No. 17A909

IN THE

Supreme Court of the United States

MICHAEL C. TURZAI, IN HIS CAPACITY AS SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, AND JOSEPH B. SCARNATI III, IN HIS CAPACITY AS PENNSYLVANIA SENATE PRESIDENT PRO TEMPORE,

Applicants,

v.

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, *et al.*,

Respondents.

RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION FOR STAY PENDING RESOLUTION OF APPEAL TO THIS COURT

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INTRODUCTION

On January 22, the Pennsylvania Supreme Court held that Pennsylvania's 2011 Redistricting Legislation is a partisan gerrymander that violates the Free and Equal Elections Clause of the Pennsylvania Constitution. It afforded the General Assembly nearly three weeks to craft and vote on a lawful plan. As in virtually every decision striking down a state redistricting plan, the court also specified a backstop: If the legislature failed to act it would impose an interim plan itself, so that the impending congressional elections would be carried out in conformity with Pennsylvania law. On February 19, after the legislature failed to enact any plan in time, the Pennsylvania Supreme Court implemented its interim plan as specified, thereby ensuring that Pennsylvania's representatives in Congress would be elected in compliance with the Pennsylvania Constitution.

That should have settled the matter. But in their kitchen-sink quest to derail the decision below by any means, Applicants have now filed their second stay request with this Court in just over a month. Once more, they seek to convince this Court that it is likely to grant certiorari and to use the Elections Clause as an excuse to overturn the Pennsylvania Supreme Court's interpretation of the Pennsylvania Constitution. And once more, they forward the alternative argument that the Elections Clause renders the General Assembly's 18-day window for redistricting inadequate, and they seek to compel Pennsylvania to hold elections under the 2011 Plan in violation of Pennsylvania's Constitution.

Justice Alito, in chambers, swiftly rejected Applicants' prior attempt to forward these remarkable claims, and since then both state and federal courts in

Pennsylvania have likewise refused to grant Applicants' stay and temporary restraining order applications. Applicants' newest and equally insubstantial stay application should meet the same fate.

Indeed, if anything, the current stay request is on weaker ground than the last because the Commonwealth has now begun to implement the new map, tilting the equities even further against federal judicial intrusion. A stay at this point in the process will force the congressional primaries to be rescheduled at an estimated cost of $20 million, or cancelled entirely. It will also sow confusion with respect to which map is in use and which election dates are in force. These harms cannot possibly be justified by Applicants' distorted Elections Clause claims, or by their hollow assertions of irreparable injury from their inability to proceed with elections under a map that violates the state Constitution. Accordingly, the stay request should be denied.

STATEMENT

1. In 2011, the Pennsylvania legislature reapportioned its congressional districts to account for the 2010 census data. App'x B at 5-6. A bill containing "information concerning the boundaries of [the proposed] congressional districts" first materialized on December 14, 2011. *Id.* at 6-7. On that same day, the Senate referred the bill to the appropriate committee, which promptly reported it back out to the floor, which held a final vote. *Id.* The bill passed with no Democratic votes.

Id. The House passed the bill six days later. *Id.*[1] On December 22, 2011, Pennsylvania's Republican governor signed the bill, now known as the "2011 Plan," into law. *Id.* All told, there were 7 days between the appearance of a Senate bill with districting boundaries and the adoption of the 2011 Plan by both houses, and 15 days between the bill's first appearance and the Plan's enactment into law.

The 2011 Plan divides Pennsylvania into eighteen bizarrely shaped districts, with most Democratic voters packed into five solidly Democratic districts and the rest spread out among the remaining thirteen Republican-leaning districts. The Seventh District, for example, features three jagged segments, connected by narrow land bridges, that split five counties. App'x D ¶¶ 136, 323. This district's unique shape has earned it the nickname "Goofy Kicking Donald Duck." *Id.* Another district, the First, is largely in the Democratic stronghold of Philadelphia, but reaches tentacles into suburban counties to pull in a number of Democratic-leaning communities. *Id.* ¶¶ 321-322. Other Democratic-leaning areas are divided up and parceled out among strongly Republican districts. *Id.* ¶¶ 325, 330. In each of the three congressional elections held under the 2011 Plan, Republicans won thirteen seats to Democrats' five, even though Republican candidates' percentage of the statewide vote ranged from 49.2% in 2012 to 54.1% in 2016 to 55.5% in 2014, *id.* ¶¶ 185, 192, 198, and Democrats won 18 of 24 statewide elections in that period.[2]

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[1] Although the bill attracted some Democratic votes in the House, nearly all were from districts that were "safe Democratic districts" under the 2011 plan. App'x B at 7 n.14.

[2] Associated Press, *Pennsylvania governor urges court to stick with new map*, Wash. Post (Feb. 26, 2018), *available at*

2. In June 2017, the League of Women Voters and a group of Pennsylvania voters ("Challengers") filed a Petition for Review in Pennsylvania's Commonwealth Court, claiming that the 2011 Plan violated the Pennsylvania Constitution. App'x B at 31. Importantly, Challengers did not claim any violations of federal law. *See id.* After the Commonwealth Court advised the parties that it would stay the case, Challengers asked the Pennsylvania Supreme Court to exercise its plenary jurisdiction, expedite resolution of the case, and rule in time for the 2018 elections. *Id.* at 33. The Pennsylvania Supreme Court accepted jurisdiction and directed the Commonwealth Court to create an evidentiary record and submit proposed findings of fact and conclusions of law by December 31, 2017. *Id.* at 33-34.

