Nos. 17A795, 17A802

In The Supreme Court of the United States

Michael C. Turzai, in his capacity as Speaker of the Pennsylvania House of Representatives, and Joseph B. Scarnati III, in his capacity as Pennsylvania Senate President Pro Tempore,
Applicants,

v.

League of Women Voters of Pennsylvania, *et al.*,
Respondents.

APPLICANTS' REPLY TO PLAINTIFFS-RESPONDENTS' RESPONSE ON APPLICATION FOR STAY PENDING RESOLUTION OF APPEAL TO THIS COURT

To the Honorable Samuel A. Alito, Jr.
Associate Justice of the United States and
Circuit Justice for the Third Circuit

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TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE THIRD CIRCUIT:

The Redistricting Challengers and the Pennsylvania Executive Branch Respondents (collectively, "Opposition Parties") argue that the decision below is unreviewable as a simple case of a state court's alleged interpretation of state law. But the Opposition Parties misconstrue Applicants' position and the reality of this case. The Elections Clause, a delegation of federal power to state "Legislatures" to regulate elections to federal office, creates a federally mandated balance of power *within* state government that this Court is duty-bound to uphold. The Pennsylvania Supreme Court's decision improperly upends this balance.

The Opposition Parties' arguments hinge on misdirection. They assure this Court that the decision below merely enforced "compliance with the Pennsylvania Constitution," Challengers' Response in Opposition ("Challengers' Opp.") at 12, but they cannot identify any provisions of that Constitution (applicable to Congressional districting) establishing the criteria, or anything resembling them, that the Pennsylvania Supreme Court applied in holding the 2011 Plan unconstitutional. Similarly, they cite cases like *Growe v. Emison*, 507 U.S. 25 (1993) in arguing that the Pennsylvania Supreme Court may "remedy" a violation of state law. Challengers' Opp. at 14. Yet those cases do not support the proposition that a state court may establish new criteria to *invalidate* an otherwise lawful plan to necessitate such a "remedy" and then rig the remedial process to ensure a court-drawn map—which is what the Pennsylvania Supreme Court did here.

In the end, the Opposition Parties are left to defend an unfettered state *judicial* power to "prescribe[]" election rules in the *absence* of legislation. U.S. Const. Art. I, § 4. That view is untenable and unsupported in this Court's Elections Clause case law.

Equally untenable is the Opposition Parties' cavalier position that no harm will result from denial of a stay. One form of harm is plain as a matter of law: the invalidation of a duly enacted state law. Additionally, the affidavit of the Commonwealth's Elections Commissioner confirms that that "[c]ourt-ordered date changes" in elections dates are likely, Marks Aff. ¶ 14, that the nominations process must be rescheduled, *id.* ¶ 17, and that, if a plan "is not ready until after February 20, 2018"—which is almost certain to occur—then the only way forward is "*to postpone the 2018 primary elections from May 15 to a date in the summer of 2018*." *Id.* ¶ 23 (emphasis added). The Pennsylvania Commonwealth Court, relying on Mr. Mark's testimony below, found that a primary date change will cost Pennsylvania taxpayers $20 million. Application App. B107.

Thus, the harm to Pennsylvania's elections process is immediate, ongoing, and palpable, as the candidate-nomination process will be underway before a new plan takes effect, which is certain to inflict confusion in the upcoming primary elections. The Court has stayed similar orders in similar circumstances, and the Challengers' reliance on legislative impasse cases, where the legislature simply fails to redistrict after the decennial census, to support their irreparable-harm position is misplaced.

I. THE COURT IS LIKELY TO GRANT CERTIORARI AND REVERSE

There is, at a bare minimum, a "reasonable probability" that four members of the Court will vote to grant certiorari and a "fair prospect" that at least five will vote to reverse the decision below. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Time, place, and manner "Regulations" governing Congressional elections "*shall* be prescribed in each State by the Legislature thereof," unless Congress chooses to "make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1 (emphasis added). Mandatory criteria governing the drawing of congressional districts are among the "Regulations" this provision delegates to "the Legislature" and Congress. *See, e.g.*, *Branch v. Smith*, 538 U.S. 254, 266 (2003); *Brown v. Sec'y of State of Florida*, 668 F.3d 1271, 1273-85 (11th Cir. 2012). Thus, any such rules that do not emanate from a state's legislative process or Congress are *ultra vires*. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995).

The Opposition Parties fail to cite a legislative basis for the Pennsylvania Supreme Court's new criteria. While they claim it lies in that court's power to (1) interpret law and (2) remedy violations of law, both of those powers are plainly *judicial*, not legislative. The Pennsylvania Supreme Court is empowered to exercise these functions only to the extent its rulings are tethered to the will of the legislature or the people, as expressed in law. That is not the case here.

A. The Pennsylvania Supreme Court's Power to Interpret Does Not Encompass the Power to Legislate

The Challengers read the Elections Clause to subordinate congressional redistricting plans to "the Pennsylvania Constitution, as interpreted by the

Pennsylvania Supreme Court." Challengers' Opp. at 12. This is only half-true: the Clause assumes compliance with the "Pennsylvania Constitution," but it does *not* subject the General Assembly to any "interpretation" the state courts may concoct.

