Nos. 17A795, 17A802

IN THE

Supreme Court of the United States

MICHAEL C. TURZAI, ET AL.,
Applicants,
v.
LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, ET AL.,
Respondents.

BRIAN MCCANN, ET AL.,
Applicants,
v.
LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, ET AL.,
Respondents.

PLAINTIFFS-RESPONDENTS' RESPONSE IN OPPOSITION TO APPLICATIONS FOR STAY PENDING THE DISPOSITION OF PETITIONS FOR A WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

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INTRODUCTION

On January 22, 2018, the Pennsylvania Supreme Court struck down Pennsylvania's 2011 congressional map on the "sole basis" that the map violates the Pennsylvania Constitution, and ordered a remedial map for the 2018 elections. It is hornbook law that this Court cannot review decisions of state courts construing state law. State courts are "free to serve as experimental laboratories," *Arizona v. Evans*, 541 U.S. 1, 8 (1995), and "[i]t is fundamental that state courts be left free and unfettered by [this Court] in interpreting their state constitutions," *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940). Applicants urge this Court to cast aside these bedrock principles and intervene in this state court, state law case. The Court should not do so. There is no partisan gerrymandering exception to federalism.

Applicants' ostensible hook for federal intervention is an Elections Clause theory that this Court has squarely rejected in decisions dating back nearly a century. To accept Applicants' theory, this Court would need to overrule no fewer than six of its precedents, all upholding the power of state courts to review and remedy unconstitutional congressional districting plans. In these circumstances, Applicants cannot seriously maintain that this Court will grant certiorari or reverse. Their stay applications are just a ploy to preserve a congressional map that violates Pennsylvania's Constitution for one more election cycle.

This Court need not take our word for it. For months, Applicants in No. 17A795 ("Legislative Applicants") have been telling federal courts in separate suits challenging Pennsylvania's 2011 map that, under settled precedent, they *must* defer

to Pennsylvania state courts. They told this Court that federal courts would be "usurp[ing] the power of the Pennsylvania state courts" to review and remedy the map, and just last week they persuaded a federal court to grant a stay in deference to this state court action. Legislative Applicants cannot now obtain a stay of the state court's judgment on the theory that state courts have no power in this realm.

Legislative Applicants' warnings of "voter confusion" and "chaos" have no grounding in evidence, history, or context. In 1992, Pennsylvania implemented a court-ordered congressional map less than two months before the primary elections. And in *Growe v. Emison*, 507 U.S. 25 (1993), this Court held that state courts may properly adopt a new congressional map only two months before the primaries. There is even more time here. Under the Pennsylvania Supreme Court's order, the new map will be in place three months before the primaries and nine months before the general elections. And Pennsylvania's chief election officials have made clear that they can administer perfectly orderly elections on this schedule.

Pennsylvania's Supreme Court has held that the 2011 map "clearly, plainly and palpably" violates Pennsylvania's Constitution. It would be unprecedented for this Court to interfere with the state court's determination about its own state's law. If federalism means anything, it means that this Court should deny the stay applications.

BACKGROUND

A. Pennsylvania's 2011 Congressional Districting Map

1. In the 2010 elections, Republicans picked up 11 seats to take control of the Pennsylvania House, retained control of the Senate, and won the governorship. Leg. App'x B ¶¶ 89-92. This gave Republicans exclusive control over Pennsylvania's congressional redistricting following the 2010 census. Working in secret, Republican mapmakers in Pennsylvania's legislature used past election results to calculate partisanship scores for each precinct, municipality, and county in Pennsylvania—with higher scores for Republican-leaning areas and lower scores for Democratic-leaning areas. Pls.' Exhibit ("PX") 1 at 38-41; Trial Tr. ("Tr.") 299:10-309:21. This enabled the mapmakers to predict the partisan voting preferences of voters in potential new congressional districts. PX1 at 39-41.

Senate Bill 1249, which Republican leaders introduced on September 14, 2011, started as an empty shell—it contained no map or details. Leg. App'x B ¶¶ 98-101. On December 14, 2011, Republicans amended the bill to add, for the first time, actual descriptions of the new districts. *Id.* at ¶¶ 104, 126(b). Republican Senators suspended the ordinary rules of procedure to rush the bill through the Senate that same day. *Id.* at ¶¶ 109, 126. Less than a week later, on December 20, 2011, the House passed SB 1249, and Governor Corbett signed the bill into law two days later, as Act 131 of 2011. *Id.* at ¶¶ 117, 121-23.

2. The 2011 map "packed" Democratic voters into five districts that Democrats would win by wide margins, and "cracked" the remaining Democratic

voters by spreading them across 13 districts that would be reliably Republican. This resulted in bizarre districts that rip apart Pennsylvania's communities to an unprecedented degree. *Id.* at ¶¶ 313-39; PX53; Tr. 579:18-644:15.

By way of example, the 7th District's tortured shape has earned the moniker "Goofy Kicking Donald Duck." Leg. App'x B ¶ 323; Tr. 598:25-599:22. This district alone splits five counties and 26 municipalities. It is barely contiguous; at one point, it is the width of a medical facility, and elsewhere its only point of contiguity is the restaurant Creed's Seafood & Steaks. Leg. App'x B ¶ 323; PX53 at 32; PX81.

The 6th District is nearly as absurd as the 7th. It cobbles together pieces of multiple communities, resembling Florida "with a more jagged and elongated panhandle." Leg. App'x B ¶ 324; Tr. 616:2-617:17; PX53 at 28-29. A surgical incision carves out the Democratic stronghold of Reading, splitting it from the rest of Berks County and grouping it with far-flung communities in the Republican 16th District via a narrow isthmus that at one point is the width of a mulch store and a service center. Leg. App'x B ¶ 325; PX53 at 50-52; Tr. 618:12-620:6.

More anomalies abound. Erie County was undivided throughout modern history until the 2011 map split it, cracking its Democratic voters between the Republican 3rd and 5th Districts. Leg. App'x B ¶ 320; PX53 at 23, 27; Tr. 591:1-598:5. The map carves up the distinctive community of the Lehigh Valley for the first time in modern history to dilute its Democratic voters. Leg. App'x B ¶¶ 326-28; Tr. 623:15-625:9; PX53 at 47-48, 54. The map splits Harrisburg, cracking its

Democratic voters between the Republican 4th and 11th Districts. Leg. App'x B ¶ 330; PX53 at 25; Tr. 631:1-632:8. The record contains many more examples.

Legislative Applicants have not disputed that the anomalous districts reflect an intentional effort to disadvantage Democratic voters.

