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

RICHARD VIETH, et al, Plaintiffs,	:	
v.	:	No. 1:CV-01-2439 (Judge Rambo)
THE COMMONWEALTH OF PENNSYLVANIA, et al., Defendants.	:	

MEMORANDUM OF LAW SUPPORTING MOTION FOR STAY, PENDING APPEAL, OF ORDER GRANTING DECLARATORY JUDGMENT AND INJUNCTION AND FOR EXPEDITED CONSIDERATION

Defendants Lieutenant Governor Jubelirer and Speaker Ryan ("Presiding Officers") have moved for a stay, pending appeal, of the Court's April 8, 2002 order declaring Act 1 unconstitutional and enjoining its implementation. This memorandum is filed in support of that motion. Because of the imminence of the Pennsylvania primary election, Presiding Officers request expedited consideration of the motion.

STATEMENT OF FACTS

On March 12, 2002, the Court's evidentiary hearing in this matter ended. On March 15, 2002, the parties submitted briefs to the Court. On April 8, 2002, the Court entered an order that, *inter alia*, enjoins the implementation of the Commonwealth of Pennsylvania's congressional redistricting law, Act 1 of 2002

("Act 1"), and directs the General Assembly of the Commonwealth, within three weeks (i.e., by April 29, 2002), to prepare a new congressional redistricting plan, to enact it and to submit it for the Court's review and approval. In response to the Court's order, the General Assembly has already started consideration of legislation. Presiding Officers will inform the Court of the outcome of the legislative process.

This is a year in which Pennsylvania will hold primary and general elections for its congressional delegation. Primary and general elections for governor, for all 203 seats in the state House of Representatives and for one-half of the state Senate are on the same schedule.

Pennsylvania law sets a number of important dates for the election process this year. March 12, the day the hearing ended in this case, was also the deadline for candidates to file nominating petitions. March 19 was the deadline for objections to nomination petitions to be filed in the Commonwealth Court of Pennsylvania. March 27 was the last day for candidates who had filed nominating petitions to withdraw before the primary. April 1 was also the day by which county boards of elections are mandated to begin sending absentee ballots to military personnel stationed, and certain other qualified electors residing, outside the Commonwealth. These dates all preceded the Court's order of April 8. As the schedule above would indicate, ballots are likely to have already been printed or sent out to absentee voters in some quantity. County boards of election are likely to need a month or more just to print ballots.

April 22 will be the last day for voters to register for the primary election. May 14, 2002, will be the last day for civilian voters to apply for an absentee ballot for the primary election. May 17, 2002, will be the last day for the 67 County Boards of Elections to receive absentee ballots for the primary election. The primary elections are scheduled for May 21.

There are candidates in the primary for all 19 of Pennsylvania's congressional districts, as established by Act 1. Registered voters in the districts established by Act 1 signed nominating petitions for these candidates based on the current boundaries of those districts. An orderly election process has been taking place under Act 1.

This Court's order, unless stayed, will disrupt the election process. It is already too late to conduct the orderly process, described above, under an alternative plan for congressional redistricting and to have it completed by the primary election, even if a new redistricting plan were in place today. Attempting to rush the process would create time pressures, as well as a concomitant danger of errors and oversights, that would be prejudicial to voters, candidates and the public interest as a whole. Uncertainty and confusion about district lines would create a great danger of invalid nominating petitions. Voters as well as candidates have an interest in clear, accurate ballots, which should not be produced in haste, because of the errors that can occur.

Moreover, postponing the congressional primary election could require altering the post-primary election schedule, to avoid overlapping with, and interfering with, the process leading up to the general election, depending on the date of the postponement. August 1 will be the last day for independent candidates to file nomination papers. August 8 will be the last day for such candidates to withdraw. August 12 will be the last day for the withdrawal of candidates nominated in the primary election. October 7 will be the last day to register to vote in the general election. By October 29, applications for civilian absentee ballots must be submitted and the completed absentee ballots must be received by November 1. The general election will occur on November 5.

Whether or not the congressional primary occurs as scheduled, the primary election for state offices is unaffected by the Court's order and is still scheduled to

occur on May 21. If a congressional election eventually takes place at a later date than the state-office election, the effect would be to double the expense and labor for the Commonwealth, its counties and local election officials in 9,427 precincts. Preliminary estimates of the cost to counties for holding a second primary are in the range of $20 million. In Philadelphia County alone, the reported cost just for paying election workers for a second primary is a million dollars. Postponing all elections would avoid the duplicative effort, but would by definition impact the state-office elections. These dilemmas can be obviated by a stay.