1. State Courts Have The Power To Interpret Legislation, Not To Exercise Legislative Power.

The Elections Clause imposes a distinction between the state constitution's *text* and the state courts' *interpretation* of that text because it delegates power, not to "each State," but to "the Legislature thereof." U.S. Const. art. I, § 4, cl. 1; *see McPherson v. Blacker*, 146 U.S. 1, 25 (1892)[1] (discussing the significance of the term "Legislature" as opposed to "State"). The power to *legislate* and the power to *interpret* legislation are vested in separate bodies of state government. So equating acts of "the Legislature" with any purported interpretation the courts give them diverts the delegation from "the Legislature thereof" to "the Courts thereof," in contravention of the Election Clause's plain text. *See Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring); *Agre v. Wolf*, 2018 WL 351603, --F. Supp. 3d -- at *2 (E.D. Pa. Jan. 10, 2018) (Opinion of Smith, C.J.) ("The language and history of the Clause suggest no direct role for the courts in regulating state conduct under the Elections Clause.").

Aside from violating the Election Clause's plain text, vesting state courts with unlimited prerogative to create congressional-election rules also frustrates the

[1] The Executive Respondents observe (at 18) that many authorities the Applicants rely on concern the provision in Article II, § 1, cl. 2 governing appointment of presidential electors, but the Elections Clause "parallels" that provision, and "[t]he Clauses also reflect the idea that the Constitution treats both the President and Members of Congress as federal officers." *U.S. Term Limits,* 514 U.S. at 890, 115 S. Ct. at 1896 n.17.

Elections Clause's manifest purpose to allocate what are fundamentally *policy* decisions to the branches best disposed to make policy. Legislation and interpretation are fundamentally different: in exercising the interpretive function, "courts must declare the sense of the law" in an act of "JUDGMENT"; in lawmaking, by contrast, the legislature exercises "WILL." The Federalist No. 78. When courts "exercise WILL instead of JUDGMENT, the consequence would be the substitution of their pleasure to that of the legislative body." *Id.* In authorizing "the Legislature" to create congressional districts, the Elections Clause confirms that "reapportionment is primarily a matter for *legislative* consideration and determination." *Reynolds v. Sims*, 377 U.S. 533, 586 (1964) (emphasis added). In other words, establishing districts and the criteria that govern their creation are exercises of *will*, not *judgment*. Accordingly, a state court's invention of criteria independent of a legislative act frustrates the Elections Clause's allocation of redistricting authority to bodies properly equipped to exercise "will": state legislatures and Congress.

The Executive Respondents retort (at 20) that the judiciary is empowered to "derive specific doctrines from open-textured provisions," but they fail to appreciate that the judicial power is far more circumscribed when an "open-textured" reading would "alter" a "constitutional balance." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quotation marks omitted). In such cases, the judiciary is restricted to enforcing "unmistakably clear…language" or else to rejecting the balance-altering interpretation. *Id.* (quotation marks omitted). The Elections Clause breathes federal constitutional significance into the balance of power in a state between "the

Legislature thereof" and the other branches. Judicial creation of election rules without plain legislative authorization violates that balance.

This Court's precedents confirm this by holding that a plan is subject to "the method which the state has prescribed for legislative enactments." *Smiley v. Holm*, 285 U.S. 355, 368 (1932); *see also Hawke v. Smith*, 253 U.S. 221, 230 (1920) (describing Election Clause's delegation to "the legislative authority of the state").[2] The Opposition Parties discuss this authority at length, *see* Challengers' Opp. at 11-20; Executive Opp. at 16-17, but fail to recognize that it carefully places redistricting authority in the state's "*legislative*" processes—that is, in "the State's prescriptions for law*making*," not law *interpreting*. *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2668 (2015). Examples of law*making* include the formal legislature, the referendum, the governor's veto, and the initiative. *See id.* (summarizing this Court's precedent). All of these are channels for the expression of popular, rather than judicial, will. Accordingly, the Opposition Parties are wrong to suggest an analogy between the judiciary's interpretive function and the gubernatorial veto addressed in *Smiley*: the governor's veto belongs to the law*making* process, not the governor's executive function. *See Smiley*, 285 U.S. at 368 (observing that "the Governor" played "a part in the making of state laws"); *Jubelirer v. Rendell*, 598 Pa. 16, 41, 953 A.2d 514, 529 (2008) ("The Governor's exercise of his veto power is unique in that it is essentially a limited legislative power…."). The Pennsylvania

[2] *Carroll v. Becker*, 285 U.S. 380, 382 (1932), and *Koenig v. Flynn*, 285 U.S. 375, 379 (1932), merely follow *Smiley* in nearly identical circumstances. They add nothing to the Challengers' or Executive Respondents' position.

Supreme Court's interpretive function is judicial and is entirely foreign to the law*making* process.

