No. 17A909

IN THE

Supreme Court of the United States

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

PLAINTIFFS-RESPONDENTS' RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION FOR STAY PENDING THE DISPOSITION OF PETITION 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 violated the Pennsylvania Constitution, and set out a process for adopting a remedial map for the 2018 elections. Casting aside the hornbook principle that this Court cannot review state court decisions construing state law, Applicants asked the Court to stay the state court's judgment and remedial process. Justice Alito denied their stay application on February 5.

Now it's déjà vu all over again. Applicants return to this Court, again seeking a stay, raising arguments materially identical to the ones they presented barely a month ago. But their arguments have not improved with age. Their ostensible hook for federal intervention remains an Elections Clause theory that this Court has squarely rejected in decisions dating back nearly a century. Since February 5, the Court has not overruled any of its many precedents upholding the power of state courts to review congressional districting plans under state constitutions and adopt remedial maps when necessary. Just like last time, Applicants cannot seriously maintain that this Court will grant certiorari or reverse. Their latest stay application is just another ploy to preserve congressional districts that violate Pennsylvania's Constitution for one more election cycle.

Also like last time, this Court need not take our word for it. For months, Applicants told 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 in January they persuaded a federal court to grant a stay in deference to this state court action. Applicants cannot now obtain a stay of the state court's judgment and remedy on the theory that the state court had no power to apply the state constitution.

While Applicants' legal arguments haven't gotten any better since February 5, their equitable arguments have gotten much worse. The legislature failed to enact a new map, and the 2018 election process is now underway using a remedial map adopted by the Pennsylvania Supreme Court. At least 150 candidates in all 18 new districts have begun collecting voter signatures on nomination petitions, and Pennsylvania's chief election official has made clear that reverting to the unconstitutional 2011 map would require postponing the May 15 primaries, costing the Commonwealth $20 million and causing significant chaos and confusion.

Pennsylvania's Supreme Court held that the 2011 map "clearly, plainly and palpably" violated the Free and Equal Elections Clause of the Pennsylvania Constitution. It would be unprecedented for this Court to interfere with the state court's determination about its own state's law. State courts are "free to serve as experimental laboratories," *Arizona v. Evans*, 514 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). There is still no partisan gerrymandering exception to federalism. The Court should deny the renewed request for a stay.

BACKGROUND

A. Pennsylvania's 2011 Congressional Districting Map

1. In the 2010 elections, Republicans took control of the Pennsylvania House, retained control of the Senate, and won the governorship. App'x B at 6. 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, and created "redistricting maps revealing partisan scoring down to the precinct level." *Id.* at 36; *see* Pls.' Exhibit ("PX") 1 at 38-41; Trial Tr. ("Tr.") 299:10-309:21.

Senate Bill 1249 started as an empty shell—it contained no map or details. App'x B at 6-7. On December 14, 2011, Republicans amended the bill to add, for the first time, actual descriptions of the new districts. *Id.* at 7. Republican Senators suspended the ordinary rules of procedure to rush the bill through the Senate that same day. App'x D ¶¶ 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. App'x B at 7.

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. Applicants' counsel admitted to the Pennsylvania Supreme Court that "[v]oters were classified and placed into districts based upon the manner in which they voted

in prior elections." Oral Arg. Video at 1:54:33-44. The result was bizarre districts that ripped apart Pennsylvania's communities to an unprecedented degree. App'x B at 48-50; PX53; Tr. 579:18-644:15.

By way of example, the 7th District's tortured shape earned the moniker "Goofy Kicking Donald Duck." App'x B at 49; Tr. 598:25-599:22. This district alone split five counties and 26 municipalities. It was barely contiguous; at one point, it was the width of a medical facility, and elsewhere its only point of contiguity was the restaurant Creed's Seafood & Steaks. App'x B at 7, 49-50; PX53 at 31-32; PX81.

The 6th District was nearly as absurd as the 7th. It cobbled together pieces of multiple communities, resembling Florida "with a more jagged and elongated panhandle." App'x D ¶ 324; PX53 at 28-29; Tr. 616:2-617:17. A surgical incision carved 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 was the width of a mulch store and a service center. App'x B at 13, 26 n17; App'x D ¶ 325; PX53 at 50-52; Tr. 618:12-620:6.

More anomalies abounded. Erie County was undivided throughout modern history until the 2011 map split it, cracking its Democratic voters between the Republican 3rd and 5th Districts. App'x B at 10, 12, 26 n.19, 49; PX53 at 23-24, 27; Tr. 589:17-598:5. The map carved up the distinctive community of the Lehigh Valley for the first time in modern history to dilute its Democratic voters. App'x D ¶¶ 326-28; PX53 at 47-48, 54; Tr. 623:15-625:9. The map split Harrisburg, cracking

its Democratic voters between the Republican 4th and 11th Districts. App'x B at 50; PX53 at 25; Tr. 631:1-632:8. The record contains many more examples.

Applicants offered no evidence that these choices reflected anything other than an intentional effort to disadvantage Democratic voters.

3. In each of the three election cycles under the 2011 map, Republican candidates won 13 of Pennsylvania's 18 congressional seats—the same 13 seats each time. App'x B at 29-30. In 2012, Republicans won those same 13 of 18 seats (72%) despite winning only a minority of the total statewide vote (49%). *Id.* at 29. 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%. *Id.* at 29-30. 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 Applicants and others (including the Pennsylvania General Assembly) in Pennsylvania Commonwealth Court on June 15, 2017. Plaintiffs challenged the 2011 map exclusively under the Pennsylvania Constitution, including its Free and Equal Elections Clause, Pa. Const. art. I, § 5. That provision requires that "elections" be "free and equal." *Id.* It has no federal counterpart.

