

Unsuccessful Injunction Against State Court Proscription on Political Gerrymandering

League of Women Voters of Pennsylvania v. Pennsylvania
(Michael M. Baylson, E.D. Pa. 2:17-cv-5137)
and Corman v. Torres (Christopher C. Conner, Kent A.
Jordan, and Jerome B. Simandle, M.D. Pa. 1:18-cv-443)

After a state supreme court redrew congressional district lines to remedy excessive partisan gerrymandering, opponents of the new lines sought a federal court injunction against the state court decision. A three-judge district court declined to enjoin the state court's new lines. An earlier attempt to remove the litigation to federal court was unsuccessful because the removal was attempted without the consent of all defendants.

Subject: District lines. *Topics:* Matters for state courts; malapportionment; three-judge court; intervention; case assignment; removal; attorney fees.

Litigation over partisan gerrymandering in 2017 and 2018 included a federal court challenge to a state supreme court's redistricting the state's members of Congress. Related actions were resolved in one of the state's other districts.

Challenging Pennsylvania's Supreme Court

According to a federal complaint filed in the Middle District of Pennsylvania on February 22, 2018, "This is an action concerning, *inter alia*, the Pennsylvania Supreme Court's striking of a validly-enacted congressional districting plan and issuance of a substitute plan, each action in direct violation of the Elections Clause of the United States Constitution (the 'Elections Clause')."¹

Pennsylvania's supreme court declared on January 22 "that the Congressional Redistricting Act of 2011 clearly, plainly and palpably violates the Constitution of the Commonwealth of Pennsylvania" and enjoined Pennsylvania from using the plan in 2018 congressional elections.² On February 5, 2018, United States Supreme Court Justice Alito declined petitions to stay the injunction.³ The Pennsylvania court said that it would begin procedures

1. Complaint, *Corman v. Torres*, No. 1:18-cv-443 (M.D. Pa. Feb. 22, 2018), D.E. 1 [hereinafter *Corman* Complaint]; *Corman v. Torres*, 287 F. Supp. 3d 558, 565 (M.D. Pa. 2018).

2. *League of Women Voters of Pa. v. Commonwealth*, 175 A.3d 282 (Pa.), *cert. denied*, 586 U.S. ___, 139 S. Ct. 445 (2018); *see Corman*, 287 F. Supp. 3d at 564; *see also* Michael Wines & Trip Gabriel, *Pennsylvania District Map Is Ruled Unconstitutional*, N.Y. Times, Jan. 23, 2018, at A10.

3. Docket Sheet, *McCann v. League of Women Voters of Pa.*, No. 17A802 (U.S. Jan. 29, 2018); Docket Sheet, *Turzai v. League of Women Voters of Pa.*, No. 17A795 (U.S. Jan. 26, 2018); *see* Adam Liptak, *Justices Decline to Halt Court's Order to Redraw a Partisan Election Map*, N.Y. Times, Feb. 6, 2018, at A10.

to establish new districts unless the other two branches of government submitted a constitutional plan by February 15.⁴ A 139-page opinion issued on February 7 explained the court's conclusions.⁵ "The General Assembly failed to pass legislation for the Governor's approval, thereby making it impossible for our sister branches to meet the Court's deadline."⁶ So the court adopted a remedial plan, "which shall be implemented forthwith in preparation for the May 15, 2018 primary election."⁷ The United States Supreme Court declined to stay the ruling.⁸

The plaintiffs—the majority leader of Pennsylvania's senate, the chair of the senate committee with jurisdiction over congressional districting, and eight Pennsylvania members of Congress—filed with their complaint against Pennsylvania's election officials a motion for a temporary restraining order and a preliminary injunction.⁹ Because the case challenged the state court's congressional redistricting, the plaintiffs also filed a notice requesting appointment of a three-judge district court.¹⁰

On the day that the federal complaint was filed, state court plaintiffs moved to intervene as additional defendants in the federal case.¹¹