The majority opinion in *Arizona State Legislature* drove home the legislative nature of redistricting in holding that the initiative process that established a new redistricting regime in Arizona was justified as "[d]irect law*making* by the *people*." 135 S. Ct. at 2659 (emphasis added). In relying on this case, *see, e.g.*, Challengers' Opp. at 18, neither Opposition Party explains how judicial lawmaking comports with the majority opinion's holding that the "Clause doubly empowers *the people*" to "control the State's law*making* processes in the first instance" or to "seek Congress' correction of regulations prescribed by state legislature." 135 S. Ct. at 2677 (emphasis added); *id.* at 2671-72 (emphasizing that "*the people* of Arizona" ; *see also id.* at 2658 (emphasizing the "endeavor by *Arizona voters*"), *id.* at 2659 (emphasizing the "[d]irect lawmaking by the people"), *id.* at 2659 n.3 (emphasizing "the people's sovereign right to incorporate themselves into a State's lawmaking apparatus"), *id.* at 2660 (emphasizing "direct lawmaking" under the "initiative and referendum provisions" of the Arizona Constitution), *id.* (emphasizing the role of the "electorate of Arizona as a coordinate source of legislation") *id.* at 2661 (emphasizing "the people's right…to bypass their elected representative and make laws directly"). *Arizona State Legislature* does not support the Opposition Parties' apparent position that the judiciary, an antonym of both "people" and "legislature," may seize the lawmaking power from both.

In fact, the Opposition Parties' theory proves too much. The Arizona referendum entailed the creation of both a redistricting commission and a detailed set of criteria governing how the commission would draw the maps. *Ariz. State Legislature*, 135 S. Ct. at 2661. Under the Opposition Parties' logic, the Arizona Supreme Court could have created the same reform package by "interpreting" it from existing constitutional provisions, and the sponsors' grueling effort at citizen legislation was superfluous. "What chumps!" *Id.* at 2677 (Roberts, C.J., dissenting). Moreover, what a state court can give, it can take away. So, in the Opposition Parties' view, the Arizona Supreme Court also may interpret the term "Arizona Independent Redistricting Commission" to mean the Arizona Legislature—or the Arizona Supreme Court or a political scientist in Switzerland—and thereby rewrite the "people's" word with impunity.

The lack of any limiting principle in the Opposition Parties' theory is untenable. If a state court's "open-textured" interpretation of legislation is *ipso facto* the legislation itself, then "the Legislature" has no voice apart from the judiciary's voice. In a dispute between "the Legislature" and "the Courts" about what "the Legislature" has legislated, the *courts will always win*. That flips the delegation to "the Legislature" on its head. The theory would bless overt seizure of redistricting by a state court that "interprets" redistricting authority as vested in a body of its choosing—including itself. *Cf. Colorado Gen. Assemb. v. Salazar*, 541 U.S. 1093 (2004) (Rehnquist, C.J., Scalia and Thomas, JJ., dissenting from the denial of

certiorari).[3] It also would authorize *de facto* usurpation by a state court that issues erratic interpretations to make legislative redistricting a practical impossibility. In this case, the General Assembly had no way to know in 2011 what the law would be in January 2018, as the new criteria were not then remotely foreseeable. Even now, it has no way to know what the law will be next month because the Pennsylvania Supreme Court (1) has not issued an opinion specifying the full extent of its new legal standards and (2) may rewrite the law at its pleasure. By the same token, a state court could read the state's free-speech clause to require that redistricting be complete an hour after the release of census data, that it meet flatly contradictory requirements, or that it satisfy standards well beyond the reach of ordinary consensus in a legislative process. Eliding interpretation and legislation into one power, aside from nixing the Nation's entire legal tradition, creates endless possibilities for mischief.

The Opposition Parties mischaracterize Applicants' argument as supposedly barring a state court from deciding whether a redistricting plan complies with the state constitution. *See, e.g.,* Challengers' Opp. at 12. A state's constitution is the product of the "State's prescriptions for lawmaking" and therefore may promulgate criteria. *Arizona State Legislature*, 135 S. Ct. at 2668. And, to the extent a state court

[3] The Executive Respondents contend (at 19) that the three-Justice dissent in *Salazar* did not attempt to "review the Colorado Supreme Court's application of its own law." To the contrary, the *Salazar* opinion challenged the Colorado Supreme Court's "construction of the Colorado Constitution to include state-court orders as part of the lawmaking." 541 U.S. at 1095. The Applicants raise the same challenge to the Pennsylvania Supreme Court's "construction" of the Pennsylvania Constitution.