There is no injury under Act 1 to the Plaintiffs Mr. and Mrs. Veith. They do not live in a district that is overpopulated. Moreover, staying the order would have no practical adverse effect on the other Plaintiff, Ms. Furey, who lives in a district (the 6th) with a theoretical deviation of only 4 persons over the ideal population of a Pennsylvania district of 646,371 (or 646,372), based on two-year-old census data. Ms. Furey resides in a district that is less populous than the congressional districts in 23 other states, giving her vote for congress more weight in theory than that of voters in districts containing 127,739,024 Americans.[1] Although these deviations in district populations among states are not resolvable by the Court, they show, for purposes of considering a stay, the absence of any real harm to plaintiff Furey.

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[1] *See* Defendants' Exhibits 79 and 80 (tables from U.S. Statistical Abstract). The states are: Montana, Delaware, South Dakota, Utah, Mississippi, Oklahoma, Oregon, Connecticut, Indiana, Kentucky, Kansas, Wisconsin, South Carolina, Arkansas, Nevada, Michigan, Maryland, Washington, New York, Illinois, Texas, New Jersey, Idaho. The "ideal" congressional district population in each state is different, ranging from 902,195 (Montana) to 646,977 (Idaho).

ARGUMENT

On a motion for a stay, the Court must weigh: (1) the likelihood of the stay applicant to succeed on the succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of a stay will substantially injure the other party interested in the proceeding; and (4) whether the public interest favors a stay. *See Republic of the Philippines v. Westinghouse Electric Corp.*, 949 F.2d 653 (3d Cir. 1991) (stay by Court of Appeals under Fed.R.App.P. 8(a)); *Harris v. Pernsley*, 654 F. Supp. 1057 (E.D. Pa. 1987) (stay by District Court under Fed.R.Civ.P. 62).

On the first prong, the stay applicant need only demonstrate a reasonable possibility of success on the merits. *See Pernsley*, 654 F. Supp. at 1059-60 (recognizing that because trial court is unlikely to agree with the stay applicant that its recently issued decision is incorrect, stay applicant need only show reasonable probability); *see also Washington Speakers' Bureau, Inc. v. Leading Authorities, Inc.*, 49 F. Supp.2d 496 (E.D. Va. 1999) (stay applicant need only show the existence of a substantial legal question on the merits where the balance of the equities favors a stay); 12 MOORES' FEDERAL PRACTICE §62.06[3] (3rd ed. 2002). As summarized by the Court of Appeals for the District of Columbia Circuit, "[t]he probability of success is inversely proportional to the degree of irreparable injury evidence. A stay may be granted with either a high probability of success and some injury or vice versa." *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985), *aff'd,* 813 F.2d 570 (2nd Cir. 1985). Overall, the factors traditionally considered in deciding whether to stay a civil order contemplate individualized judgments on a case by case basis and the formula cannot be reduced to a set of rigid rules. *Hilton v. Braunskill*, 481 U.S. 770 (1982).

Presiding Officers respectfully submit that they are likely to succeed on the merits of their appeal to the Supreme Court and, at the very least, have a

reasonable possibility of success on the merits. Under principles derived from Supreme Court decisions in *Karcher v. Daggett*, 462 U.S. 725 (1983), *Abrams v. Johnson*, 521 U.S. 74 (1997), and *White v. Weiser*, 412 U.S. 783 (1973), Act 1 should have been upheld. The majority of the three-judge court erred in invalidating Act 1. *See also* Opinion of Yohn, J., dissenting. The Legislative Journals (Defendants' Exhibits 2-5) show that the General Assembly made a good faith effort to minimize population deviation, progressively reducing the deviation as it refined its ultimate plan, rejecting alternatives that would have increased the deviation, while simultaneously pursuing entirely lawful political objectives. The majority opinion fails to afford the appropriate deference due to the policy preferences of the General Assembly. The majority opinion and dissent in this case resemble the obverse of the majority and dissent in *Anne Arundel Co. Republican Cent. Committee v. State Advisory Bd. of Election Laws*, 781 F. Supp. 394 (D. Md). 1991).