3. In each of the three election cycles under the 2011 map, Republican candidates have won 13 of Pennsylvania's 18 congressional seats—the same 13 seats each time. Leg. App'x B ¶¶ 185, 192, 198. In 2012, Republicans won those same 13 of 18 seats (72%) despite winning only a minority of the total statewide vote (49%). *Id.* at ¶¶ 183-85. The distribution of votes across districts reveals how the gerrymander worked. In 2012, 2014, and 2016, Democrats won lopsided victories in the five "packed" districts, with average vote shares of 76.4%, 73.6%, and 75.2%. Leg. App'x B ¶ 185. Republicans won their 13 "cracked" districts with closer—but still comfortable—average vote shares of 59.5%, 63.4%, and 61.8%. *Id.*

B. The Pennsylvania State Court Proceedings Below

1. Respondents the League of Women Voters of Pennsylvania and 18 individual Pennsylvania voters (Petitioners below; hereinafter "Plaintiffs") filed this action against Legislative Applicants and others in Pennsylvania Commonwealth Court on June 15, 2017. Plaintiffs challenged the 2011 map exclusively under the Pennsylvania Constitution. Count I asserted that the map violates the Pennsylvania Constitution's Free Expression and Free Association Clauses, Pa. Const. Art. I, §§ 7, 20, which provide "broader protections of expression than the related First Amendment," *DePaul v. Commonwealth*, 969 A.2d 536, 546 (Pa. 2009).

Count II asserted that the map violates the Pennsylvania Constitution's Free and Equal Clause, Pa. Const. Art. I, § 5, which requires that "elections" be "free and equal" and has no federal counterpart, as well as the Pennsylvania Constitution's equal protection guarantees, Pa. Const. Art. I, §§ 1, 26. Applicants in No. 17A802, who are Pennsylvania Republican voters, volunteers, and prospective candidates ("Intervenor Applicants"), intervened to defend the map.

2. On November 9, 2017, the Pennsylvania Supreme Court exercised "extraordinary jurisdiction" under 42 Pa. C.S. § 726 and ordered the Commonwealth Court to conduct a trial and issue findings of fact and conclusions of law.

At the weeklong trial in December 2017, Petitioners' experts demonstrated the 2011 map's extreme partisan bias. Dr. John J. Kennedy, an expert in Pennsylvania's political geography, demonstrated—without rebuttal—that partisan intent was the only explanation for the map's packing and cracking of Democratic voters, its bizarre districts, and its unprecedented division of communities. Tr. 579:22-580:1, 621:15-636:14; PX53; Leg. App'x B ¶¶ 313-39.

Petitioners' other three experts presented multiple statistical measures and models that each independently supported the conclusion that the 2011 map intentionally and effectively disadvantages Democratic voters. Using a computer simulation methodology, Dr. Jowei Chen concluded with over 99.9% statistical certainty that the 2011 plan's 13-5 Republican advantage would never have emerged from a districting process that adhered to traditional principles. Tr. 203:14-204:2; Leg. App'x B ¶¶ 238-47. Dr. Chen concluded that extreme partisan

intent subordinated traditional districting principles in the 2011 plan. Leg. App'x B ¶ 268. As a result, Republicans have won 4 to 5 more seats than they would have under a plan that followed only traditional principles. *Id.* ¶ 267; Tr. 204:16-205:6.

Dr. Wesley Pegden, a mathematician at Carnegie Mellon University, demonstrated to a mathematical certainty that the 2011 map was intentionally drawn to maximize partisan advantage. PX117 at 1-2; Tr. 1384:22-1386:12. Using a computer algorithm that generated hundreds of billions of maps, he showed that the 2011 map is so carefully engineered to advantage Republicans that its partisan bias immediately evaporates when tiny random changes are made to the district boundaries. Leg. App'x B ¶¶ 342-43, 358-59.

Dr. Christopher Warshaw, an expert in political representation, public opinion, and elections, demonstrated that, under the "Efficiency Gap" measure, the three congressional elections held under the 2011 map have produced historically extreme levels of pro-Republican bias. PX35 at 5-15; Leg. App'x B ¶ 364.

3. On December 29, 2017, the Commonwealth Court issued recommended findings of fact and conclusions of law. The court found that the evidence "established intentional discrimination." Leg. App'x B ¶ 51. As the court stated, "it is clear that the 2011 Plan was drawn through a process in which a particular partisan goal—the creation of 13 Republican districts—predominated." *Id.* at ¶ 291. The court nevertheless recommended upholding the 2011 map.

4. At oral argument before the Pennsylvania Supreme Court, Legislative Applicants' counsel conceded that "[v]oters were classified and placed into districts

based upon the manner in which they voted in prior elections." Oral Argument Video at 1:54:33-44. Counsel did not deny that this was done "to punish" Democratic voters "by placing them into a district where their vote isn't going to carry equal weight." *Id.* at 1:53:20-1:54:20. Legislative Applicants' other counsel stated that if the map were struck down, the legislature wanted "at least three weeks" to enact a new map, *id.* at 1:45:53-1:46:13, and agreed that the traditional districting criteria of compactness, contiguity, and avoiding splitting political subdivisions were appropriate for congressional plans under the Pennsylvania Constitution, *id.* at 1:29:41-1:30:21, 1:32:18-47.

5. On January 22, 2018, the Pennsylvania Supreme Court issued an order, with opinion to follow, holding that the 2011 map "clearly, plainly and palpably violates the Constitution of the Commonwealth of Pennsylvania, and, on that sole basis, we hereby strike it as unconstitutional." Leg. App'x A2. The court ordered that the map's "further use in elections for Pennsylvania seats in the United States House of Representatives, commencing with the upcoming May 15, 2018 primary, is hereby enjoined." *Id.*

As a remedy, the Pennsylvania Supreme Court gave the General Assembly three weeks—until February 9, 2018—to pass a new districting plan, and gave the Governor until February 15 to sign or veto it. *Id.* If the General Assembly and Governor are unable to enact a new plan, the court will "proceed expeditiously to adopt a plan based on the evidentiary record developed in the Commonwealth Court." *Id.* The court accordingly invited all parties to submit "proposed remedial

districting plans on or before February 15, 2018." *Id.* at A2-A3. The court directed that, "to comply with this Order, any congressional districting plan shall consist of: congressional districts composed of compact and contiguous territory; as nearly equal in population as practicable; and which do not divide any county, city, incorporated town, borough, township, or ward, except where necessary to ensure equality of population." *Id.* at A3.

The court advised that "a congressional districting plan will be available by February 19, 2018," and directed the "Executive Branch Respondents"— the Governor, the Secretary of the Commonwealth, and the Commissioner of the Bureau of Elections—to "take all measures, including adjusting the election calendar if necessary, to ensure that the May 15, 2018 primary election takes place as scheduled." *Id.*

Writing separately, Justice Baer concurred in the court's holding that the 2011 map violates the Pennsylvania Constitution and the court's "invitation to the Legislature and Governor to craft constitutional maps" in the first instance. Leg. App'x A5. He dissented solely with respect to ordering a remedial plan for the 2018 rather than 2020 elections. *Id.* at A5-A7. Chief Justice Saylor and Justice Mundy separately dissented. They expressed "substantial concerns as to the constitutional viability of Pennsylvania's current congressional districts," but objected to the timing of the decision and the court's remedy. *Id.* at A9-A13.

