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.*

## REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR STAY PENDING RESOLUTION OF APPEAL TO THIS COURT

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


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

Petitioners, the Executive Respondents, and Lt. Gov. Stack ("Opposition Parties") argue that Applicants' request for a stay of the Pennsylvania Supreme Court's orders is unprecedented. But that is only because no state court has ever done what the Pennsylvania Supreme Court did here. It invented legally binding redistricting criteria that do not apply to congressional plans, invalidated a duly enacted plan for failure to comply with them, afforded two days from issuance of its opinion for the political branches to adopt a new plan, and then imposed its own plan which it declared with no support whatsoever is compliant with state law. While Opposition Parties claim this *coup d'état* raises no federal issue, the Elections Clause is a delegation of federal power to "the Legislature" of each state, not to states *writ large*, to regulate elections to federal office. That delegation creates a federally mandated balance of power *within* state government that this Court is duty-bound to uphold. The Pennsylvania Supreme Court's unprecedented course of action has shattered that balance.

Opposition Parties offer no meaningful defense of the merits of the court's decisions. Instead, they argue, in effect, that *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015), compels the conclusion that redistricting may be accomplished by whichever body of state government wins the internal battle of control over the process, full stop. But this position lacks any limiting principle; as long as a state supreme court claims it is "interpreting the state constitution," its decisions on matters directly affecting federal elections are

unreviewable by this Court no matter how unmoored those decisions may be in law. Furthermore, this radical position ignores that the phrase "the Legislature thereof" appears in the *federal* Constitution, not the Pennsylvania Constitution, and the structure is therefore a matter of *federal*, not state, law.

Opposition Parties further argue the stay should be denied because the primary election petitioning process is now underway under the court-ordered remedial map, and they claim that staying that process now would cause voter confusion and complicate the work of elections officials. They have it backwards. The *status quo* is not the new map unilaterally adopted by four justices of the Pennsylvania Supreme Court just two weeks ago, but the congressional districts adopted by the General Assembly—the body charged with the task of redistricting—and signed into law by the Governor in 2011. Moreover, it is not too late to correct the Pennsylvania Supreme Court's egregious violation of federal law. Plowing forward with new judicially crafted districts that have existed for just two weeks—and only eight days prior to the beginning of the period for circulating nomination petitions that has already been pushed back by two weeks—rather than using the districts that have existed for six years and three election cycles, will cause voter confusion and disrupt the election process. A stay would not cause confusion, but would necessarily restore order to the 2018 elections in Pennsylvania.

For these additional reasons, this Court should stay the judgments of the Pennsylvania Supreme Court.

## FURTHER REASONS TO GRANT THE STAY

### A. The Court Is Likely To Grant Certiorari And Reverse.

"Regulations" governing the time, place, and manner of congressional elections "*shall* be prescribed in each State by the Legislature thereof," unless Congress chooses to "make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1 (emphasis added). Mandatory criteria governing the drawing of congressional districts are among the "Regulations" this provision delegates to "the Legislature" and Congress. *See, e.g.*, *Branch v. Smith*, 538 U.S. 254, 266-68 (2003); *Brown v. Secretary of State of Fla.*, 668 F.3d 1271, 1273-85 (11th Cir. 2012). Thus, any such rules that do not emanate from a state's legislative process or Congress are *ultra vires*. *See U.S. Term Limits v. Thornton*, 514 U.S. 779, 805 (1995).

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

#### 1. The Pennsylvania Supreme Court's Power to Interpret the State Constitution Does Not Encompass the Power to Legislate.

Applicants agree with Opposition Parties that *Arizona State Legislature,* 135 S. Ct. at 2673, requires legislatively enacted districting plans, like the 2011 Plan, to comply with the state constitution. Executive Resp. Br. at 14; Petitioners Br. at 18-19. But legislation enacting a congressional districting plan is different from other

types of state legislation. The power to adopt a district plan under the Elections Clause is a federal delegation to the state "Legislature." For that power to have any meaning, the Legislature cannot be subjected to just any "interpretation" of the state constitution that the state courts may concoct, particularly when that "interpretation" imposing specific criteria had been previously rejected by that same state supreme court without any intervening statutory change or state constitutional amendment.