On February 23, Chief Circuit Judge D. Brooks Smith appointed Circuit Judge Kent A. Jordan and District of New Jersey Judge Jerome B. Simandle to join Middle District of Pennsylvania Judge Christopher C. Conner as the three-judge district court.¹² That day, the National Democratic Redistricting Committee moved to intervene as yet another defendant.¹³

On the day that it was appointed, the three-judge court denied the plaintiffs immediate relief, but set the case for expedited consideration, with a hearing scheduled for March 9.¹⁴

Following a March 1 hearing on the intervention motions,¹⁵ the court decided on March 2 to grant intervention as defendants to individual voters who were plaintiffs in the state court case, but to deny intervention to the League

4. *League of Women Voters of Pa.*, 175 A.3d 282; see *Corman*, 287 F. Supp. 3d at 564.

5. *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018).

6. *League of Women Voters of Pa. v. Commonwealth*, 181 A.3d 1083, 1086 (Pa. 2018).

7. *Id.* at 1087; see *Corman*, 287 F. Supp. 3d at 561, 565 (noting, "Pennsylvania's Republican-dominated General Assembly and Democratic Governor were unable to agree on remedial congressional redistricting legislation by the deadlines mandated in the January 22 order.").

8. *Turzai v. League of Women Voters*, 583 U.S. ___, 138 S. Ct. 1323 (2018); see Adam Liptak, *Justices Won't Block Pennsylvania Redistricting*, N.Y. Times, Mar. 20, 2018, at A20.

9. Motion, *Corman v. Torres*, No. 1:18-cv-443 (M.D. Pa. Feb. 22, 2018), D.E. 3; see *Corman* Complaint, *supra* note 1; *Corman*, 287 F. Supp. 3d at 561.

10. Notice, *Corman*, No. 1:18-cv-443 (M.D. Pa. Feb. 22, 2018), D.E. 4; see 28 U.S.C. § 2284(a) (2016).

11. Intervention Brief, *Corman*, No. 1:18-cv-443 (M.D. Pa. Feb. 22, 2018), D.E. 6; Intervention Motion, *id.* (Feb. 22, 2018), D.E. 5.

12. Order, *id.* (Feb. 23, 2018), D.E. 11.

13. Intervention Brief, *id.* (Feb. 23, 2018), D.E. 13; Intervention Motion, *id.* (Feb. 23, 2018), D.E. 12; *Corman*, 287 F. Supp. 3d at 565–66.

14. Order, *Corman*, No. 1:18-cv-443 (M.D. Pa. Feb. 23, 2018), D.E. 19.

15. Intervention Hearing Transcript, *id.* (Mar. 1, 2018, filed Mar. 8, 2018), D.E. 125.

of Women Voters—at one time a state court plaintiff—and the National Democratic Redistricting Committee, allowing them nevertheless to participate as amici curiae.¹⁶

On March 19, the court determined that the federal plaintiffs did not have standing to pursue their complaint.¹⁷ The state legislators did not have standing because “a legislator suffers no Article III injury when alleged harm is borne equally by all members of the legislature.”¹⁸ As to the members of Congress, “Case law strongly suggests that a legislator has no legally cognizable interest in the composition of the district he or she represents.”¹⁹

On April 10, the court denied a pro se motion to intervene and seek reconsideration of the court’s decision.²⁰ The court of appeals affirmed denial of intervention on September 25, because the movant’s

motion does not address how his particular participation would be required to achieve in some concrete fashion the relief sought. We note that, in seeking to intervene on the defendants’ side, the eighteen individual state-court petitioners, who were granted leave to intervene by the District Court, were the only parties to present evidence at trial of the 2011 map’s invalidity and the qualities of a map that would comply with the Pennsylvania Constitution.²¹

The United States Supreme Court declined review of the decision by Pennsylvania’s supreme court.²²