On January 25, 2018, the state high court denied Applicants' requests for a stay pending appeal to this Court. *Id.* at D2. Subsequently, the court appointed

Nathaniel Persily to serve "as an advisor to assist the Court in adopting, if necessary, a remedial congressional redistricting plan." Order at 2 (Jan. 26, 2018).

6. On January 26, 2018, Legislative Applicants and Intervenor Applicants asked this Court to stay the Pennsylvania Supreme Court's decision pending resolution of forthcoming petitions for certiorari. Thereafter, one of the Legislative Applicants, Senator Scarnati, advised the state court by letter that the legislature has begun "advancing bills aimed at creating an alternative map" under the timeline the court prescribed.[1] In the same letter, he asserted that the state court's orders were unconstitutional and stated that he would not comply with the court's directive to turn over data relating to Pennsylvania's geographic boundaries.

REASONS TO DENY THE STAY APPLICATIONS

To grant a stay pending the disposition of a petition for certiorari, there must be "(1) a reasonable probability that this Court will grant certiorari, (2) a fair prospect that the Court will then reverse the decision below, and (3) a likelihood that irreparable harm will result from the denial of a stay." *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers) (internal quotation marks and alterations omitted). The Court may not grant a stay unless the balance of the equities supports it. *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 4-5 (2010) (Scalia, J., in chambers). There is no basis for a stay here.

[1] Ltr. from Brian S. Paszamant to Justices of the Supreme Court of Pennsylvania, Jan. 31, 2018, https://www.brennancenter.org/sites/default/files/legal-work/LWV_v_PA_Scarnati-Response-to-01.26.18-Order.pdf/

I. The Court Is Exceedingly Unlikely to Grant Certiorari and Applicants Have No Chance of Success on the Merits

A. The State Court's Ruling that the Map Violates the State Constitution Is Unreviewable and Cannot Be Stayed

The portion of the Pennsylvania Supreme Court's order that strikes down the 2011 map as a matter of state law is not reviewable by this Court, and accordingly this Court lacks jurisdiction to stay that portion of the order. The Pennsylvania Supreme Court made clear that its decision to invalidate the map rested solely on state constitutional grounds: "[T]he Court finds as a matter of law that the Congressional Redistricting Act of 2011 clearly, plainly and palpably violates the Constitution of the Commonwealth of Pennsylvania, and, *on that sole basis*, we hereby strike it as unconstitutional." Leg. App'x A2 (emphasis added).

Nothing in the Elections Clause, U.S. Const. Art. I, § 4, alters the state court's unreviewable authority to invalidate the 2011 map—a state law passed by the state legislature—for violating the state constitution. Nearly a century ago, in *Smiley v. Holm*, 285 U.S. 355 (1932), this Court explained that the Elections Clause does not "render[] inapplicable the conditions which attach to the making of state laws." *Id.* at 365. The Clause does not "endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *Id.* at 368. Congress has codified this requirement, providing that congressional districting plans are not valid unless they are adopted "in the manner provided by [state] law." 2 U.S.C. § 2a(c); *see Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2670 (2015).

In Pennsylvania, one of the conditions that attaches to the making of any state law—including a law that establishes congressional districts—is compliance with the Pennsylvania Constitution, as interpreted by the Pennsylvania Supreme Court. *Emerick v. Harris*, 1 Binn. 416, 1808 WL 1521 (Pa. 1808); *Fillman v. Rendell*, 986 A.2d 63, 75 (Pa. 2009). Here, the Pennsylvania Supreme Court has held that Pennsylvania's Act 131 of 2011, which enacted the 2011 map, does not comply with the Pennsylvania Constitution. This Court is, "of course, bound to accept the interpretation of [state] law by the highest court of the State." *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488 (1976). This Court lacks jurisdiction to review or stay any aspect of a decision that is based on state law. 28 U.S.C. §§ 1257(a), 2101(f).

Intervenor Applicants argue that the Pennsylvania Supreme Court made no "plain statement" that its decision rests upon state-law grounds. Int. Appl. 11. This argument is frivolous in light of the court's plain statement that state constitutional grounds were the "sole basis" for its ruling. Even Legislative Applicants do not dispute that the court below made sufficiently clear that the map was invalid exclusively as a matter of state law.

Legislative Applicants instead declare that the Pennsylvania Supreme Court engaged in "judicial activism" and "not interpretation at all, but rank legislation." Leg. Appl. 2, 11. But inflammatory rhetoric does not transform a state court's interpretation of the state's own constitution into a federal question. Nor do *ad hominem* attacks against individual state supreme court justices. *Id.* at 5-6 n.1.

In any event, Legislative Applicants' intemperate portrayal of the decision does not accord with reality. Pennsylvania's Supreme Court has consistently and repeatedly held that excessive partisan gerrymandering offends the Pennsylvania Constitution and that such claims are justiciable under Pennsylvania law. *In re 1991 Pennsylvania Legislative Reapportionment Comm'n*, 609 A.2d 132, 141-42 (Pa. 1992); *Erfer v. Commonwealth*, 794 A.2d 325, 331 (Pa. 2002).[2] The state high court has consistently and repeatedly held that the Pennsylvania Constitution provides "broader protections of expression than the related First Amendment," including for political speech. *DePaul*, 969 A.2d at 546; *see Pap's A.M. v. City of Erie*, 812 A.2d 591 (Pa. 2009). Pennsylvania's constitutional guarantee that "elections" must be "free and equal," Pa. Const. Art. I, § 5, has no federal counterpart. And the Pennsylvania statute under which the state high court exercised jurisdiction authorizes the court to assume "plenary jurisdiction" of any matter and "enter a final order or otherwise cause right and justice to be done," "[n]otwithstanding any other provision of law." 42 Pa. C.S. § 726. Pennsylvania's Supreme Court has been invoking this provision for decades in the congressional redistricting context. *E.g.*, *Erfer*, 794 A.2d at 328; *Mellow v. Mitchell*, 607 A.2d 204, 206 (Pa. 1992). Judicial review here was not some invention for this case only.

In light of the overwhelming evidence and Applicants' admission at oral

[2] Legislative Applicants' citation to *Erfer* for the proposition that "no [Pennsylvania] state constitutional requirements apply to congressional district maps," Leg. Appl. 12, is puzzling. *Erfer* "reject[ed]" the "radical conclusion that our Commonwealth's Constitution is nullified in challenges to congressional reapportionment plans," 794 A.2d at 331, and evaluated the 2002 map under state constitutional provisions.

argument that the map was drawn to discriminate on the basis of prior political expression, it is no surprise that the Pennsylvania Supreme Court concluded that this map, unlike prior Pennsylvania maps, crossed the line. Applicants say it is "untenable" that Pennsylvania's Free Expression and Association Clauses prohibit partisan gerrymandering, as if such a holding were somehow outside the mainstream. Leg. Appl. 12. But a Justice of this Court has explained that partisan gerrymandering may violate the First Amendment, which provides less expansive protections than Pennsylvania's free expression guarantee. *Vieth v. Jubelirer*, 541 U.S. 267, 315 (2004) (Kennedy, J. concurring). And the fact that federal law is unsettled, Int. Appl. 13-14, does not counsel in favor of federal intervention. Quite the opposite. Federalism encourages state supreme courts to interpret their own constitutions independent of federal law.