2. On November 9, 2017, the Pennsylvania Supreme Court exercised "extraordinary jurisdiction" under 42 Pa. Cons. Stat. § 726, which authorizes the court to "assume plenary jurisdiction" over any case "involving an issue of immediate public importance" and to "enter a final order or otherwise cause right and justice to be done." The state high court ordered the Commonwealth Court to conduct a trial and issue findings of fact and conclusions of law.

At the weeklong trial in December 2017, Plaintiffs' 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. App'x B at 48-50; PX53; Tr. 579:18-580:1, 621:15-636:14.

Plaintiffs' other three experts presented multiple statistical measures and models that each independently supported the conclusion that the 2011 map intentionally and effectively disadvantaged 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. App'x B at 45-48; Tr. 203:14-204:2. Dr. Chen concluded that extreme partisan intent subordinated traditional districting principles in the 2011 plan. App'x B at 45. As a result, Republicans won 4 to 5 more seats than they would have under a plan that followed only traditional principles. App'x D ¶ 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. App'x B at 51; 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 was so carefully engineered to advantage Republicans that its partisan bias rapidly dissipated when tiny random changes were made to the district boundaries. App'x B at 51; App'x D ¶¶ 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 produced extreme levels of pro-Republican bias—the worst in Pennsylvania's history and among the worst in American history. App'x B at 52-55; PX35 at 5-15.

3. On December 29, 2017, the Commonwealth Court issued recommended findings of fact and conclusions of law. The court credited all of Plaintiffs' experts and found Applicants' experts not credible. The court then found that the evidence "established intentional discrimination." App'x B at 67-68. 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." App'x D ¶ 291. The court nevertheless recommended upholding the 2011 map.

4. At oral argument in the Pennsylvania Supreme Court, Applicants' counsel stated that, if the 2011 map were struck down, Applicants wanted "at least three weeks" to pass a new map. App'x C at 3 n.2. Counsel for one Applicant then

asked the court for "a month" to "do the politics here." *Id.*; Oral Arg. Video at 2:12:46-2:12:50. Counsel also admitted that the Pennsylvania Supreme Court had previously applied the traditional districting criteria of compactness, contiguity, and avoiding splitting political subdivisions in assessing congressional maps, and agreed that those criteria were appropriate. Oral Arg. Video at 1:29:41-1:32:47.

5. On January 22, 2018, the Pennsylvania Supreme Court struck down the 2011 map on the "sole basis" that it violated the Pennsylvania Constitution. App'x A at 2. In light of the "requests of the parties … [a]t oral argument," App'x C at 3 n.2, the court gave the General Assembly nearly three weeks (until February 9) to submit a remedial map to the Governor, and another week (until February 15) for the Governor to consider such a submission. If they failed to agree on a valid map, the court stated that it would "proceed expeditiously to adopt a plan." App'x A at 2. The court declared that there would be a remedial map in place by February 19, *id.* at 3, in line with an earlier affidavit from Pennsylvania's chief elections official stating that the May 15 congressional primaries would need to be postponed, at a cost of $20 million, unless a new map was adopted by February 20.

The Pennsylvania Supreme Court's January 22 order set clear criteria for any remedial map. It had to "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." App'x C at 3. Applicants did not request clarification of these criteria following the January 22 order.

On January 25, 2018, the state high court appointed Dr. Nathaniel Persily of Stanford University to serve "as an advisor to assist the Court in adopting, if necessary, a remedial congressional redistricting plan." App'x C at 4.

6. On January 26, 2018, Applicants filed an emergency application asking this Court to stay the Pennsylvania Supreme Court's judgment and remedial process. Their arguments were materially identical to the ones they present here. They argued that the state high court exceeded its authority under the Elections Clause because the criteria it imposed constituted "legislation" and "judicial activism," and that the court separately violated the Elections Clause by failing to afford the legislature a "genuine opportunity" to enact a new map. 17A795 Stay Appl. 20, 23, 33. Justice Alito denied the stay application on February 5.

7. In an opinion issued February 7, 2018, the Pennsylvania Supreme Court held that the 2011 map violated the Pennsylvania Constitution's Free and Equal Elections Clause. App'x B at 96. The Court explained that Pennsylvania's "founding document is the ancestor, not the offspring, of the federal Constitution," and that Pennsylvania's Free and Equal Elections Clause "provides a constitutional standard, and remedy," for partisan gerrymandering, "even if the federal charter does not." *Id.* at 2. The court undertook a lengthy analysis of the Free and Equal Elections Clause and its "evolution" in light of "[o]ur Commonwealth's centuries-old and unique history." *Id.* at 101. The Court concluded that the Clause's "actual and plain language … mandates that all voters have an equal opportunity to translate their votes into representation." *Id.* at 100.

The court explained that traditional redistricting criteria set forth in its January 22 order were the "measure by which to assess whether th[is] guarantee" has been violated. App'x B at 122. Those criteria are "deeply rooted in the organic law of [the] Commonwealth." *Id.* at 121. The court held that "a congressional redistricting plan violates" the Free and Equal Elections Clause when the "neutral criteria" of equal population, contiguity, compactness, and avoiding splitting political subdivisions "have been subordinated, in whole or in part, to extraneous considerations such as gerrymandering for unfair partisan political advantage," and that the 2011 plan failed that test. *Id.* at 123, 130. The court stressed that, "while explicating our rationale, nothing in this Opinion is intended to conflict with, or in any way alter, the mandate set forth in our Order of January 22, 2018." *Id.* at 4.

