No. 17A745

In the Supreme Court of the United States

ROBERT RUCHO, ET AL.,
Applicants,

v.

COMMON CAUSE, ET AL.,
Respondents.

On Emergency Application for Stay of Order Invalidating Congressional Districts Pending Appeal to the Supreme Court of The United States

MOTION FOR LEAVE TO FILE AMICUS BRIEF, MOTION FOR LEAVE TO FILE BRIEF ON 8 1/2 BY 11 INCH PAPER, AMICUS BRIEF FOR PRESIDENT PRO TEMPORE OF THE PENNSYLVANIA SENATE, SENATOR JOSEPH SCARNATI AS AMICUS CURIAE IN SUPPORT OF APPLICANTS

To the Honorable John G. Roberts, Jr.
Chief Justice of the United States and
Circuit Justice for the Fourth Circuit

Jason Torchinsky
*Counsel of Record
Shawn Sheehy
HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC
45 North Hill Drive, Suite 100
Warrenton, Virginia 20186
Phone: (540) 341-8808
Fax: (540) 341-8809
Email: jt@hvjt.law
Ssheehy@hvjt.law

Attorneys for Amicus Curiae Senator Joseph B. Scarnati, III

Brian S. Paszamant
Jason A. Snyderman
John P. Wixted
BLANK ROME LLP
One Logan Square
130 N. 18th Street
Philadelphia, Pennsylvania 19103
Phone: (215) 569-5791
Fax: (215) 569-5555
Email: Paszamant@blankrome.com
Snyderman@blankrome.com
JWixted@blankrome.com

Attorneys for Amicus Curiae Senator Joseph B. Scarnati, III

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CONSTITUTION

U.S. Const. art. I, § 4 7

MOTION FOR LEAVE TO FILE AN AMICUS BRIEF

Following the decision of a divided three-judge panel of the U.S. District Court for the Western District of Wisconsin in *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), which dramatically upset at least 30 years of this Court's precedent regarding partisan gerrymandering claims, a number of other plaintiffs, including the ones here, filed a flurry of similar challenges to state and congressional district maps across this country in the hope of affecting the 2018 congressional elections. This is the case in Pennsylvania.

Currently pending are three separate legal challenges to Pennsylvania's congressional districts: one before the Supreme Court of Pennsylvania; one before the U.S. District Court for the Eastern District of Pennsylvania; and the third to arrive shortly before this Court.[1]

Amicus Curiae, Senator Scarnati is a defendant in all three of these pending cases. Additionally, as the leader of the Pennsylvania Senate, Senator Scarnati would be directly involved in drafting new redistricting

[1] In *Agre v. Wolf*, No. 17-04392, slip op. (E.D. Pa. Jan. 10, 2018) (three-judge court) (ECF 210-213), a divided three-judge court ruled against the plaintiffs, rejecting their partisan gerrymandering claims and awarding judgment to defendants, including defendant Senator Joseph B. Scarnati, III ("Senator Scarnati"), the President Pro Tempore of the Pennsylvania Senate. Plaintiffs have indicated they will file a jurisdictional statement to this Court in the near future. Senator Scarnati, along with his co-defendant, Michael C. Turzai, Speaker of the Pennsylvania House of Representatives will also file a jurisdictional statement challenging the three-judge panel's legislative privilege ruling.

legislation, should any of these three cases result in the invalidation of Pennsylvania's congressional map.

The substantial legal uncertainty created by numerous, conflicting lower court decisions and the temporary absence of clear guidance from this Court have prejudiced Senator Scarnati as a defendant—to defend himself and the work of the Pennsylvania legislature based on a known, clear, and fixed standard, and may seriously prejudice Senator Scarnati as a legislator—in his ability to draft congressional redistricting legislation based on a known, clear, and fixed standard. Moreover, the timing of these challenges, facilitated by lower courts' disregard of the import of this Court's stay in *Gill v. Whitford*, 137 S. Ct. 2289 (2017), places at risk the orderly administration of the impending 2018 congressional elections in Pennsylvania as well as in other states.