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

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

"interpretation" of its constitution also frustrates the Elections Clause's manifest purpose to allocate what are fundamentally *policy* decisions to the branches best disposed to make policy. Legislation and interpretation are fundamentally different: in exercising the interpretive function, "courts must declare the sense of the law" in an act of "JUDGMENT"; in lawmaking, by contrast, the legislature exercises "WILL." THE FEDERALIST No. 78 (Alexander Hamilton). When courts "exercise WILL instead of JUDGMENT, the consequence would be the substitution of their pleasure to that of the legislative body." *Id.*

In authorizing "the Legislature" to create congressional districts, the Elections Clause confirms that "reapportionment is primarily a matter for *legislative* consideration and determination . . . ." *Reynolds v. Sims*, 377 U.S. 533, 586 (1964) (emphasis added). In other words, establishing districts and the criteria that govern their creation are exercises of *will*, not *judgment*. Accordingly, a state court's invention of criteria independent of a legislative act frustrates the Elections Clause's allocation of redistricting authority to bodies properly equipped to exercise "will:" state legislatures and Congress.

The Executive Respondents retort that state courts are empowered to "deriv[e] specific doctrines from open-textured provisions," Executive Resp. Br. at 14-15, and analogize the Pennsylvania Supreme Court's adoption of mandatory districting criteria as mere "benchmarks" that were akin to "intricate doctrines this Court has developed for policing limits on the Commerce Clause and Article III jurisdiction . . . ." *Id.* at 17. Petitioners make a similar argument. Petitioners Br. at 20. However, this

analysis fails to appreciate that the judicial power of a state court is far more circumscribed when an "open-textured" reading would "alter" a "constitutional balance." *Cf. Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). In such cases, the judiciary is restricted to enforcing "unmistakably clear . . . language" or else to rejecting the balance-altering interpretation. *Id.* (quotation marks omitted). The Elections Clause breathes federal constitutional significance into the balance of power in a state between "the Legislature thereof" and the other branches. State-court judicial creation of election rules without explicit legislative authorization violates that balance.[1]

This Court's precedents confirm that a plan is subject to "the method which the state has prescribed for legislative enactments." *Smiley v. Holm*, 285 U.S. 355, 367-68 (1932); *see also Hawke v. Smith*, 253 U.S. 221, 230 (1920) (describing Election Clause's delegation to "the legislative authority of the state").[2] Opposition Parties discuss this authority, *see* Petitioners Br. at 14-15; Executive Resp. Br. at 15, but fail to recognize that it carefully places redistricting authority in the state's "*legislative*" processes—that is, in "the State's prescriptions for law*making*," not law *interpreting*. *Arizona State Legislature*, 135 S. Ct. at 2668. Examples of law*making* include the

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[1] Indeed, commentators quickly acknowledged that the Pennsylvania Supreme Court "gave state courts a blueprint to strike down political gerrymandering" by resorting to "interpretations" of state constitutions without reference to or regard for the U.S. Constitution or federal court precedent. *See* Mark Joseph Stern, *How to Kill Partisan Gerrymandering*, SLATE (Feb. 11, 2018), https://slate.com/news-and-politics/2018/02/pennsylvania-gave-state-courts-a-blueprint-to-strike-down-partisan-gerrymandering.html.

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

legislature, the referendum, the governor's veto, and the initiative. *See id.* All of these are channels for the expression of popular, rather than judicial, will. The Pennsylvania Supreme Court's interpretive function is judicial and is entirely foreign to the law*making* process.

The majority opinion in *Arizona State Legislature* drove home the legislative nature of redistricting in holding that the initiative process that established a new redistricting regime in Arizona was justified as "[d]irect law*making* by the *people*." 135 S. Ct. at 2659 (emphasis added). In relying on this case, *see, e.g.*, Petitioners Br. at 18, Opposition Parties do not explain how state judicial lawmaking comports with the majority opinion's holding that the "Clause doubly empowers *the people*" to "control the State's law*making* processes in the first instance" or to "seek Congress' correction of regulations prescribed by state legislature." 135 S. Ct. at 2677 (emphasis added); *id.* at 2671-72 (emphasizing that "*the people* of Arizona"); *see also id.* at 2658 (emphasizing the "endeavor by *Arizona voters*" to reform redistricting); *id.* at 2659 (emphasizing the "[d]irect lawmaking by the people"); *id.* at 2660 n.3 (emphasizing "the people's sovereign right to incorporate themselves into a State's lawmaking apparatus"); *id.* at 2660 (emphasizing "direct lawmaking" under the "initiative and referendum provisions" of the Arizona Constitution); *id.* (emphasizing the role of the "electorate of Arizona as a coordinate source of legislation"); *id.* at 2661 (emphasizing "the people's right . . . to bypass their elected representative and make laws directly"). *Arizona State Legislature* does not support the Opposition Parties' apparent position

that the judiciary, an antonym of both "people" and "legislature," may seize the lawmaking power from both.