The Commonwealth Court complied, holding a bench trial from December 11 to 15. *Id.* at 34. At trial, the Challengers produced expert testimony that the 2011 Plan could not have come about through the sole application of "traditional districting criteria," which one expert "identified as equalizing population, contiguity, maximizing geographic compactness, and preserving county and municipal boundaries." App'x D ¶¶ 239-240, 276.

Governor Thomas W. Wolf, Acting Secretary of the Commonwealth Robert Torres, and Commissioner of the Bureau of Commissions, Election and Legislation ("Executive Branch Parties"), who were respondents below, did not introduce evidence attacking or defending the 2011 Plan. They did, however, express concern

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https://www.washingtonpost.com/national/pennsylvania-governor-urges-court-to-stick-with-new-map/2018/02/26/c532c62a-1b44-11e8-98f5-ceecfa8741b6_story.html?utm_term=.638e132d1b4b.

that the 2011 Plan was an unconstitutional manipulation of political boundaries intended to secure lasting Republican dominance of Pennsylvania's congressional delegation. *See* Brief of Respondents Governor Thomas W. Wolf, Acting Secretary Robert Torres, and Commissioner Jonathan Marks at 2, *League of Women Voters of Pa.* v. *Commonwealth*, No. 159 MM 207 (Pa. Jan. 10, 2018). Anticipating that the Pennsylvania Supreme Court might agree with this conclusion and order redistricting in advance of the 2018 elections, the Executive Branch Parties assessed potential remedies.

This task fell primarily to Commissioner Marks, who has served in the Pennsylvania Bureau of Commissions, Elections and Legislation ("Bureau") since 2002 and headed it for the last six years, through both Democratic and Republican administrations. App'x D ¶¶ 33-34. At the Bureau, he has supervised more than 20 regularly scheduled elections and a number of special elections. *Id.* ¶ 35. He determined that if a new map were issued by February 20, 2018, it would be possible for Pennsylvania to hold the 2018 primary elections on their scheduled date of May 15 while minimizing disruption. *Id.* ¶ 448. Marks explained this conclusion in an affidavit at trial, which the other parties did not object to or dispute. *See id.* ¶¶ 447-454.

The Commonwealth Court ultimately concluded that all Challengers' expert witnesses were credible, *see id.* ¶¶ 339, 360, 389, and that Applicants' expert witnesses were not credible in significant respects, *id.* ¶¶ 398, 409. It held that "partisan considerations are evident" in the 2011 Plan, that the Plan was

"intentionally drawn so as to grant Republican candidates an advantage in certain districts within the Commonwealth," and that it "overall favors Republican Party candidates in certain congressional districts." *Id.* ¶¶ 51, 58. Nevertheless, the Commonwealth Court held that Challengers had failed to state a cognizable claim that the 2011 Plan violated the Pennsylvania Constitution. *Id.* ¶ 61.

3. The Pennsylvania Supreme Court promptly ordered briefing and heard oral argument. On January 22, 2018, the court issued a *per curiam* order, rejecting the Commonwealth Court's construction of the Pennsylvania Constitution and holding that the 2011 Plan "clearly, plainly and palpably violates the Constitution of the Commonwealth of Pennsylvania, and, on that sole basis, we hereby strike it as unconstitutional." App'x A at 2. The order enjoined the use of the 2011 Plan in the May 2018 primary elections, gave the General Assembly until February 9 to pass a remedial districting plan, set a February 15 deadline for the Governor to decide whether to approve it, and gave all parties an opportunity to submit proposed remedial plans. *Id.* at 2-3.

The Court explained 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 3. And it explained that, in keeping with the timeline set out by Commissioner Marks, the Executive Branch Parties should "anticipate that a congressional districting plan will be available by

February 19, 2018" and "take all measures, including adjusting the election calendar if necessary, to ensure that the May 15, 2018 primary election takes place as scheduled." *Id.*[3]

Shortly after the Order issued, Applicants filed an emergency stay application in this Court.[4] They argued that the Pennsylvania Supreme Court had "legislated criteria" for redistricting in violation of the Elections Clause, and that the Elections Clause required that "the General Assembly receive a genuine opportunity to remedy any violation." Emergency Application for Stay Pending Resolution of Appeal to This Court at 10, 20, *Turzai* v. *League of Women Voters of Pa.*, No. 17A795 (Jan. 26, 2018) (emphasis omitted). On February 5, Justice Alito, acting in chambers, denied the stay application. No. 17A795.

While the stay application was pending, Applicants also took some early steps that could have led to the enactment of a map within the Pennsylvania Supreme Court's deadline. On January 29, 2018, a "shell" bill was introduced in the Senate that would repeal the statutory descriptions of the districts included in the 2011 Plan and serve as a vehicle for enacting new language. *See* Pa. Gen. Assemb. S.B. 1034 Reg. Sess. 2017-2018 (2018). But the bill quickly stalled, and the General Assembly never scheduled a vote on a plan, nor did it seek an extension of the timetable adopted in the January 22 order. App'x C at 5.