affords them a legitimate interpretation faithful to their plain meaning, it acts consistent with the Elections Clause. For the same reason, the Executive Branch Respondents are wrong to suggest (at 1) that the Applicants' position places this Court in the position of "policing the correctness of state courts' interpretation of their own constitutions." Quite the contrary, this Court need not assess *de novo* the "correctness" of the ruling. It is rather tasked with assessing whether the Pennsylvania Supreme Court's order can fairly be characterized as an act of legislation rather than interpretation.[4] As in *Arizona State Legislature*, the question here is whether the new redistricting regime is the product of a bona fide legislative process, or something else entirely. That inquiry does not upset the normal balance of state and federal judicial power because (1) it only occurs in the exceptionally rare cases covered by the Elections Clause or similar provisions, and (2) it affords deference to reasonable interpretations consistent with the state constitution's plain text and the legislature's reasonable expectations under precedent interpreting it.[5]

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[4] The Opposition Parties' contrary position further guts the Elections Clause by effectively rendering its meaning a question of state law. In their view, the Minnesota Supreme Court could easily have reversed this Court's decision in *Smiley v. Holm*, 285 U.S. 355 (1932), by finding a state constitutional exemption from gubernatorial veto for redistricting plans—whether or not there was the slightest textual support for that caveat. The Ohio Supreme Court too could have reversed this Court's opinion in *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), by creating from thin air a redistricting exception to the Ohio constitution's referendum provision.

[5] For example, the Pennsylvania Supreme Court would not have "legislated" new redistricting criteria had it applied the two-decades-old standard it previously applied in partisan-gerrymandering cases. *See Erfer v. Commonwealth*, 794 A.2d 325, 334 n.4 (Pa. 2002); *In re 1991 Pa. Legis. Reapportionment Comm'n*, 609 A.2d 132 (Pa. 1992). The Challengers claim (at13) that *Erfer* placed the General Assembly on notice of the potential result here, but that precedent expressly

The "unprecedented intrusion upon state sovereignty" the Challengers' assert this case entails (at 24) is fiction.

2. The Lower Court's Order Legislates Mandatory Criteria.

Under *any* colorable Elections Clause standard, this is not a close case. The Pennsylvania Supreme Court's "interpretation" is so far removed from the Pennsylvania constitution's text and its own precedent that it does not meet the ordinary standard of deference this Court normally affords state-court readings of state law, especially given that the General Assembly "could not fairly be deemed to have been apprised" of the "existence" of these new criteria. *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 457 (1958); *see also Bouie v. City of Columbia*, 378 U.S. 347, 361-62 (1964).

The Opposition Parties offer no textual basis for the ruling, nor could they. The Pennsylvania Constitution does not state that Congressional districts must be "compact and contiguous" or "not divide any county, city, incorporated town, borough, township or ward." Application App. A3. Pennsylvania's constitutional framers knew how to articulate these requirements, and they did so for *state legislative* districts.[6] *See* Pa. Const. art. II, § 16. If that constitutional provision had been drafted to apply to Congressional districts, a state court would not run afoul of the Elections Clause

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disclaimed that any compactness, contiguity, or subdivision-integrity requirement applies to congressional districts. *Erfer*, 794 A.2d at 334 n.4.

[6] Moreover, the Pennsylvania Supreme Court has experience interpreting those provisions in a traditional judicial manner. *See Holt v. 2011 Legislative Reapportionment Comm'n*, 620 Pa. 373, 417-25, 67 A.3d 1211, 1237-42 (2013) (adjudicating challenges under the legislative provisions).

by enforcing it.[7] Likewise, while the Challengers repeatedly employ the rhetoric that the Applicants request reversal of six precedents, *none* of those precedents involve this type of judicial improvisation of *mandatory* redistricting rules at issue here—or anything remotely like it.

The Executive Respondents attempt (at 25) to re-characterize the state court's adoption of new criteria as mere "*guidance* to the legislature regarding how it *may* engage in a redistricting process that comports with the state constitution" (emphasis added). That is nonsense. The Order states that "any congressional districting plan *shall*" comport with its new criteria "to comply" with its view of the law. App. A3 (emphasis added). Those criteria are mandatory, not mere "guidance" as to how the legislature "may" redistrict consistent with the Pennsylvania Supreme Court's standards. The Challengers are also wrong in implying (at 16) that these criteria only concern the lower court's *remedial* order, not its *invalidation* of the 2011 Plan. Quite the contrary, the Order requires the General Assembly "to submit a congressional districting plan that satisfies the requirements of the Pennsylvania Constitution" and specifies that, to do so, "any congressional districting plan shall" comply with the new criteria. A2-A3. Obviously, the court views its new criteria as "requirements of the

[7] The Opposition Parties point to *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992) and *Holt v. Legislative Reapportionment Comm'n*, 38 A.3d 711, 745 (Pa. 2012) in an effort to justify the Pennsylvania Supreme Court's current overstep. Challengers Opp. at 22). Neither decision supports the Opposition Parties' position. That the Pennsylvania Supreme Court in *Mellow* may have used tradition districting criteria when it was properly entrusted with drawing a congressional map does not in any way suggest that the court can look to those criteria here for purposes of striking the 2011 Plan as unconstitutional. *Holt* involved legislative reapportionment, not congressional districting.

Pennsylvania Constitution" and, where it specified no other criteria, it is clear that the lower court struck the Plan down for ostensibly not meeting the criteria it *did* specify.