8. On February 9, Applicants (but not the General Assembly) submitted a proposed map to the Governor. The same day, they submitted the map to the Pennsylvania Supreme Court, stating that it "clearly satisfies the requirements set forth in the Court's January 22, 2018 Order." Leg. Resps.' Br. in Supp. of Proposed Remedial Congressional Districting Map at 9 (Feb. 9, 2018). The Senate's top lawyer reportedly indicated that "the map will be turned into legislation but a decision about whether to bring it up for floor votes early next week will partially depend on the response from [Governor] Wolf." *GOP leaders unveil revamped Pennsylvania congressional map*, Associated Press, Feb. 9, 2018. After considering the map, the Governor rejected it because it was another extreme gerrymander. Neither Applicants' proposed map nor any other map was turned into legislation or

brought to a vote. And as the Pennsylvania Supreme Court noted, "[n]either the General Assembly nor the Governor sought an extension of the dates set forth in our January 22 Order." App'x C at 5.

9. On February 19, the Pennsylvania Supreme Court adopted a remedial map (the "Remedial Plan") developed with the assistance of Dr. Persily. The court explained that "[t]he Remedial Plan is based upon the record developed in the Commonwealth Court, and it draws heavily upon the submissions provided by the parties, intervenors, and amici." App'x C at 6. The Remedial Plan strictly adheres to the criteria set forth in the court's January 22 order. *Id*. It splits 13 counties, compared to 27 under the 2011 map. *Id.* It splits 19 municipalities, compared to 68 under the 2011 map.[1] And it is far more compact than the 2011 map. App'x C at 7.

The Pennsylvania Supreme Court published the data files relating to the Remedial Plan on the Internet, and empirical analysis of the Remedial Plan confirms that it exhibits no partisan bias in favor of either party. If anything, it slightly favors Republicans. Under the Remedial Plan, ten districts favored Donald Trump in the 2016 presidential election, while eight favored Hillary Clinton. Objective metrics that redistricting scholars commonly use to evaluate districting plans, such as the mean-median gap and the Efficiency Gap, similarly produce results slightly favoring Republicans. *See* Br. of Amicus Campaign Legal Center, *Corman v. Torres*, No. 18-cv-443, ECF No. 81 (M.D. Pa. Mar. 2, 2018).

[1] *See* Pa. Supreme Court, goo.gl/1FRrxy (click on "Remedial Plan Reports").

In the meantime, in addition to filing this renewed stay application, Applicants recruited other "Republican leadership" in the General Assembly to initiate a collateral attack on the Pennsylvania Supreme Court's judgment and remedy in federal district court. E-mail from M. Turzai to Republican House Members, Feb. 21, 2018, *available at* goo.gl/LmkaUv. That lawsuit was filed on February 22 by the same counsel representing Applicants before this Court, and it raises the same claims raised in Applicants' renewed stay application. *Corman*, No. 18-cv-443, ECF No. 1 (M.D. Pa. Feb. 22, 2018).

10. Pennsylvania's 2018 election process has now begun under the Remedial Plan. The period for congressional candidates to collect signatures on nomination petitions from voters in their districts began February 27. At least 150 candidates—including candidates for all 18 districts in the Remedial Plan—have created and downloaded nomination petitions from the Department of State's website. *Corman*, No. 18-cv-443, ECF 92-3 ¶ 31. The Department has invested significant time and money in educating voters on the new districts. *Id.* ¶¶ 35-48.

Because of a variety of state and federal deadlines, Pennsylvania's chief election official has attested that it will "not be possible to hold the 2018 congressional primary as scheduled [for May 15] if it must proceed under any map other than the" Remedial Plan. *Id.* ¶ 70. Reverting to the 2011 map would require Pennsylvania to "postpone the 2018 primary elections" at a cost of "approximately $20 million," risking "error and confusion among voters and election administrators." *Id.* ¶¶ 75, 79.

REASONS TO DENY THE STAY APPLICATION

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) (quotations and alterations omitted). The Court may not grant a stay unless the balance of the equities supports it. *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1305 (2010) (Scalia, J., in chambers). There is no basis for a stay here.

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

A. The Pennsylvania Supreme Court's Decision Striking Down the 2011 Map Did Not Offend the Elections Clause

Applicants disagree with the Pennsylvania Supreme Court's interpretation of the Pennsylvania Constitution. Their stay application is littered with attacks on the state court's substantive state-law ruling, which they call "absurd" (Appl. 18) and a departure from prior Pennsylvania Supreme Court decisions (Appl. 2, 9). Applicants argue that "no criteria or other restrictions on the General Assembly's legislative power to enact congressional district plans exist in the Pennsylvania Constitution." Appl. 17.

The Pennsylvania Supreme Court held the opposite. It held that Pennsylvania's Free and Equal Elections Clause—a provision with no federal counterpart—does restrict the legislature's power to enact congressional district

plans. In particular, the court held that the Pennsylvania Constitution prohibits the legislature from subordinating traditional districting criteria for partisan ends. It is a cornerstone of the American judicial system that federal courts cannot review a state court's construction of the state's constitution. *Nat'l Tea*, 309 U.S. at 557.

Applicants pay lip service to the settled principle that "state courts have the final say over the meaning of state law," Appl. 5, but they claim that "state courts' authority to interpret [state constitutional] law has limited force in this context because [of] the Elections Clause," Appl. 23. But nearly a century's worth of this Court's precedent holds otherwise. Applicants' argument does not warrant review, and there is no likelihood of certiorari and zero likelihood of reversal. This Court would have to overturn at least six of its decisions to hold, as Applicants propose, that the Elections Clause precludes state courts from striking down a congressional map under the state constitution and adopting a remedial map.