The fundamental problem with Opposition Parties' approach is that it lacks a limiting principle. The Arizona referendum entailed the creation of both a redistricting commission and a detailed set of criteria governing how the commission would draw the maps. *Arizona State Legislature*, 135 S. Ct. at 2661. Under Opposition Parties' logic, the Arizona Supreme Court could have created the same reform package by "interpreting" it from existing constitutional provisions, and the sponsors' grueling effort at citizen legislation was superfluous. "What chumps!" *Id.* at 2677 (Roberts, C.J., dissenting). Moreover, what a state court can give, it can take away. So, in Opposition Parties' view, the Arizona Supreme Court also may interpret the term "Arizona Independent Redistricting Commission" to mean the Arizona Legislature—or the Arizona Supreme Court or a political scientist in Switzerland—and thereby rewrite the "people's" word with impunity. And, in this case, a differently composed state Supreme Court could find two years from now that the criteria created in 2018 are no longer applicable—and then strike down the most recent plan, replacing it with one it declares, with no support whatsoever, is "compliant" with its new legal principles.

The lack of any limiting principle in their theory is untenable. If a state court's "open-textured" interpretation of legislation is *ipso facto* the legislation itself, then "the Legislature" has no voice apart from the state judiciary's voice. In a dispute between "the Legislature" and "the Courts" about what "the Legislature" has

legislated, the *state courts will always win*. That flips the delegation to "the Legislature" on its head. The theory would bless overt seizure of redistricting by a state court that "interprets" redistricting authority as vested in a body of its choosing—including itself. *Cf. Colorado Gen. Assemb. v. Salazar*, 541 U.S. 1093 (2004) (Rehnquist, C.J., Scalia and Thomas, JJ., dissenting from the denial of certiorari). It also would authorize *de facto* usurpation by a state court that issues erratic interpretations to make congressional redistricting by the state legislature a practical impossibility. Eliding interpretation and legislation into one power, aside from nixing the Nation's entire legal tradition, creates endless possibilities for mischief.

For this reason, for the Elections Clause's delegation of districting authority to the state "Legislature" to have vitality, this Court must, as the ultimate arbiter of the federal constitution, be able to enforce the balance of power between the state legislative and state judicial powers the Elections Clause creates. To be sure, a state court has the authority to strike down a redistricting plan that violates clearly applicable state constitutional provisions. This is because a state's constitution is the product of the "State's prescriptions for lawmaking" and therefore may promulgate criteria. *Arizona State Legislature*, 135 S. Ct. at 2668. And, to the extent a state court affords them a legitimate interpretation faithful to their plain meaning, it acts consistent with the Elections Clause. But when a state court derives criteria from whole cloth in no way identified in any state constitutional provision, it crosses the line into "legislating" such criteria in violation of the Elections Clause. Thus,

Applicants' position does not demand that this Court act as an "uber-adjudicator of state voting disputes." Executive Resp. Br. at 13. Quite the contrary, this Court need not assess *de novo* the "correctness" of the ruling. It is rather tasked with assessing whether the Pennsylvania Supreme Court's order can fairly be characterized as acts of legislation rather than interpretation.[3]

As in *Arizona State Legislature*, the question here is whether the new redistricting regime is the product of a bona fide legislative process, or something else entirely. That inquiry does not upset the normal balance of state and federal judicial power because (1) it only occurs in the exceptionally rare cases covered by the Elections Clause or similar provisions, and (2) it affords deference to reasonable interpretations consistent with the state constitution's plain text and the legislature's reasonable expectations under precedent interpreting it.

