

No. 18-1816

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

**JACOB CORMAN, in his official capacity as Majority Leader of the
Pennsylvania Senate, *et al.*, Plaintiff,**

v.

**ROBERT TORRES, in his official capacity as Acting Secretary of the
Commonwealth, *et al.*, Defendants-Appellees,**

CARMEN FEBO SAN MIGUEL, *et al.*, Intervenor-Defendants,

JEFFREY CUTLER, Appellant

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA**

BRIEF FOR DEFENDANTS-APPELLEES

Thomas P. Howell
Office of General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17101

Timothy E. Gates
Kathleen M. Kotula
Pennsylvania Department of State
Office of Chief Counsel
306 North Office Building
Harrisburg, PA 17120

Mark A. Aronchick
Michele D. Hangle
Hangle Aronchick Segal Pudlin &
Schiller
One Logan Square, 27th Floor
Philadelphia, PA 19103

*Attorneys for Defendants-Appellees
Robert Torres, in his official capacity as
Acting Secretary of the Commonwealth
of Pennsylvania, and Jonathan M.
Marks, in his official capacity as
Commissioner of the Bureau of
Commissions, Elections, and Legislation*

TABLE OF CONTENTS

COUNTERSTATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION.....1

COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW1

COUNTERSTATEMENT OF RELATED PROCEEDINGS.....1

COUNTERSTATEMENT OF THE CASE.....2

SUMMARY OF ARGUMENT AND ARGUMENT.....3

CONCLUSION.....4

TABLE OF AUTHORITIES

Page(s)

Cases

Page v. Bartels,
248 F.3d 175 (3d Cir. 2001) 1

Statutes

28 U.S.C. § 1253 1
28 U.S.C. § 1291 1
28 U.S.C. § 1331 1
28 U.S.C. § 2284(a) 1

COUNTERSTATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The case appealed from, *Corman v. Torres*, raised a federal question; accordingly, the District Court exercised jurisdiction pursuant to 28 U.S.C. § 1331. Because the plaintiffs challenged the constitutionality of the apportionment of congressional districts, a three-judge panel was appointed pursuant to 28 U.S.C. § 2284(a).

This Court's jurisdiction depends on the basis for Mr. Cutler's appeal. To the extent Mr. Cutler is appealing from the District Court's denial of the motion for preliminary injunction, then this Court lacks jurisdiction over the appeal. *See* 28 U.S.C. § 1253; *Page v. Bartels*, 248 F.3d 175, 185 (3d Cir. 2001). Otherwise, this Court has jurisdiction under 28 U.S.C. § 1291.

COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

Where Mr. Cutler has not set forth any basis to challenge the District Court's Orders, should this Court affirm them?

COUNTERSTATEMENT OF RELATED PROCEEDINGS

The congressional districts at issue in the underlying proceedings have also been the subject of other recent cases in Pennsylvania and federal courts. These cases are as follows:

- *League of Women Voters of Pennsylvania, et al., v. Commonwealth of Pennsylvania, et al.*, No. 261 M.D. 2017 (Commonwealth Court of

Pennsylvania), No. 159 MM 2017 (Supreme Court of Pennsylvania), and Nos. 17A795, 17A802, 17A909, and 17-1700 (U.S. Supreme Court)

- *Agre, et al., v. Wolf, et al.*, No. 17-cv-4392 (U.S. District Court for the Eastern District of Pennsylvania) and Nos. 17-1339 and 17-1368 (U.S. Supreme Court)
- *Diamond, et al., v. Torres, et al.*, No. 17-cv-5054 (U.S. District Court for the Eastern District of Pennsylvania)
- *League of Women Voters of Pennsylvania, et al., v. Commonwealth of Pennsylvania, et al.*, No. 17-cv-5137 (U.S. District Court for the Eastern District of Pennsylvania) and No. 18-1838 (U.S. Court of Appeals for the Third Circuit)

All of these proceedings have been completed except for a pending petition for certiorari in the *League of Women Voters* case, docketed at No. 17-1700 before the U.S. Supreme Court, and the appeal pending in this Court at No. 18-1838.