Success on the merits of the appeal is also likely as to the scope and scheduling of the injunctive relief contained in the order. The Supreme Court, in *Reynolds v. Sims*, 377 U.S. 533, 585 (1963), cautioned that

> under 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 grant of immediately effective relief ... 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 complexities of the state election laws, and should act and rely upon general equitable principles.

The Court of Appeals for the Third Circuit adhered to the *Sims* caution in *Page v. Bartels*, 248 F.3d 175, 195-196 (3d Cir. 2001), when it refused to grant the plaintiffs further interim injunctive relief to postpone imminent state legislative elections. Focusing on the dates established by state law for the upcoming election process, the Third Circuit stressed:

> In reaching these conclusions, we also note our own keen awareness of the significant disruption that action on our part (or on the part of any federal court issuing interim relief) will have on the upcoming New Jersey legislative elections. The original deadline for filing a State Senate or General Assembly candidacy, April 19, 2001, has already passed. We are also fast approaching the date of this summer's upcoming legislative primary, scheduled . . . .to occur on June 5, 2001, in conjunction with the gubernatorial primary and the primaries of certain local races. Any interim injunctive or restraining action on our part, particularly action that broadly proscribes the implementation of the redistricting plan adopted by the Apportionment Commission, would likely delay or suspend the legislative elections. Further, if the legislative elections were delayed in this fashion, the State of New Jersey, if it desired to avoid also postponing the concurrent gubernatorial and local elections, would be required to hold two separate primaries and general elections for its state offices, at great expense to the taxpayers. Defendants have forcefully spun out the implications of such disruption in their briefs. Federal court intervention that would create such a disruption in the state electoral process is not to be taken lightly. This important equitable consideration, going to the heart of our notions of federalism, was expressed quite cogently by the Supreme Court in [Sims] ... . This warning in Sims on the issue of relief was delivered after the Supreme Court found, on the merits, that a state legislative apportionment plan violated the Constitution. If aggressive federal court intervention is not necessarily appropriate following an adjudication of unconstitutionality, then surely it cannot be any more appropriate at this early stage of the proceedings.

Id. at 195-196 (internal citations and footnotes omitted); *see id.* at n.16. *See also Upham v. Seamon*, 456 U.S. 37, 44 (1982) ("It is true that 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 ... [n]ecessity has been the motivating factor in these situations."); *Chisom v. Roemer*, 853 F.2d 1186 (5th Cir. 1988), *overruled in part on other grounds, League of United Latin Amer. Citizens Council No. 4434 v. Oliver,* 914 F.2d 620 (5th Cir. 1990) (vacating injunction and allowing judicial election to go forward because the uncertainty generated by the injunction would have a deleterious effect on the state supreme court and the administration of justice which would outweigh any potential harms to plaintiffs if the elections occurred).

The injunctive relief framed by the Court was issued in the absence of any evidence on the record regarding the equities that must be balanced under *Sims* before injunctive relief interfering with an impending election can be entered. The hearing in this matter, which was not designated as a trial, focused on the merits of the one-person, one-vote challenge. No testimony is in the record on the impact of the injunction on the current election cycle. This flies in the face of *Sims* and decisional law applying it.

Even in the absence of evidence on the record, it is obvious that the Court's injunction will disrupt the congressional election process in Pennsylvania. The process should have been allowed to go forward under existing law, while the Commonwealth and, if warranted, the Court, considered remedies.

Furthermore, the Court's injunction, as it relates to the General Assembly, is also likely to be reversed on appeal. There is nothing in the record to indicate that the Court gave sufficient time for the General Assembly to consider alternatives. The Court lacks the authority to order the General Assembly to enact law or to submit a statute to it for its review and approval. The General Assembly is not a party to this case. If the General Assembly enacts a new plan into law, and if it is signed by the Governor, the new plan will be valid and effective, and entitled to a presumption of constitutionality, without prior review by the Court. As the Supreme Court has said:

> The Court has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt. Connor v. Finch, 431 U.S. 407, 414-415 (1977); Chapman v. Meier, 420 U.S. 1, 27 (1975); Gaffney v. Cummings, 412 U.S. 735, 749 (1973); Burns v. Richardson, 384 U.S. 73, 84-85 (1966). When a federal court declares an existing apportionment scheme unconstitutional, it is therefore, appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal

> court to devise and order into effect its own plan. The new legislative plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution. "[A] State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause." Id., at 85.