2. The Pennsylvania Supreme Court's Orders Can Only Be Read As Legislating Mandatory Districting Criteria.

Opposition Parties provide no colorable defense of the Pennsylvania Supreme Court's decision on its merits, and they cannot. That Court's "interpretation" of the Pennsylvania Free and Equal Elections Clause, Pa. Const. art. I, § 5, is so far removed from the text and that court's own precedent that it does not meet the ordinary

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

standard of deference this Court normally affords state-court readings of state law. The Pennsylvania Constitution does not state that congressional districts must be "compact and contiguous" or "not divide any county, city, incorporated town, borough, township or ward." App. A at 3, ¶ 4.[5] Pennsylvania's constitutional framers knew how to articulate these requirements, and they did so for *state legislative* districts.[6] *See* Pa. Const. art. II, § 16. If that constitutional provision had been drafted to apply to congressional districts, a state court would not run afoul of the Elections Clause by enforcing it.[7] Likewise, while the Petitioners claim that Applicants request reversal of six precedents, *none* of those precedents involve this type of state judicial improvisation of *mandatory* redistricting rules at issue here—or anything remotely like it.

The Executive Respondents attempt to re-characterize the state court's adoption of new criteria as mere "benchmarks" for assessing whether a plan complies with the state constitution. Executive Resp. Br. at 17-18. That is nonsense. The Order states that "any congressional districting plan *shall*" comport with its new criteria "to

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[5] "App." refers to the Appendix filed with Applicants' Emergency Motion for a Stay.

[6] Moreover, the Pennsylvania Supreme Court has experience interpreting those provisions in a traditional judicial manner. *See Holt v. 2011 Legislative Reapportionment Comm'n*, 67 A.3d 1211, 1237-42 (Pa. 2013) (adjudicating challenges under the legislative provisions). *See also* Amicus Br. of Att'y Gens. Thornburgh and McCollum. General Thornburgh was a delegate to Pennsylvania's 1967-68 constitutional convention, and urges that this Application be granted.

[7] Petitioners point to *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992) to argue that the criteria adopted in this case existed in Pennsylvania law. Petitioners Br. at 21. While the Pennsylvania Supreme Court in *Mellow* may have used those traditional districting criteria to draw a remedial map when the political branches deadlocked following a decennial census does not mean that the use of those criteria is constitutionally required.

comply" with its view of the law. App. A at 3, ¶ 4 (emphasis added). Those criteria are mandatory, not mere "benchmarks" as to how the legislature "may" redistrict consistent with the Pennsylvania Supreme Court's standards. And these "benchmarks" formed the basis of the Pennsylvania Supreme Court's decision to strike down the 2011 Plan, as it held that compliance with the "benchmarks" was an "essential part of" the analysis. App. B at 123.

Similarly, Petitioners are wrong to claim that state courts "routinely" improvise such standards. Petitioners Br. at 22. *Beauprez v. Avalos*, 42 P.3d 642, 651 (Colo. 2002) and *Alexander v. Taylor,* 51 P.3d 1204, 1209-11 (Okla. 2002), both involved impasse litigation where the state legislatures failed to pass *any* redistricting plan after the census, and they addressed only the lower courts' use of traditional districting criteria in evaluating proposed maps for implementation in light of this abnegation of the political branches' redistricting duty. Neither case struck down a plan that *was* passed by the legislature for non-compliance with discretionary criteria that, by the state constitution's express terms, carried no legal effect against congressional maps. None of the Opposition Parties have cited a single case where a state court divined mandatory criteria, such as "compactness" from an "open-textured" free-speech or equal-protection provision.[8]

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

Here, the Pennsylvania Supreme Court not only invented them wholesale without authorization from either the legislature or the people, but it contradicted its prior finding that no such criteria apply. *Erfer v. Commonwealth*, 794 A.2d 325, 334 n.4 (Pa. 2002).[9] Then it struck down a plan drawn seven years earlier for *failure* to comply with these and other previously unknown standards and ordered that new districts be drawn in less than three weeks under those criteria and any others it might supply in a forthcoming opinion that was only issued two days before the deadline. App. A at 2.[10] And in doing so, the Court invalidated congressional seats which had been in place for three election cycles without challenge. Finally, it enacted its own plan, which it ratified on the *ipse dixit* representation that it complies with state law, affording no opportunity for the parties to the litigation to vet that plan

