

EXHIBIT 1

**IN THE 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; JONATHAN M.
MARKS, in his official capacity as
Commissioner of the Bureau of
Commissions, Elections, and
Legislation,

Defendants.

CIVIL ACTION

No. 1:18-cv-00443-CCC-KAJ-JBS

Three-Judge Panel

Pursuant to 28 U.S.C. § 2284(a)

Circuit Judge Kent Jordan

Chief Judge Christopher Conner

District Judge Jerome Simandle

SUPPLEMENTAL AFFIDAVIT OF JONATHAN M. MARKS

Jonathan M. Marks, being duly sworn, deposes and says:

1. I submit this Supplemental Affidavit to correct or clarify statements in two of the affidavits attached to Plaintiffs' Reply Brief in Further Support of Motion for Preliminary Injunction and to respond to a proposed remedy raised by Intervenors.

Declaration of Former Secretary Aichele

2. Former Secretary of the Commonwealth Carol Aichele has submitted a Declaration concluding that it would be possible to conduct the congressional primary on May 15 if a court reinstates the 2011 Plan by March 16. *See* March 7, 2018 Declaration of Carol Aichele, Ex. C to Plaintiffs' Reply ("Aichele Decl.") ¶ 12.

3. Former Secretary Aichele is incorrect. I emphatically reiterate the statement I made in paragraph 70 of my March 2 affidavit: It will not be possible to hold the 2018 congressional primary as scheduled if it must proceed under any map other than the Current Plan.

4. Former Secretary Aichele's conclusion overlooks important legal requirements and practical realities of election preparation.

5. First, Former Secretary Aichele assumes that if a court ordered the reinstatement of the 2011 Plan on March 16, the Department could have petition

packages ready in time for candidates to begin circulating them on March 20. *Id.* ¶ 13.

6. While the Department might be able to use the 2011 Plan's stored data to have petition packages available within this short time frame, the Department has never attempted to use stored data in this fashion. *See* my March 2, 2018 Affidavit ("March 2 Aff.") ¶ 76. Therefore, it may not be possible to begin a petition period on March 20.

7. After the Current Plan was issued, the Department posted nomination petitions on its website five days before the petition circulation period began. *Id.* ¶ 30. During the five days between the posting and the start of the petition circulation period, 125 candidates created and downloaded petitions. In my experience, candidates prefer to download their petitions far enough in advance of the start of the circulation period to make copies and distribute the petitions to the people who will circulate them.

8. Under Former Secretary Aichele's plan, however, candidates will likely have less than 24 hours between the time that they can download petitions and the time that they may begin to circulate them.

9. Former Secretary Aichele's proposed schedule also makes it impossible for counties to comply with state and federal statutory deadlines that

require counties to begin delivering military-overseas absentee ballots 45 days before an election. *See* March 2 Aff. ¶ 57.

10. Under Former Secretary Aichele's proposed timeline, the deadline for filing nomination petitions would fall on April 3, *see* Aichele Decl. ¶ 13, which is seven days after the date by which the Secretary must send the counties a list of congressional candidates known to exist at the time, seven days after the first deadline of March 26 for remote military-overseas voters, and three days after the second deadline of March 30 for all other military-overseas voters.

11. As a result, candidates will still be circulating petitions, and counties will not know who is running for congressional seats, when the military absentee ballots are deployed. Instead, these ballots will have to be mailed out with no names of congressional candidates at all, but rather instructions on how to obtain candidate information at a later time.

12. Former Secretary Aichele's proposed timeline also requires candidates to collect the statutorily established 1,000 signatures without any advance preparation, and in an abbreviated circulation period of two weeks, rather than the usual three. *Id.* ¶ 13. If the proposed timeline is adjusted to allow counties to comply with military absentee deadlines, the circulation period shrinks to just one week.

13. In my experience, shortening the circulation period so significantly and giving candidates so little time to prepare will generate voluminous litigation by putative candidates who believe they were not given sufficient time to obtain the requisite signatures.

14. The proposed timeline is also very likely to jeopardize the critical period that counties need in order to adequately prepare for the primary.

15. I believe, and stated in my December 14, 2017 affidavit, that counties need six to eight weeks after the close of the nomination petition period to prepare for a primary election. *See* March 2 Aff. Ex. 1 ¶ 16.

16. The schedule currently in place, which I believe to be the most compressed schedule possible, gives counties eight weeks between the close of the nominations period and the primary date.