Similarly, the Challengers are wrong to claim (at 23 n.7) that state courts "routinely" improvise such standards, and the cases they cite prove the opposite. For example, *League of Women Voters of Florida v. Detzner*, 179 So. 3d 258, 263 (Fla. 2015), applied provisions of the Florida constitution specifying that "districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries." Fla. Const. art. III, § 20. Likewise, *Beauprez v. Avalos*, 42 P.3d 642, 651 (Colo. 2002), applied provisions of the Colorado constitution specifying that "[e]ach district shall be as compact in area as possible" and "no part of one county shall be added to all or part of another county in forming districts." Colo. Const. art. V, § 47. Section 46.[8] Neither opposition party cites a single case where a state court divined a

[8] *See also Zachman v. Kiffmeyer*, at *15, 2002 Minn. LEXIS 884 (Minn. Spec. Redis. Panel Mar. 19, 2002) (applying criteria such as requirements of "convenient contiguous territory" as spelled out in Minnesota Constitution, Article IV, § 3); *Hippert v. Ritchie*, 813 N.W.2d 391, 395 (Minn. Spec. Redis. Panel 2012) (utilizing criteria set forth by specific provisions of state law such as "drawing districts that comprise convenient, contiguous territory." Minn. Stat. § 2.91, subd. 2 (2010).); In re 2003 Apportionment of the State Senate and U.S. Congressional Districts, 827 A.2d 844, 847 (Maine 2003) (redistricting on legislature's failure to enact a new plan under Maine Revised Statute Chapter 15 § 1206, requiring compactness, contiguity and subdivision integrity); *Legislature v. Reinecke*, 516 P.2d 6, 10, 13 (Cal. 1973) (applying criteria under California Constitution Article XXI providing for equal population, contiguity, and respect for the "geographical integrity of any city, county . . . or of any geographical region"). Other cases the Challengers cite involve impasse litigation where the legislature simply failed to redistrict after the decennial census, thereby leaving the courts with no choice but to choose criteria to evaluate competing plans. *See In re Apportionment Comm'n*, 36 A.3d 661 (Conn. 2012); *Jepsen v. Vigil-Giron*, 2002 WL 35459962 (N.M. Dist. Jan. 8, 2002); *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992). None of those cases suggest that a state court

mandatory criterion, such as that districts be "compact," from an "open-textured" free-speech or equal-protection provision. Moreover, the Opposition Parties fail to distinguish the implementation of mandatory criteria to restrict legislative discretion from the use of redistricting criteria as guideposts for adjudicating which of many proposed plans in a remedial proceeding is superior. *See League of Women Voters of Florida*, 179 So. 3d at 263. Counsel for the Applicants conceded below the latter, not the former, use of redistricting criteria.[9]

Here, the Pennsylvania Supreme Court not only invented them wholesale without authorization from either the legislature or the people, but it contradicted its prior finding that no such criteria apply. *Erfer v. Commonwealth*, 794 A.2d 325, 334 n.4 (Pa. 2002). Then it struck down a plan drawn seven years earlier for *failure* to comply with these and other unknown standards and ordered that new districts be drawn in three weeks under those criteria and any others it might supply in a forthcoming opinion that, a few days before the deadline, still has not issued. App. A at 2. Finally, it reserved the right to enact its own plan, even if the General Assembly

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may create new criteria to *strike down* a duly enacted plan, and the recognize that a "court, as a general rule, should be guided by the legislative policies underlying the existing plan." *Alexander v. Taylor*, 51 P.3d 1204, 1211 (Okla. 2002).

[9] In this regard, the Challengers (at 22) misrepresent the Applicants' concession below that compactness and contiguity have properly guided courts in remedial proceedings. The concession was made in defense of incumbency-protection as one of many valid traditional districting principles and concerned the use of that criteria, alongside compactness and contiguity, in guiding a remedial process. Oral Argument at 1:28:30-1:31:10.

passes and the Governor signs a compliant plan. *Id.* The court's order is all will and no judgment. It is therefore *ultra vires* in violation of the Elections Clause.[10]

B. The Pennsylvania Supreme Court's Power to Remedy Does Not Encompass the Power to Legislate

The Opposition Parties' argument that the Pennsylvania Supreme Court's order is a valid exercise of its power to "remedy" violations of law fails because the power to remedy does not, any more than the power to interpret, confer the power to *legislate*. *See* Challengers' Opp. at 23; Executive Opp. at 24.