B. There Is No Possibility That This Court Will Review or Reverse the State Court's Remedy Under the Federal Elections Clause

Legislative Applicants argue that the word "Legislature" in the Elections Clause, U.S. Const. art. I, § 4, forbids state courts from taking steps to remedy a state legislature's violation of the state constitution. Leg. Appl. 9. That argument has been rejected time and again by this Court and does not warrant review. There is no likelihood of certiorari, and zero likelihood of reversal. This Court would have to overturn at least six of its decisions spanning almost a century to hold, as Legislative Applicants propose, that the Elections Clause precludes state courts from setting criteria for, or adopting, remedial congressional maps.

In two companion cases decided the same day as *Smiley*, this Court expressly

affirmed state courts' implementation of remedial congressional districting plans after those courts invalidated prior plans under the state constitution. *Carroll v. Becker*, 285 U.S. 380, 381-82 (1932); *Koenig v. Flynn*, 285 U.S. 375, 379 (1932). In *Koenig*, the New York Court of Appeals struck down the state's congressional districting law because it violated "the requirements of the Constitution of the state in relation to the enactment of laws," and the state court ordered the election to proceed under a remedial plan. 285 U.S. at 379. Relying on *Smiley*'s holding that the Elections Clause does not empower state legislatures to violate state constitutions, this Court affirmed the decision and the state court's authority to impose a remedial plan. *Id.*; *see also Carroll*, 285 U.S. at 382 (same as to congressional districting plan imposed by Missouri Supreme Court).

More recently, in *Growe v. Emison*, 507 U.S. 25 (1993), this Court held that federal courts must *defer* to state courts in congressional redistricting—and upheld a state court's power to draw a remedial map using traditional districting criteria. After invalidating Minnesota's prior congressional map, a Minnesota state court "adopted final criteria for congressional plans and provided a format for submission of plans in the event the legislature failed to enact a constitutionally valid congressional apportionment plan." *Cotlow v. Growe*, C8-91-985 (Minn. Spec. Redis. Panel Apr. 15, 1992).[3] Two months later, a federal court enjoined the state court from adopting any new plan and then adopted its own remedial plan. *Growe*, 507 U.S. at 30-31. The state court subsequently released a provisional remedial plan,

[3] *Available at* https://www.senate.mn/departments/scr/REDIST/COTLO415.HTM.

subject to the federal injunction, that used the criteria of "minimiz[ing] the number of municipal and county splits" and promoting "compactness." *Cotlow*, C8-91-985, *supra*. Because of the federal court injunction, however, the 1992 congressional elections proceeded under the federal court plan.[4]

This Court reversed the federal court's injunction. Writing for a unanimous Court, Justice Scalia explained that "[t]he District Court erred in not deferring to the state court's efforts to redraw Minnesota's … federal congressional districts." *Growe*, 507 U.S. at 42. This Court stated over and over and over again that state courts have the power to review and remedy congressional districting plans and that federal courts must not interfere:

- "In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself." 507 U.S. at 33 (emphasis in original).

- "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." *Id.* (internal quotation marks omitted).

- "[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts. We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court. Absent 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." *Id.* at 34 (quotations omitted).

[4] *Minnesota Redistricting Cases: the 1990s*, https://www.senate.mn/departments/scr/REDIST/Redsum/mnsum.htm.

- "[T]he District Court's December injunction of state-court proceedings … was clear error. It seems to have been based upon the mistaken view that federal judges need defer only to the Minnesota Legislature and not at all to the State's courts. Thus, the January 20 deadline the District Court established was described as a deadline for the legislature, ignoring the possibility and legitimacy of state judicial redistricting. And the injunction itself treated the state court's provisional legislative redistricting plan as 'interfering' in the reapportionment process. But the doctrine of *Germano* prefers both state branches to federal courts as agents of apportionment." *Id.* at 34.

- "The Minnesota [court's] issuance of its plan (conditioned on the legislature's failure to enact a constitutionally acceptable plan in January), far from being a federally enjoinable 'interference,' was precisely the sort of state judicial supervision of redistricting we have encouraged." *Id.* at 34.

- "The District Court erred in not deferring to the state court's timely consideration of congressional reapportionment." *Id.* at 37.

Following this Court's decision in *Growe*, the state court's remedial plan—which was drawn using the traditional criteria of compactness and minimizing political subdivision splits—governed the 1994 congressional elections.[5]

The Pennsylvania Supreme Court proceeded here in precisely the way *Growe* "encouraged": it gave the state legislature a chance to enact a new plan and "conditioned" the adoption of a state court plan on the "legislature's failure to enact a constitutionally acceptable plan." *Growe*, 507 U.S. at 34. Yet without even citing *Growe*, Legislative Applicants effectively urge this Court to overturn it. Under their view, state courts would not only lose their primacy in addressing congressional districting challenges, but would be rendered powerless in this area. Stays are for cases where there is a probability of certiorari and a prospect of reversal, not for theories that are squarely foreclosed by this Court's longstanding precedent.

[5] *Minnesota Redistricting Cases: the 1990s*, *supra* note 4.

Nothing in *Arizona State Legislature* suggests that state courts lack power to review and remedy state congressional maps. *Cf.* Leg. Appl. 9, 14-15. To the contrary, this Court upheld against an Elections Clause challenge the power of states to assign congressional redistricting to an independent commission. In so holding, the Court reaffirmed that redistricting must be "performed in accordance with the State's prescriptions for lawmaking." *Ariz. State Legislature*, 135 S. Ct. at 2668. The Court *rejected* the notion that the "Elections Clause renders the State's representative body the sole component of state government authorized to prescribe regulations for congressional redistricting." *Id.* at 2673 (quotations and alterations omitted). "Nothing in that Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." *Id.* Legislative Applicants make no effort to reconcile their radical interpretation of the Elections Clause with that decision from just three years ago.

It is not only that this Court has repeatedly rejected the notion that the reference to "Legislature" in the first part of the Elections Clause precludes state courts from enforcing state constitutions. The second part of the Elections Clause allows Congress "at any time" to alter state laws related to congressional redistricting, U.S. Const. Art. I, § 4, and this Court held in *Branch v. Smith*, 538 U.S. 254 (2003), that Congress has validly done so by conferring remedial authority on state courts. *Branch* held that 2 U.S.C. § 2c authorizes both state and federal courts to "remedy[] a failure" by the state legislature "to redistrict constitutionally,"

and "embraces action *by state and federal courts* when the prescribed legislative action has not been forthcoming." *Id.* at 270, 272 (emphasis added). "[Section] 2c is as readily enforced by courts as it is by state legislatures, and is just as binding on courts—federal or state—as it is on legislatures." *Id.* at 272. Legislative Applicants apparently would have this Court overturn *Branch*, but they do not even cite it.