Accordingly, Senator Scarnati respectfully requests leave to file this amicus brief to articulate to the Court the importance, to other litigants and lawmakers across this country, of granting the Applicants' stay application. Granting this stay while this Court addresses the partisan gerrymandering cases that are already pending before it will foster stability in the uncertain legal landscape by sending a clear message to lower courts that they should stay their hands while they await this Court's valuable guidance. This stability will permit Senator Scarnati to appropriately defend himself in state and federal court against a standard that is known, clear, and fixed.

Additionally, in the event that a Pennsylvania court orders congressional districts redrawn, Senator Scarnati will be able to properly exercise his constitutionally vested role in drafting redistricting legislation.

Senator Scarnati therefore moves this Court for leave to file an amicus brief in support of the Emergency Application for Stay.

Respectfully submitted on this 16th day in January, 2018.

Jason Torchinsky
*Counsel of Record
Shawn Sheehy
HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC
45 North Hill Drive, Suite 100
Warrenton, Virginia 20186
Phone: (540) 341-8808
Fax: (540) 341-8809
Email: jt@hvjt.law
Ssheehy@hvjt.law

Attorneys for Amicus Curiae Senator Joseph B. Scarnati, III

/s/ Brian S. Paszamant
Brian S. Paszamant
Jason A. Snyderman
John P. Wixted
BLANK ROME LLP
One Logan Square
130 N. 18th Street
Philadelphia, Pennsylvania 19103
Phone: (215) 569-5791
Fax: (215) 569-5555
Email: Paszamant@blankrome.com
Snyderman@blankrome.com
JWixted@blankrome.com

Attorneys for Amicus Curiae Senator Joseph B. Scarnati, III

MOTION FOR LEAVE TO FILE BRIEF ON 8 ½ BY 11 INCH PAPER

The North Carolina legislature's deadline for redrawing its congressional districts, January 24, 2018, is imminent. *See Common Cause v. Rucho*, Nos. 16-1026, 16-1164, slip op. at 189 (M.D.N.C. Jan. 9, 2018) (three-judge court). Recognizing this, this Court has expedited briefing and ordered plaintiffs to respond to Applicants' Emergency Application for Stay by Wednesday, January 17, 2018. Because of the urgency and importance of this matter, Senator Scarnati moves this Court for permission to file this short brief on 8 ½ by 11 inch paper.

Respectfully submitted on this 16th day in January, 2018.

Jason Torchinsky
*Counsel of Record
Shawn Sheehy
HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC
45 North Hill Drive, Suite 100
Warrenton, Virginia 20186
Phone: (540) 341-8808
Fax: (540) 341-8809
Email: jt@hvjt.law
Ssheehy@hvjt.law

Attorneys for Amicus Curiae Senator Joseph B. Scarnati, III

/s/ Brian S. Paszamant
Brian S. Paszamant
Jason A. Snyderman
John P. Wixted
BLANK ROME LLP
One Logan Square
130 N. 18th Street
Philadelphia, Pennsylvania 19103
Phone: (215) 569-5791
Fax: (215) 569-5555
Email: Paszamant@blankrome.com
Snyderman@blankrome.com
JWixted@blankrome.com

Attorneys for Amicus Curiae Senator Joseph B. Scarnati, III

INTEREST OF AMICUS CURIAE[2]

Amicus curiae, Senator Joseph Scarnati, III ("Senator Scarnati"), in his official capacity as President Pro-Tempore of the Pennsylvania Senate, is a defendant in three separate partisan gerrymandering lawsuits aimed at invalidating Pennsylvania's congressional districting plan before the 2018 elections. One is pending before the Supreme Court of Pennsylvania, *League of Women Voters v. Commonwealth*, No. 159 MM 2017 (Pa. Jan. 17, 2018) (oral argument scheduled). Another before a three-judge panel of the U.S. District Court for the Eastern District of Pennsylvania just ended with judgment in favor of the defendants. *See Agre v. Wolf*, No. 17-cv-04392, slip op. (E.D. Pa. Jan. 10, 2018) (ECF 210-213). Both plaintiffs, and Senator Scarnati and his co-defendant, Michael C. Turzai, in his official capacity as the Speaker of the Pennsylvania House of Representatives (collectively, "legislative defendants"), in that case have indicated publicly that they will appeal the judgment with respect legislative privilege rulings issued by the E.D. Pa to this Court. A third is pending before another three-judge panel of the U.S. District Court for the Eastern District of Pennsylvania. *See Diamond*