This Court's decisions in *Growe v. Emison*, 507 U.S. 25 (1993), and *Scott v. Germano*, 381 U.S. 407 (1965), do not suggest otherwise. Both cases hold that, as between the federal courts and state courts, principles of comity establish a preference that state courts take the lead in remedying a legislature's *failure* to redistrict. In both cases, the state legislature failed to pass *any* plan once the former plan was deemed malapportioned in violation of the federal Constitution. *See Growe*, 507 U.S. at 27-31; *Germano*, 381 U.S. at 408-09. With the proper legislative bodies out of the picture, the cases assessed the lesser-of-two-evils choice of which of two competing *courts* should draw the new plan—given that only *one* plan can govern. The Court's choice of state courts over federal courts for that task did not suggest an

[10] The Challengers impliedly argue that this exercise of raw will was justified in light of the alleged partisan-gerrymandering endeavor challenged below. Even if that were true as a matter of law, the Challengers are disingenuous on the facts. For example, in contending (at 7-8) that the Applicants' counsel conceded that "[v]oters were classified and placed into districts based upon the manner in which they voted in prior elections," they misstate the *actual* quite different concession that "[p]olitical decision making "is the essence of the process from day one." Oral Argument 1:54:40-1:55:00.

equivalence between state courts and state *legislatures* where, as here, the state legislature had passed a plan. That much is clear from *Germano*'s reliance on *Maryland Comm. for Fair Representation v. Tawes*, which cautioned that state courts "need feel obliged to take further affirmative action only if the legislature fails to enact a constitutionally valid state legislative apportionment scheme in a timely fashion after being afforded a further opportunity by the courts to do so." 377 U.S. 656, 676 (1964); *See Germano*, 381 U.S. at 409. The preference in all instances is the legislature over *any* court, state or federal.

Accordingly, *Growe* and *Germano* have no relevance in a case like this where, instead of conflict between two ill-equipped competitors (state and federal courts), the conflict is between the constitutional ideal ("the Legislature") and an ill-equipped competitor (a state court). Likewise, neither *Growe* nor *Germano* even hints that state courts are empowered to *create* new criteria to *find* an otherwise nonexistent violation and then veto any proposed replacement plan that does not adhere to those criteria.

In suggesting otherwise, the Opposition Parties ignore that this Court's precedents define the scope of courts' remedial authority and expressly refute the legitimacy of court-made criteria. Courts must implement plans that "most clearly approximate[] the reapportionment plan of the state legislature," *White v. Weiser*, 412 U.S. 783, 796 (1973), and this duty deprives courts of any independent power to create policy, *Upham v. Seamon*, 456 U.S. 37, 41-43 (1982). Even if a plan is struck down for failure to comply with some *valid* legal criterion—which is not the case here—a court's power to impose a remedy does not mean "that the policy judgments" of the

legislature "can be disregarded"; rather a court "appropriately confines itself to drawing interim maps…without displacing legitimate state policy judgment *with the court's own preferences*." *Perry v. Perez*, 565 U.S. 388, 394 (2012) (emphasis added).[11] Thus, the Opposition Parties' suggestion that the courts' power to remedy entails the power to legislate is exactly backwards.

Moreover, the Opposition Parties are wrong that the Pennsylvania Supreme Court has honored this Court's directive in *Tawes* that state courts "take further affirmative action" only on a failure of the legislature to redistrict "after being afforded a further opportunity." 377 U.S. 656, 676 (1964). Instead, the Pennsylvania Supreme Court rigged the remedial process to guarantee a court-drawn plan by (1) withholding an opinion specifying the full extent of new legal principles it will apply, (2) granting only three weeks for the remediation process,[12] and (3) reserving for itself the right to veto a *compliant* plan. A2-A3. Furthermore, the Pennsylvania Supreme Court has hired an expert to draw plan and has, since its final judgment, issued an order demanding the parties to produce data to assist the court in drawing a new map. *See* Letter from Turzai et al. to The Honorable Samuel Alito.[13] Neither *Growe* nor *Germano* support this power grab.

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[11] Although these cases concern the remedial authority of federal courts, the Elections Clause's delegation of authority to "the Legislature" demands that similar, if not identical, principles apply here.

[12] Applicants do not contend that, standing alone, a three-week deadline would be improper, but rather that, under the circumstances—including the ongoing confusion in legal standards and the inconsistency of the lower court's order with a possible legislative override—the process is tainted towards a predetermined end of judicial redistricting.

[13] While the Opposition Parties cite (at 10 n.1) Senator Scarnati's letter to the

The Challengers' alternative argument (at 18) that a federal statute, 2 U.S.C. § 2c, justifies the Pennsylvania Supreme Court's order provides no better (or even different) rationale. As this Court held in *Branch v. Smith*, this statute authorizes both state and federal courts to "remedy[] a failure" by the state legislature "to redistrict constitutionally." 538 U.S. 254, 270 (2003). But, as described above, the power to remedy violations is not the same as the power to enact law to identify violations that otherwise would not exist. Undeterred, the Challengers point (at 19) to a second statute, 2 U.S.C. § 2a(c), which prescribes procedures that apply "[u]ntil a State is redistricted in the manner provided by [state] law." 2 U.S.C. § 2a(c). But a requirement that redistricting occur as provided by state law does not empower state courts to *create* state law. Neither statute bridges the gap between remediation and the legislation that occurred here.

C. Judicial Estoppel Does Not Apply

The Challengers raise the specter of a vehicle problem for this case by contending (at 26-29) that the Applicants' arguments are barred by judicial estoppel. But the only parties facing an estoppel problem in this case are the Challengers themselves.

