

# In the Supreme Court of the United States

Michael C. Turzai, in his capacity as Speaker of the Pennsylvania House of  
Representatives, *et.al.*,

*Applicants,*

v.

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

*Respondents.*

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**ON EMERGENCY APPLICATION FOR STAY  
PENDING APPEAL TO THE SUPREME COURT OF THE UNITED STATES**

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MOTION FOR LEAVE TO FILE AMICUS BRIEF, MOTION FOR LEAVE TO FILE  
BRIEF ON 8 1/2 BY 11 INCH PAPER, AMICUS BRIEF FOR THE STATES OF  
ARIZONA, KANSAS, LOUISIANA, MICHIGAN, MISSOURI, SOUTH CAROLINA,  
TEXAS, UTAH, AND NORTH CAROLINA, THROUGH PHILIP E. BERGER,  
PRESIDENT PRO TEMPORE, NORTH CAROLINA SENATE, AND TIMOTHY K.  
MOORE, SPEAKER, NORTH CAROLINA HOUSE OF REPRESENTATIVES AS  
*AMICI CURIAE* IN SUPPORT OF APPLICANTS' REQUEST FOR A STAY

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STATES OF ARIZONA, KANSAS, LOUISIANA, MICHIGAN, MISSOURI, SOUTH  
CAROLINA, TEXAS, UTAH, AND NORTH CAROLINA, THROUGH PHILIP E.  
BERGER, PRESIDENT PRO TEMPORE, NORTH CAROLINA SENATE, AND  
TIMOTHY K. MOORE, SPEAKER, NORTH CAROLINA HOUSE OF  
REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF APPLICANTS'  
REQUEST FOR A STAY**

The States of Arizona, Kansas, Louisiana, Michigan, Missouri, South Carolina, Texas, Utah, and North Carolina, through Philip E. Berger, President Pro Tempore, North Carolina Senate, and Timothy K. Moore, Speaker, North Carolina House of Representatives move the Court for leave to file an *amicus* brief in support of Pennsylvania's Emergency Application for Stay.

In support, *Amici* States assert that the ruling of the Pennsylvania Supreme Court will, and is intended to, substantively affect impending congressional elections in Pennsylvania, which will not only affect the nation as its approaches a

mid-term election cycle but also threatens future redistricting efforts in the states. The ruling raises grave concerns among the *Amici* States about disruption of 2018 elections and state judicial usurpation of power exclusively reserved to the people to be exercised exclusively through state legislatures and congress.

*Amici* States assert that the ruling creates exceptional circumstances that warrant their being permitted to be heard on the issue of Pennsylvania's emergency application for stay and request that their motion to file the attached *amicus* brief be granted.

Respectfully submitted.

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# In the Supreme Court of the United States

Commonwealth of Pennsylvania, *et al.*,  
*Applicants,*

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League of Women Voters of Pennsylvania, *et al.*,  
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**MOTION FOR LEAVE TO FILE BRIEF ON 8 1/2 BY 11 INCH PAPER  
FOR THE STATES OF ARIZONA, KANSAS, LOUISIANA, MICHIGAN,  
MISSOURI, SOUTH CAROLINA, TEXAS, UTAH, AND NORTH CAROLINA,  
THROUGH PHILIP E. BERGER, PRESIDENT PRO TEMPORE, NORTH  
CAROLINA SENATE, AND TIMOTHY K. MOORE, SPEAKER, NORTH  
CAROLINA HOUSE OF REPRESENTATIVES**

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The States of Arizona, Kansas, Louisiana, Michigan, Missouri, Ohio, South Carolina, Texas, Utah, and North Carolina, through Philip E. Berger, President Pro Tempore, North Carolina Senate, and Timothy K. Moore, Speaker, North Carolina House of Representatives move the Court for leave to file their *amicus* brief in support of Petitioner’s Emergency Application for Stay on 8 ½ by 11 inch paper rather than in booklet form. In support, *Amici* States assert that Pennsylvania filed its Emergency Application for Stay in the Supreme Court of Pennsylvania on the afternoon of January 23, 2018, which that court denied January 25, 2018. *See* Order Denying Stay from the Pennsylvania Supreme Court, Petitioner’s Motion for Stay, App. Ex. D. Petitioners filed its Emergency Motion for Stay in this Court the same day.

The expedited filing of Petitioner's application and compressed deadlines established by the Pennsylvania Supreme Court impair *Amici's* ability to prepare a and file a brief in booklet form. *Amici* desire to be heard on the application and respectfully request that the Court grant this motion and accept their paper filing.