1. Time and again, this Court has held that nothing in the Elections Clause alters a state court's unreviewable authority to invalidate a congressional map for violating the state constitution. In *Smiley v. Holm*, 285 U.S. 355 (1932), the Court held that the Elections Clause does not "render[] inapplicable the conditions which attach to the making of state laws." *Id.* at 365. It 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. In companion cases decided the same day as *Smiley*, the Court reiterated that state courts have authority to strike down congressional plans for violating "the

requirements of the Constitution of the state in relation to the enactment of laws." *Koenig v. Flynn*, 285 U.S. 375, 379 (1932); *accord Carroll v. Becker*, 285 U.S. 380, 381-82 (1932). Those decisions also expressly affirmed state courts' authority to implement a remedial congressional plan where the prior plan violated the state constitution. *Carroll*, 285 U.S. at 381-82; *Koenig*, 285 U.S. at 379.

More recently, in *Growe v. Emison*, 507 U.S. 25 (1993), this Court held that state courts not only have authority to review and remedy congressional plans, but that federal courts must not interfere with state courts in this arena. After a Minnesota state court invalidated the state's prior congressional map, the 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. Special Redistricting Panel Apr. 15, 1992).[2] Two months later, a federal court enjoined the state court from adopting any new plan and adopted its own remedial plan. *Growe*, 507 U.S. at 30-31. The state court subsequently released a provisional remedial plan, subject to the federal injunction, that used the traditional criteria of "minimiz[ing] the number of municipal and county splits" and promoting "compactness." *Cotlow*, C8-91-985, *supra*. But the federal injunction blocked the state court's plan from taking effect.

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

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

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:

- "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." 507 U.S. at 33 (quotations omitted).

- "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." *Id.* (emphasis in original).

- "[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 (citations and quotations omitted).

- "[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.*

- "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.*

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

Just three years ago, this Court held again: "Nothing in [the Elections] 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." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015). The Court affirmed that redistricting must be "performed in accordance with the State's prescriptions for lawmaking." *Id.* at 2668. And 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).

There is more. The second part of the Elections Clause allows Congress "at any time" to make its own regulations related to congressional redistricting, U.S. Const. art. I, § 4, and Congress has codified the principle that congressional districting plans are not valid unless they are adopted "in the manner provided by [state] law." 2 U.S.C. § 2a(c). In *Arizona State Legislature*, the Court explained that congressional maps are valid under § 2a(c) where they are "established . . . in whatever way [states] may have provided by their constitution and by their statutes." 135 S. Ct. at 2669. Conversely, a map is invalid under § 2a(c) where it does not comply with state law, however the state defines it. *Id.*; *see also Branch v. Smith*, 538 U.S. 254, 273-76 (2003) (plurality op.).

In short, it is well-settled that state legislatures may not pass congressional maps that violate the "provisions of the State's constitution." *Ariz. State*

Legislature, 135 S. Ct. at 2673. In Pennsylvania, one of the conditions that attaches to the making of any state law 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 the 2011 map violates 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).

2. Applicants argue that the authority of state courts to consider congressional districting "present[s] an issue of federal law long overdue for definitive resolution by this Court," Appl. 15, but they have no persuasive response to all of this Court's decisions definitively resolving the question against them. They argue that the gubernatorial veto addressed in cases like *Smiley* and the commission addressed in *Arizona State Legislature* constitute "lawmaking" as opposed to "law interpreting. " Appl. 24. But this overheated rhetoric runs headlong into *Arizona*, which held that "[n]othing in [the Elections] 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." 135 S. Ct. at 2667. Pennsylvania election laws cannot defy the Pennsylvania Constitution's Free and Equal Elections Clause.

Applicants do not cite any decision from this or *any* court holding that the Elections Clause prevents a state court from invalidating a state congressional map

for violating the state constitution. *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), *rejected* any notion that a congressional map that was contrary to "the Constitution and laws of the state was yet valid and operative." *Id.* at 568. Key here, the Court held that the state court's "decision below is conclusive on that subject." *Id.*; *accord Smiley*, 285 U.S. at 367. None of the remaining majority decisions that Applicants cite (*Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70 (2000); *Hawke v. Smith*, 253 U.S. 221 (1920); *McPherson v. Blacker*, 146 U.S. 1 (1892); Appl. 20-21) even involved the Elections Clause.

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. The dissent from denial of certiorari in *Colorado General Assembly v. Salazar*, 541 U.S. 1093 (2004), was a dissent, and it concerned the different question whether a state court could *forbid* 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. 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.* Appl. 14-15.

In these circumstances, Applicants cannot demonstrate a "reasonable probability" that this Court will grant certiorari, and they certainly cannot

demonstrate a "fair prospect" that this Court would reverse. 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.[3]

3. Applicants' argument that state courts can strike down congressional maps only under "*express* criteria identifiable in the plain text" of the state constitution flouts bedrock principles. Appl. 25. Federal courts have no business second-guessing a state supreme court's interpretation of its own state constitution on the ground that the constitutional provision requires some interpretation. Federal courts simply do not get to decide whether a state constitutional provision is or is not "express" enough. Courts, including this one, interpret broad constitutional provisions all the time. *See, e.g.*, U.S. Const. amend. XIV. Applicants' argument that state courts lack interpretive power in the context of congressional elections has no support in this Court's precedent and no likelihood of success. Indeed, as for Applicants' assertion that they have "yet to uncover a single case … where the court identified mandatory criteria from a generic guarantee of equal protection," Appl. 26, they overlook *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964), where this Court identified a mandatory one-person, one-vote rule from a

[3] Applicants' view that the Elections Clause "vests [redistricting] authority" exclusively in state legislatures and Congress, Appl. 15, would seemingly require this Court to overrule *Wesberry v. Sanders*, 376 U.S. 1 (1964). There, the Court rejected the plurality opinion in *Colegrove 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.

generic guarantee of equal protection. Inflammatory rhetoric about "judicial activism," Appl. 20, and "legislating" by courts, Appl. 16-27, does not transform a state constitutional interpretation into a federal question.