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[3] Three Justices have consistently dissented from the Pennsylvania Supreme Court's orders. Two disagree with the court on the merits. One dissenter concurs that the 2011 Plan is unconstitutional but objects to the Court's remedial timeline.

[4] The Applicants also filed for a stay before the Pennsylvania Supreme Court, which that court denied on January 25. Order, *League of Women Voters of Pa.* v. *Commonwealth*, No. 159 MM 2017 (Pa. Jan. 25, 2018).

4. On February 7, the Pennsylvania Supreme Court released an opinion regarding its January 22 order. This opinion explained that the Free and Equal Elections Clause of the Pennsylvania Constitution was the sole basis of its ruling that the 2011 Plan was unconstitutional. App'x B at 96. That provision, which has no analog in the federal Constitution, provides that "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Pa. Const. art. I, § 5.

The court began its analysis with the text. App'x B at 97. It observed that "[t]he broad text of the first clause of this provision mandates clearly and unambiguously, and in the broadest possible terms, that *all* elections conducted in this Commonwealth be 'free and equal.' " *Id.* at 100. It then turned to the historical context in which the clause was adopted, finding that in light of the "intense and seemingly unending regional, ideological, and sectarian strife" that dominated Pennsylvania's founding era, "this provision must be understood * * * as a salutary effort by the learned delegates to the 1790 convention to end, once and for all, the primary cause of popular dissatisfaction which undermined the governance of Pennsylvania: namely, the dilution of the right of the people of this Commonwealth to select representatives to govern their affairs." *Id.* at 108-109. The court also surveyed the relevant precedent, and noted that the Free and Equal Elections Clause has always been treated as "distinct" from the federal Equal Protection Clause, and that none of its precedent foreclosed a partisan gerrymandering claim. *See id.* at 114-115.

Based on this analysis, the court held that the Free and Equal Elections Clause "governs all aspects of the electoral process, and * * * provides the people of this Commonwealth an equally effective power to select the representative of his or her choice, and bars the dilution of the people's power to do so." *Id.* at 118-119. The court explained that the factors set out in its January 22 order would be "an essential part" of assessing compliance with the Free and Equal Elections Clause, and that subordinating those factors to "extraneous considerations such as * * * partisan political advantage" would violate the state Constitution. *Id.* at 123.

The court also explained in greater detail the precise features of the 2011 Plan that led to its finding that it amounted to a political gerrymander. *Id.* at 125-131. Critically, however, the court reiterated that the January 22 order remained the lodestar for passing a compliant map. *Id.* at 4. And the court explicitly stated that "nothing in [the February 7] Opinion is intended to conflict with, or in any way alter, the mandate set forth in [its] Order of January 22, 2018." *Id.* at 4.

5. Although the General Assembly never voted on a remedial plan, the individual Applicants generated a proposal during the time period outlined in the January 22 order. They submitted that proposal to the Governor and the court on February 9. Other parties, including the Challengers and Governor Wolf, submitted their own maps for the court's consideration.

The court "carefully reviewed" all the proposed plans, and on February 19, it issued an order adopting a map for use in the 2018 congressional election. App'x C at 6. "The 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*." *Id.* It further explained that the plan adheres to the "traditional redistricting criteria of compactness, contiguity, equality of population, and respect for the integrity of political subdivisions"—that is, the same criteria that the court originally identified in its January 22 order. *Id.*

The court also approved a calendar for the elections. App'x C to App'x C. The calendar ensures that the primary and general elections will be held on the originally scheduled dates in May and November, respectively. *Id.* Under this timetable, the circulation period for nomination petitions began on February 27, and the filing period for nomination papers begins on March 7. *Id.*

The court's adoption of the map launched a new barrage of challenges. Applicants once again sought a stay from the Pennsylvania Supreme Court, which was again denied. The instant stay application to this Court swiftly followed, but it is not the only request for injunctive relief pending in federal court.

While the *state* stay application was pending, another group of Pennsylvania Republican legislators, joined by certain incumbent members of Congress, filed a lawsuit in the Middle District of Pennsylvania raising Elections Clause arguments identical to the ones presented to this Court, and seeking a temporary restraining order and a preliminary injunction. *See* Complaint and Motion for Temporary Restraining Order and Preliminary Injunction, *Corman* v. *Torres*, No. 1:18-cv-00443-CCC-KAJ-JBS (M.D. Pa. Feb. 22, 2018) (ECF Nos. 1, 3). The district court refused the TRO request, concluding that the situation was "not so exigent" as to

warrant interim relief. Order at 2, *Corman*, No. 1:18-cv-00443-CCC-KAJ-JBS (M.D. Pa. Feb. 23, 2018) (ECF No. 19). The motion for a preliminary injunction remains pending, as do defendants' motions to dismiss. *See id.*

ARGUMENT

"Stays pending appeal to this Court are granted only in extraordinary circumstances." *Graves* v. *Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers). "To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam). Applicants did not meet this standard with their first stay application, and their second effort fares even worse.