[2] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* made a monetary contribution to its preparation or submission. On January 14, 2018, undersigned counsel sought consent of the parties for the filing of this brief. Later on that same day, Counsel for the Applicants granted consent. On January 15, 2018, Counsel to Plaintiffs/Appellees also consented to the filing of this amicus brief. On January 16, 2018, counsel to the State of North Carolina provided blanket consent to the filing of amicus briefs.

v. Torres, No. 17-cv-5054 (E.D. Pa. Nov. 22, 2017) (First Amended Complaint filed) (ECF 42).

Further, should any of these three cases result in the invalidation of Pennsylvania's congressional map, Senator Scarnati, as leader of the Pennsylvania Senate would be directly involved in drafting and enacting new redistricting legislation at breakneck speed before February 13, 2018, when Pennsylvania begins circulating nominating petitions for congressional candidates.

The substantial legal uncertainty caused by numerous, conflicting lower court decisions and temporary lack of guidance from this Court concerning the appropriate standard to evaluate partisan gerrymandering claims (if any) harms Senator Scarnati, as a defendant in these actions, by forcing him to defend himself and Pennsylvania's congressional districting legislation without a known, clear, and fixed standard. The roiling legal landscape also make it impossible for Senator Scarnati and the rest of the Pennsylvania General Assembly to know what is and what is not permissible in any court-ordered redrawing of the map should that become necessary.

Senator Scarnati urges this Court to stay the three-judge court's ruling in the instant case to allow this Court to consider and issue rulings in *Gill v. Whitford* (No. 16-1161) and *Benisek v. Lamone* (No. 17-333), and thereby offer lower courts definitive and uniform guidance. A stay pending appeal will send a strong and clear message to lower courts to defer any unguided

experimentation that threatens to create a patchwork of conflicting legal regimes and throw into chaos the 2018 congressional elections across the country. A stay pending appeal will also foster stability for defenders of the Pennsylvania congressional districting plan, Pennsylvania legislators, and most importantly, Pennsylvania voters during the 2018 congressional election season.

ARGUMENT

I. THE COURT HAS NOT OFFERED A CLEAR, JUDICIALLY MANAGEABLE STANDARD TO EVALUATE PARTISAN GERRYMANDERING CLAIMS

The Constitution vests the various state legislatures with the primary responsibility for drawing congressional districts, *see* U.S. Const. art. I, § 4, and this Court has repeatedly confirmed the primary role state legislatures play in drawing congressional districts. *See, e.g.*, *Growe v. Emison,* 507 U.S. 25, 34 (1993). Because the Constitution vests a political branch of government with the primary responsibility of drawing districts, the Court has recognized that politics inevitably plays a role in the crafting of districts. *See, e.g.*, *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973); *Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004) (plurality op.); *id.* at 307 (Kennedy, J., concurring); *id*. at 358, 360 (Breyer, J., dissenting).

Consequently, this Court has struggled to ascertain a judicially-manageable standard to evaluate when partisan gerrymandering claims violate the Constitution; from the four separate opinions in *Davis v. Bandemer*, 478 U.S. 109 (1986), to the five separate opinions in *Vieth*, 541

U.S. 267, to the six separate opinions in *League of United Latin Am. Citizens v. Perry* ("LULAC"), 548 U.S. 399, 514 (2006), this Court has produced 15 separate opinions, none of which produced a judicially manageable rule or standard to determine if and when an unconstitutional partisan gerrymander has occurred.

