No. 17-631

In The

Supreme Court of the United States

IN RE MICHAEL C. TURZAI, SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES & JOSEPH B. SCARNATI, PENNSYLVANIA SENATE PRESIDENT PRO TEMPORE,

Petitioners.

On Petition For A Writ Of Mandamus To The United States District Court For The Eastern District Of Pennsylvania

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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QUESTION PRESENTED

Did the district court act properly in denying Intervenor-Defendants' Motion to Stay or Abstain and allowing a constitutional challenge to a Congressional redistricting to proceed to trial in advance of the 2018 elections, or did it so clearly abuse its discretion as to justify the drastic and extraordinary remedy of issuance of the writ of mandamus to force a stay?

PARTIES TO THE PROCEEDING

Louis Agre, William Ewing, Floyd Montgomery, Joy Montgomery, Rayman Solomon, John Gallagher, Ani Diakatos, Joseph Zebrowitz, Shawndra Holmberg, Cindy Harmon, Heather Turnage, Leigh Ann Congdon, Reagan Hauer, Jason Magidson, Joe Landis, James Davis, Ed Gragert, Ginny Mazzei, Dana Kellerman, Brian Burychka, Marina Kats, Douglas Graham, Jean Shenk, Kristin Polston, Tara Stephenson, and Barbara Shah are plaintiffs in the district court action below. Many of these plaintiffs joined the case with the filing of the First Amended Complaint on November 17, 2017, after the filing of the instant petition, and were therefore omitted from the petitioners' description of the parties to the proceeding.

Thomas W. Wolf, Governor of Pennsylvania, Robert Torres, Secretary of State of Pennsylvania, and Jonathan Marks, Commissioner of the Bureau of Elections are the Defendants in the action below. They are all named in their official capacities, and Robert Torres has been substituted for the previously-named Pedro Cortés pursuant to Rule 25(d) of the Federal Rules of Civil Procedure and Supreme Court Rule 35.4.

Michael C. Turzai, Speaker of the Pennsylvania House of Representatives, and Joseph B. Scarnati, Pennsylvania Senate President Pro Tempore, are Intervenor-Defendants in the action below.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

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 such Regulations, except as to the Places of chusing Senators.

U.S. Const. art. I, § 4.

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States[.]

U.S. Const. art. I, § 2.

No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States[.]

U.S. Const. amend. XIV, § 1.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or

appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1651.

STATEMENT OF THE CASE

I. The Federal Action.

On October 2, 2017, five of the respondents filed a complaint in the U.S. District Court for the Eastern District of Pennsylvania challenging the congressional redistricting plan passed by the Pennsylvania General Assembly in 2011 (the "2011 Plan"). *Agre, et al. v. Wolf, et al.*, Civil Action No. 2:17-cv-4392 (E.D. Pa.); ECF No. 1. The complaint named as defendants the Pennsylvania executive officers responsible for conducting elections under the 2011 Plan (the "Executive Defendants"). Subsequently, the petitioners intervened as defendants. ECF No. 47.

The complaint contained three counts – the Privileges and Immunities and Equal Protection Clauses of the Fourteenth Amendment (counts I and II), and the Speech Clause of the First Amendment (count III). But each count rested upon the Elections Clause, Article I, Section 4, of the Constitution, and upon the contention that it is a *per se* violation of that Clause for States to abuse the limited power the Clause confers to enact procedural rules by instead dictating electoral outcomes through maps designed to favor or disfavor a

class of candidates. *See generally id.*; *see also Cook v. Gralike*, 531 U.S. 510, 523 (2001).

On November 7, 2017, the district court denied petitioners' motion to dismiss count I of the complaint, dismissed count II with prejudice, and dismissed count III without prejudice, granting leave to amend by adding plaintiff voters from each of Pennsylvania's Congressional districts. ECF No. 74. On November 17, plaintiffs filed a First Amended Complaint in two counts (Privileges and Immunities and Speech Clauses, respectively), both resting, as before, upon the Elections Clause. ECF No. 88. Twenty-one new plaintiffs were added, at least one from each of Pennsylvania's 18 Congressional districts. *Id.*

Unlike many other challenges to partisan gerrymandering, including the one in *Gill v. Whitford*, No. 16-1161, currently pending in this Court, the complaint here does not proffer a theory as to when partisan gerrymandering becomes "too much" partisan gerrymandering. Rather, it contends that *any* partisan gerrymandering violates the Elections Clause because *any* such gerrymandering amounts to the State "interpos[ing] itself between the people and the National Government," *see Cook*, 531 U.S. at 527-28 (2001) (Kennedy, J., concurring), and is an *ultra vires* act, in conflict with the structure of the Constitution, that places an unlawful burden on plaintiffs' rights as federal citizens under both the Privileges and Immunities Clause of the Fourteenth Amendment and the Speech Clause of the First Amendment.