I. THERE IS NO PROBABILITY THAT THIS COURT WILL GRANT CERTIORARI TO REVERSE THE STATE SUPREME COURT'S INTERPRETATION OF THE DEMANDS OF THE STATE CONSTITUTION.

A. The Pennsylvania Supreme Court's Interpretation Of The Pennsylvania Constitution Does Not Present A Federal Question.

Applicants' principal argument—virtually identical to one they made in their stay application one month ago—is that the Pennsylvania Supreme Court misinterpreted the Pennsylvania Constitution by holding that the State's Free and Fair Elections Clause prohibits partisan gerrymandering. Applicants reason that

this supposed error of state law raises a federal question meriting this Court's review because, in their view, any misinterpretation of state election law amounts to seizing power from "the Legislature" in violation of the Elections Clause. That argument is as weak as it sounds, and neither precedent nor the fundamental precepts of our federal structure support it.

1. It is a bedrock principle of federalism that "state courts are the ultimate expositors of state law." *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975). In particular, "[i]t is fundamental * * * that state courts be left free and unfettered by us in interpreting their state constitutions." *Florida* v. *Powell*, 559 U.S. 50, 56 (2010) (internal quotation marks omitted). Accordingly, this Court has long recognized that it lacks authority to review whether a state court has correctly interpreted that state's own laws. *See Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590, 626, 633 (1874). Indeed, this Court's own jurisdictional statute bars it from exercising such review. *See* 28 U.S.C. § 1257(a) (permitting review only "where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States").

This elemental rule applies with full force to state-court decisions concerning redistricting. "[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe* v. *Emison*, 507 U.S. 25, 34 (1993); *see Miller* v. *Johnson*, 515 U.S. 900, 915 (1995) ("Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions."). Thus, over a century ago, this Court said that it was

"obvious" that a state court's interpretations of its constitutional provisions regarding electoral districts was "conclusive on that subject." *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565, 567-568 (1916); *see Smiley* v. *Holm*, 285 U.S. 355, 363-364 (1932) (likewise treating the Minnesota Supreme Court's understanding of the requirements of the Minnesota Constitution as dispositive on that issue). No decision, before or since, has deviated from that understanding.

That rule resolves this case. In the decision at issue, the Pennsylvania Supreme Court held that the Pennsylvania legislature violated the Pennsylvania Constitution when it drew the state's 2011 congressional map for the purpose of achieving partisan advantage. App'x B at 2. The Pennsylvania court made clear that its decision rested, from start to finish, "sole[ly]" on state-law grounds. App'x A at 2; *see* App'x B at 2 (same). That decision is accordingly "conclusive on th[e] subject," and this Court has no basis to review it. *Hildebrant*, 241 U.S. at 568.

2. Applicants nonetheless ask this Court to take the extraordinary and unprecedented step of setting aside the Pennsylvania Supreme Court's decision on the ground that it misinterpreted Pennsylvania's Constitution. Applicants identify no precedent or statute that authorizes this Court to exercise such review. And the smattering of arguments they offer in support of their unprecedented request do not withstand scrutiny. Indeed, if Applicants' argument were accepted, it would transform this Court and place it in the role of being an *uber*-adjudicator of state voting disputes.

Applicants first suggest that any judicial review of a legislative redistricting decision violates the Elections Clause. In their words, "[t]he Pennsylvania Supreme Court's interpretive function is judicial," not legislative, and thus "entirely foreign to the law*making* process" authorized by the Elections Clause. App. 24; *see id.* at 16 ("[T]he Pennsylvania Supreme Court does not exercise a legislative function when it decides cases."). This argument is meritless. As this Court explained in *Arizona State Legislature* v. *Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015), "[n]othing 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.* at 2673 (emphasis added); *see id.* at 2687 (Roberts, C.J., dissenting) (explaining that "when [the state legislature] prescribes election regulations, [it] may be required to do so within the ordinary lawmaking process"). Pennsylvania courts do not engage in lawmaking when they enforce state constitutional limits any more than this Court engages in lawmaking when it invalidates federal statutes for violating the U.S. Constitution.

As a fallback, Applicants contend that state courts may at most enforce constitutional limits drawn at a high level of specificity, but that invalidating a state legislative map based on broad constitutional guarantees amounts to lawmaking. App. 25-26. That, too, is wrong: A court engaged in constitutional interpretation does not engage in "legislation" simply because the precise rule of law in a particular case does not appear in the document's text. Indeed, deriving

specific doctrines from open-textured provisions is the basic task of constitutional adjudication. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 406-407 (1819). The "nature" of a constitution is "that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves." *Id.* at 407. Constitutional decisions of all stripes employ a similar methodology. *See, e.g.*, *Reynolds* v. *Sims*, 377 U.S. 533, 557 (1964) (deriving the one-person, one-vote principle from the Equal Protection Clause).