This Court's struggle with this difficult question over the past three decades led district courts to the prevailing wisdom that partisan gerrymandering claims are, at best, justiciable in theory, but may be futile in fact given the absence of any coherent standard. *See, e.g.*, *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333, 348 (4th Cir. 2016) ("We recognize that the Supreme Court has not yet clarified when exactly partisan considerations cross the line from legitimate to unlawful."); *Shapiro v. McManus*, 203 F. Supp. 3d 579, 594 (D. Md. 2016) (three-judge court) ("Taken together, the combined effect of *Bandemer*, *Vieth*, and *LULAC* is that, while political gerrymandering claims premised on the Equal Protection Clause remain justiciable in theory, it is presently unclear whether an adequate standard to assess such claims will emerge."); *Ala. Legislative Black Caucus v. Alabama,* 988 F. Supp. 2d 1285, 1296 (M.D. Ala. 2013) ("The Black Caucus plaintiffs conceded at the hearing on the pending motions that the standard of adjudication for their claim of partisan gerrymandering is 'unknowable.'") (three-judge court).

That prevailing wisdom persisted until November 2016.

II. THE RAPID DESTABILIZATION OF PARTISAN GERRYMANDERING JURISPRUDENCE

In November of 2016, a divided three-judge panel of the U.S. District Court for the Western District of Wisconsin unsettled this long line of precedent by becoming the first court in 30 years to rule that a legislature violated the Fourteenth Amendment's Equal Protection Clause with an alleged partisan gerrymander. *See Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016) (three-judge court) ("*Whitford*"). This Court, however, issued a stay pending appeal. *Gill v. Whitford*, 137 S. Ct. 2289 (2017). In noting probable jurisdiction, this Court also indicated that it was postponing jurisdictional questions to the merits. *See Gill v. Whitford*, 137 S. Ct. 2268 (2017).

Since this Court issued the stay in *Whitford*, however, various district courts have treated the *Whitford* decision and this Court's stay order in disparate manners, sowing confusion. Whereas some courts have properly read this Court's stay order to tread carefully, others have brushed it aside and bolted headlong into reevaluating their own state's congressional districts in advance of the 2018 elections.

First, a divided three-judge court in Maryland issued a stay and denied a preliminary injunction in light of this Court's order in *Gill*. *See* No. 13-3233, *Benisek v. Lamone,* 2017 U.S. Dist. LEXIS 136208 (D. Md. Aug. 24, 2017) (three-judge court). The court issued the stay because "the [U.S. Supreme] Court's analysis [in *Gill v. Whitford*] undoubtedly will shed light on critical

questions in this case, and the parties and the panel will be best served by awaiting that guidance." *Id*. at *36.

Then, on September 8, 2017, the United States District Court for the Middle District of North Carolina denied a stay in the instant action and ordered a trial in October. *See Common Cause v. Rucho*, Nos. 16-1026 and 16-1164 (M.D.N.C. Sept. 8, 2017) (three-judge court) (ECF 87).

In Pennsylvania, a few weeks later on October 10, 2017, the United States District Court for the Eastern District of Pennsylvania ordered an expedited proceeding that resulted in a four-day trial *less than sixty days after the Complaint was filed* in *Agre v. Wolf*. No. 17-cv-04392 (E.D. Pa. Oct. 10, 2017) (ECF 20) (scheduling trial for the week of December 4, 2017). The court specifically set this schedule to permit the ordering of relief in time for the 2018 Pennsylvania congressional elections.

Two days after that, a three-judge panel in Alabama dismissed a partisan gerrymandering claim after concluding that the plaintiffs failed to identify a standard to evaluate their partisan gerrymandering claims. *See Ala. Legislative Black Caucus v. Alabama*, No. 12-691, 12-1081, 2017 U.S. Dist. LEXIS 168741, *22-23, (M.D. Ala. Oct. 12, 2017) (three-judge court).