The plurality portion of *Branch* explained that another federal statute, 2 U.S.C. § 2a(c), also recognizes state courts' power to adopt congressional redistricting plans pursuant to state law. Section 2a(c) prescribes procedures that apply "[u]ntil a State is redistricted in the manner provided by [state] law." The plurality explained that the "[u]ntil a State is redistricted" language in this provision "can certainly refer to redistricting by courts as well as by legislatures," and that "when a court, *state or federal*, redistricts pursuant to § 2c, it necessarily does so 'in the manner provided by state law.'" *Id.* at 274 (emphasis added; bracketing omitted). The dissent disagreed with the plurality not on the theory that state courts lack authority to impose a redistricting plan, but because the dissent thought that *only* state courts (and not federal courts) may undertake an initial redistricting. *Id.* at 277. But every Justice agreed that, as compared to federal courts, it is "preferable for the State's legislature to complete its constitutionally required redistricting … or for the state courts to do so if they can." *Id.* at 278.

The majority in *Arizona State Legislature* upheld this interpretation. Under § 2a(c), "Congress expressly directed that when a State has been redistricted in the manner provided by state law—whether by the legislature, *court decree*, or a

commission established by the people's exercise of the initiative—the resulting districts are the ones that presumptively will be used to elect Representatives." 135 S. Ct. at 2670 (emphasis added) (quotations and alterations omitted). Legislative Applicants thus are wrong that, in *Arizona State Legislature*, "[n]o Justice suggested that state courts might share in" the redistricting function. Leg. Appl. 9.

In short, while Legislative Applicants argue that the authority of state courts to consider congressional reapportionment "present[s] an issue of federal law long overdue for definitive resolution by this Court," Leg. Appl. 8-9, they ignore at least six decisions of this Court—*Growe*, *Smiley*, *Koenig*, *Carroll*, *Branch*, and *Arizona State Legislature*—definitively resolving the question against them. In these circumstances, Applicants cannot demonstrate a "reasonable probability" that this Court will grant certiorari, and they certainly cannot demonstrate a "fair prospect" that a majority of this Court would vote to reverse.[6]

It would be remarkable for this Court to intrude upon state sovereignty by entering a stay under these circumstances, and the sprinkling of dissents and concurrences Applicants cite hardly counsel otherwise. Applicants repeatedly cite a dissent from denial of certiorari in *Colorado General Assembly v. Salazar*, 541 U.S.

[6] Legislative Applicants' view that the Elections Clause "vests [redistricting] authority" exclusively in state legislatures and Congress, Leg. Appl. 9, would seemingly require this Court to overrule *Wesberry v. Sanders*, 376 U.S. 1 (1964). There, the Court rejected the plurality opinion in *Colgrove v. Green*, 328 U.S. 549 (1946)—which had concluded that the Elections Clause's reference to "Congress" deprives *federal* courts of power to review congressional maps. *Wesberry*, a foundational redistricting decision, explained: "[N]othing in the language of [the Elections Clause] gives support to a construction that would immunize state congressional apportionment laws … from the power of courts to protect the constitutional rights of individuals from legislative destruction." 376 U.S. at 6-7.

1093 (2004), but that concerned the very different question whether a state court could *prohibit* the legislature from redistricting. The petitioners there did "not disput[e] state courts' remedial authority to impose temporary redistricting plans 'so long as the legislature does not fulfill its duty to redistrict'" in a lawful manner. *Id.* at 1094. Here, the state high court has given the legislature the opportunity to redistrict in a constitutional manner and will step in only if the legislature fails to do so—again, precisely the procedure this Court unanimously blessed in *Growe*.

Similarly, no part of the three-Justice concurrence in *Bush v. Gore*, 531 U.S. 98 (2000), which concerned *presidential* elections, suggests that the Court should overrule decades of precedent confirming that state courts have power to remedy unconstitutional congressional districting statutes. *Cf.* Leg. Appl. 14. And in *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916) (cited at Leg. Appl. 15), the Court *rejected* any notion that a congressional districting plan that was contrary to "the Constitution and laws of the state was yet valid and operative." *Id.* at 568.

C. The Remedy the Pennsylvania Supreme Court Ordered Is Consistent With Precedent in Pennsylvania and Other States

Nothing about the particular criteria the Pennsylvania Supreme Court adopted in fashioning a remedy in this case warrants this Court's intervention, and Legislative Applicants have waived any contrary argument. The court instructed the legislature, in drawing a remedial map, to follow traditional districting criteria, namely, equalizing population, maximizing compactness, ensuring contiguity, and minimizing political subdivision splits. Leg. App'x A3. Applicants claim that the Pennsylvania Supreme Court "wove" these criteria "from whole cloth," Leg. Appl.

10-11, but that is not true.

More than 25 years ago, in *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992), the Pennsylvania Supreme Court adopted a remedial congressional map using these very criteria. The Pennsylvania Supreme Court picked among competing plans proposed by the parties based on criteria including "avoid[ing] splitting of political subdivisions and precincts," "preserv[ing] communities of interest," and "compactness." *Id.* at 208, 215-25. Two decades later, the court reaffirmed that "compactness, contiguity, and respect for the integrity of political subdivisions not only have deep roots in Pennsylvania constitutional law," but also "represent important principles of representative government." *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 745 (Pa. 2012).

At oral argument before the Pennsylvania Supreme Court, Legislative Applicants' counsel acknowledged that "compactness[] and avoiding splitting political subdivisions were things that this court identified in *Mellow* when this court identified what criteria it was going to use when adopting a map." Oral Argument Video at 1:29:49-1:30:21. Subsequently, counsel confirmed that the criteria were valid criteria for evaluating the constitutionality of congressional districts in Pennsylvania. *Id.* at 1:32:18-47.

In short, these criteria are well-established in Pennsylvania, and Legislative Applicants have waived any challenge to their use in this case. That waiver precludes the Court from granting a stay on the basis of an objection to the Pennsylvania Supreme Court's remedial choices.

What is more, disagreement with the criteria the Pennsylvania Supreme Court imposed would not present a basis for a stay even absent the waiver. Legislative Applicants make no serious argument that it offends the *federal constitution* for a state to require congressional districts to be compact and to avoid splitting political subdivisions, much less as part of a remedial measure. This Court has repeatedly recognized these criteria as valid. *E.g.*, *Reynolds v. Sims*, 377 U.S. 533, 578 (1964); *Shaw v. Reno*, 509 U.S. 630, 646 (1993).