The plaintiffs have requested that the district court declare the 2011 Plan unconstitutional and direct the defendants to submit alternative redistricting plans that are not based on partisan considerations to the Pennsylvania General Assembly for approval. ECF No. 88 at 11-15.

II. The Pennsylvania State Court Action.

On June 15, 2017, a group of Pennsylvania voters filed a Petition of Review in the Commonwealth Court of Pennsylvania challenging the 2011 Plan. *See* Pet. for Review in *League of Women Voters of Pennsylvania, et al. v. Commonwealth of Pennsylvania, et al.*, No. 261 MD 2017 (Pa. Commw. Ct.), *under continuing supervision*, No. 159 MM 2017 (Pa.) ("*LWV*").[1] The *LWV* petition alleged that the 2011 Plan constituted an "extreme" partisan gerrymander in violation of several provisions of the Pennsylvania Constitution. The state claims set forth in the *LWV* petition do not assert a violation of the Elections Clause, are in many respects analogous to the federal claims at issue in *Gill*, and – contrary to petitioners' description of the case – do not include claims "substantively identical" to those raised in *Agre*. It is upon this misstatement that Petitioners hinge, in part, their invocation of *Growe* as controlling authority in this case. *See* Pet. 17.

The petitioners moved the Commonwealth Court for a stay of the *LWV* proceedings on the ground that

[1] A copy of the Petition for Review was attached as Exhibit B to the Petitioners' Emergency Application for a Stay (17A480).

that court should await guidance from this Court in *Gill*, and the Commonwealth Court granted a partial stay on October 16, 2017. Pet. 7. The *LWV* petitioners then filed an application with the Pennsylvania Supreme Court requesting that the stay be lifted, Pet. 8, and on November 9, 2017, that Court granted the application, vacated the stay, and remanded the case to the Commonwealth Court for proceedings under continuing supervision. App. 3. The remand order instructed the Commonwealth Court to "conduct all necessary and appropriate discovery, pre-trial and trial proceedings so as to create an evidentiary record on which Petitioners' claims may be decided," and to "file with the Prothonotary of [the Pennsylvania Supreme Court] its findings of fact and conclusions of law no later than **December 31, 2017**." *Id.* (emphasis in original).

III. The several attempts to stay, abstain, or remove.

The district court in *Agre* having scheduled trial for the week of December 4, 2017, Oct. 10 Trans. 15-16, 21,[2] the petitioners – having obtained a stay of *LWV* proceedings on the ground that the state court should await this Court's ruling in *Gill* – then filed a motion in *Agre* to stay and/or abstain on the ground that *Growe v. Emison*, 507 U.S. 25 (1993), required federal courts to defer to state court reapportionment efforts.

[2] The Transcript of the October 10 proceedings was attached to Application 17A480 as Exhibit J.

ECF No. 45-2. The district court denied this motion on October 25, 2017. ECF No. 47.

On November 14, 2017, petitioners filed a notice of removal of *LWV* to federal court, arguing that because a special election had been called to fill a Congressional vacancy, a new federal question had been introduced in the *LWV* case that allowed for removal under 28 U.S.C. § 1446. App. 11-12 at ¶¶ 20-21. The federal question that Scarnati contended was now at issue was "whether a state court under state law can strike down a Federal congressional district in which a state 'Executive Authority' has, by Federal constitutional writ and federal law, already mandated and set a special election." App. 11 at ¶ 18.

In his notice of removal, Scarnati stated that he had the consent of petitioner Turzai to remove the case, as required by 28 U.S.C. § 1446(b)(2)(A). However, on November 16, 2017, petitioner Scarnati filed an emergency motion requesting that the case be remanded back to the Pennsylvania Supreme Court, stating that although Scarnati had understood that petitioner Turzai had consented to removal, he had been advised that petitioner Turzai "does not now consent[.]" App. 16. (Turzai filed a response stating that he had at no point consented to removal. App. 21.) On November 16, 2017, the district court remanded the *LWV* case back to the Pennsylvania Supreme Court. App. 22.