17. Under Former Secretary Aichele's proposed timeline, counties will need to begin programming ballots and testing voting systems before the objections period even begins. Under the Election Code, objections do not have to be filed until April 10, *see* 25 P.S. § 2937, after which the Commonwealth Court must adjudicate, and the Pennsylvania Supreme Court must review, any objections made. *See* 42 Pa.C.S. § 764; *see also* Pa.R.A.P. 903(c)(1)(ii); Pa.R.A.P. 1101.

18. Former Secretary Aichele's proposed timeline also overlooks other deadlines that will impact counties' ability to prepare ballots in the six weeks

between April 3 and May 15, including the candidate withdrawal deadline and the ballot lottery, which determines ballot order of the candidates. The counties cannot program voting machines until these details are determined.

19. Former Secretary Aichele's timeline also threatens to affect civilian absentees' access to the ballot box. Although counties are not statutorily required to mail out civilian absentee ballots until May 1, many counties prepare ballots in advance of this deadline in order to compensate for the realities of the U.S. Postal Service's transit time. Even short delays in this timeline would make it impossible for absentee voters outside the Commonwealth to timely return their voted ballots. Civilian absentee ballots must be received by the counties – not merely postmarked – by 5:00 PM on the Friday before the election, or they cannot be counted.

20. Former Secretary Aichele suggests that her proposed changes should be made “before much activity has taken place in connection with” the Current Plan. Aichele Decl. ¶ 17. But as set forth in my previous affidavit, a tremendous amount of effort has already been expended to implement the Current Plan. March 2 Aff. ¶¶ 26-48. Counties are continuing to move forward with ballot notices and have already published their newspaper advertisements. The Department of State has engaged in an unprecedented voter and candidate education campaign. To date, 182 candidates have downloaded and begun to circulate nomination petitions. Unraveling these efforts would come at a great cost.

21. Moreover, Former Secretary Aichele's proposed schedule places additional severe strains on the 2018 election cycle.

22. When, back in December 2017, I and my team considered whether it would be possible to amend the elections calendar to accommodate a new congressional map, we carefully analyzed the impact that each potential administrative adjustment and deadline change might have on voters', candidates', and counties' ability to participate in a fair, orderly primary. Based on these calculations, we determined that a two-week shift in certain early deadlines was the maximum feasible adjustment, and accordingly, concluded that any new map needed to be put into place no later than February 20.

23. Former Secretary Aichele suggests starting the clock over again almost a month after that date. This proposed timeline is so compressed that it creates an unacceptable level of risk of error, confusion, and ultimately voter disenfranchisement.

24. Based on my years of experience with Pennsylvania elections, I believe that adopting Former Secretary Aichele's proposed timeline would endanger the integrity of Pennsylvania's 2018 congressional primaries, and could have spillover effects that would compromise the integrity of other primary races.

Affidavit of Cheryl Corsa

25. In my March 2, 2018 Affidavit, I described the Department's updates to the voter registration files in the Statewide Uniform Registry of Electors ("SURE"). *See* March 2 Aff. ¶¶ 32-33.

26. The only information in the SURE system that is affected by the changes to voting districts is the voters' congressional districts. The Department is not statutorily required to provide this information in the SURE system. *See* 25 Pa.C.S. § 1404 ("[T]he information provided shall contain the name, address, date of birth and voting history. . . . The list may also include information on voting districts."). Nonetheless, the Department provides this information as a courtesy.

27. As I stated in my Affidavit, the Department completed its updates of the overwhelming majority (8,347,549 out of 8,436,596) of voter registration files on February 23. March 2 Aff. ¶ 32.

28. The remaining voter registration files are in the 14 counties that are split between voting districts. The Department has been working with those counties over the last two weeks to ensure that the remaining files are updated as quickly as possible.

29. As of March 8, eight of the 14 counties had completed their updates. Approximately 29,000 voter records—less than 0.5% of the Commonwealth's voter files – remain to be updated.

30. After the Department completed its bulk updates of the SURE system on February 23, we intended to spend additional time verifying the updates before posting the new data in downloadable form. However, we had the system set up to automatically post updates once a week. Early in the morning of Monday, February 26, such an automatic update took place, resulting in the posting of inaccurate data.

31. As described in her Affidavit, at 9:07 AM, Cheryl Corsa downloaded a Full Voter Export (“FVE”) that contained the inaccurate data. *See* March 7, 2018 Affidavit of Cheryl Corsa, Ex. E.1 to Plaintiffs’ Reply (“Corsa Aff.”) ¶ 3. Ms. Corsa is the only person who ever downloaded that data. By 10:00 AM, the Bureau had spotted the error and removed the data, replacing it with an older version of the data.

