Governor Schweiker moves tens of thousands of people into new districts. If a stay is not granted and new district boundaries are applied immediately, the process of circulating these petitions would have to be repeated.

Once the period for circulating nomination petitions commenced, candidates had three weeks to circulate such petitions and obtain the necessary signatures. The deadline for filing such petitions with the Secretary of the Commonwealth was March 12, 2002 – more than a month ago. *See* 25 P.S. § 2873. Once this deadline passed, parties had seven days to file objections or challenges to the nominating petitions. *See* 25 P.S. § 2937. These objections and challenges were heard by the Commonwealth Court, which by statute had fifteen days from March 12 to decide them. *Id.* Decisions of the Commonwealth Court were appealable, within ten days, to the Supreme Court, which has no statutory deadline for making decisions. Even though the General Assembly has complied with this Court's deadline for passing a new congressional redistricting plan, this process of circulating and filing nominating petitions, filing objections, and resolving them in court cannot be re-done in time for the May 21 primary.

On or before April 1, 2002, almost three weeks ago, the Secretary of the Commonwealth was required to transmit to County Boards of Elections the names of candidates who had filed nominating petitions and who had not withdrawn or been declared disqualified. The purpose of this transmission was to enable the 67 County Boards to mail write-in absentee ballots to military voters who are stationed in remote locations (*e.g.*, Afghanistan). State law requires County Boards to begin to mail these ballots to such military voters no later than April 1,

2002. In addition, County Boards were required by April 8, 2002, to mail absentee write-in ballots to all other military voters. Re-transmitting absentee ballots to remote overseas locations could be done only at great expense to the taxpayers, and could cause significant confusion to the troops, potentially compromising their votes.[2]

In addition to the statutorily-prescribed process of preparing for an election described above, the practicalities of conducting an election would also render a May 21 primary impossible absent a stay. For example, the Secretary of the Commonwealth must certify the names of the candidates and the order in which they will appear on the ballot to each of the 67 County Boards of Elections. Although there is no statutory deadline, as a practical matter, the Secretary must certify no later than six weeks before the primary. May 21 is less than five weeks from now. Therefore, even if the nominating petition process were already resolved, it would be impossible to hold a primary on May 21 if the stay is denied.

Moreover, many ballots have already been printed; thus, if new congressional district lines had to be implemented for the May 2002 primary, new ballots would need to be printed, which can take several weeks. Because this

[2] As demonstrated by the 2000 presidential election, the process of gathering and counting absentee ballots is a challenging one – even when performed only once for an election that is conducted as scheduled. Implementing a new congressional districting plan at this stage and for this election would further complicate this difficult process.

Court has not yet approved a new plan, the precise locations of the district boundaries are not yet known; consequently, the County Boards cannot prepare in advance to distribute the correct ballots to the appropriate polling places. For these reasons as well, if congressional district lines must be re-drawn for the present election cycle, state and local officials cannot complete all the tasks necessary to hold a primary on May 21.

II. DELAYING THE MAY 21 PRIMARY WOULD CAUSE IRREPARABLE INJURY AND WOULD HARM THE PUBLIC INTEREST

Since 1952, the date for the Pennsylvania primary elections has remained in the spring (either April or May). In reliance upon this 50-year old election date, numerous local governments, state courts, voters, and taxpayers have structured and conducted their respective duties and activities with the understanding that the primary would take place on May 21. With less than five weeks left on the primary calendar, a postponement of the primary date would cause irreparable harm and contravene the public interest.[3]

[3] Federal courts in Pennsylvania have long recognized the Commonwealth's strong interest in avoiding a delay in the primary. *See In re Pennsylvania Congressional Districts Reapportionment Cases,* 535 F.Supp. 191, 194 (M.D. Pa. 1982) (denying preliminary injunction because of, *inter alia,* "the expense to the public, the disruption of campaign organizations, and the confusion which would inevitably result if at this late date the congressional primary were to be delayed.")

To delay the primary on account of a new congressional redistricting plan would cost the taxpayers substantial sums. For example, ballots would have to be re-printed and voting machines re-programmed, all at the taxpayers' expense. A delayed primary would also generate much confusion among voters, who have voted in spring primaries for half a century. Holding the primary at a time other than its usually scheduled one also would depress voter turnout.

Moreover, delaying the primary would unfairly compress the general election campaign, to the voters' detriment. The current election schedule provides for over five months between the primary and the general election. During that time, voters assess the qualifications and values of one candidate from each party. Debates are held, the press compares the candidates to one another, and the electorate decides which candidates might best serve their interests and those of Pennsylvania and of the United States. Delaying a primary would shorten the time for comparing the two candidates who ultimately run for each office, and thus impair the democratic process.[4]

[4] The harms associated with a delayed primary could well be even worse if the primary were split and separate primaries were held for Congress and all other offices.