Respectfully submitted.

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## INTEREST OF *AMICI CURIAE*

*Amici Curiae* are the States of Arizona, Kansas, Louisiana, Michigan, Missouri, South Carolina, Texas, Utah, and North Carolina, through Philip E. Berger, President Pro Tempore, North Carolina Senate, and Timothy K. Moore, Speaker, North Carolina House of Representatives. The *Amici* States have an interest in being heard in this matter based upon their shared interest in protecting the basic reservation to state legislatures of power to establish the time, place, and manner of Congressional elections. This power, pursuant to the Elections Clause, is shared with Congress – but nevertheless reserved by the United States Constitution to these two *legislative* branch bodies.

The Pennsylvania Supreme Court, to be sure, has the power to interpret its own constitution and determine whether a legislatively-drawn

map complies with it. What it does *not* have power to do is contravene the United States' Constitution's Election Clause with a remedy that eviscerates the Elections Clause by co-opting power exclusively reserved to the legislative branches of state and federal government. State courts can and do, within certain limits, draw congressional maps. But the courts must give reasonable notice of the violations to satisfy federal due process requirements and *must* give a reasonable time to the legislature to craft a compliant map to satisfy Article I, Section 4. The Pennsylvania Supreme Court violated these requirements because it did not issue any opinion explaining how the new maps violated the federal or state constitutions, did not give the legislature a reasonable time to draw a map, and imposed judicially-created criteria for remedial maps the Pennsylvania Supreme Court has no authority to impose.

The Pennsylvania Supreme Court's overreach threatens the core purpose the Framers included the Elections Clause in the Constitution – to preserve to the people, through their state and federal legislative bodies – certain rights that are integrally related to the casting of an actual ballot. Because *Amici* are all States who engage in redistricting, they have a clear interest in this matter. State supreme courts simply do not, as a matter of *federal constitutional law*, have the authority to, in effect, override the legislature, trample due process, and arbitrarily re-draw congressional maps.

*Amici* also have an interest in ensuring other state supreme courts do not follow Pennsylvania's lead, creating *further* chaos on the eve of mid-term

Congressional elections. The Pennsylvania Supreme Court’s ruling already throws its 2018 Congressional elections into chaos. Its ruling is not only likely but *intended to* substantively affect the outcome of impending congressional elections, in complete disregard of the impact on the voting public. The harm to Pennsylvania voters is tangible – but the harm to other States and their citizens is also tangible. *Every state* is impacted by whomever Pennsylvania elects to Congress because its elected representatives earn the right to vote on every act of Congress. And any act of Congress affects every citizen and resident of the United States.

#### **ARGUMENT**

The Commonwealth of Pennsylvania, through the Speaker of the Pennsylvania House of Representatives and the President Pro Tempore of its Senate, has requested that this Court issue an emergency stay of a ruling issued January 22, 2018, by the Pennsylvania Supreme Court striking a bi-partisan redistricting plan used in three congressional elections over the past five years (the “2011 Map”).

In an astonishing ruling that usurps power exclusively reserved to the state and federal legislative branches through the Elections Clause and which also defies common sense, the Pennsylvania Supreme Court has demanded that state legislators convene in an emergency legislative session to immediately draw new congressional districts and submit the new map to

the Governor and also ordered other state executive branch take other vague actions (including changing election dates) in less than two weeks' time.

This compressed time frame alone is worthy of a stay because it virtually guarantees little to no participation by voters, little to no time for deliberative debate by the legislature, and no time whatsoever for a legislative override of a gubernatorial veto. *See* Pa. Const. art. IV § 15 (explaining the veto power and timelines in Pennsylvania); *see also Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (“A State indisputably has a compelling interest in preserving the integrity of its election process.”). (It is worthy to note that in the *Abbot v. Perez* matter, the federal court struck a map partially on the basis that the Texas Legislature had not acted with sufficient “deliberation.” *See Amicus* Brief for Louisiana, Alabama, Michigan, Missouri, Ohio, South Carolina, and Wisconsin, in *Abbot v. Perez*, 17-626.) These problems alone raise serious due process concerns and expose *any* new map to *new* litigation in state *and* federal courts.