32. By Wednesday, February 28, an FVE reflecting the Current Plan was made available online. As Ms. Corsa acknowledges, the FVE website stated that some voter records were still being updated: “Voter records in 2 townships and 29 wards within 14 counties that are split by the Remedial Plan will continue to be updated as those county election offices make necessary changes to reflect the new congressional districts.” Corsa Aff. Ex. 5. The statement explained where users could go to find details regarding those split townships and wards. *Id.*

33. Information that will help candidates match the Current Plan's boundaries to the tiny percentage of voters whose data has not yet been updated is available from many sources other than the Department's FVE. The most important of these are the counties themselves, which are responsible for providing this information in the first place. As Ms. Corsa acknowledges, this information is also reflected in the certified textual descriptions of the districts posted on the Department's website. Corsa Aff. ¶ 13.

34. Ms. Corsa is also correct that at one point, the SURE system displayed incorrect congressional district information for one voting division (approximately 934 voters) in Clarion County. Corsa Aff. ¶ 11. Bureau staff identified that anomaly and corrected it on March 2.

35. I do not believe that the incorrect data for the Clarion County division could have caused problems to any candidate, because all of Clarion County is in District 15.

36. The Bureau has communicated with Ms. Corsa about her concerns, and has given her an extra day of free access to FVE downloads.

37. To my knowledge, no user of the FVE other than Ms. Corsa has called the Help Desk to complain about the small number of voter records in the SURE system that remain to be updated.

38. It is extremely important to me that the data provided by the Department be as up to date and accurate as possible. For that reason, the Bureau is working closely with the counties who have not yet completed their data updates, with the goal of ensuring that all of the millions of records in the SURE system are up to date.

39. The Department is also trying to eliminate any confusion by keeping the SURE system home page updated with warnings that certain townships and wards remain to be updated. Ms. Corsa acknowledges reading these warnings. Corsa Aff. Exs. 4, 5, 6, 9.

The Consequences of an At-Large Election

40. In the event that the Current Plan is stayed, Intervenors suggest that a statewide at-large congressional election might be legally required under 2 U.S.C. § 2a(c).

41. An at-large congressional election would be unprecedented in the Commonwealth. The Election Code does not provide any guidance on how such an election should be organized, and the Department does not have any institutional experience with, or existing guidelines for, running this type of election. New requirements and procedures would have to be developed or adapted to address many aspects of the process: for example, to determine how many signatures the candidates should be required to collect and from where.

42. The Commonwealth and the counties would also face significant logistical challenges, many of which are not yet even knowable, in implementing such a novel remedy. For example, the Department would be required to adjust existing voting machines and balloting systems to accommodate the large number of names that would appear on every ballot in both the primary and general election. It is unclear whether the voting systems currently certified for use in the Commonwealth can all accommodate such a high volume of candidates.

43. Any outside machines leased by the Commonwealth would need to be inspected and certified by the state certification system and be compliant under the Americans with Disabilities Act in time for the primary. It is unclear whether there would be sufficient time to get new voting systems certified and whether vendors will be able to meet the increased demand for voting systems.

44. An at-large election would also require a massive training and education effort to ensure that poll workers and voters understand the new ballot and voting systems.

45. An at-large format also poses risks to the integrity of the election. For example, although this list is by no means exclusive, an at-large format would favor candidates with the largest financial resources who can advertise statewide or target large cities. There will be no way to ensure a reasonable distribution of candidates, geographically or otherwise, potentially resulting in an

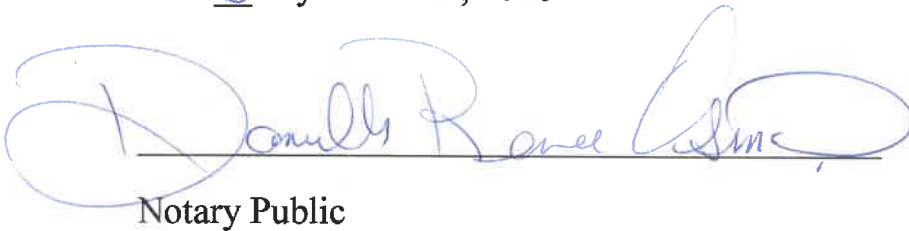
unrepresentative congressional delegation. Because the ballot requires candidates from the party of the governor (Democratic) to be listed first, an at-large ballot would also disadvantage Republican and third-party candidates in the general election, where they will be listed 19th and below.



Jonathan M. Marks

Sworn to and subscribed before me

This 8 day of March, 2018



Notary Public