[9] Following the 1967-1968 Pennsylvania Constitutional Convention, Article II, Section 16 of the Pennsylvania Constitution was amended to require, among other criteria, minimization of county and municipal splits for state senatorial and legislative districts. *See* Pa. Const. art. II, § 16. Article II, Section 17 of the Pennsylvania Constitution was also amended at the same time to establish a Legislative Reapportionment Commission for senatorial and legislative districts. *See* Pa. Const. art. II, § 17. Conspicuously absent from both of these amendments was any mention of congressional districts; congressional districts were simply not a focus of the 1967-1968 Constitutional Convention. For this reason, the Pennsylvania Supreme Court held in *Erfer* that in the "context of Congressional reapportionment," there are "*no analogous, direct textual references to such neutral apportionment criteria*." *Erfer*, 794 A.2d at 334 n.4 (emphasis added). More recently, House Bill 1835, Printer's Number 3036 of the 2015 Session of the General Assembly would have amended Article II, Section 16 to require compactness and minimization of county and municipal splits in Congressional redistricting. But this Joint Resolution was not adopted by the General Assembly and, therefore, was never endorsed by the People of Pennsylvania at the ballot box.

[10] This opinion was issued on the evening of February 7, 2018 when a snowstorm had resulted in closure of the state capitol in Harrisburg, and when the state House and Senate were not in session.

under the criteria the court invented. *Id.* The court's order is all legislative will and no judgment. It is therefore *ultra vires* in violation of the Elections Clause.

**B. Judicial Estoppel Does Not Apply.**

Petitioners raise the specter of a vehicle problem for this case by contending that the Applicants' arguments are barred by judicial estoppel. Petitioners Br. at 29-32. Not so.

Applicants were faced with defending three actions seeking to invalidate the 2011 Plan: this action, filed June 15, 2017, and two federal cases—*Agre*, No. 2:17-cv-4392 and *Diamond v. Torres*, No. 5:17-cv-5054 (E.D. Pa., filed Nov. 9, 2017). Applicants *unsuccessfully* sought to stay *Agre* pending decisions in *Whitford, Benisek,* and this case. (ECF No. 45, 2:17-cv-4392). *Agre* was tried on December 4-7, 2017, the week before this case was tried in the Commonwealth Court. Applicants prevailed on the merits in *Agre*.

In *Diamond*, Applicants similarly sought a stay pending *Whitford, Benisek,* and this case, and prevailed following the state court's January 22 order in this case. The Opposition Parties are correct that, in both *Agre* and *Diamond*, one of the arguments the Applicants made was based on *Growe v. Emison*, 507 U.S. 25 (1992). But that argument was that the state court was exercising jurisdiction over a gerrymandering challenge to the 2011 Plan, just as the Eastern District of Pennsylvania was in *Agre* and *Diamond*. As between the state court and the Eastern District of Pennsylvania, Applicants argued, *Growe* counsels that the state court should take the lead in adjudicating virtually identical cases. At the time, the federal and state standards were "coterminous," and the Applicants argued before the

Pennsylvania Supreme Court that they should remain coterminous. Thus, *Growe* would suggest that the state courts should take the lead in applying the existing standard to the facts in a process of *adjudication,* following the lead of this Court as more than fifty years of precedent in the Commonwealth suggested.

The Applicants most certainly did *not* contend or concede at any point that the state courts were free to *legislate* a new standard completely untethered from any legislative act. Quite the opposite, the Applicants vigorously contested throughout all levels of this case that state courts lack the right under the Elections Clause to adopt any criteria not ratified in a bona fide legislative process. The notion that the Applicants forfeited an appeal of the Pennsylvania Supreme Court's legislative conduct to *this* Court under 28 U.S.C. § 1257 by raising an abstention argument in the *Eastern District of Pennsylvania* is meritless. Indeed, Petitioners have forfeited their estoppel argument by not raising it in the Pennsylvania Supreme Court and Pennsylvania Commonwealth Court in response to the Applicants' advocacy against new redistricting criteria. *See, e.g.*, *United States v. Jones*, 565 U.S. 400, 413 (2012).

### C. The Stay Equities Favor The Granting Of A Stay In This Case.

Opposition Parties further argue that the balance of equities weighs against the imposition of a stay in this case, arguing, in effect, that the Pennsylvania Supreme Court's remedial plan is the status quo and it is Applicants who seek to depart from that status quo. Opposition Parties have it exactly backwards.