Wise v. Lipscomb, 437 U.S. 535, 540 (1978). Other reasons for the likelihood of success on the merits are stated in the post-hearing brief of the Presiding Officers.

The interest of the public weighs heavily in favor of a stay of the order. The deadline for filing nomination petitions for the 2002 Congressional elections in Pennsylvania was March 12, 2002, a date that coincided with the second day of hearing. *See* 25 P.S. §2913(c). Primary elections are scheduled to take place May 21, 2002, which is less than six weeks away. *See* 25 P.S. §2753. The process is so far advanced that any new congressional plan will require postponement of the primary election for these offices. Holding a second primary would come at great cost to the implementing arms of state and county government. A stay would allow the elections to proceed on schedule pending final resolution of this legal challenge to Act 1 in the Supreme Court or for orderly consideration of remedial measures.

There is precedent for allowing elections to go forward under redistricting plans that have been invalidated by the courts. In *Whitcomb v. Chavis*, 396 U.S. 1055 (1970), the Supreme Court stayed an order of a three-judge court which had enjoined the defendants from conducting elections under an invalidated state reapportionment plan. *See also Chavis v. Whitcomb*, 307 F. Supp. 1362 (S.D. Ind. 1969); *Chisom*, 853 F.2d at 1189-90 (discussing *Chavis*). Similarly, in *Davis v. Bandemer,* 478 U.S. 109 (1986), two elections were held under a plan invalidated by a three-judge court, the first prior to trial and the second after trial but before the three-judge court's decision invalidating the plan. Although the trial court declared

the plan invalid (a decision ultimately reversed by the Supreme Court), the court also ruled that elections held under it were valid. The Supreme Court had also granted a stay of the three-judge court's order declaring the plan unconstitutional. *See* 474 U.S. 991 (1985). Finally, in *Karcher v. Daggert*, Justice Brennan stayed the order of the three-judge court which enjoined the state defendants from conducting elections under the invalidated state reapportionment statute. *See* 455 U.S. 1303 (1982). Allowing elections to go forward is a recognition of the significant public interest in a smooth rendition of the state's election process. *See also Watkins v. Mabus*, 771 F. Supp. 789, 802 (S.D. Miss. 1991), *aff'd in part and vacating challenge as moot,* 502 U.S. 954 (1991) (invalidating state reapportionment plan but allowing elections to go forward because "with imminent elections and lack of advisable options, it is constitutionally permissible to utilize the 1982 plan in fashioning interim relief"); *Martin v. Venables*, 401 F. Supp. 611 (D. Conn. 1975) (invalidating councilmanic apportionment plan but refusing to disrupt scheduled elections).

The defendants, as officials of Commonwealth government, are all impacted in their duties by the Court's order, but also can speak to the harm to the public interest if the Court's order is not stayed.

Plaintiffs, on the other hand, will not be substantially injured by the stay as the very small deviations of 19 persons overall and of only 4 persons in the 6th District do not realistically impede their ability to have their vote count in the upcoming elections. The Vieth Plaintiffs do not even reside in a district that is overpopulated so as to violate the one-person, one-vote principle.

CONCLUSION

For all of the reasons given above, this Court should grant Presiding Officers' motion for a stay pending appeal to the Supreme Court, and allow the Commonwealth's election procedure to continue on schedule.

Respectfully submitted,

April 11, 2002

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CERTIFICATE OF SERVICE

I certify that on April 11, 2002, I caused a copy of the foregoing Memorandum in Support of Motion for Stay, Pending Appeal of Order Granting Declaratory Judgment and Injunction and for Expedited Consideration to be served on the following in the manner indicated:

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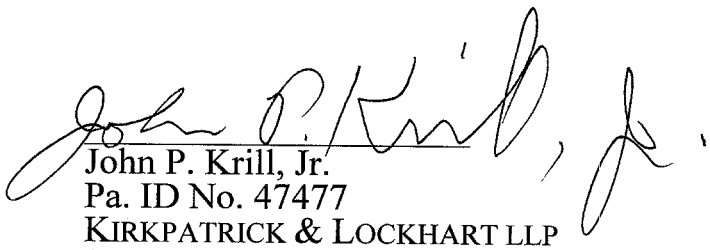

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