In any event, Applicants' intemperate portrayal of the state high court's decision does not accord with reality. The Free and Equal Elections clause is a specific constitutional direction relating to elections in Pennsylvania, and the decision below traced the history of the clause to specific concern about the "dilution of the right of the people of this Commonwealth to select representatives to govern their affairs based on considerations of the region of the state in which they lived, and the religious and political beliefs to which they adhered." App'x B at 109. Pennsylvania's Supreme Court has long rejected the "radical conclusion that our Commonwealth's Constitution is nullified in challenges to congressional reapportionment plans." *Erfer v. Commonwealth*, 794 A.2d 325, 331 (Pa. 2002).

Nothing about the criteria the state court adopted warrants this Court's intervention, and Applicants have waived any contrary argument. 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 criteria including "avoid[ing] splitting of political subdivisions and precincts," "preserv[ing] communities of interest," and "compactness." *Id.* at 208, 215-25. While Applicants tell this Court the criteria were "wove[n] … from whole cloth," Appl. 16, they told the state court that "[c]ompactness and avoiding splitting political subdivisions were things that this court identified in *Mellow*." Oral Arg. 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:

> JUSTICE BAER**:** "Is it your position, respectfully, that compactness, contiguousness, lack of splitting municipal county lines or the like, that those are not criteria that this court should apply in deciding the evidentiary standards to determine if there's overwhelming partisanship or invidious viewpoint discrimination or the like?"
>
> MR. TORCHINSKY: "Not at all, Your Honor. And again, we look to what the Court said in *Mellow*, which is preserving cores of districts, protecting incumbents, respecting compactness, minimizing splits of political subdivisions, and we submit that the 2011 map did split fewer counties than the 2002 map and did split fewer political subdivisions than the 2002 map."

Oral Arg. Video at 1:32:18-1:33:05. In short, these criteria are well-established in Pennsylvania, and Applicants have waived any challenge to their use in this case. That waiver alone precludes the Court from granting a stay.[4]

B. Applicants' Claim That the General Assembly Was Denied An Adequate Opportunity to Pass a Map Lacks Merit

Applicants claim that the state court's remedial process independently violated the Elections Clause, including by denying the General Assembly an "adequate opportunity" to pass a new map. Appl. 28. They made the same argument in their first stay application barely a month ago. It was not right then, and it is not right now.

1. As a threshold matter, it is unclear whether Applicants still argue that the Pennsylvania Supreme Court lacks power to develop a remedial plan, but to the

[4] State courts regularly apply these criteria too, even when the criteria do not expressly appear in the state constitution. *E.g.*, *Alexander v. Taylor*, 51 P.3d 1204, 1209, 1211 (Okla. 2002); *Beauprez v. Avalos*, 42 P.3d 642, 652 (Colo. 2002) (en banc). Contrary to Applicants' argument, Appl. 25, *Beauprez* applied neutral redistricting criteria to a congressional map even though the state constitution enshrined those specific criteria only for state legislative maps. 42 P.3d at 651.

extent they do, that argument is also foreclosed by this Court's precedents. *Growe* confirmed "the power of the judiciary of a State" to "redraw … federal congressional districts." 507 U.S. at 33, 42. This Court "specifically encouraged" state courts to "formulate a valid redistricting plan" when the state lacks a valid one, and barred federal courts from interfering. *Id.* at 33. Just as here, the state court in *Growe* drew a remedial plan using traditional districting criteria of compactness and minimizing political subdivision splits, *Cotlow v. Growe*, C8-91-985, *supra* p.15 & n.2. The state court plan governed Minnesota's 1994 congressional elections.[5]

In *Branch*, 538 U.S. 254, this Court held that, under the second part of the Elections Clause, Congress has codified the authority of state courts to develop remedial congressional plans. *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). The *Branch* plurality explained that another federal statute, 2 U.S.C. § 2a(c), also recognizes state courts' power to adopt congressional maps pursuant to state law. *Id.* at 274. Applicants fail to cite, let alone try to distinguish, *Branch*.

The majority in *Arizona State Legislature* upheld *Branch's* 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

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

districts are the ones that presumptively will be used to elect Representatives." 135 S. Ct. at 2670 (emphasis added) (quotations and alterations omitted). Applicants thus are wrong that, in *Arizona State Legislature*, "[n]o Justice suggested that state courts might share in" the redistricting function. Appl. 16.

State courts frequently develop remedial congressional plans, including in cases where the state court struck down a map passed by the state legislature for violating the state constitution. *See, e.g.*, *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258 (Fla. 2015); *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003). Indeed, at least six states currently have congressional districts drawn by state courts.[6]

Here, the Pennsylvania Supreme Court proceeded in precisely the way that *Growe, Branch*, and *Arizona State Legislature* "encouraged." *Growe*, 507 U.S. at 33, 34. The state court "conditioned" the adoption of a court-drawn plan on the "legislature's failure to enact a constitutionally acceptable plan." *Id*. at 30, 34.