Applicants assert that the Court reviewed state-court interpretations of state enactments in *Smiley* and *Hildebrant*. App. 21. It did not. In both cases, the Court deemed the state courts' interpretation of their respective laws dispositive. *See Hildebrant*, 241 U.S. at 568; *Smiley*, 285 U.S. at 363-364. The only question the Court reviewed in either case was whether the state's laws, *as interpreted by the state's courts*, complied with the Elections Clause. In *Hildebrant*, the Court reviewed whether the Elections Clause permits redistricting decisions to be made by referendum. 241 U.S. at 569 (holding that it does). In *Smiley*, the Court reviewed whether the Elections Clause entitles the legislature to make redistricting decisions free of "the conditions which attach to the making of state laws." 285 U.S. at 398-399 (holding that it does not). Applicants do not (and cannot) raise any analogous argument here; there is no contention that a prohibition on partisan gerrymandering is somehow *forbidden* by the Elections Clause.

Finally, Applicants point to dissenting and concurring opinions in *Colorado General Assembly* v. *Salazar*, 541 U.S. 1093 (2004) and *Bush* v. *Gore*, 531 U.S. 98 (2000). Even if these opinions were precedents of this Court, they still would not furnish Applicants any support. In dissenting from denial of certiorari in *Salazar*, Chief Justice Rehnquist argued simply that the Court should review the Colorado Supreme Court's interpretation *of the Elections Clause itself*. *See* 541 U.S. at 1094 (Rehnquist, C.J., dissenting from denial of certiorari) (questioning the state court's holding that the court was itself part of "the legislature" for purposes of the Elections Clause and so could require "*permanent* use of a court-ordered plan, despite the legislature's proposal of a valid alternative"). In *Bush* v. *Gore*—a decision that even the majority said was "limited to the present circumstances," 531 U.S. at 109 (per curiam)—Chief Justice Rehnquist concurred on the ground that Florida state courts had infringed on the Florida legislature's role in "appointing Presidential electors." *Id.* at 113 (Rehnquist, J., concurring). As this Court has repeatedly made clear, both before and since that decision, the Constitution places substantially greater restrictions on state constitutional processes when the legislature is exercising its "'electoral' function" than when it is carrying out "redistricting." *Arizona*, 135 S. Ct. at 2667 (quoting *Smiley*, 285 U.S. at 365-366). Applicants cannot locate a single opinion—majority, concurring, or otherwise—that supports the intrusive form of review they propose.

3. In any event, even under the misguided standard Applicants urge, this Court's intervention would still be improper. Applicants contend that the Elections

Clause permits the Court to review state-court interpretations of state law that amount to a usurpation of legislative authority. But Applicants have pointed to nothing in the Pennsylvania Supreme Court's opinion that resembles such a usurpation. The Pennsylvania Supreme Court applied all of the ordinary tools of constitutional interpretation in reaching its decision. App'x B at 96-125. And its conclusion—that the Free and Equal Elections Clause bars partisan gerrymandering—is comparable to one that numerous justices of this Court have long considered a reasonable construction of the U.S. Constitution's substantially more general guarantee of equal protection. *See Vieth* v. *Jubelirer*, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring in the judgment); *id.* at 317 (Stevens, J., dissenting); *id.* at 343 (Souter, J., dissenting); *id.* at 355-356 (Breyer, J., dissenting).

Applicants object that the relevant provisions of the Pennsylvania Constitution do not explicitly use words such as contiguity and compactness. App. 16-17. But the Pennsylvania Supreme Court explained that these "neutral criteria," "deeply rooted in the organic law of our Commonwealth," merely constituted "benchmarks" for assessing whether a legislative plan violates the Constitution's textual requirement of "free and equal" elections. App'x B at 119, 121-122. The articulation of benchmarks of this kind is a commonplace of constitutional interpretation—consider, for instance, the intricate doctrines this Court has developed for policing limits on the Commerce Clause and Article III jurisdiction, or the extensive requirements it has found implicit in the Fifth Amendment's guarantee of "due process." It was no error—let alone an error of federal

constitutional magnitude—for Pennsylvania's courts to apply the same approach in interpreting their own Constitution.

Applicants also claim that prior Pennsylvania Supreme Court decisions deemed partisan gerrymandering claims nonjusticiable. App. 18-19. But as the Pennsylvania court (again) explained, those decisions did not in fact preclude partisan gerrymandering challenges. App'x B at 112-116. And, in any event, *stare decisis* is not an inexorable command; it is the "prerogative" of a court "to overrule one of its precedents." *Bosse* v. *Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam) (internal quotation marks omitted). This Court has done so time and again. *See, e.g.*, *Citizens United* v. *FEC*, 558 U.S. 310, 365 (2010) (overruling *Austin* v. *Mich. Chamber of Commerce*, 494 U.S. 652 (1990)); *Lawrence* v. *Texas*, 539 U.S. 558, 578 (2003) (overruling *Bowers* v. *Hardwick*, 478 U.S. 186 (1986)); *Brown* v. *Bd. of Educ.*, 347 U.S. 483, 494-495 (1954) (overruling *Plessy* v. *Ferguson*, 163 U.S. 537 (1896)). Under our system of federalism, the Pennsylvania Supreme Court was well within its rights to likewise interpret its Constitution, and either extend or refine its precedents. Applicants' request that this Court intrude on that sovereign function is grossly improper and should be rejected.