The Commonwealth cannot recover the increased expenses, and the voters cannot be compensated for the confusion they will suffer and the resulting decrease in turnout. These harms militate in favor of a stay, which would protect the public interest.

In short, denying the stay would cause irreparable injury and impair the public interest in efficient and fair elections, cost the taxpayers significant sums, and disadvantage voters and candidates who took no part in enacting the redistricting plan held unconstitutional by this Court. The United States Supreme Court has concluded on more than one occasion that these types of harms warrant staying the implementation of a redistricting injunction, even if it means that a possibly unconstitutional plan will remain in place for an election cycle. *See Upham v. Seamon,* 456 U.S. at 44; *Reynolds v. Sims,* 377 U.S. at 585. The same result should obtain here.

CONCLUSION

For all the reasons set forth above, Senator Robert J. Mellow respectfully requests that this Court grant (a) this motion to for leave to participate as *amicus curiae* and (b) the Defendants' renewed motion for a stay of this Court's April 8, 2002 injunction.

Respectfully submitted,

Dated: April 22, 2002

Lawrence J. Moran
ABRAHAMSEN, MORAN & CONABOY, P.C.
W.C. Carter Building
205-207 North Washington Ave.
Scranton, PA 18503
(570) 348-0200

Mark A. Packman
Lara H. Schwartz
GILBERT HEINTZ & RANDOLPH LLP
1350 I Street NW Suite 200
Washington, DC 20005-3324
(202) 772-2200

COUNSEL FOR
SENATOR ROBERT J. MELLOW

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RICHARD VIETH, *et al.*, Plaintiffs, v. COMMONWEALTH OF PENNSYLVANIA , *et al.*, Defendants. ROBERT J. MELLOW, Senator, 22nd District, Proposed *Amicus Curiae.*	Civil No. 1:CV-01-2439

VERIFICATION

Senator Robert J. Mellow hereby states, subject to the penalties of 28 U.S.C. § 1746, that he is authorized to make this verification, that he has read the foregoing Motion for Leave to Participate as *Amicus Curiae* and Memorandum of Senator Robert J. Mellow His Motion for Leave to Participate as *Amicus Curiae* and In Support of Defendants' Renewed Motion for a Stay, and that the facts set forth therein are true and correct to the best of his knowledge, information, and belief.

ROBERT J. MELLOW

Dated: April 22, 2002

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

RICHARD VIETH, *et al.*, Plaintiffs, v. COMMONWEALTH OF PENNSYLVANIA , *et al.*, Defendants. ROBERT J. MELLOW, Senator, 22nd District, Proposed *Amicus Curiae*.	Civil No. 1:CV-01-2439

ORDER

Upon consideration of the Motion of Senator Robert J. Mellow for Leave to Participate as *Amicus Curiae*, the Memorandum in Support thereof, and the record in this case,

IT IS HEREBY ORDERED THAT the Motion for Leave to Participate as *Amicus Curiae* is **GRANTED.**

RICHARD L. NYGAARD
United States Circuit Judge

WILLIAM H. YOHN, JR.
United States Circuit Judge

SYLVIA H. RAMBO
United States District Judge

Dated: April ___, 2002

CERTIFICATE OF SERVICE

I, MARK A. PACKMAN, co-counsel for Senator Robert J. Mellow, hereby certify that on April 22, 2002, I caused to be served a copy of the Motion of Senator Robert J. Mellow for Leave to Participate as *Amicus Curiae* and the Memorandum of Senator Robert J. Mellow in Support of His Motion for Leave to Participate as *Amicus Curiae* and in Support of Defendants' Renewed Motion for a Stay by fax and first-class mail upon the following:

Paul M. Smith
Thomas J. Perrelli
Daniel Mach
Brian P. Hauck
JENNER & BLOCK, L.L.C.
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000
(202) 639-6066 (fax)

John P. Krill, Jr.
Linda J. Shorey
KIRKPATRICK & LOCKHART LLP
240 North Third Street
Harrisburg, PA 17101
(717) 231-4500
(717) 231-4501 (fax)

J. Bart DeLone
Senior Deputy Attorney General
Office of Attorney General
Appellate Litigation Section
15th Floor Strawberry Square
Harrisburg, PA 17120
(717) 783-3226
(717) 772-4526 (fax)

The Honorable Richard L. Nygaard
U.S. Circuit Judge
717 State Street
Suite 500
Erie, PA 16501
(814) 456-2947 (fax)

Robert B. Hoffman
REED SMITH, LLP
213 Market Street, 9th Floor
P.O. Box 11844
Harrisburg, PA 17108
(717) 257-3042
(717) 236-3777 (fax)

The Honorable William H. Yohn, Jr.
U.S. District Judge
3809 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1753
(215) 580-2141 (fax)

Mark A. Packman

MARK A. PACKMAN
Co-counsel For Senator Robert J. Mellow