ARGUMENT

Petitioners ask this Court to use "one of 'the most potent weapons in the judicial arsenal,'" the writ of mandamus, to reverse the interlocutory, discretionary, and unanimous decision of a three-judge district court to proceed promptly to a trial of this case. *See Cheney v. United States Dist. Ct.*, 542 U.S. 367, 380 (2004). Yet the district court's order was plainly justified, for if plaintiffs' claim is sound – namely, that as a partisan gerrymander, Pennsylvania's Congressional map is a *per se* violation of the Elections Clause of the Constitution and therefore unconstitutional – plaintiffs would be entitled to "appropriate action to insure that no further elections are conducted under the invalid plan." *Reynolds v. Sims*, 377 U.S. 533, 585 (1967).

Although another case challenging the validity of the same map under the Pennsylvania state constitution is proceeding in state court, unlike the situation in *Growe v. Emison*, 507 U.S. 25 (1993), plaintiffs do not seek to delay, halt, or otherwise obstruct or interfere with that proceeding. Nor, indeed, again unlike the situation in *Growe*, do the plaintiffs seek to require or enforce a map crafted under federal auspices. To the contrary, the declaratory judgment requested by the amended complaint will not only not interfere with any remedy the state court may provide to those plaintiffs, but would enhance the state court proceedings by clarifying *federal* law. Thus, the amended complaint contemplates submission of a plan "*for approval of the General Assembly [of Pennsylvania]*" (not approval of

the federal court) that is consistent with the Elections Clause. ECF No. 88 at 14 (emphasis added).

There is therefore no conflict in the concurrent jurisdiction being exercised by the federal and state courts, no violation of comity, no attempt to interfere in any way with the jurisdiction of the Pennsylvania state court or even any remedy – assuming there is a remedy – that the court may grant. It would be perfectly consistent with the relief sought here should the state court order that a lawful map be drawn under state auspices in time for the 2018 Congressional elections. Unlike the situation in *Growe*, however, it is unclear whether the state court will recognize any legal challenge to, or grant any relief at all, respecting the 2011 Plan. Should the state court fail to act within the next few weeks, and should this case be stayed, plaintiffs will have suffered irreparable injury respecting their voting rights in the 2018 elections.

The extraordinary writ of mandamus simply has no office where a federal court has done nothing to interfere with the jurisdiction of a state court. Nor is abstention or deferral appropriate when important rights of federal citizenship are at stake. Denial of the petition ensures that, should plaintiffs here be successful, the 2018 elections will not be conducted under a plan that violates the constitutional prohibition on States "interpos[ing themselves] between the people and the National Government." *See Cook v. Gralike*, 531 U.S. 510, 527-28 (2001) (Kennedy, J., concurring). The lower court's decision not to stay these proceedings in no way conflicts with the holding in *Growe* that, when a state

court is timely engaged in reapportionment, a federal court must not "obstruct" or "impede" it in the performance of that task. 507 U.S. at 34.

I. Plaintiffs' claims differ substantially from those being pursued in state court.

Contrary to petitioners' repeated statements that plaintiffs' claims in *Agre* are "substantively identical" to those in *LWV*, there is no claim in *LWV* about violations of the Elections Clause – the fundamental *Agre* contention. Unlike the *LWV* (and *Gill*) plaintiffs, *Agre* plaintiffs do not seek to curtail extreme partisan gerrymanders based on assessing "efficiency gaps" and "wasted votes." Rather, they seek a declaration that *any* partisan gerrymandering violates the Elections Clause.

Agre is aimed specifically at protecting plaintiffs' rights of *federal* citizenship from any deliberate state attempt to dictate or influence the political party that represents them in Congress. In federal elections, plaintiffs have a constitutional privilege to be free from any such deliberate gerrymandering. The thrust of the *Agre* complaint is that, as this Court determined in *U.S. Term Limits v. Thornton*, 514 U.S. 779, 833-34 (1995), the Elections Clause is only a "grant of authority to issue procedural regulations, and not a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *See also Cook*, 531 U.S. at 522-24. Unlike the plaintiffs in *LWV* and *Gill*, plaintiffs here

allege that a deliberate attempt by the state legislature to interfere with plaintiffs' free choice of their representatives to the National Government frustrates the intent of the Framers and the design of the Constitution. They seek to protect plaintiffs' direct right to vote for the U.S. House of Representatives, which was originally intended to be the one truly "national" branch of government which the states did not have a role in electing.