Similar cases are also pending in Georgia, *Ga. State Conference of the NAACP v. Brian Kemp*, No. 17-1427 (N.D. Ga. April 24, 2017) (Complaint filed) (ECF 1), and in Michigan, *League of Women Voters of Mich. v. Johnson*, 17-14148 (E.D. Mich. Dec. 22, 2017) (three-judge court) (Complaint filed)

(ECF 1) (challenging congressional and state legislative districts). In fact, since *Whitford*'s divided decision in November of 2016, at least nine partisan gerrymandering claims have been or are being pursued across six states.[3] Indeed, since the *Whitford* decision, a total of 46 congressional districts, or 11% of the total, are being challenged as unconstitutional partisan gerrymanders.[4]

The rapid multiplication of partisan gerrymandering claims has placed partisan gerrymandering jurisprudence into a state of flux. But what is troubling is not the sheer number of these claims, but that, in the absence of clear guidance from this Court, lower courts have demonstrated a willingness to conduct their own disorderly legal experiments and impose a chaotic patchwork of conflicting requirements on states, legislators, and voters.

Accordingly, this Court should stay the district court's opinion in the instant matter so that this Court can provide guidance and stability as to how courts should evaluate partisan gerrymandering claims.

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[3] Additional cases are: *League of Women Voters v. Commonwealth,* No. 159 MM 2017 (Pa. June 15, 2017) (Complaint filed) and *Diamond v. Torres*, No. 17-5054 (E.D. Pa. Nov. 9, 2017) (Complaint Filed); *Texas Democratic Party v. Abbot*, No. 17-680 (U.S. Nov. 6, 2017) (Dismissed for want of jurisdiction).

[4] These include North Carolina's 13 congressional districts, Pennsylvania's 18 congressional districts, Michigan's 14 congressional districts, and Maryland's 1 challenged congressional district, which potentially may require all of Maryland's congressional districts to be redrawn.

III. IN THE ABSENCE OF CLEAR GUIDANCE, LOWER COURTS WILL CREATE AND IMPOSE MULTIPLE, CONFLICTING TESTS TO EVALUATE PARTISAN GERRYMANDERING CLAIMS

The instant case proves an illustrative example.

Here, the three-judge panel in North Carolina denied a request for a stay because of what it determined were substantive factual and legal differences between this case and *Whitford*. *See Common Cause v. Rucho*, No. 16-1026, 16-1164, 2017 U.S. Dist. LEXIS 145590 at *17-19 (M.D.N.C. Sept. 8, 2017). Then it ruled on the merits that North Carolina's congressional district plan is an unconstitutional partisan gerrymander on three separate grounds (Equal Protection Clause, Free Speech and Association Clause, and the Elections Clause). *See Common Cause*, Nos. 16-1026, 16-1164, slip op. (M.D.N.C. Jan. 9, 2018) (three-judge court) (ECF 118).

The court arrived at this conclusion by rejecting long-standing recognition by this Court that legislatures have lawfully injected partisanship into redistricting legislation since the founding and that partisanship is to be expected in redistricting. *See id.* at 58-59, 64; *but see, e.g., Vieth*, 541 U.S. at 274-75 (plurality op.); *Gaffney*, 412 U.S. at 753; *Cooper v. Harris*, 137 S. Ct. 1455, 1488 (2017) (Alito, J., Roberts, C.J., and Kennedy, J., dissenting). The court seems to suggest that no partisanship may be injected into redistricting plans and that any districting plan must afford the political parties approximate proportional representation in congressional

seats based on aggregate statewide votes from each of the single-member elections. *See Common Cause*, slip op. at 57.