As the Court stated in *Purcell v. Gonzalez*, "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent

incentive to remain away from the polls." 549 U.S. 1, 4-5 (2006). "As an election draws closer, that risk will increase." *Id*. at 5. In *Purcell*, the Court vacated an injunction issued by the Ninth Circuit—one that, like the Pennsylvania Supreme Court's January 22 order in this case, came without opinion—prohibiting Arizona from enforcing its voter identification law. *Id*. at 3. The Court held that "[g]iven the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction suspending the voter identification rules." *Id*. at 5-6.

*Purcell*'s presumption against last minute elections changes applies equally here. This Court has long rejected 11th hour changes to elections even when faced with constitutional violations. *Wells v. Rockefeller*, 394 U.S. 542, 547 (1969) (affirming conduct of elections under a map struck down because the "primary election was only three months away"); *Kilgarlin v. Martin*, 386 U.S. 120, 121 (1967) (per curiam) (affirming the district court's decision allowing the 1966 Texas election to continue under a "constitutionally infirm" rule due to the proximity of the election date); *Klahr v. Williams*, 313 F. Supp. 148, 152 (D. Ariz. 1970), *aff'd sub nom. Ely v. Klahr*, 403 U.S. 108 (1971) (similar timing). As the Court stated in *Reynolds*:

> In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.

377 U.S. at 585 (1964).

It is hard to imagine greater disruption to an election process than what the Pennsylvania Supreme Court ordered in this case. It has totally redrawn Pennsylvania's districts right before the primaries, allowing only days for candidates to contemplate the shape of the new districts, decide whether to run, and to complete their nominating petitions to get on the ballot. If elections were baseball, the Pennsylvania Supreme Court's orders would be the equivalent of reconstituting half the roster of every team just minutes before the first pitch on opening day. It is akin to a teacher instructing the class the entire semester on geometry, but the night before the final telling her students that the test will be on calculus.

Modern congressional campaigns do not begin on the first day for circulating nomination petitions. Their preparation relies upon knowing the boundaries of the district they will be running in well in advance. Candidates and their campaign committees must start campaigning, fundraising, and recruiting volunteers many months, if not years, prior to the election.[11] *See generally* Amicus Brief for Republican Party of Pa. Many candidates organize events for collecting nomination petitions, and the location and attendees for such events are often based upon their current congressional district. Following adoption of the court's plan, some candidates may consider running in a different district, especially if the new plan pairs them with a strong incumbent, and others may re-think running at all. But candidates must now make these important decisions with virtually no notice or time to adjust their

[11] Indeed, a recent lawsuit filed in the United States District Court for the Middle District of Pennsylvania contains allegations regarding the efforts and funds already expended by certain representatives and how their districts have drastically changed under the new map. *See Corman*, No. 1:18-cv-00443.

strategy, gather endorsements, raise money, and attend to the million other tasks that congressional candidates must do to run a strong race. In addition, candidates have raised and spent money under FECA's limits to campaign in their prior districts, and these limits do not reset because new district lines have been imposed on the eve of the nomination process. Additionally, as the Executive Respondents admit, the process for updating the voter registration records will not even be fully complete until the week of March 5. *See* Affidavit of Jonathan Marks at ¶ 34, *Corman v. Torres*, 1:18-cv-00443-CCC-KAJ-JBS, ECF No. 92-3 (M.D. Pa. Feb. 22, 2018) ("Marks Affidavit").

Voters are significantly disrupted, too. Voters have become familiar with their districts and their incumbent candidates over the last six years and three congressional election cycles. But the Pennsylvania Supreme Court's orders make drastic, last-minute changes to these districts. Even a cursory visual inspection of the new map reveals that a significant number of Pennsylvanian voters have been drawn into a new district under the court's plan. Likely millions of Pennsylvanians expecting to vote for or against specific candidates on the bases of specific issues will be required to return to the drawing board and relearn the facts, issues, and players in their new districts. Indeed, many voters may not even realize that their congressional district have changed. For example, the General Assembly's "Find Your Legislator" website shows each Pennsylvania resident's current congressional representative, *see* PENNSYLVANIA GENERAL ASSEMBLY, *Find Your Legislator*, http://www.legis.state.pa.us/cfdocs/legis/home/findyourlegislator (last visited Mar. 6,

2018), but thus far, there is no publicly-accessible means for Pennsylvania voters to discern whether their current representative even resides in their new Court-drawn district.