In *Growe*, the state court used compactness and avoiding subdivision splits as criteria in drawing its own plan, and this Court forbade federal courts from interfering. *Supra* § I.B. And state courts around the country routinely use these very criteria in ordering or generating remedial congressional districting plans where an existing plan violates the state or federal constitution.[7] Like the Pennsylvania Supreme Court, none of these courts were engaging in "judicial activism" or "rank legislation." Leg. Appl. 2, 11, 14. They were doing what courts do: fashioning an appropriate equitable remedy to redress a constitutional violation. Nothing about the Pennsylvania Supreme Court's order warrants a stay any more than it did in these cases dating back decades.

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[7] *See, e.g.*, *League of Women Voters v. Detzner*, 179 So.3d 258, 288-89 (Fla. 2015); *Beauprez v. Avalos*, 42 P.3d 642, 652 (Colo. 2002); *Hall v. Moreno*, 270 P.3d 961, 966 (Colo. 2012); *In re Apportionment Comm'n*, 36 A.3d 661 (Conn. 2012); *Zachman v. Kiffmeyer*, at *15, 2002 Minn. LEXIS 884 (Minn. Spec. Redis. Panel Mar. 19, 2002); *Hippert v. Ritchie*, 813 N.W.2d 391, 395 (Minn. Spec. Redis. Panel 2012); *In re 2003 Apportionment of the State Senate and U.S. Congressional Districts*, 827 A.2d 844, 847 (Maine 2003); *Jepsen v. Vigil-Giron*, 2002 WL 35459962 (N.M. Dist. Jan. 8, 2002); *Alexander v. Taylor*, 51 P.3d 1204, 1211 (Okla. 2002); *Wilson v. Eu*, 823 P.2d 545, 549-50 (Cal. 1992); *Legislature v. Reinecke*, 516 P.2d 6, 10, 13 (Cal. 1973).

Applicants argue that allowing state courts to enforce state constitutions means that "no reins would exist" to restrain state courts, that "any state-court created criteria are possible," and that state courts could require the legislature to "favor one political party or interest group" or require "at large" elections or "proportional representation." Leg. Appl. 16-17. Not so. As just noted, state courts have been enforcing state constitutions in the context of congressional redistricting for a century without any calamitous result or violation of federal law.

Applicants attempt to distinguish the decision below from some other state court cases reviewing congressional districting maps under state constitutions, arguing that in other cases a state "statutory or constitutional provision plainly empowered such review." Leg. Appl. 10 n.6. Such a distinction appears nowhere in the Elections Clause and is not enforceable by this Court. A holding that this Court must decide in every congressional apportionment case whether a state constitutional provision "plainly empowers" state court review would effect an unprecedented intrusion upon state sovereignty and a radical rewriting of centuries worth of precedent establishing that this Court lacks the power to review decisions of a state high court interpreting state constitutional law. In any event, Pennsylvania's Constitution "plainly empowers" judicial review, including the Pennsylvania Supreme Court's authoritative interpretation of the state constitutional provisions at issue here.

D. Legislative Applicants Are Estopped From Asserting an Elections Clause Challenge and Intervenor Applicants Waived Any Such Challenge

There is a further, dispositive vehicle problem that will prevent this Court from granting certiorari: Legislative Applicants are judicially estopped from asserting their Elections Clause argument in this Court. That alone provides sufficient basis to deny their request for a stay.

To determine if a party is judicially estopped under federal law, courts consider whether (1) the party's position is "clearly inconsistent with its earlier position"; (2) "the party has succeeded in persuading a court to accept that party's earlier position"; and (3) "the party seeking to assert an inconsistent position would derive an unfair advantage ... if not estopped." *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001) (internal quotation marks omitted). All three factors are met here. Indeed, it is difficult to imagine a clearer case where estoppel is warranted "to prevent improper use of judicial machinery." *Id.*

1. Legislative Applicants advanced the opposite of their current position in separate federal litigation. On October 16, 2017, in a federal lawsuit challenging the 2011 map, Legislative Applicants asked the federal court to stay or abstain based on this state court action. *Agre v. Wolf*, No. 17-4392, ECF No. 45-2 (E.D. Pa. Oct. 2, 2017). Citing *Growe*, they argued that under "long-accepted and well-settled principles of abstention," the federal court was "required" to defer to the state court. *Id.* at 24-25 (capitalization omitted). Under *Growe*, they argued, a state's "judicial

branch" is a valid and preferable "agent[] of apportionment" with respect to congressional redistricting. *Id.* at 25.

When the district court denied the motion, Legislative Applicants sought emergency mandamus relief in this Court. They explained that, under this Court's precedent and "principles of federalism," "federal judges are '**required** … to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself.'" Emergency Mandamus Pet'n 13-14, *In re Michael C. Turzai*, No. 17-631 (2017) (quoting *Growe*, 507 U.S. at 33) (emphasis by Legislative Applicants). In a section titled "The District Court Usurped the Power of the Pennsylvania State Courts," Legislative Applicants wrote:

> [T]here can be no question that the Pennsylvania state courts have already begun the "highly political task" of addressing the challenges to the 2011 Plan. Because federal courts are **required** to defer adjudication of a redistricting matter that a state legislative or judicial branch is already considering, the District Court usurped the power of the Pennsylvania appellate courts[.]

Id. at 18-19.

While this Court denied mandamus, Legislative Applicants have now succeeded in persuading a lower federal court to enter a stay on the basis of this exact same argument. On November 20, 2017, in a second federal lawsuit challenging Pennsylvania's 2011 map, Legislative Applicants again argued that the federal court was "required" to defer to the Pennsylvania state courts, because state courts are valid and preferable "agents of apportionment." *Diamond v. Torres*, No. 5:17-cv-5054, ECF No. 26-4 at 23-26 (E.D. Pa.). The federal court granted an initial

stay on November 22, and subsequently extended the stay through January 8, 2018 on the basis of this state court action. *Diamond*, ECF Nos. 40, 48.

After the stay expired, Legislative Applicants filed a new stay motion, again asserting that the "legislative *or* judicial branch" of a state has authority to review and remedy congressional districting plans. *Diamond*, ECF No. 69-2 at 16 (emphasis in original). Legislative Applicants also noted that, in *Scott v. Germano*, 381 U.S. 407, 409 (1965), this Court expressed "the preference to have state legislatures and state courts, rather than federal courts, address reapportionment." *Diamond*, ECF No. 69-2 at 16.

On January 22, 2018—just days before filing their stay application in this Court—Legislative Applicants filed a reply brief in *Diamond* again asserting that the federal court had to defer to the Pennsylvania Supreme Court. *Diamond*, ECF No. 81. They argued that the *Diamond* court was "required to defer to Pennsylvania's legislative, executive and judicial branches" under the "plain language of *Growe*." *Id.* at 2, 5. On January 23, the *Diamond* court stayed the case indefinitely "upon consideration of Legislative Defendants' motion to stay (Doc. No. 69), as well as the *per curiam* order entered by the Supreme Court of Pennsylvania on January 22, 2018 in *League of Women Voters of Penn. v. Commw. of Penn.*" *Diamond*, ECF No. 84.

