UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JACOB CORMAN, in his official capacity as Majority Leader of the Pennsylvania Senate, MICHAEL FOLMER, in his official capacity as Chairman of the Pennsylvania Senate State Government Committee, LOU BARLETTA, RYAN COSTELLO, MIKE KELLY, TOM MARINO, SCOTT PERRY, KEITH ROTHFUS, LLOYD SMUCKER, and GLENN THOMPSON, *Plaintiffs*, v. ROBERT TORRES, in his official capacity as Acting Secretary of the Commonwealth, and JONATHAN M. MARKS, in his official capacity as Commissioner of the Bureau of Commissions, Elections, and Legislation, *Defendants*.	:	No. 18-cv-00443-CCC

BRIEF FOR *AMICUS CURIAE* COMMON CAUSE

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STATEMENT OF INTEREST OF AMICUS CURIAE

Common Cause is a non-profit corporation organized and existing under the laws of the District of Columbia. It is a nonpartisan democracy organization with over 1.1 million members and local organizations in 35 states, including Pennsylvania. Common Cause in Pennsylvania has over 30,000 members and followers. Since its founding by John Gardner in 1970, Common Cause has been dedicated to fair elections and making government at all levels more representative, open, and responsive to the interests of ordinary people. "For the past twenty-five years, Common Cause has been one of the leading proponents of redistricting reform." Jonathan Winburn, *The Realities of Redistricting* 205 (2008).

Gerrymanders have been used by both Democrats and Republicans to entrench their power almost since the founding of this Nation. Whether done by Democrats or Republicans, partisan gerrymanders are antithetical to our democracy. Common Cause is at the forefront of efforts to combat gerrymandering, no matter what party is responsible, in the belief that when election districts are created in a fair and neutral way the People will be able to elect representatives who truly represent them. To that end, Common Cause has organized and led the coalitions that secured passage of ballot initiatives that created independent redistricting commissions in Arizona and California and

campaigned for ratification of an amendment to the Florida Constitution prohibiting partisan gerrymandering. Common Cause is a co-founder of the Fair Districts PA coalition, sponsor of the annual Gerrymander Standards Writing Competition, and the lead plaintiff in the challenge to the congressional gerrymander in North Carolina pending in *Common Cause v. Rucho,* 1:16-CV-1026 (M.D.N.C. filed Aug. 5, 2016), heard by a three-judge federal district court and now awaiting decision.

For Common Cause, these are issues of principle, not of party, and it is committed to eliminating the harm caused to its members and all citizens by these practices.

No person or entity other than the amicus curiae, through its counsel, either paid for the preparation of this brief, or authored any part of it.

ARGUMENT

Common Cause submits this brief to address a crucial flaw in Plaintiffs' submissions – the erroneous assumption that the Court has the power to order an election under the unconstitutional 2011 Pennsylvania congressional map.[1] *See* Memorandum of Law in Support of Plaintiff's Motion for Temporary Restraining

[1] Common Cause strongly support Defendants' position that Plaintiffs have failed to state a cause of action, much less demonstrate the right to injunctive relief. This brief is directed to a narrow issue that might otherwise be lost in these expedited proceedings.

Order and Preliminary Injunction at 18 ("Conversely, if injunctive relief is granted, the upcoming primary will be held under a plan in existence, and unchallenged, since 2011") (hereinafter "Plaintiff's Memorandum"). Plaintiffs have overlooked 2 U.S.C. § 2a(c)(5), which mandates that in the absence of a legally-created map, Pennsylvania must conduct an at-large election for all 18 Congressional districts. There is no going back to the 2011 map, which is a legal nullity. Thus, even if this Court were to conclude that Plaintiffs have stated a cause of action (they have not), the remedy they seek is simply unavailable as a matter of law.