2. Applicants primarily argue that the Pennsylvania Supreme Court's January 22 order denied the General Assembly an "adequate opportunity" to redistrict. Appl. 28. They made the same argument in their first stay application, 17A795 Stay Appl. 20, which Justice Alito denied. Applicants cite no case—and we

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[6] *See Detzner*, 179 So. 3d 258; *Hall v. Moreno*, 270 P.3d 961 (Colo. 2012); *In re Reapportionment Comm'n*, 36 A.3d 661 (Conn. 2012); *Hippert v. Ritchie*, 813 N.W.2d 391 (Minn. 2012); *Egolf v. Duran* (N.M. Dist. Ct. Dec. 29, 2011), http://www.nmlegis.gov/lcs/redcensus/docs/Court%20Decision%20-%20Congressional.pdf; *Guy v. Miller* (Nev. Dist. Ct. Oct. 27, 2011), http://redistricting.lls.edu/files/NV%20guy%2020111027%20final%20order.pdf, aff'd, 373 P.3d 943 (Nev. 2011)).

are aware of none—holding that the Elections Clause requires a state court to give the state legislature any particular amount of time to remedy an unconstitutional congressional map before adopting its own court-drawn remedial map. Applicants offer no workable standard for a federal court to adjudicate such a claim. They do not say how much time state courts must give state legislature. Nor do they say how much time would have been adequate here. If this Court is reluctant to intervene in disputes between other branches of the *federal* government, *see, e.g.*, *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997), it should be that much more reluctant to referee disputes between branches of a state government—particularly where the dispute concerns the timing of state legislative processes.

In any event, Applicants' claim that the General Assembly lacked enough time here is baseless for a host of reasons. First, while Applicants suggest that they needed more time to pass a new plan because such legislation would have to go through "the normal legislative process, including several reviews in both chambers," Appl. 28, the 2011 map was passed by the legislature and signed by the governor in eight days, one-third the time the state court gave here.

Second, Applicants waived any argument that the General Assembly lacked sufficient time. Plaintiffs' opening brief in the Pennsylvania Supreme Court proposed two weeks, and neither the General Assembly nor Applicants objected to that timeframe in their response briefs. Then, at oral argument, Applicants' counsel told the Pennsylvania Supreme Court that they wanted three weeks:

> JUSTICE BAER: Assume reluctantly that you do not prevail on the constitutionality, is three weeks a fair opportunity for a legislature to redraw these maps? Because I think it should get the opportunity.
>
> MR. TORCHINSKY: Your Honor, as I mentioned at the beginning, I'm going to defer to Mr. Braden on remedy, but I think we would like at least three weeks.

Oral Arg. Video at 1:45:53-1:46:09. Mr. Torchinsky's co-counsel Mr. Braden subsequently did not disagree that three weeks was "fair," but asked for "a month" to "do the politics here." *Id.* at 2:12:42-2:12:50.

Thus, the state court gave Applicants what they asked for—18 days for the General Assembly to submit a map to the Governor and five more days to reach agreement with the Governor. Applicants should not be heard to argue now that the time allotted was "utterly inadequate" because passing a map requires an "arduous political process." Appl. 28. The Pennsylvania Supreme Court stated that it fashioned its schedule on the basis of Applicants' "requests." App'x C at 3 n.2.

3. Applicants' claim that they couldn't start drawing a new map until the issuance of the February 7 opinion is demonstrably false. They argued in their first stay application that the state court's January 22 order provided "*no* guidance," and this Court denied a stay. 17A795 Stay Appl. 13. The January 22 order expressly required that any remedial plan 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." App'x A at 3.

The February 7 opinion in no way changed these criteria. While Applicants repeatedly assert that the February 7 opinion added a new requirement of "proportional representation," Appl. 3, 4, 10, 16, 18-20, 29, those words appear nowhere in the opinion. Applicants rely on two sentences stating that Pennsylvania voters must "have an equal opportunity to translate their votes into representation," App'x B at 100, 118, but that is not proportional representation. The Court held that the "measure" of whether voters generally have the requisite equal opportunity is whether the "neutral criteria" set forth in the January 22 order have been "subordinated, in whole or in part, to extraneous considerations." *Id.* at 119-25. Eliminating any doubt, the court stated that "nothing in this Opinion is intended to conflict with, or in any way alter, the mandate set forth in our Order of January 22, 2018." *Id.* at 4.

Applicants did not ask the Pennsylvania Supreme Court for clarification following the January 22 order. Nor, as the Pennsylvania Supreme Court noted, did Applicants ask for more time—not after the January 22 order, and not after the February 7 opinion. App'x C at 5. As late as February 5, the Senate Majority Leader reportedly said that legislative leaders still needed to decide whether they even "have the desire to try to draw a new one." J. Lai & L. Navratil, *SCOTUS denies Pa. GOP lawmakers' attempt to delay drawing new congressional map*, Philadelphia Inquirer, Feb. 5, 2018. Even now, the General Assembly, a separately represented party that filed its own briefs defending its own institutional interests

in the state court action, has not complained to the Pennsylvania Supreme Court or to this Court that it lacked sufficient time to pass a new map.

Any notion that the General Assembly needed more time after the February 7 opinion is belied by Applicants' own statements and actions. When Applicants submitted their proposed map to the Pennsylvania Supreme Court on February 9, they told the court that it "clearly satisfies the requirements set forth in the Court's January 22, 2018 Order." Leg. Resps.' Br. in Supp. of Proposed Remedial Congressional Districting Map at 9 (Feb. 9, 2018). And when Applicants submitted the map to Governor Wolf on the same day, the Senate's top lawyer stated that it could be brought "up for floor votes early next week," but that would "partially depend on the response from Wolf." *GOP leaders unveil revamped Pa. congressional map*, Associated Press, Feb. 9. But Governor Wolf rejected the proposal. The problem was not that the General Assembly lacked adequate time or guidance, it was that Applicants would not produce a map the Governor would sign.