Justice Baer recognized early on the dangers of the rushed process created by the Pennsylvania Supreme Court. In his dissent from the Court's February 7 opinion, he identified that the timing of the Court's decisions created "substantial uncertainty, if not outright chaos, currently unfolding in this Commonwealth regarding the impending elections . . . ." App. B, Baer Concurring and Dissenting at 8. In his dissent from the February 19 Order, Justice Baer reiterated these concerns and counseled that because the breakneck pace adopted by the Pennsylvania Supreme Court did not allow adequate time for a remedial process to play out, Pennsylvania law would allow the 2018 elections to proceed under the 2011 Plan even if it was unconstitutional. He wrote:

> My skepticism regarding the time allotted the Legislature has been borne out. Democracy generally, and legislation specifically, entails elaborate and time-consuming processes. Here, regardless of culpability, the Legislature has been unable to pass a remedial map to place on the Governor's desk for signature or veto. Under these circumstances, Pennsylvania and federal law permit the use of the existing, albeit unconstitutional, map for one final election. *See Butcher v. Bloom*, 203 A.2d 556, 568-69 (Pa. 1964) (citing *Lucas v. Forty-Fourth General Assembly of State of Colorado*, 377 U.S. 713, 739 (1964)).

App. C, Baer Dissenting Op. at 2.

Opposition Parties try to flip *Purcell* on its head, arguing that the Pennsylvania Supreme Court's new map is the *status quo* and conducting the election under the 2011 Plan would create voter confusion and burden the Pennsylvania

executive. But *Purcell* disfavors late disruption by courts in the electoral process, including the Pennsylvania Supreme Court's January 22 Order enjoining use of the 2011 Plan and the February 19 Order adopting a new map. The Court in *Purcell* reversed the Ninth Circuit's last minute injunction prohibiting the state from enforcing its voter identification law out of concern for disruption of the election process.

Thus, for purposes of the *Purcell* analysis, the *status quo* is not the judicially created map that has existed for just two weeks, but the congressional districts that existed in Pennsylvania for six years and three election cycles, and that were adopted through the bi-partisan legislative process by the General Assembly in 2011. Any holding otherwise is contrary to *Purcell*, in which this Court expressed its disfavor of such late-in-the-game changes.

Opposition Parties claim that voters have already been educated about their new districts, but the effort undertaken by Executive Respondents to do so is scant. Neither the Pennsylvania Secretary of State nor the Pennsylvania Judiciary has requested any funds to educate Pennsylvania voters regarding their new districts. Pa. Senate Approp. Comm. Hearing (Feb. 27, 2018), at 53:23 and 1:05:10; John L. Micek, *So … About that Redistricting Decision. Senate Panel Grills Pa. Supreme Court Justices*, PENNLIVE.COM, (Feb 27, 2018), http://www.pennlive.com/opinion/2018/02/so_about_that_redistricting_de.html. They have done nothing to explain the last minute changes to the districts that voters have lived in for six years. There have been no mailings to educate voters or provide them with updated cards reflecting

their new congressional district, no television advertisements, and no other advertisements to direct voters to the Department of State's website to obtain more information. Moreover, while Executive Respondents tout there will be no confusion by using the remedial plan in 2018, the Department of State's website calendar of "2018 Key Election Dates" still lists February 13 as the beginning of the period for circulating nominating petitions, and March 6 as the deadline.[12]

Opposition Parties also argue that staying the Pennsylvania Supreme Court's orders and holding the 2018 elections under the 2011 Plan would create chaos and require a new primary. But these claims are mere puffery by politically-motivated Executive Respondents. In *Agre*, Executive Respondents claimed they needed a new map by January 23, 2018. *See* Joint St. of Stip. and Undisputed Facts ¶¶ 19-28, *Agre,* No. 2:17-cv-4392, ECF No. 150. But when confronted with the likelihood that a new map could not be in place by that date, Executive Respondents then claimed that they could keep the May primary if they had a new map by February 20—though admitted they would have to change several dates in the election schedule. Marks Aff. ¶ 19. In reality, Executive Respondents have little knowledge on just how much confusion the new map will cause candidates and voters, and their protestations about the elections calendar ring hollow.[13]

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[12] *See* PA. DEP. OF STATE, BUREAU OF COMM'NS, ELECTIONS AND LEGIS., *2018 Pa. Elections Important Dates to Remember*, www.dos.pa.gov/VotingElections/CandidatesCommittees/RunningforOffice/Documents/2018%20important%20dates.pdf (last accessed March 6, 2018).