Applicants were faced with defending three actions seeking to invalidate the 2011 Plan: this action, filed June 15, 2017, and two federal cases—*Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa., filed Oct. 2, 2017) and *Diamond v. Torres*, No. 5:17-cv-5054

Pennsylvania Supreme Court, they neglect to mention that Senator Scarnati advised that he does not possess any data responsive to the Pennsylvania Supreme Court's Order.

(E.D. Pa., filed Nov. 9, 2017). Applicants *unsuccessfully* sought to stay *Agre* pending decisions in *Whitford, Benisek,* and this case. (ECF No. 45, 2:17-cv-4392). *Agre* was tried on December 4-7, 2017, the week before this case was tried in the Commonwealth Court. Applicants prevailed on the merits in *Agre*.[14]

In *Diamond*, Applicants similarly sought a stay pending *Whitford, Benisek,* and this case, and prevailed. The Challengers are correct that, in both *Agre* and *Diamond*, one of the arguments the Applicants made was based on *Growe v. Emisson*. But that argument was that the state court was exercising jurisdiction over a gerrymandering challenge to the 2011 Plan, just as the Eastern District of Pennsylvania was in *Agre* and *Diamond*. As between the state court and the Eastern District of Pennsylvania, Applicants argued, *Growe* counsels that the state court should take the lead in adjudicating virtually identical cases. At the time, the federal and state standards were "coterminous," Appendix App. B ¶ 45, and the Applicants argued before the Pennsylvania Supreme Court that they should remain coterminous. Thus, *Growe* would suggest that the state courts should take the lead in applying the existing standard to the facts in a process of *adjudication*.

The Applicants most certainly did *not* contend or concede at any point that the state courts were free to *legislate* a new standard completely untethered from any legislative act. Quite the opposite, the Applicants vigorously contested before both

[14] *Agre* was an Elections Clause challenge to the 2011 Plan, and the Applicants defended that challenge, consistent with their position in this case, on the basis that the Elections Clause is a *grant* of legislative discretion, not a *restriction* on discretion, as the *Agre* plaintiffs argued. The Challengers are wrong to suggest tension between these positions.

the Pennsylvania Supreme Court and the Pennsylvania Commonwealth Court that state courts lack the right under the Elections Clause to adopt any criteria not ratified in a bona fide legislative process. The notion that the Applicants forfeited an appeal of the Pennsylvania Supreme Court's legislative conduct to *this* Court under 28 U.S.C. § 1257 by raising an abstention argument in the *Eastern District of Pennsylvania* is meritless.[15] Indeed, Challengers have forfeited their estoppel argument by not raising it in the Pennsylvania Supreme Court and Pennsylvania Commonwealth Court in response to the Applicants' advocacy against new redistricting criteria. *See, e.g.*, *United States v. Jones*, 565 U.S. 400, 413 (2012).

II. IRREPARABLE HARM WILL RESULT WITHOUT A STAY

The Challengers dismiss Applicants' argument around irreparable harm as "insubstantial," but they are wrong. To begin, they pay virtually no attention to the first form of irreparable harm at issue, which results from the state's inability to implement a "statute enacted by representatives of its people." *Maryland v. King*, 133 S. Ct. 1, 3 (2012). The Challengers observe (at 30) that the Pennsylvania Supreme Court found the statute violative of the state constitution, but the validity of that court's finding is the subject of this appeal. Obviously, irreparable harm

[15] In a footnote, Challengers also suggest that Applicants' Elections Clause argument before this Court would be found to be judicially estopped under Pennsylvania state law. Challengers' Opp. at 29 n. 8. But in federal court, federal law governs whether judicial estoppel applies. *See, e.g., Thore v. Howe,* 466 F.3d 173 n.1 (1st Cir. 2004)*, Alternative System Concepts, Inc.v. Synopsys, Inc.,* 373 F.3d 23, 32 (1st Cir. 2004); *Ryan Operations, G.P. v. Santiam-Midwest Lumber Co.,* 81 F.3d 355, n. 2 (3d Cir. 1996) (observing that "a federal court's ability to protect itself from manipulation by litigants should not vary according to the law of the state in which the underlying dispute arose").

would result in enjoining the statute pending the appeal to assess whether it is, in fact, unconstitutional.