4. In all events, the Pennsylvania Supreme Court's timeline was consistent with federal law. Congress through § 2c has authorized state courts to adopt a remedial congressional map without delay when, as here, a state lacks any valid map for an imminent election. *Branch* explained that when a congressional election is approaching, "a court, state or federal," should redistrict expeditiously to prevent the "last-resort remedy" of at-large elections under 2 U.S.C. § 2a(c)(5). 538 U.S. at 274-75 (plurality op.).

That is what the state court did here. Pennsylvania's chief election official attested that a new map needed to be in place no later than February 20 to avoid postponing the May congressional primaries. Based on that deadline, the Pennsylvania Supreme Court gave the General Assembly and the Governor all the time that was available, setting a schedule that would have a new map in place by February 19.

C. Applicants' Elections Clause Arguments Are Estopped

There is a further, dispositive vehicle problem that will prevent this Court from granting certiorari: Applicants are judicially estopped from asserting their Elections Clause arguments 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) (quotations 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.* (quotations omitted).

1. Applicants advanced the opposite of their current position in separate litigation. On October 16, 2017, in a federal lawsuit challenging the 2011 map, Applicants argued that *Growe* "required" the federal court to stay or abstain based

on this state court action. *Agre v. Wolf*, No. 17-cv-4392, ECF No. 45-2 (E.D. Pa. Oct. 2, 2017). When the district court denied the motion, Applicants sought emergency mandamus relief in this Court. They explained that, under "principles of federalism" and this Court's precedents in *Growe* and *Scott v. Germano*, 381 U.S. 407 (1965), "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 Applicants). In a section titled "The District Court Usurped the Power of the Pennsylvania State Courts," 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, Applicants subsequently 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, 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, Applicants filed a new stay motion, again asserting that the "legislative *or* judicial branch" of a state has authority to review and remedy congressional maps. *Diamond*, ECF No. 69-2 at 16 (emphasis in original). Applicants also noted that, in *Germano*, 381 U.S. 407, 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—after the Pennsylvania Supreme Court struck down the 2011 map and set forth the timeline for the legislature to enact a new map—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. That stay remains in place today.

Under these circumstances, there can be no dispute that Applicants have taken inconsistent positions. Applicants remarkably now assert that "*Growe* and *Germano* have no relevance in a case like this," Appl. 27, but they previously told

this Court that *Growe* and *Germano* were so on-point that they warranted emergency mandamus relief. Applicants continued to rely heavily on *Growe* and *Germano* in obtaining a stay in *Diamond*. Applicants likewise now argue that the Elections Clause "vests authority" over congressional redistricting *only* in state legislatures and Congress, and "[s]tate courts enjoy none of this delegated authority." Appl. 15. But Applicants previously told this Court and the *Diamond* court that state courts are "agents of apportionment" whose authority to review congressional redistricting plans is so unquestioned that federal courts are "required" to defer. *Diamond*, ECF No. 69-2 at 16, No. 81 at 2.

Significantly, Applicants reiterated these arguments in *Diamond* even *after* the Pennsylvania Supreme Court issued its January 22 order setting forth the remedial timeline. *Diamond*, ECF No. 81. They even told the *Diamond* court about their February 15 deadline to develop a new map under the state court's order. *Id.* at 1-5. Applicants did not tell the federal court that this timeline was invalid, impracticable, or otherwise insufficient. Instead, they cited it as a reason for the federal court to stay its hand. *See id.*

2. Applicants "succeeded" in making this argument to the federal *Diamond* court. *New Hampshire*, 532 U.S. at 750-51. The *Diamond* court granted a full and indefinite stay based on Applicants' argument that state courts have primacy in addressing congressional redistricting challenges. *Diamond*, ECF No. 84. Applicants have accrued significant benefits from this stay: it has allowed

them to avoid discovery and trial in federal court and precluded the *Diamond* plaintiffs from obtaining relief from the federal court in time for the 2018 elections.

3. Judicial estoppel is necessary to prevent 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, 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 Pennsylvania Supreme Court had no authority to resolve the challenge to the 2011 map. The judicial estoppel doctrine exists precisely to prevent such results.

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 grant a stay in this case. The 2018 election process is now proceeding under the Pennsylvania Supreme Court's Remedial Plan. Requiring a different map at this time is not only unwarranted for the reasons described above, but also would throw Pennsylvania's election machinery into chaos. The Commonwealth would need to postpone the May 15 congressional primaries, imposing an enormous financial burden and risking highly disorderly elections. And even if Applicants were right that the elections should not be held under the Remedial Plan, federal law would require 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 gerrymandered map that the state's highest court has declared invalid under the state's own constitution.

1. Applicants note that court orders affecting elections "can themselves result in voter confusion and consequent incentive to remain away from the polls," a risk that increases "[a]s an election draws closer." Appl. 32 (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006)). They further say that "changes in the elections schedule [are] highly likely to lead cause voter confusion and depress turnout." *Id.* But these principles weigh overwhelmingly *against* a stay here. The Remedial Plan, not the invalidated and unconstitutional 2011 plan, is currently governing the 2018 election process. It is Applicants who ask this Court to change the map now.

The election process under the Remedial Plan is no longer just "draw[ing] closer," *id.*—it is already underway. As of February 27, congressional candidates from both parties began collecting signatures on nomination petitions based on the Remedial Plan. *Corman*, No. 18-cv-443, ECF 92-3 ¶ 25. At least 150 candidates covering all 18 districts under the Remedial Plan have created and downloaded nomination petitions from the Department of State's website. *Id.* ¶ 31. Candidates have less than two weeks left, until March 20, to finish collecting signatures and file their nomination petitions. Marc Levy, *GOP candidates hit ground in districts they hope to block*, Associated Press, Feb. 27, 2018.