I. The 2011 Map is a Legal Nullity

Pennsylvania creates its Congressional districts through legislation, and the 2011 map was passed in the form of the Pennsylvania Congressional Redistricting Act of 2011 (the "2011 Act"). On February 7, 2018, the Pennsylvania Supreme Court ruled that the 2011 Act violated Article I, Section 5 of the Pennsylvania Constitution. *League of Women Voters v. Commonwealth*, No. 159 MM 2017, 2018 WL 750872, at *51 (Pa. Feb. 7, 2018). The effect of that ruling was to render the 2011 Act a legal nullity, as if it had never existed. *See Commonwealth v. Barnes*, 637 Pa. 493, 503 (2016) ("As that [statute] has now been rendered unconstitutional on its face…it is as if that statutory authority never existed); *Commonwealth v. Wolfe*, 636 Pa. 37, 53 (2016) ("…a sentence based on an unconstitutional statute that is incapable of severance is void"); *Commonwealth v.*

Michuck, 686 A.2d 403, 407 (Pa. Super. Ct. 1996) ("An unconstitutional statute 'is ineffective for any purpose since its unconstitutionality dates from the time of its enactment and not merely from the date of the decision holding it so'"). Accordingly, as a matter of Pennsylvania law, the citizens of Pennsylvania are in the same position as if the legislature had never drawn a map after the 2010 census.

II. In the Absence of Valid State Redistricting Legislation, the Court is Bound to Follow 2 U.S.C. § 2a(c)(5) and Order an At-Large Election.

Plaintiffs fail to appreciate the import of the declaration of unconstitutionality. Even if this Court were to somehow find a flaw in the Pennsylvania Supreme Court's map drawing process, there would be no refuge in the old unconstitutional map, which now forms no part of the law of the Commonwealth of Pennsylvania.

Fortunately, Congress contemplated the possibility that political gridlock or other circumstances could result in the failure of a state to redistrict in time for a Congressional election, and Congress provided the solution outlined in 2 U.S.C. § 2a(c):

> Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner…**(5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.**

(emphasis added).[2] The text of 2 U.S.C. § 2a(c)(5) could not be more clear. If a State has not redistricted in the manner provided by state law, and if there is a decrease in the number of Representatives and the number of districts exceeds that decreased number, all Representatives shall be elected at large.

The Supreme Court, in considering § 2a(c), has described it as "a last-resort remedy to be applied when, on the eve of a congressional election, no constitutional redistricting plan exists and there is no time for either the State's legislature or the courts to develop one." *Branch v. Smith*, 538 U.S. 254, 274 (2003) (plurality opinion). If the state legislature and state courts have all failed to produce a map that complies with state and federal law, then Congress's fallback provision, expressed in § 2a(c)(5), applies.

The *Branch* test is met here. The 2011 Pennsylvania congressional reapportionment reduced the size of Pennsylvania's delegation to the House of Representatives by one. *League of Women Voters*, 2018 WL 750872 at *3. The legislature then failed to draw a legal map. Given the timing of these proceedings

[2] The Supreme Court has noted on multiple occasions that § 2a(c)(1)-(4) are likely unconstitutional under its subsequent election law jurisprudence. *See Arizona State Legislature v. Arizona Indep. Redistricting Com'n*, 435 S.Ct. 2652, 2670 (2015); *Branch v. Smith*, 538 U.S. 254, 273 (2003) (plurality opinion). However, this does not apply to § 2a(c)(5), and the Court has explicitly stated that use of § 2a(c)(5) might be necessary in some circumstances. *Branch*, 538 U.S. at 273-74 (plurality opinion).

and the impending election, if the Plaintiffs are successful, the courts will have no time to draw a new map. That is precisely the circumstance envisioned under *Branch*. Accordingly, the Congressional fallback of 2 U.S.C. § 2a(c)(5) would become operative, requiring an at-large election.

Nor can this statutory provision be brushed aside in favor of vague notions of equity. Equity follows the law, not the other way around, and when Congress legislates in an area, courts are not free to substitute their own judgment for that of Congress. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 270 (2009); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 626 (1978), *overruled on other grounds by Miles v. Apex Marine Corp.*, 498 U.S. 19, 32-33 (1990). Section 2a(c)(5) constitutes the considered judgment of Congress as to the proper manner for conducting an election when no valid state map exists and there is no time for court-ordered redistricting. Indeed, the language of the provision is mandatory, stating that representatives "***shall be*** elected in the following manner . . . ." There is no equitable wiggle room if this Court were to conclude that the Pennsylvania Supreme Court's map is invalid. The remedy Plaintiffs seek is simply unavailable as a matter of law, and on this independent basis the motion for injunctive relief should be denied.

Respectfully submitted,

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