Moreover, in asserting that there is plenty of time before the November elections to acclimate the public to new districts, the Challengers (at 30) and Executive Respondents (at 36), both pay short shrift to the disruption to the upcoming *primary* elections. *See Wells v. Rockefeller*, 394 U.S. 542, 547 (1969) (affirming conduct of elections under a map struck down because the "primary election was only three months away"); *Kilgarlin v. Martin*, 386 U.S. 120, 121 (1967) (per curiam); *Klahr v. Williams*, 313 F. Supp. 148, 152 (D. Ariz. 1970), aff'd sub nom. *Ely v. Klahr*, 403 U.S. 108 (1971) (similar timing). And, while *Purcell v. Gonzalez*, 549 U.S. 1 (2006), involved court intervention in a state's election laws several weeks prior to an election, Challengers' effort to distinguish it falls flat. The candidate-petition process, pursuant to which potential candidates seek to qualify for the ballot, will begin by operation of statute before the court's reapportionment deadline—despite the fact that until a new plan is implemented, there are no districts for candidates to petition to run for. Unsurprisingly, the Court has already stayed decisions ordering new plans under materially identical elections periods. *Gill v. Whitford*, No. 16-1161 (U.S.); *Rucho v. Common Cause*, No. 17A745 (U.S.).[16]

The Challengers (at 31) and Executive Respondents (at 36) claim that a new map will not cause disruption because of cases where new maps have been imposed

[16] The Challengers would distinguish these cases (at 35) on the ground that they "involve federal constitutional claims brought in federal courts," but a state-court injunction is equally disruptive as a federal injunction to an election.

in the spring of elections years. But all the cases they rely on involve *impasse litigation* resulting from legislatures' failures to pass *any* map at the beginning of the decade. *See Mellow v. Mitchell*, 607 A.2d 204, 206 (Pa. 1992); *Growe v. Emison*, 507 U.S. 25, 37 (1992). In those cases, both the legislature and executive branch were on notice as of January or February in the first *odd year* of the decade that redistricting was required and therefore had little room to complain when *a year later* a new plan was imposed. For example, in *Mellow*, the legislature had "from early 1991 to the present" (March 1992) to enact a plan.[17] 607 A.2d at 47. Here, the General Assembly had no way to know of a redistricting obligation until late January *of the even election year* and was given three weeks to respond. The general public also was caught by surprise. Moreover, a state has advanced notice even prior to the issuance of census data of its decennial redistricting duty; by contrast, the General Assembly had no notice here, given that, as of late December 2017, the Pennsylvania courts had signaled that the plan was valid. Application App. B131.

Additionally, the equities in impasse litigation are different from those here because that type of litigation occurs only once every ten years. Indeed, *Reynolds v. Sims* limited the redistricting obligation to once per decade because "[l]imitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system." 377 U.S. 533, 583-84

[17] For the same reason the Executive Respondents are confused in suggesting (at 36) that the General Assembly in *Mellow* had only "12 days" to enact a plan. It had over a year to do so, and, once the old map was (as was inevitable) deemed malapportioned, there was little point in giving a process at impasse much additional time.

(1964). The disruption the Challengers propose would only exacerbate the disruption visited on Pennsylvania's elections in 2011; the disruption in 2011 does not justify *more disruption* now, as the Challengers suggest.

The Executive Respondents' contention (at 27) that the state will have "no difficulty complying with the order" is astounding when the affidavit they proffer, from Elections Commissioner Jonathan Marks, confirms that "difficulty" is certain. It states that "it would be highly preferable" that districts be finalized "by January 23, 2018"—a date that *has already passed*. Marks Aff. ¶ 12. That deadline being transgressed, it "*may* still be possible for the 2018 primaries to proceed, *id.* ¶ 13 (emphasis added), but "Court-ordered date changes" are likely, *id.* ¶ 14, and the nominations process must be moved, *id.* ¶ 17. If a plan "is not ready until after February 20, 2018," then the only way forward is "*to postpone the 2018 primary elections from May 15 to a date in the summer of 2018*." *Id.* ¶ 23. If that occurs, the courts will be left to choose whether to bifurcate the primaries or postpone *all* primaries—including those for non-congressional seats. *Id.* ¶ 23. According to the Commonwealth Court, this disruption is likely to cost Pennsylvania taxpayers $20 million. Application App. B107.

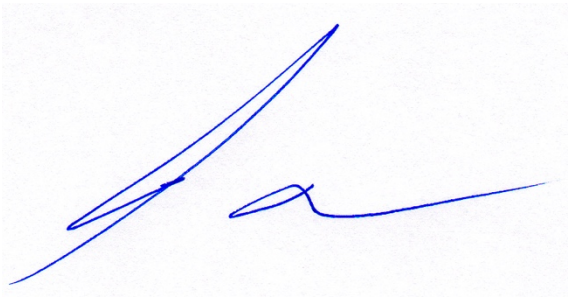
In light of these facts, it is mystifying that both Opposition Parties represent that a new plan is simply business as usual. Executive Opp. at 31-35. A date change of the primaries affects the campaigns of all involved and risks voter confusion. *See* Amicus Br. of Republican Party of Pa 7-15. Potential candidates—all of whom have been planning their candidacies for months if not years—have no idea where the

new congressional district lines will lie or what communities they will encompass. This means that all campaign efforts must, if the Pennsylvania Supreme Court's order takes effect, start over from scratch, with most of the money expended already wasted. This disruption is immediate, ongoing, and palpable, and this Court's intervention is required if it is to be alleviated.

III. CONCLUSION

For these reasons, and those stated in the Stay Application, the Court should issue a stay of the Pennsylvania Supreme Court's final judgment pending appeal.

Respectfully Submitted,



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