B. The Pennsylvania Supreme Court's Order Did Not Otherwise Violate The Elections Clause.

Applicants next contend that the Pennsylvania Supreme Court violated the Elections Clause "by implementing a remedial phase that did not give the General Assembly an 'adequate opportunity' to enact a new map." App. 28 (quoting *Upham*

v. *Seamon*, 456 U.S. 37, 41 (1982) (per curiam)). That is wrong both as a matter of law and a matter of fact.

1. The Elections Clause does not empower the federal judiciary to micromanage state judicial remedies when the highest court of a state finds state constitutional violations. The "fundamental" principle that state courts must be "left free and unfettered * * * in interpreting their state constitutions" would be vacuous if state courts were not also "free" to fashion remedies to effectuate their interpretations. *Powell*, 559 U.S. at 56. Further, in the elections context, this Court has affirmed, time and again, the "legitimacy of state *judicial* redistricting," *Growe*, 507 U.S. at 34, and the "power of the judiciary of a State * * * to formulate a valid redistricting plan," *Scott* v. *Germano*, 381 U.S. 407, 409 (1965) (per curiam). There is simply no authority for the proposition that a federal court can brandish the Elections Clause to second-guess a state court's remedial choices, and to force a State to hold an election under a map that has been authoritatively determined to violate the state's Constitution.

While Applicants protest otherwise, they have not pointed to a single case in which this Court or any other federal court has reviewed the propriety of a *state* court's remedial timeline with respect to a redistricting order. Instead, Applicants rely on a series of cases in which this Court has reviewed or revised redistricting efforts by *federal* courts, an altogether different circumstance where a branch of the federal government is already interfering with state decisions. In those cases, this Court has suggested that, as a matter of remedial equity, a state legislature "should

be given the opportunity to make its own redistricting decisions" if "the State chooses to take the opportunity" and "*so long as [it] is practically possible*." *Lawyer* v. *Dep't of Justice*, 521 U.S. 567, 576 (1997) (emphasis added). But it has *never* suggested that the Elections Clause is the source of this guidance; still less has it suggested that a state court risks violating that Clause if it fails to provide some set amount of time for a legislature to attempt to redraw a map. This fact is telling: in all the redistricting opinions that state courts have issued for decades, Applicants cannot cite a single example—not one—of this Court doing anything like what Applicants propose here. This case is hardly a good candidate to be the first.

Applicants' heavy reliance on *Upham* v. *Seamon* illustrates how far afield they are forced to stray in their search for relevant precedent. In that Voting Rights Act case, the Court chastised a federal district court for unnecessarily redrawing districting lines that were not implicated by the VRA violation the federal court had found. *Upham* did not involve a challenge to a remedial timeline *at all*, and it did not make any mention of the Elections Clause. To be sure, the Court recited the straightforward principle that federal courts should not interfere in state districting efforts any more than is necessary. But a decision applying that proposition to conclude that a *federal* court should not redraw lawful districting lines cannot be reasonably read to establish that the Elections Clause compels a *state* court to give a legislature more than 18 days to redraw districting lines that were the result of an unconstitutional gerrymander.

Nor is the utter lack of precedent the only problem Applicants face in championing the notion that the Elections Clause permits federal courts to review the adequacy of state court remedial plans. Applicants have also failed to explain how our federalist system may tolerate the intrusion on federal rights inherent in federal oversight of state court remedies for state constitutional violations. And they have failed to offer any workable standard for such oversight, or any explanation as to why federal courts should be preferred to state courts—which will generally be more attuned to the requirements of state election laws and local political realities—for making "adequacy" determinations.

2. Even if the Elections Clause did impose some sort of "adequate opportunity" requirement, Applicants' challenge would still fail. Applicants claim (at 28) that 18 days was "utterly inadequate" to "go through the normal legislative process." That is plainly false. The 2011 plan itself was *actually adopted* by the legislature in less time than the Pennsylvania Supreme Court accorded to pass its replacement. *See supra* p. 3; *see also Agre* v. *Wolf*, No. 17-4392, 2018 WL 351603 (E.D. Pa. Jan. 10, 2018) (Baylson, J., dissenting), *appeal docketed*, No. 18-1135 (3d Cir. Jan. 24, 2018). And this Court has accepted court-drawn maps following similarly compressed timelines in the past. *See, e.g.*, *Loeper* v. *Mitchell*, 506 U.S. 828 (1992) (denying certiorari in *Mellow* v. *Mitchell*, 607 A.2d 204, 205 (Pa. 1992), where court gave legislature from January 30, 1992, to February 11, 1992); *see also Larios* v. *Cox*, 305 F. Supp. 2d 1335, 1336 (N.D. Ga.) (per curiam) (legislature given nineteen days to remedy one-person, one-vote violation), *aff'd*, 542 U.S. 947 (2004);

Abrams v. *Johnson*, 521 U.S. 74, 82 (1997) (legislature given less than two months); *cf. Vieth*, 541 U.S. at 273 (noting that Pennsylvania *met* a three-week court ordered deadline to cure a finding of malapportionment); *accord League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 416 (2006) (Kennedy, J.) ("Judicial respect for legislative plans * * * cannot justify legislative reliance on improper criteria for districting determinations.").