Accordingly, the court adopted two radically new tests to evaluate partisan gerrymandering claims:

Per the district court, a plan violates the Equal Protection Clause if it favors one political party to the disadvantage of another without an "adequate" justification. *See id.* at 80-81. Unlike racial gerrymandering claims, a plaintiff need not show that partisanship was the predominant intent behind the plan. Rather, a plaintiff need only show that the legislature acted with *any* intent to disadvantage one political party to the advantage of the other. *See id.* at 86; *compare with Cooper*, 137 S. Ct. at 1463-64; *see also Shaw v. Reno,* 509 U.S. 630, 650 (1993) ("But nothing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting—as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race ... would seem to compel the opposite conclusion."). Then, to prove discriminatory effect, the court held that a plaintiff must prove that the partisan bias in the redistricting plan will "likely" persist during the life of the redistricting plan "such that an elected representative from the favored party will not feel a need to be responsive to

constituents who support the disfavored party." *Common Cause*, slip op. at 120.

The court also articulated a wholly new and separate test under the First Amendment.[5] According to the court, a plaintiff may independently invalidate a districting plan under the First Amendment if she proves

> (1) that the challenged districting plan was intended to favor or disfavor individuals or entities that support a particular candidate or political party, (2) that the districting plan burdened the political speech or associational rights of such individuals or entities and (3) that a causal relationship existed between the government actor's discriminatory motivation and the First Amendment burdens imposed by the districting plan.

Id. at 162-63. As with the court's Fourteenth Amendment test, a plaintiff can apparently satisfy the first, intent prong if she shows that the legislature was motivated by *any* partisan intent. A plaintiff can satisfy the second prong by showing anything more than a *de minimis* chilling effect or burden on any First Amendment activity. *See id.* at 164-67. And a plaintiff easily fulfills the third, causation requirement if any portion of the non-*de minimis* effect is attributable to the minimal partisan intent, *i.e.* but for the existence of partisan intent, no burden on plaintiff's First Amendment activity would

[5] Courts have consistently held that there is no independent partisan gerrymandering claim under the First Amendment without a concurrent violation of the Fourteenth Amendment. *See, e.g.*, *Whitford*, 218 F. Supp. 3d at 884; *Republican Party of North Carolina v. Martin*, 980 F.2d 943, 959 n.28 (4th Cir. 1992); *Washington v. Finlay*, 664 F.2d 913, 927-28 (4th Cir. 1981); *Pope v. Blue*, 809 F. Supp. 392, 398-99 (W.D.N.C. 1992).

exist. *See id.* at 173-74. As Judge Osteen noted, this test "would in effect foreclose all partisan considerations in the redistricting process." *Id.* at 201.

Needless to say, these tests are not only a radical departure from this Court's precedent—including the demanding standard articulated by this Court's plurality opinion in *Bandemer* and the conclusion of the plurality in *Vieth* that all partisan gerrymandering claims are nonjusticiable—but also a departure from the standard articulated by the *Whitford* district court, which requires plaintiffs to prove that a redistricting plan "(1) is intended to place *a severe impediment* on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds." 218 F. Supp. 3d at 884 (emphasis added).

Absent this Court granting a stay, confusion will persist within both the federal district courts and state courts, as lower courts (such as the one here), continue to view the post-*Whitford* legal landscape as an open invitation to conduct their own, unguided legal experiments at the expense of states, legislators, and voters.

IV. DENIAL OF A STAY PREJUDICES OTHER STATES, LEGISLATORS AND VOTERS

As the situation in Pennsylvania clearly demonstrates, a denial of a stay in this action will prejudice other states, legislators, and voters.

Because new tests, purporting to determine whether an alleged partisan gerrymander violates the Constitution, are emerging each day,

Senator Scarnati cannot adequately defend himself and Pennsylvania's congressional districting plan in court. Senator Scarnati simply cannot possibly know which standard the courts will ultimately apply to evaluate the claims arrayed against him: in effect, Senator Scarnati must be prepared to simultaneously defend himself and Pennsylvania's congressional districting plan against the *Bandemer* plurality's standard that the Supreme Court of Pennsylvania has adopted, *Erfer v. Commonwealth*, 794 A.2d 325, 331-32 (Pa. 2002); the *Whitford* district court standard, 218 F. Supp. 3d at 884; now the *Common Cause* standard, *Common Cause*, slip op. at 80-81, 86, 120; and whatever new standard that the Pennsylvania Supreme Court or the U.S. District Court for the Eastern District of Pennsylvania may ultimately divine. *See, e.g.*, *Agre*, slip op. at 117 (E.D. Pa. Jan. 10, 2018) (Baylson, J., dissenting) (ECF 213) (articulating new "visual test" arising solely from the Elections Clause of the U.S. Constitution).