In violation of this Constitutional scheme, the *Agre* complaint alleges that the 2011 Plan was drafted with an intent to favor Republican candidates, and it is therefore an unconstitutional intrusion by the State of Pennsylvania into plaintiffs' federal constitutional rights to choose their Congressional representatives. It thus violates the Privileges and Immunities Clause because it abridges the plaintiffs' rights as National citizens to elect their own representatives. It also violates plaintiffs' rights under the First Amendment to engage in a core form of political speech, that is, through casting ballots in Congressional elections whose results will be expressive of *their* intentions, not those of Pennsylvania State officials.

Since the *LWV* plaintiffs do not pursue similar claims, the *LWV* case, no matter its result, will not resolve the claims of the *Agre* plaintiffs. If the *LWV* plaintiffs lose, the result will have no bearing on the merits of plaintiffs' claims here. If the *LWV* plaintiffs win, Pennsylvania will have to craft a new map. Should this Court issue the writ of mandamus, Pennsylvania will do so without benefit of an answer to the Election

Clause question that would otherwise have been provided by the *Agre* court.

In the very first status before the district court, prior to the appointment of the full three-judge panel, the single judge originally assigned to the case, District Judge Michael M. Baylson, noted that the *Agre* complaint raised entirely novel theories that are not raised in *Gill* and that he presumed were not raised in *LWV* given that it raised only state law claims and therefore could not raise claims under the Elections Clause. Trans. 12-15. For this reason, he noted his reticence to grant a stay of the *Agre* plaintiffs' "claims of constitutional deprivation" pending the outcome of either *Gill* or *LWV*. *Id.* His colleagues apparently agreed with him as the three-judge panel unanimously denied petitioners' motion for a stay shortly thereafter.

II. *Growe* does not require a stay of these proceedings, and therefore does not justify issuance of a writ of mandamus here.

To justify issuance of the extraordinary writ they seek, Petitioners must show that the district court's decision to proceed to trial is so wrong as to constitute a "judicial usurpation of power" or a "clear abuse of discretion," a showing that can only be made in "exceptional circumstances." *Cheney*, 542 U.S. at 380 (quoting *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953)). Petitioners assert that they meet this burden because of *Growe*. This assertion, however, does not withstand analysis.

Growe involved challenges to a State's congressional and legislative maps in both federal and state courts. 507 U.S. at 27-28. There, however, the similarity to *LWV/Agre* ends. In *Growe*, state defendants in the state court action had conceded that the maps in question were unconstitutional, *id.*, so shortly after the state court suit was filed the Minnesota Supreme Court appointed a Special Redistricting Panel to preside over efforts to draw new maps. *Id.* Meanwhile, the plaintiffs in *Growe* filed a federal action challenging the same maps with claims under the U.S. Constitution that mirrored those in the state case, as well as with additional claims under the federal Voting Rights Act. *Id.* at 28. Simultaneously, the Minnesota Legislature was engaged in its own reapportionment process. *Id*.

Whereupon the district court in *Growe* entered orders staying all reapportionment proceedings in the state court, and then subsequently enjoined permanently the implementation of any maps other than the ones it itself developed. *Id*. at 29-31. This Court determined that it was wrong for the federal court to thus disrupt the State's attempts to reapportion, holding that "[a]bsent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Growe*, 507 U.S. at 33-34.

The district court's decision to move forward with a trial here neither "impedes" nor "obstructs" Pennsylvania's reapportionment processes. The court has not

enjoined any action by the state court as was the case in *Growe* (and plaintiffs have not asked it to). Nor will trial of the *Agre* case "obstruct" or "impede" State processes. Not only have the *Agre* plaintiffs *not* asked the district court to redraw the Pennsylvania Congressional map, but their amended complaint anticipates that the Pennsylvania General Assembly – not the district court – will be the map drawer. ECF No. 88 at 11-15. Moreover, the declaratory judgment the *Agre* plaintiffs seek will helpfully resolve the applicable Election Clause question, and will thus *aid* State reapportionment processes, not obstruct or impede them. Indeed, it might well be error for the district court to await the development of a new State map before resolving the Elections Clause question because, regardless of the outcome in *LWV*, the answer to that question will be needed to develop a new map prior to the 2018 election.[3]

Because the district court's decision to proceed to trial thus does not in any way obstruct or impede the *LWV* litigation or any state attempt to draw a new map, and instead simply helps ensure that any new

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[3] Notably, the *Growe* opinion does *not* indicate that it was inappropriate for the district court to consider the merits of the plaintiffs' Voting Rights Act claims. And in *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532 (2002), a redistricting case that led to a revised map upheld by this Court in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), the district court rejected a claim that *Growe* required deferral under the circumstances there, noting as to plaintiffs' request for a declaratory judgment that "[c]learly, the court has the remedial power to issue such a declaratory judgment." 188 F. Supp. 2d at 549.

map developed *by the State* will comport with and not violate the Elections Clause, *Growe* does not require a stay of proceedings here. The district court's decision cannot thus be deemed a "usurpation of power" or a "clear abuse of discretion" that warrants issuance of the extraordinary writ of mandamus.