[13] Executive Respondents might identify, as an obstacle to a May primary, the statutory deadline under the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 52 U.S.C. § 20301, to mail, at least 45 days before a primary election, absentee ballots to persons covered by the statute. But this Court could extend the

In addition, accepting Opposition Parties' arguments would reward them and the Pennsylvania Supreme Court for a time crunch of their own creation. After the Executive Respondents claimed they needed a new plan by February 20, the Pennsylvania Supreme Court released its remedial map the day before, on February 19. Opposition Parties now claim this timing deprives Applicants of any further relief, including from this Court, that could prevent the Pennsylvania Supreme Court's usurpation of the General Assembly's power in violation of federal law from coming to fruition for at least the 2018 elections. If the Court adopts this logic, future plaintiffs and future state courts will have learned the important lesson to game the timing of their filings and rulings in order to effectively shield them from judicial review by this Court. That outcome is certainly not consistent with *Purcell* or the principles that underlie it.

Opposition Parties cite cases where new maps have been imposed in the spring of election years to argue that the remedial plan will not cause disruption here, but those cases are distinguishable because they involve *impasse litigation* resulting from legislatures' failures to pass *any* map following the release of a new Census at the beginning of the decade. *See Mellow*, 607 A.2d at 206; *Growe*, 507 U.S. at 37. In those cases, both the legislature and executive branch were on notice as of January or February in the first *odd year* of the decade that redistricting was required and

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deadline for receipt of UOCAVA ballots until after the primary date, relieving this important pressure point and facilitating an on-schedule primary. *See, e.g., United States v. West Virginia*, No. 2:14-cv-27456, ECF No. 5, at 6 (Nov. 3, 2014) (consent decree, moving deadline to accept UOCAVA ballots); *United States v. Vermont*, No. 5:12-cv-236, ECF No. 10, at 3 (Oct. 22, 2012) (consent decree).

therefore had little room to complain when *a year later* a new plan was imposed. For example, in *Mellow*, the legislature had "from early 1991 to the present" (March 1992) to enact a plan. 607 A.2d at 47. Here, the General Assembly had no way to know of a redistricting obligation until late January *of the even election year* and was given less than three weeks to respond. The general public also was caught by surprise. Moreover, a state has advance notice even prior to the issuance of census data of its decennial redistricting duty; by contrast, the General Assembly had no notice here, given that, as of late December 2017, the Pennsylvania courts had signaled that the plan was valid. App. D at 127.

Additionally, the equities in impasse litigation are different from those here because that type of litigation occurs only once every ten years. Indeed, *Reynolds* limited the redistricting obligation to once per decade because "[l]imitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system." 377 U.S. at 583. The disruption the Opposition Parties propose would only exacerbate the disruption visited on Pennsylvania's elections in 2011; the disruption in 2011 does not justify *more disruption* now, as the Respondents suggest.

The propriety of a stay here follows *a fortiori* from the grant of a stay in *Gill*. There, the district court issued its remedial order *more than a year* before the 2018 election cycle was set to commence, and gave the State *nine months* to draw a new map. Moreover, the court specifically emphasized that the Wisconsin mapdrawers had "produced many alternate maps, some of which may conform to constitutional

standards," which it thought would "significantly assuage the task now before them." *Whitford v. Gill*, No. 15-cv-421-bbc, 2017 WL 383360, at *2 (W.D. Wisc. Jan. 27, 2017). Here, by contrast, the Pennsylvania Supreme Court issued its initial order barely three weeks before the ballot access process for the 2018 election cycle was set to commence, giving the General Assembly a mere 18 days to enact a new map. Then, after the time for circulating nomination petitions began, the court adopted new districts and amended that deadline.

In the end, the equities favor staying the Pennsylvania Supreme Court's orders and permitting the 2018 elections to proceed under the 2011 Plan.

## CONCLUSION

For these reasons and those stated in the Stay Application, the Court should issue a stay of the Pennsylvania Supreme Court's orders pending resolution of this case.

Respectfully Submitted,

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