Federal Gerrymander Challenges Based on the Elections Clause

A federal complaint filed in the Eastern District of Pennsylvania on October 2, 2017, argued, “Because the Elections Clause is a source of only neutral procedural rules, it does not give [Pennsylvania’s] General Assembly the authority to draw Congressional districts based on the likely voting preferences of plaintiffs and other citizens.”²³ The Elections Clause, which is the first paragraph of the Constitution’s Article I, section 4, authorizes states to determine how members of Congress will be selected and it also authorizes Congress to regulate the states on this issue: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter

16. Order, *id.* (Mar. 2, 2018), D.E. 85; *Corman*, 287 F. Supp. 3d at 565.

17. *Corman*, 287 F. Supp. 3d 558; see Intervention Hearing Transcript, *supra* note 15, at 38 (“Judge Jordan: . . . The League of Women Voters was not a party to the suit at the end in the state system . . .”).

18. *Id.* at 567; see *Raines v. Byrd*, 521 U.S. 811, 821 (1997).

19. *Corman*, 287 F. Supp. 3d at 569.

20. Order, *Corman*, No. 1:18-cv-443 (M.D. Pa. Apr. 10, 2018), D.E. 140; see Intervention Motion, *id.* (Apr. 3, 2018), D.E. 139.

21. *Corman v. Secretary*, 751 F. App’x 157, 160–61 (3d Cir. 2018).

22. *Turzai v. League of Women Voters of Pa.*, 586 U.S. ____, 139 S. Ct. 445 (2018).

23. Complaint at 1, *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa. Oct. 2, 2017), D.E. 1; see Amended Complaint, *id.* (Nov. 17, 2017), D.E. 88.

such Regulations, except as to the Places of choosing Senators.”²⁴ In later briefing, the plaintiffs argued that gerrymanders meant to affect the outcome of congressional elections are ultra vires under the Elections Clause.²⁵

Following a four-day trial in December,²⁶ a three-judge court ruled on January 10, 2018, by a vote of two to one, against the plaintiffs.²⁷ Chief Circuit Judge Smith did not see in the Elections Clause a role for the courts in selecting members of Congress.²⁸

Circuit Judge Patty Shwartz concluded that the plaintiffs could not prevail because although they included voters in every one of Pennsylvania’s congressional districts, the plaintiff in one district did not present a strong enough case.²⁹ “Plaintiffs have adduced evidence that plaintiffs from seventeen of the eighteen districts suffered an injury in fact. They, however, failed to present facts to show that the plaintiff from the Fourth Congressional District sustained an injury sufficient to confer standing.”³⁰ The plaintiff from District 4 testified that her district was less gerrymandered than the others.³¹ “Although there may be a case in which a political gerrymandering claim may successfully be brought under the Elections Clause, this is not such a case.”³²

District Judge Michael M. Baylson, to whom the case was originally assigned, concluded on the other hand, “Gerrymandering is a wrong in search of a remedy.”³³ “In summary, the history of the Elections Clause and the United States Supreme Court decisions [interpreting the clause] establish that there are substantive restrictions on states when they determine the ‘manner’ of apportioning voters into congressional districts.”³⁴

The court assigned to Judge Baylson as a related case another challenge to partisan gerrymandering as a violation of the Elections Clause, equal protection, and freedom of speech and association.³⁵ On November 22, 2017, Judge Baylson stayed the second case, which was filed on November 9, pending the completion of the first case’s trial.³⁶ Following resolution of the first case, Judge Baylson granted the parties in the second case a stipulated dismissal.³⁷

24. U.S. Cons. art. I, § 4.

25. Plaintiff Brief at 1–2, *Agre*, No. 2:17-cv-4392 (E.D. Pa. Nov. 30, 2017), D.E. 157.

26. Transcripts, *id.* (Dec. 4 to 7, 2017, filed Dec. 13, 2017), D.E. 195 to 198.

27. *Agre v. Wolf*, 284 F. Supp. 3d 591 (E.D. Pa. 2018), *appeal dismissed for want of jurisdiction*, 584 U.S. ___, 138 S. Ct. 2602 (2018) (ruling by the district court on speech or debate immunity), and *appeal dismissed as moot*, 584 U.S. ___, 138 S. Ct. 2576 (2018).