III. Petitioners' claims of harm or prejudice are without merit.

Petitioners claim that they have "no other adequate means to obtain the relief" they seek. Of course, if – as shown above – petitioners are not entitled to the extraordinary relief they seek, the unavailability of another means to obtain it is irrelevant. Nonetheless, the petitioners' claims about the harm or prejudice that will result from the district court's denial of a stay are without merit – or, at best, they are premature and speculative.

A. There will be no interference with state court decisions on matters of state law.

First, the petitioners claim that the district court's refusal to abstain "may" disrupt Pennsylvania courts' handling of legislative privilege issues. In the body of their petition, they go further, arguing that it is "beyond dispute that uncertain issues of Pennsylvania Constitutional law will be implicated if the Federal Action is permitted to proceed." Pet. 21. But there was and is no risk that the district court in *Agre* would construe the state legislative privilege petitioners claim is

provided by Pennsylvania's constitution "in a manner inconsistent with Pennsylvania's highest courts." *See* Pet. 21-22. Even the petitioners have acknowledged in *Agre* that "the legislative privilege in this case is governed by federal common law," *not* state law. ECF No. 57 at 6 & n.5. In any event, the district court has already compelled the petitioners to produce information they argued was protected by legislative privilege, so that concern is moot. *See* ECF Nos. 76 and 114.

B. The 2018 election calendar will not be impacted and any effect on the 2018 elections will be positive.

Second, petitioners claim that the district court's refusal to abstain "*may* negatively impact" Pennsylvania's 2018 elections. Pet. 23 (emphasis added). Whatever this means, it is speculative and clearly affords no ground for the exceptional remedy of a writ of mandamus. But it is unlikely that the *Agre* case will have any impact on the election calendar in Pennsylvania. And to the extent it has an impact on the map used for the 2018 elections, it could only be a positive effect resulting from a determination that the current map violates the Constitution.

The district court properly took the 2018 elections into account when it set the trial schedule in *Agre*. At the very first status conference, on October 10, 2017, the court heard from counsel for the Executive Defendants – that is, the officers actually responsible for carrying out the 2018 elections – about the planned

calendar for those elections. Trans. 17-18 & 24-26. The court set the trial for the week of December 4th, and noted its intention to have a decision issued before Christmas in order to accommodate the election calendar. Trans. 26. Counsel for the Executive Defendants represented that this schedule was "quick, but it could work." Trans. 26. Thereafter, the Executive Defendants did not join the petitioners' motion to stay. Moreover, in the weeks since that hearing, the Executive Defendants declined to object both to an extension of discovery deadlines and to the intervention of additional parties so long as the trial schedule was not affected. App. 23-24; ECF No. 66.

In short, contrary to petitioners' claims that the district court's schedule will interfere with the 2018 election calendar, the officials responsible for administering the elections have indicated that is not the case.[4] Moreover, the petitioners cite nothing to support their claims besides their "information and belief" about "countless parties" besides themselves that have expended time on the 2018 elections in reliance on the 2011 Plan. Pet. 23-24.

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[4] The petitioners also suggest that the district court's decision will cause disruption to a special election set to fill a vacancy in Pennsylvania's congressional delegation on March 13, 2018. Pet. 24-25. Not only was that election not yet set when the district court ruled on petitioners' motion to abstain, and therefore an inappropriate basis for complaining about the district court's purported "abuse of discretion," but the *Agre* plaintiffs have not sought and do not seek any relief with regard to the special election. ECF No. 88.