Under these circumstances, there can be no dispute that Legislative Applicants have taken inconsistent positions across these cases. In their stay application to this Court, Legislative Applicants argue that the federal Elections

Clause "vests authority" over congressional redistricting *only* in state legislatures and Congress, and "[s]tate courts enjoy none of this delegated authority." Leg. Appl. 9. But Legislative Applicants said the opposite to the *Diamond* court, not to mention to this Court in requesting the extraordinary relief of a writ of mandamus. They asserted in the federal lawsuits that state courts are "agents of apportionment" whose authority to review congressional plans is so unquestioned that federal courts are "required" to defer. *Diamond*, ECF No. 69-2 at 16, No. 81 at 2.

2. Legislative Applicants "succeeded" in making this argument to the federal *Diamond* court. *New Hampshire*, 532 U.S. at 750-51. The *Diamond* court has now granted a full and indefinite stay based on Legislative Applicants' argument that state courts have authority and primacy in addressing congressional redistricting challenges. *Diamond*, ECF No. 84. Legislative Applicants have accrued and will continue to accrue significant benefits from this stay: it will allow them to avoid discovery and trial in federal court and preclude the *Diamond* plaintiffs from obtaining relief from the federal court in time for the 2018 elections.

3. Judicial estoppel is necessary to prevent Legislative Applicants from "deriv[ing] an unfair advantage" and abusing the "judicial machinery." *New Hampshire*, 532 U.S. at 750-51. If this Court were to grant a stay, Legislative Applicants will have obtained two *simultaneous* stays in two different courts based on diametrically opposed positions: (1) a stay in *Diamond* based on the argument that state courts have primary authority to review and remedy congressional

districting challenges; and (2) a stay in this Court based on the argument that state courts have no authority to review and remedy congressional districting plans. The judicial estoppel doctrine exists precisely to prevent such results.

The separate application for a stay by the Intervenor Applicants does not avoid this vehicle problem. Intervenor Applicants did not raise an Elections Clause (or any federal law argument) during the state court proceedings below, and they have therefore waived the argument. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002). Because Legislative Applicants are judicially estopped from pursuing the argument and Intervenor Applicants did not raise it below, there is no proper party to raise the argument before this Court. *See FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 226 n.4 (2013).[8]

II. There Is No Likelihood of Irreparable Harm and the Balance of Equities Weighs Against a Stay

It is in no party's interest to stay the order in this case. Applicants' objections to the court-ordered remedial process are insubstantial and ignore the facts and the law. Pennsylvania and other states around the country have implemented remedial congressional maps in less time than is available here. The new map will be in place well before the primary and general elections, and the

[8] Legislative Applicants' Elections Clause argument is also judicially estopped under Pennsylvania law. *In re Adoption of S.A.J.*, 838 A.2d 616, 620 (Pa. 2003). The possibility that the Pennsylvania Supreme Court will so hold could create an adequate and independent state ground that precludes this Court's review. *See Smith v. Texas*, 550 U.S. 297, 325 (2007) (Alito, J., dissenting) ("[I]n cases in which this Court has reversed a state-court decision based on a possible federal constitutional violation, it is not uncommon for the state court on remand to reinstate the same judgment on state-law [procedural] grounds" such as waiver.).

Pennsylvania Supreme Court gave Legislative Applicants what they asked for—three weeks—to draw a new map. And even if Applicants were right that there is insufficient time to implement a new map, federal law would dictate at-large elections, not the reinstatement of Pennsylvania's unconstitutional 2011 map. Finally, the balance of equities is not even close given the extreme and irreparable harm of forcing millions of Pennsylvania voters to choose their members of Congress based on a map that the state's highest court has declared invalid under the state's own constitution.

1. Legislative Respondents assert that "irreparable injury is certain" because the Pennsylvania Supreme Court has enjoined a state statute "'enacted by representatives of [Pennsylvania's] people.'" Leg. Appl. 18 (quoting *Maryland v. King*, 133 S. Ct. 1, 3 (2012)). But, as the Pennsylvania Supreme Court held in an unreviewable ruling, this particular state statute violates the state constitution. An inability to enforce an unconstitutional law is not a cognizable injury.

Legislative Respondents assert that adopting a new map for 2018 will cause irreparable harm because it will cause "voter confusion" and "depress turnout." Leg. Appl. 19. They put on no evidence of this below, and bare speculation cannot support a stay. *See Winter v. Nat. Res. Def. Council*, Inc., 555 U.S. 7, 22 (2008). There will be three months between the adoption of the new map in mid-February and the May 15 primaries, and nine months until the general elections in November. Unlike the Secretaries of State *amici* from other jurisdictions, the officials actually charged with administering elections in Pennsylvania—the

Executive Branch Defendants—have made clear that there will be no difficulty educating voters and administering orderly elections in this timeframe.

In fact, Pennsylvania voters will have almost as much time to become "familiar" with the new district boundaries and candidates as they did following enactment of the 2011 map itself. Leg. Appl. 18-19. The 2011 map was signed into law on December 22, 2011 and used in the primaries four months later, on April 24, 2012. Here, a new map will be in place by February 19, 2018, three months before the May 15, 2018 primaries. There is zero indication that Pennsylvanians had any difficulty learning the "facts, issues, and players" in the four months from December 2011 to April 2012. Leg. Appl. 19. Applicants offer no reason to believe that the three months from February to May 2018 will be any different.

What is more, the Commonwealth of Pennsylvania has successfully implemented court-ordered congressional plans in *less* time than it has here. In *Mellow*, the Pennsylvania Supreme Court adopted a new map on March 10, 1992, and that map was used at the April 28, 1992 primary elections, just a month and a half later. 607 A.2d at 206, 225. That is *half* the time available here. The *Mellow* court also gave candidates nine days to circulate and file nominating petitions, *id.* at 244, also less time than the 15 days they will have here. This Court denied review in *Mellow*. *See* 506 U.S. 828 (1992). Thus, the Commonwealth of Pennsylvania has implemented new congressional district boundaries for an upcoming election before without incident, and it will do it again here.

This Court similarly has held that state courts may properly adopt a new congressional districting map *less than two months* before the elections. In *Growe*, the Minnesota state court planned to adopt a new congressional map in early March 1992, less than two months before primary elections in late April and early May 1992. 507 U.S. at 31, 37 n.2. In holding that the federal court had improperly enjoined the state court's adoption of a new plan on this schedule, this Court rejected the view that "the state court was … unable to adopt a congressional plan in time for the elections." *Id.* at 37. With almost two months to go, there was no need for a "last-minute federal-court rescue of the Minnesota electoral process." *Id.*

Courts typically have stayed orders affecting elections only when those orders were entered much closer to the election at issue. In *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (cited at Leg. Appl. 3, 18-19; Int. Appl. 2, 15, 20), this Court blocked a lower court's order enjoining enforcement of Arizona's voter-identification law barely four weeks before the 2006 general elections. By contrast, here, the May 2018 primaries are still almost four months away. The state agencies charged with implementing the new plan have concluded that adopting a new plan by February 19 will not "compromis[e] the election process in any way." Leg. App'x B ¶¶ 35, 448-51.