Changing the map now would be disastrous and would require "changes in the election schedule," which Applicants themselves say would "cause voter

confusion and depress turnout." Appl. 32. Just days ago, Pennsylvania's chief election official, Jonathan Marks, attested that "[i]t will not be possible to hold the 2018 congressional primary as scheduled [for May 15] if it must proceed under any map other than the" Remedial Plan. *Corman*, No. 18-cv-00443, ECF 92-3 ¶ 70. Instituting a new map or reverting to the 2011 map would require Pennsylvania instead to "postpone the 2018 [congressional] primary elections" and conduct them at a later date, separately from the gubernatorial and various other primaries that will proceed on May 15 regardless. *Id.* ¶ 79. Holding separate congressional primaries would cost Pennsylvania's government "approximately $20 million." *Id.*

In addition to the financial cost, granting the stay requested by Applicants in the midst of an election cycle already underway would "risk error and confusion among voters and elections administrators" *Id.* ¶ 75. Before the state court adopted the Remedial Plan on February 19, the Department of State had several weeks to "plan and marshal its resources and the educate the public and candidates about the changes," but the Department is not "prepared for a second redistricting close on the heels of the first." *Id.* It would require either extensive further "data management steps," *id.* ¶ 77, or, if the 2011 map is restored, use of "stored data" in a manner "never attempted" by the Department before, *id.* ¶ 76.

Mr. Marks further attested that changing the map "in the middle of the current circulation period will cause particularly significant confusion and delay, because it is likely to result in competing sets of nomination petitions." *Id.* ¶ 73. At least 150 candidates are currently circulating petitions and collecting signatures

based on the Remedial Plan, and "[i]f different districts are ordered during this time period, or the 2011 Plan is reinstated, a second set of petitions will begin circulating." *Id.* This would complicate the Department of State's efforts to evaluate petitions submitted by candidates, potentially requiring "manual[] review," and would "increase exponentially" objections to candidates' petitions. *Id.*

Rescheduling the primaries also would cause "significant logistical challenges for county election administrators." *Id.* ¶ 80. In the view of Pennsylvania's chief election official who has supervised the administration of more than 20 regular elections, rescheduling "would cause a great deal of confusion among district-level elections administrators, risking problems at the polls." *Id.* ¶ 81.

This Court has declined to order changes to elections at the eleventh-hour. But the case against a stay is even stronger here. The eleventh hour has passed and the election process is already underway. Changing the map now would cause chaos, and the Court should not order it.

2. Applicants assert that "irreparable injury is certain" because the Pennsylvania Supreme Court has enjoined a state statute "'enacted by representatives of [Pennsylvania's] people.'" Appl. 31 (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.

Applicants' assertion that use of the Remedial Plan will cause "voter confusion" and "depress turnout," Appl. 32, is bare speculation that cannot support

a stay. *See Winter v. Nat. Res. Def. Council*, Inc., 555 U.S. 7, 22 (2008). There are three months between the state court's adoption of the Remedial Map on February 19 and the May 15 primaries, then six more months until the general elections in November. That is plenty of time to educate voters.

And the process of educating voters is already well underway. Since the state court issued the Remedial Plan two weeks ago, the Department of State has devoted significant time and resources to educating voters on the new districts, including press releases, a robust social media campaign, newspaper ads, video and audio interviews, and extensive information on the Department's website (*e.g.*, an interactive version of the Remedial Plan overlaid on Google Maps). *Corman*, No. 18-cv-443, ECF 92-3 ¶¶ 35-48. And there have been no "reports from county officials that they have been unable to implement or have had difficulty implementing the [Remedial] Plan." *Id.* ¶ 50.

Further, 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. Appl. 32. 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 was in place by February 19, 2018, three months before the May 15, 2018 primaries.

What is more, Pennsylvania has successfully implemented court-ordered congressional plans in *less* time than 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 here. This Court denied review. 506 U.S. 828 (1992).

3. In all events, Applicants' equitable arguments rest entirely on the false premise that if the Remedial Plan is not used, the 2018 elections will go forward under the 2011 map. As explained, § 2a(c) prohibits the use of any congressional map not enacted "in the manner provided by [state] law." 2 U.S.C. § 2a(c); *see Ariz. State Legislature*, 135 S. Ct. at 2670. Because the Pennsylvania Supreme Court has definitively held that the 2011 map was not enacted in the manner provided by Pennsylvania law, federal law precludes its use in 2018.

Rather, if the Remedial Plan were stayed now, then § 2a(c)(5) would require at-large elections for all 18 of Pennsylvania's congressional seats in 2018. 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 op.); *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.

But there is no reason to resort to § 2a(c)(5)'s procedures. The Pennsylvania Supreme Court followed an orderly process to develop the Remedial Plan—exactly in the way the majority portion of *Branch* held that 2 U.S.C. § 2c directs. This remedial process was 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)).

4. Applicants ignore the balance of equities. They omit the arguments they made in their earlier emergency stay application to this Court that this case involves only the "paltriest" of rights to which Plaintiffs do not attach any real "significance." 17A795 Stay Appl. 20-21. For good reason: 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.

Pennsylvania has not had fair congressional elections. The 2011 map was 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.

Applicants also no longer argue that adopting a new map for 2018 will undermine the "integrity" of the elections, as they did in their prior emergency stay

application to this Court. 17A795 Stay Appl. 3, 18. This, too, was a wise deletion. Nothing has done more damage to the integrity of Pennsylvania's elections than 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.

Federalism and the integrity of Pennsylvania's elections will be best served by denying a stay and allowing the Commonwealth of Pennsylvania to hold its 2018 elections under the Remedial Plan adopted by the Pennsylvania Supreme Court in accordance with the dictates of the Pennsylvania Constitution.

CONCLUSION

The application for a stay should be denied.

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Respectfully submitted,

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