The petitioners also cite *Reynolds v. Sims* for the proposition that "under certain circumstances, such as where an impending election is imminent and *a State's election machinery is already in progress*, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid." 377 U.S. at 585 (emphasis added). But the Court also noted in *Reynolds* that "it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." *Id.*

Pennsylvania's election machinery is not already in progress and, thanks to the district court's decision to deny the petitioners' motion to stay and to set an expedited trial schedule, it still will not be when this case is resolved. And even if the resolution of this case begins to encroach more closely on the February 13th date than the district court originally planned – and there is no reason to think that it will – the district court retains the authority to alter that schedule if necessary to "insure that no further elections are conducted under the invalid plan." Federal courts have broad authority to remedy constitutional violations, including the power to "disregard provisions of state law" governing election calendars. *Judge v. Quinn*, 612 F.3d 537 (7th Cir. 2009), as modified by 387 Fed. Appx. 629, 630 (7th Cir. 2010), *cert. denied*, 536 U.S. 1032 (2011); *see also Judge v. Quinn*, 624 F.3d 352, 359-60 (7th Cir. 2010). To be clear, there has been no suggestion by any

party that the schedule for Pennsylvania's 2018 congressional elections will need to be compressed as a result of the *Agre* litigation. But if it must be, the district court has authority to do so.

Moreover, if there is some delay in this case in the future that causes concern about disruption to the 2018 elections, *Reynolds* vests the district court with the discretion, acting and relying upon general equitable principles, to withhold the granting of immediate relief. 377 U.S. at 585. *Reynolds* does not require or even suggest that the court should stay all proceedings. The district court has plainly engaged in an appropriate exercise of the discretion discussed by *Reynolds*, and there is no reason to think it will not continue to do so. The petitioners fall far short of showing the "clear abuse of discretion" that would justify issuance of the writ of mandamus.

Finally, now that the Pennsylvania Supreme Court has ordered that the *LWV* case be decided by the end of 2017, there is already some degree of uncertainty regarding the map that will be used for the 2018 elections no matter whether this Court grants the instant petition or not. So that concern will not be addressed by a grant of the stay that petitioners seek.

C. General objections to an expedited trial schedule do not provide a basis for issuance of the writ of mandamus.

The petitioners' third argument is simply that by refusing to abstain, the district court has prejudiced

the petitioners' ability to defend this case by setting a quick trial schedule. But surely this Court should not issue the writ of mandamus for the purpose of micromanaging a district court's case management and trial scheduling decisions. Though the trial schedule may be expedited by the standards of modern civil litigation, it is not a "judicial usurpation of power" for a trial court to set a schedule that will allow significant constitutional questions about Pennsylvania's congressional redistricting to be decided in advance of the next congressional elections.

D. The equities plainly favor plaintiffs.

As noted above, *Reynolds* requires the district court to consider general equitable principles in deciding whether to withhold the granting of immediate relief for a constitutional violation in the redistricting context. 377 U.S. at 585. Here, the equities plainly favor the plaintiffs.

Petitioners' request that the district court defer to the *LWV* case was especially inappropriate not just because that case was stayed at the time of the petition's filing, but also that it was the petitioners themselves who requested that stay, pending a ruling in *Gill*. So, the petitioners first convinced a state court hearing state law challenges to a federal congressional map in *LWV* to stay that case pending the outcome of a federal case concerning federal law challenges to a state legislative map in *Gill*. They then asked a federal court hearing federal law challenges to a federal

congressional map in *Agre* to stay that case pending the outcome of *LWV* on the grounds that federal courts must defer to state courts when it comes to redistricting. The petitioners' position is so inconsistent it is bewildering even to describe.

Moreover, as soon as the Pennsylvania Supreme Court lifted the stay in *LWV*, at least one of the petitioners, Senate President Pro Tempore Scarnati, immediately removed that case to the U.S. District Court for the Eastern District of Pennsylvania. So, while asking this Court to order the district court to stay *Agre* in deference to the Pennsylvania state courts hearing *LWV*, Scarnati was attempting to remove *LWV* from those state courts into the very same district court. And the basis for his removal was that only a federal court should decide whether it was appropriate for a state court to interfere in a federal election. While there appears to be a dispute as to whether petitioner Turzai ever joined his co-petitioner in taking this absurd position, Scarnati's actions surely undermine his claim that federal-state comity demands deference to state court action in the area of congressional redistricting.

The Court should not grant the extraordinary remedy that the petitioners request when there is nothing to remedy. The petitioners have repeatedly taken inconsistent legal positions about the "harms" that will result from a trial of the *Agre* case. Their wavering positions belie the legitimacy of their concerns about federal-state comity or the integrity of the electoral process. They betray the petitioners' true

motivation: a desire to delay any ruling on the validity of the 2011 Plan, which they and their colleagues designed to favor their political party, until after the 2018 Congressional elections.

CONCLUSION

For the reasons set forth above, the plaintiffs in the underlying district court action respectfully request that this court deny the Petition for Writ of Mandamus.

Respectfully submitted on this 30th day of November, 2017.

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