Applicants contend that they could not take advantage of the full 18 days because the January 22 order did not give the legislature sufficient guidance to enact a compliant map. That claim is flatly contradicted by the text of the January 22 order, which provided specific instructions about how "to comply with" the Pennsylvania Supreme Court's mandate. App'x A at 2-3. And it is equally contradicted by Applicants' actions. When the Pennsylvania Supreme Court released the January 22 order, Applicants did not seek clarification, the natural remedy for a party that believes it has insufficient information to proceed. To the contrary, the Applicants sought a stay from this Court and the Pennsylvania Supreme Court, characterizing the Order as providing "mandatory redistricting criteria of the type typically found in a legislatively enacted elections code." App. 16.

Applicants fare no better with their contention that the February 7 opinion somehow altered the criteria for redistricting or added new requirements that impeded the legislature's redistricting efforts. Again Applicants' assertion is directly contrary to what the Pennsylvania Supreme Court said. The February 7

order "emphasize[d] that * * * nothing in this Opinion is intended to conflict with, or in any way alter, the mandate set forth in [the January 22] Order." App'x B at 4. And it is again contrary to what Applicants did at the time. If Applicants truly believed that something in the February 7 order affected their efforts to pass redistricting legislation, they could have promptly asked the Pennsylvania Supreme Court for additional time in light of that development. But Applicants said nothing, choosing instead to raise their complaint only *after* the 18-day window had expired. Indeed, Applicants still have not explained exactly what changes to the remedial timeline would have made it possible for them to produce a map in time for the 2018 elections. Their sole proposition has been to move forward under the unconstitutional 2011 map.

3. Unable to muster a convincing argument that the Pennsylvania Supreme Court violated the federal Constitution by giving the General Assembly almost three weeks to draw its own map, Applicants resort to nitpicking other elements of the state court's remedial process. They complain that the four-day period for judicial review of the parties' proposed maps was too short to allow for "meaningful" consideration of the General Assembly's proposal. And they assert that they should have been given an opportunity to comment on the map that the Pennsylvania Supreme Court ultimately put in place. In raising these challenges, Applicants reveal exactly how far they seek to stretch the Elections Clause. In their view, it gives federal courts the right to police every element of a state court's remedial efforts, permitting federal courts to tell the state courts not only how much time the

legislature must be given to propose a new map, but also how long the state court must take in reviewing that proposal, and what process must be followed once the judiciary has selected a new map for implementation. That kind of interference is simply anathema to our federalist system.

In any event, Applicants' challenges in this respect are wholly baseless. They suggest that the Pennsylvania Supreme Court's four-day window for judicial review was unacceptable because it demonstrates that the Pennsylvania Supreme Court "never had the intention" of giving the parties' "proposed remedial maps * * * any meaningful review." App. 30. But the Pennsylvania Supreme Court explained that all the "proposed remedial districting plans" submitted by the parties were "carefully reviewed." App'x C at 6. That consideration happened over 4 days because the Court recognized the need to put a new map in place by February 19, 2018, so that the primary elections could be held on schedule. App'x A at 3. Working backwards from that date, the court gave the political branches 24 days to propose a map, which it would then have four days to review. In other words, the compressed review period was intended to *accommodate* the legislature, and ensure that it had the maximum possible time to create its own map.

Applicants also complain that the review process was "closed," and did not provide an opportunity for them to comment on the proposed map. But again, providing such an opportunity would have taken significant time. It was perfectly reasonable for the Pennsylvania Supreme Court to instead give the parties more time at the front end to develop their proposed maps. Indeed, the process adopted

by the Pennsylvania Supreme Court is typical in redistricting cases. *See, e.g.*, *Abrams*, 521 U.S. at 84 (noting that the "District Court considered the plans submitted by the various parties and then adopted its own," and then affirming that plan).

The "reality" is that "States must often redistrict in the most exigent circumstances." *Growe*, 507 U.S. at 35. That is what happened here, and the Pennsylvania Supreme Court developed a remedial process tailored to address a state constitutional violation while providing time for the political branches to act and accounting for the demands of the state elections system. This Court should resist Applicants' request to overthrow the basic principles of our federalist system by allowing for federal judicial intervention into that remedial process.

II. THE EQUITIES COUNSEL STRONGLY AGAINST A STAY.

The congressional primary elections are now underway under the plan adopted by the Pennsylvania Supreme Court. A stay would completely derail the ongoing primary election process, at a cost of tens of millions of dollars. It would also sow confusion in candidates and voters alike regarding which map governs. Applicants have made *no* credible showing of irreparable harm, much less shown harms significant enough to justify such dramatic consequences.

A. A Stay Would Severely Disrupt The 2018 Elections And Impose Major Burdens On Pennsylvania Voters.

When Applicants filed their last stay request with this Court, they suggested that it would be impossible to implement a new map without disturbing the 2018 election cycle. Respondents explained precisely why that was not so, setting out the

schedule they had developed to ensure that the new map could be rolled out with minimal disruption.