But the Pennsylvania Supreme Court did not stop there – it went on to declare that the map must be submitted to the court itself for review and approval, with the declaration that it expects a new map to be used for the upcoming mid-term Congressional election. *League of Women Voters of Pa, et al. v. Commonwealth of Pa., et al.*, (No. 159 MM 2017), 2018 Pa. LEXIS 438. In the alternative, the Pennsylvania Supreme Court “encourages” state election officials to move the congressional election, in contravention of a

longstanding traditions in that state to hold them at the same time that other statewide elected officials are elected. *See id.* This would no doubt result in lower voter turnout and widespread voter confusion. Normally qualifying would open February 13, only two weeks away, for the May primaries but has already been thrown into a state of confusion due to the order.<sup>1</sup>

Thus, in one fell swoop, the Pennsylvania Supreme Court has eviscerated due process *and* the Elections Clause, with no concern for the impact its ruling has on the voters in its own state and no concern for the downstream implications on other states. *See Purcell*, 549 U.S. at 4.

This kind of judicial overreach, on the eve of qualifying for mid-term Congressional elections simply cannot be allowed to stand. This Court should grant the stay, affording Pennsylvania and its voters the opportunity time to seek further review in this Court of this extraordinary ruling. *Id.* at 5-6. In addition, the ruling ensures continued instability. It will certainly spawn additional litigation that will undermine any new map the Legislature draws and the Governor and court approves, which is highly unlikely given the impossibly compressed time frame. However, the more likely result is that the Pennsylvania Supreme Court will draw the map. *Either outcome*, however, results in further litigation challenging the map. The equities and law here are clear – the Pennsylvania Supreme Court has seriously

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<sup>1</sup>Pennsylvania Dep't of State, Important Notice Regarding Nomination Petition Filing, <http://www.dos.pa.gov/VotingElections/CandidatesCommittees/RunningforOffice/Pages/default.aspx#.VBMGyvldUQ0>

overstepped. Because of the implications for voters in that state and the downstream implications for voters in every state this Court should stay the ruling pending further review.

**I. The Pennsylvania Supreme Court’s decision raises serious federal constitutional concerns requiring a stay.**

Like Texas in *Abbott v. Perez*, Pennsylvania’s Legislature no doubt feels it has become the victim of a decidedly unfunny practical joke – only this time, it is at the hands of its own state supreme court. After adopting a bipartisan Congressional district plan in 2011 and using it for the past five years in three elections, petitioners below challenged the map on grounds of partisan gerrymandering. The Pennsylvania Supreme Court expedited review and assigned a lower court to conduct a trial in order to submit findings of fact and conclusions of law. After the lower court upheld the map, the Pennsylvania Supreme Court reversed the lower court. This litigation started and finished in the state court system in less than eight months. And not only did the Pennsylvania Supreme Court charge legislative and executive branch officials with impossible time frames to draw a new map, it also refused to supply *any actual reasons* why the map violated its state constitution.

The United States Constitution’s Elections Clause provides that “[t]he Times, Places and Manner” of congressional elections “shall be prescribed in each State by the Legislature thereof” unless Congress should “make or alter such Regulations.” U.S. Const. art. I, §4, Cl. 1. The Elections Clause vests

authority over congressional elections in *state legislatures* and in *Congress*. *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2670-71 (2015); *Smiley v. Holm*, 285 U.S. 355, 365 (1932); Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, Utah Law Rev. 859, 862-63 (2010). *Amici* recognize that state supreme courts are the ultimate arbiter of questions regarding the interpretation and application of the state’s own constitution and under some circumstances may even be required to draw maps. Therefore, *Amici* do not take issue with the Pennsylvania Supreme Court’s decision that the map is unconstitutional based solely on state constitutional grounds. But its attempt to usurp the power of its legislature, strike the map without opinion, then order new criteria for congressional districts, *and* take over this function itself, without adequate time for the legislature to act and without adequate time for meaningful public participation, creates a *federal* constitutional problem. *Purcell*, 549 U.S. 5-6.

This ruling usurps the power *expressly* reserved by the United States Constitution to state and federal *legislative* bodies in the Elections Clause. “Redistricting involves lawmaking in its essential features and most important aspect.” *Arizona Indep. Redistricting Comm’n*, 135 S. Ct. at 2667 (internal quotation marks omitted). The Elections Clause prohibits the state judicial branch from exercising the power of redistricting because “the legislature is not acting solely under the authority given to it by the people of the State, but by virtue of a direct grant of authority” from the federal

Constitution. *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76 (2000). The federal constitutional problem, therefore, is not that the state supreme court found its maps to be unconstitutional but what the court intends to do about it. Instead of providing a reasonable time for the legislature to act, it imposed an impossible time frame that virtually ensures the supreme court will draw the map. Accordingly, the court is co-opting a legislative responsibility, which violates the Elections Clause. *Smiley v. Holm*, 285 U.S. at 367-68.