The cases listed on pages 1-2 of Mr. Cutler's Brief are not related to these proceedings.

COUNTERSTATEMENT OF THE CASE

On February 22, 2018, a group of Pennsylvania state and federal legislators filed the underlying lawsuit against Defendant-Appellees, Robert Torres, in his official capacity as Acting Secretary of the Commonwealth of Pennsylvania, and Jonathan M. Marks, in his official capacity as Commissioner of the Bureau of Commissions, Elections, and Legislation. The plaintiffs also moved for a preliminary injunction, asking the District Court to enjoin implementation of a congressional map issued by the Pennsylvania Supreme Court and order that

Pennsylvania's 2018 congressional elections be held in accordance with a different map. After briefing and oral argument, on March 19, 2018, the District Court dismissed the complaint and denied the plaintiffs' motion for a preliminary injunction, holding that the plaintiffs lacked standing to pursue their claims. *See* R.5a-28a.

Mr. Cutler, who had not previously participated in the lawsuit, filed a motion to intervene as a plaintiff and for reconsideration. R.45a-210a. The District Court denied this Motion as untimely and without merit on April 10, 2018, noting that Mr. Cutler had not articulated a basis for leave to intervene and that he had not complied with court rules. R.29a-30a. Mr. Cutler filed a Notice of Appeal of the District Court's March 19 and April 10, 2018 Orders.

SUMMARY OF ARGUMENT AND ARGUMENT

Mr. Cutler's Brief largely discusses matters that have no relationship to the underlying lawsuit, including criminal sentencing guidelines, the Affordable Care Act, and unrelated civil and criminal proceedings. To the extent that the Brief touches on the substance of the case appealed from, it discusses amendment of the Pennsylvania Constitution, an issue that did not arise below and was not preserved for appeal. *See* Br. at 2-3. The Brief does not address standing, the District Court's jurisdiction, or the District Court's explanation of why Mr. Cutler was not entitled to

intervene, and therefore provides no basis for this Court to reverse the District Court's Orders under any standard of review.

CONCLUSION

For the reasons stated above, this Court should reject Mr. Cutler's appeal and affirm the District Court's Orders of March 19 and April 10, 2018.

Respectfully submitted,

Dated: August 1, 2018

Thomas P. Howell
Office of General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17101
Tel: (717) 783-6563
Fax: (717) 787-1788
thowell@pa.gov

Timothy E. Gates
Kathleen M. Kotula
Pennsylvania Dept. of State
Office of Chief Counsel
306 North Office Building
Harrisburg, PA 17120
Tel: (717) 783-0736
tgates@pa.gov
kkotula@pa.gov

/s/ Mark A. Aronchick

Mark A. Aronchick
Michele D. Hangle
Hangle Aronchick Segal Pudlin & Schiller
One Logan Square, 27th Floor
Philadelphia, PA 19103
Tel: (215) 568-6200
Fax: (215) 568-0300
maa@hangle.com
mdh@hangle.com

*Attorneys for Acting Secretary Torres and
Commissioner Marks*

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume requirements of Fed. R. App. P. 32(a)(7)(B), because it contains 698 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirement of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2013 in 14-point Times New Roman font.

3. The hard copies and the electronic copy of this brief are identical.

4. The electronic copy of this brief has been virus scanned using Trend Microscan and no virus was detected.

Dated: August 1, 2018

/s/ Mark A. Aronchick

Mark A. Aronchick

CERTIFICATE OF SERVICE

I, Mark Aronchick, hereby certify that on August 1, 2018, a true and correct copy of the foregoing Brief for Defendants-Appellees was filed via the Court's CM/ECF system, which will provide electronic notice to all counsel of record, and sent via first class mail to the following:

Jeffrey Cutler
P.O. Box 2806
York, PA 17405

/s/ Mark A. Aronchick

Mark A. Aronchick