And the possibility that the Pennsylvania Supreme Court and the U.S. District Court for the Eastern of Pennsylvania will pronounce different and mutually conflicting standards and requirements cannot be overlooked. In that case, state legislators such as Senator Scarnati will be left utterly lost as to how they can draw a constitutionally permissible remedial map if so ordered.

All this comes at a critical time, with the submission of nominating petitions for Pennsylvania's congressional primaries set to open in less than a

month, on February 13, 2018. At this point, any disruption of Pennsylvania's congressional districts will row chaos in Pennsylvania's legislature and among Pennsylvania's electorate. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) ("Court order affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.").

This Court must grant a stay in the instant action to prevent the already confusing array of district court decisions from metastasizing, and to send a clear message to lower courts to tread carefully while awaiting this Court's further guidance. The proper adjudication of numerous partisan gerrymandering actions and orderly administration of the 2018 congressional elections across this country depend on it.

CONCLUSION

For the foregoing reasons, this Court should issue a stay of all proceedings before the three-judge panel in the U.S. District Court for the Middle District of North Carolina pending this Court's disposition of Applicants' Jurisdictional Statement.

Respectfully submitted on this 16th day in January, 2018.

Jason Torchinsky
*Counsel of Record
Shawn Sheehy
HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC
45 North Hill Drive, Suite 100
Warrenton, Virginia 20186
Phone: (540) 341-8808
Fax: (540) 341-8809
Email: jt@hvjt.law
Ssheehy@hvjt.law

Attorneys for Amicus Curiae Senator Joseph B. Scarnati, III

/s/ Brian S. Paszamant
Brian S. Paszamant
Jason A. Snyderman
John P. Wixted
BLANK ROME LLP
One Logan Square
130 N. 18th Street
Philadelphia, Pennsylvania 19103
Phone: (215) 569-5791
Fax: (215) 569-5555
Email: Paszamant@blankrome.com
Snyderman@blankrome.com
JWixted@blankrome.com

Attorneys for Amicus Curiae Senator Joseph B. Scarnati, III

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CERTIFICATE OF SERVICE

I, Jason Torchinsky, a member of the Supreme Court Bar, hereby certify that three copies of the attached Amicus Brief and Motions in support of Applicants' Emergency Application for Stay, filed by hand-delivery to the United States Supreme Court, were served via Next-Day Service and on the following parties listed below on this 16th day of January, 2018. An electronic pdf of the Application has been sent to the following counsel via e-mail:

EMMET J. BONDURANT
BONDURANT MIXSON & ELMORE, LLP
1201 W. Peachtree St., N.W.
Suite 3900
Atlanta, GA 30309
(404) 881-4100
bondurant@bmelaw.com

EDWIN M. SPEAS, JR.
POYNER SPRUILL, LLP
301 Fayetteville Street, Ste. 1900
Raleigh, NC 27601
(919) 783-6400
espeas@poynerspruill.com
Counsel for Common Cause, et al.

ALLISON JEAN RIGGS
SOUTHERN COALITION FOR SOCIAL JUSTICE
1415 W. Hwy. 54, Suite 101
Durham, NC 27707
(919) 323-3380 ext. 117
allison@southerncoalition.org
Counsel for League of Women Voters, et al.

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com
Counsel for Robert Rucho, et al.

JASON TORCHINSKY
Counsel of Record
HOLTZMAN VOGEL JOSEFIAK
TORCHINSKY PLLC
45 North Hill Drive
Suite 100
Warrenton, VA 20186
(540) 341-8808
jt@hvjt.law