**II. The ruling should be stayed because the time frame is punitive, unconstitutional, and threatens core rights preserved by the elections clause – the *exclusive* constitutional right to establish time, place and manner of elections, through their *elected* legislative branch representatives.**

The terms and conditions imposed by the Pennsylvania Supreme Court do more than add insult to a very deep constitutional injury. The Elections Clause, at its core, ensures citizen engagement from the root level. This level of engagement – between the public and its state or federal elected representatives – is at the *heart* of the Elections Clause. Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, Vand. L. Rev. 1195, 1219 (2012) (“The framers chose a federalist system to protect the people from tyranny by allocating power between the states and the federal government to counteract ambition with ambition, so to speak.”). Loss of this opportunity in the short term strikes a hard blow to republican democracy and potentially a death blow in the long term. Depriving the people of the opportunity to *directly* engage with those they



have elected on a matter as fundamental as drawing district lines related to future elections can only result in an apathetic and disengaged electorate. *That* is a death blow to democracy itself.

Every citizen and resident of the United States, therefore, is impacted by an action like the one at issue here that undermines our republican system of government. Even *one* state supreme court taking such an action injures *all* states.

The implications of the ruling are serious. This ruling alone potentially causes a cognizable constitutional injury to Pennsylvania residents, who have an interest in *direct political engagement* in the legislative process of redistricting and who are denied that engagement by the Pennsylvania Supreme Court's arrogation of that power to itself. The State could even face federal claims under 42 U.S.C. §1983 for violating the rights of the voters of the state.<sup>2</sup>

Moreover, it is naïve to think the map drawn by the Pennsylvania Supreme Court – or any state judiciary, appointed or elected, is immune from political forces at play in congressional redistricting. *See generally* LNP Editorial Board, *Our Choices for State Supreme Court in Tuesday's Election*, LANCASTER ONLINE, at [http://lancasteronline.com/opinion/editorials/our-choices-for-state-supreme-court-in-tuesday-s-election/article\\_08e9810c-7ea2-](http://lancasteronline.com/opinion/editorials/our-choices-for-state-supreme-court-in-tuesday-s-election/article_08e9810c-7ea2-)

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<sup>2</sup> Specifically, 42 USC §1983 “provides a cause of action for the deprivation of any rights, privileges, or immunities secured by the Constitution and laws by any person acting under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory.” *Gomez v Toledo*, 446 US 635, 638 (1980)(internal quotations omitted).

[11e5-a10c-9ba2a8da9aa0.html](http://www.pse.com/11e5-a10c-9ba2a8da9aa0.html); *Spring 2015 Judge Candidate Forum*, Neighborhood Networks and MoveOn Philly, at <https://www.youtube.com/watch?v=713tnbv55mU&feature=youtu.be>. The Pennsylvania Supreme Court's map is almost certain to also be challenged in State or federal court, or both. This exposure alone shows how the ruling places the State Legislature and Executive Branch Officials between a rock and hard place. No matter what either branch does, the State will be faced with costly, lengthy litigation, unsettled districts, and widespread voter confusion.

This Court has recognized that federal judicial scrutiny of state redistricting is a “serious intrusion on the most vital of local functions.” *Miller v. Johnson*, 515 U.S. 900, 915 (1995). Accordingly, federal courts must “exercise extraordinary caution” in redistricting cases and afford states a presumption of constitutionality and good faith. *Id.* at 916. The Pennsylvania Supreme Court, however, will not be subject to such restrictions.

And unless this Court grants a stay, the voters and legislature have nowhere to turn to prevent the constitutional injury itself. The State, likewise has nowhere else to turn to vindicate the federal constitutional allocation of power and is surely destined to be mired in litigation in state *and* federal court for many years to come. This simply cannot be the result the Framers envisioned.

## CONCLUSION

The *Amici* States urge this Court to grant a stay. The decision of the Pennsylvania Supreme Court, in part based upon the projected outcome of *Gill v. Whitford*, is premature. The Court has issued an opinion upon which even state standards pursuant to the state constitution can be divined. And the remedy the Court has imposed is flatly unconstitutional.

Respectfully submitted.

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**CERTIFICATE OF SERVICE**

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I, Elizabeth B. Murrill, a member of the Supreme Court Bar, hereby certify that three copies of the attached Amicus Brief and Motions in support of Applicants' Emergency Application for Stay, filed electronically and by hand-delivery to the United States Supreme Court, were served via Next-Day Service and on the following parties listed below on this 1st day of February, 2018. An electronic pdf of the Application has been sent to the following counsel via e-mail:

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