That schedule is now underway, and Respondents' predictions are proving correct. Last Tuesday, candidates began circulating petitions to obtain the necessary number of signatures to appear on the ballot. *See* Affidavit of Jonathan Marks ¶ 73, *Corman*, No. 1:18-cv-00443-CCC-KAJ-JBS (M.D. Pa. Mar. 2, 2018) (ECF No. 92-3) ("Marks Aff."). And on Wednesday of this week, third-party candidates may begin filing their nominating papers with the Bureau. *See* App'x C to App'x C. So long as the schedule continues to be enforced, the May 15 primary will occur as originally planned.

Any stay from this Court would severely disrupt that process, requiring Pennsylvania to postpone or cancel its primary election. *See* Marks Aff. ¶ 70. Bifurcating the primaries to hold a second election exclusively for congressional candidates would cost approximately $20 million more, a cost that would fall primarily on Pennsylvania's counties. *Id.* ¶ 79. On top of that, the 150 nominating petitions already circulating would have to be scrapped, and candidates would have to restart this process from scratch. *Id.* ¶ 73.

A stay would also create immense confusion about the 2018 elections. The Pennsylvania Supreme Court's remedial plan has garnered extensive media coverage.[5] The public has known since January 22 that a new plan was coming,

[5] *See, e.g.*, Jonathan Lai & Patricia Madej, *Pa. gerrymandering case: State Supreme Court releases new congressional map for 2018 elections*, Philly.com (Feb. 19, 2018), *available at* http://www.philly.com/philly/news/politics/pennsylvania-gerrymandering-supreme-court-map-congressional-districts-2018-elections-

and it has been informed since February 19 that the districts adopted by the Pennsylvania court would govern the 2018 elections. The Pennsylvania Department of State has prominently displayed the court's plan on its website, which candidates and voters rely on for authoritative information about the electoral process.[6] An order from this Court reinstating the 2011 Plan would leave voters with whiplash about what district boundaries apply this year.

Even worse, it would force Pennsylvania residents to go through yet another election cycle under an unconstitutional congressional districting scheme. The Pennsylvania Supreme Court found that the 2011 Plan "clearly, plainly, and palpably" violated the state Constitution by diluting the votes of Pennsylvania residents. App'x B at 96. That violation "undermines voters' ability to exercise their right to vote in free and 'equal' elections," which in turn weakens the credibility of democracy. *Id.* at 130. Confronting the possibility of perpetuating similar injuries with constitutional dimensions, courts have routinely denied stays. *See, e.g., Personhuballah* v. *Alcorn*, 155 F. Supp. 3d 552, 560 (E.D. Va.), *stay denied*, 136 S. Ct. 998 (2016) (mem.); *Larios*, 305 F. Supp. 2d at 1336, 1344, *aff'd*, 542 U.S. 947.[7]

20180219.html; Matthew Rink, *High court draws new Pa. congressional map*, GoErie.com (Feb. 20, 2018), *available at* http://www.goerie.com/news/20180220/high-court-draws-new-pa-congressional-map.

[6] *See Trending*, Pa. Dep't of State, *available at* http://www.dos.pa.gov/Pages/default.aspx (last visited Mar. 5, 2018).

[7] Indeed, the relief Applicants seek here is even more intrusive. In the cases cited above, courts refused to grant a stay that would have the effect of *leaving* an unconstitutional map in place. Here, Applicants ask this Court to affirmatively re-impose an unconstitutional map.

B. Applicants Will Not Be Harmed If A Stay Is Denied.

Applicants have not identified *any* irreparable harms that they will suffer in the absence of a stay, let alone harms that outweigh the practical exigencies counseling against such extraordinary relief. Indeed, they devote only three pages to this critical factor, and the harms enumerated in those pages collapse almost entirely into the merits of their case. Although a state surely has an interest in enforcing its laws, App. 31, that interest is limited to "*valid* law[s]." *See Planned Parenthood of Greater Tex. Surgical Health Servs.* v. *Abbott*, 134 S. Ct. 506, 507 (2013) (Scalia, J., concurring in denial of application to vacate stay) (emphasis added). And, of course, their claims that the legislature's rights under the Elections Clause have been infringed, App. 33, depend entirely on the correctness of their view of those rights.

The only other harm that Applicants allude to is the possibility of voter confusion. But, as explained above, that factor weighs strongly *against* a stay now that the primary election process has already begun. Voters are far more likely to be confused by a reinstatement of the 2011 Plan *after* the nominating process has already begun than by holding elections under the widely-reported remedial plan.

* * *

The Pennsylvania Supreme Court has reached an authoritative determination about what the Pennsylvania Constitution requires and "select[ed] a fitting remedy" after "taking account of what is necessary, what is fair, and what is workable." *North Carolina* v. *Covington*, 137 S. Ct. 1624, 1625 (2017) (per curiam)

(internal quotation marks omitted). Its assessment is entitled to this Court's respect, all the more because our federalism "prefers *both* state branches"—legislatures and courts—"to federal courts as agents of apportionment." *Growe*, 507 U.S. at 34. This Court should deny the second Application, just as it did the first, and put an end to the Applicants' hydra-like efforts to dislodge the Pennsylvania Supreme Court's interpretation of state law.

CONCLUSION

The application should be denied.

Respectfully submitted,

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