Nor does this Court's order deny the political branches a "genuine opportunity" to enact legislation creating a new map, as Legislative Applicants claim. Leg. Appl. 20. Legislative Applicants waived any such argument when they told the Pennsylvania Supreme Court at oral argument that they "would like at least three weeks." Oral Argument Video at 1:46:05-1:46:13. The state high court's

order gives them what they asked for—19 days for the General Assembly to pass a bill (including 15 business days) and six days after that for the Governor to sign or veto it. This is at least as much time as it took to enact the 2011 map. Republicans in the General Assembly first revealed the 2011 map on December 14, 2011, and within eight days the bill had been passed and signed into law.

Legislative Applicants' contention that the General Assembly has "*no* guidance" on how to draw a valid map is simply wrong. Leg. Appl. 13; *accord id.* at 20. The Pennsylvania Supreme Court's order is clear as day: the remedial map must have "congressional districts composed of compact and contiguous territory; as nearly equal in population as practicable; and which do not divide any county, city, incorporated town, borough, township, or ward, except where necessary to ensure equality of population." Leg. App'x A3. With this guidance, Legislative Applicants' position that they cannot figure out how to draw a map that passes constitutional muster is hardly credible.[9]

Intervenor Applicants contend that adopting a new map for 2018 will cause them irreparable harm because it will harm the "exercise of their constitutional rights to participate in the political process" by forcing them to "start anew" in their campaigning activities. Int. Appl. 16. But they have never relied on any federal

[9] The Pennsylvania Supreme Court required districts to be drawn as nearly equal in population as is practicable (Leg. Appl. 20) because that is the language from this Court's precedent and because Pennsylvania's 2010 census population is not evenly divisible by 18, not because the state court was sanctioning unconstitutional population inequality. As for the Voting Rights Act, of course federal law is a backstop and nothing in the state high court's order suggests otherwise. And the court's decision to retain authority to review the legislature's remedial map (Leg. Appl. 20) for constitutionality is standard practice.

constitutional provision in this case, nor have they identified a cognizable constitutional "right" to perpetuate unconstitutional congressional districts.

2. Applicants' *Purcell* argument also rests on the false premise that if there is insufficient time to implement a remedial map, the 2018 elections will go forward under the 2011 map. In fact, if there were not enough time to implement a new map, then a federal statute would provide the remedy. As this Court has explained, 2 U.S.C. § 2a(c)(5) prescribes mandatory procedures where (i) a state lost a congressional seat from the prior decade's reapportionment (as occurred in Pennsylvania); (ii) the state does not have a congressional plan enacted "in the manner provided by the law thereof"; and (iii) "there is no time for either the State's legislature or the courts to develop one." *Branch*, 538 U.S. at 275 (plurality opinion); *see Ariz. State Legislature*, 135 S. Ct. at 2670. In those circumstances, § 2a(c)(5) requires at-large elections for a state's entire congressional delegation.

Applicants' supposition that the 2018 elections should proceed under the 2011 map if there is not time to implement a new map is therefore wrong. Section 2a(c)(5) bars the use of a congressional plan that was not enacted "in the manner provided by state law," and the Pennsylvania Supreme Court has held that the 2011 map was not enacted in the manner provided by Pennsylvania law. *See Arizona State Legislature*, 135 S. Ct. at 2670 ("Section 2a(c) sets forth congressional-redistricting procedures ... if the State, 'after any apportionment,' ha[s] not redistricted 'in the manner provided by state law.'" (bracketing omitted)); *Branch*, 538 U.S. at 274 (plurality opinion) (same). Thus, if this Court were to grant a stay

on Applicants' theory that there is not enough time, then § 2a(c)(5) would require 18 at-large elections in 2018.

But there is no reason to resort to § 2a(c)(5)'s procedures. The Pennsylvania Supreme Court set forth an orderly process to develop a remedial plan—exactly in the way the majority portion of *Branch* held that 2 U.S.C. § 2c directs. This remedial process is consistent with the congressionally-prescribed scheme, with longstanding Pennsylvania precedent, and with remedial plans that state courts have implemented across the country. *See, e.g.*, *Favors v. Cuomo*, 2012 WL 928223, at *1 n.4, 3 (E.D.N.Y. Mar. 19, 2012) (adopting remedial congressional plan drawn by special master Nathaniel Persily to avoid at-large elections under § 2a(c)(5)).

3. Legislative and Intervenor Applicants note that this Court granted stays in *Whitford v. Gill*, No. 16-1161, and *Rucho v. Common Cause*, No. 17A745. But those cases involve federal constitutional claims brought in federal courts that were subject to direct review in this Court. This case involves exclusively state constitutional claims decided by the state's highest court. The Pennsylvania Supreme Court has already held that the 2011 map violates the Pennsylvania Constitution regardless of what this Court says in the pending federal cases.

4. On the balance of equities, Legislative Applicants stunningly suggest that this case involves only the "paltriest" of rights to which Plaintiffs do not attach any real "significance." Leg. Appl. 20-21. Voting is a "fundamental political right" because it is "preservative of all rights." *Reynolds*, 377 U.S. at 562. "[O]nce a State's legislative apportionment scheme has been found to be unconstitutional, 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.* at 585. Plaintiffs and millions of other Pennsylvanians have an overwhelming interest in participating in fair elections under a valid map.

Legislative Applicants argue that their constitutional violation was "not severe." Leg. Appl. 21. The 2011 map is the worst partisan gerrymander in Pennsylvania's history and among the worst in American history. In each of the three election cycles under the 2011 map, Republicans won up to five seats more than they would have under a non-partisan plan, including in 2012 when they won 13 of 18 seats with only a minority of the statewide vote.

Legislative Applicants argue that adopting a new map for 2018 will undermine the "integrity" of the elections. Leg. Appl. 3, 18. But nothing has done more damage to the integrity of Pennsylvania's elections than Legislative Applicants' historically extreme gerrymander. Gerrymandering undermines citizens' trust in government and strikes at the foundation of representative democracy. Forcing Pennsylvanians to vote in districts that their state's highest court has declared invalid under the state constitution would cause lasting damage.

Federal and the integrity of Pennsylvania's elections will be best served by denying a stay and allowing the Commonwealth of Pennsylvania to adopt a new map that comports with the Pennsylvania Constitution.

CONCLUSION

The applications for a stay should be denied.

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Respectfully submitted,

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