28. *Agre*, 284 F. Supp. 3d at 592–630.

29. *Id.* at 630–48.

30. *Id.* at 642.

31. *Id.*

32. *Id.* at 631.

33. *Id.* at 648 (Judge Baylson, dissenting).

34. *Id.* at 696.

35. Docket Sheet, *Diamond v. Torres*, No. 5:17-cv-5054 (E.D. Pa. Nov. 9, 2017); Complaint, *id.* (Nov. 9, 2017), D.E. 1; *see* Amended Complaint, *id.* (Nov. 2, 2017), D.E. 42.

36. Order, *id.* (Nov. 22, 2017), D.E. 40.

37. Stipulated Dismissal, *id.* (Apr. 9, 2018), D.E. 86.

Improper Removal

A third related case before Judge Baylson was an action removed by a state senator concerning how Pennsylvania's supreme court's pending decision on gerrymandering would affect an ongoing special election to fill a congressional vacancy.³⁸ The plaintiffs filed an emergency motion to remand the case two days later,³⁹ and Judge Baylson set the case for hearing at 2:00 p.m. that afternoon.⁴⁰ Pennsylvania's lieutenant governor—one of the defendants—filed a motion to remand the case, noting his lack of consent to the removal.⁴¹ The removing senator then sought to withdraw his removal.⁴²

Following the hearing, at which Judge Baylson noted chambers time spent on the clearly improper removal,⁴³ he remanded the case to state court.⁴⁴ On April 13, 2018, Judge Baylson awarded the plaintiffs \$29,360.02 in attorney fees and costs.⁴⁵

The court of appeals decided to post a video recording of a November 7 oral argument on the court's website.⁴⁶ On April 24, 2019, the court of appeals affirmed the fee award, but the court determined that because the senator was named as a defendant in his official capacity it was not proper to hold him personally liable for fees.⁴⁷

38. Notice of Removal, *League of Women Voters of Pa. v. Pennsylvania*, No. 2:17-cv-5137 (E.D. Pa. Nov. 14, 2017), D.E. 1; *League of Women Voters of Pa. v. Pennsylvania*, 921 F.3d 378, 381 (3d Cir. 2019).

39. Motion, *League of Women Voters of Pa.*, No. 2:17-cv-5137 (E.D. Pa. Nov. 16, 2017), D.E. 2; *League of Women Voters of Pa.*, 921 F.3d at 381.

40. Notice, *League of Women Voters of Pa.*, No. 2:17-cv-5137 (E.D. Pa. Nov. 16, 2017), D.E. 3.

41. Motion, *id.* (Nov. 16, 2017), D.E. 5.

42. Motion, *id.* (Nov. 16, 2017), D.E. 9; *League of Women Voters of Pa.*, 921 F.3d at 381–82.

43. Transcript at 8, *League of Women Voters of Pa.*, No. 2:17-cv-5137 (E.D. Pa. Nov. 16, 2017, filed Nov. 21, 2017), D.E. 22.

44. Order, *id.* (Nov. 16, 2017), D.E. 15; *League of Women Voters of Pa.*, 921 F.3d at 380.

45. Opinion, *League of Women Voters of Pa.*, No. 2:17-cv-5137 (E.D. Pa. Nov. Apr. 13, 2018), D.E. 28, 2018 WL 1787211.

46. Docket Sheet, *League of Women Voters of Pa. v. Pennsylvania*, No. 18-1838 (3d Cir. Apr. 18, 2018); player.piksel.com/v/refid/3CA/prefid/18_1838 (video recording of oral argument).

47. *League of Women Voters of Pa.*, 921 F.3d 378.