No. 17A795

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.

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:

"Redistricting involves lawmaking in its essential features and most important aspect." *Arizona State Legis. v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2667 (2015) (internal quotation marks omitted). But for the first time in United States history, a state court, in attempting to play the role of "lawmaker," has invalidated a congressional districting plan without identifying a violation of the U.S. Constitution or a state constitutional or statutory provision providing specific redistricting criteria. Instead, the Pennsylvania Supreme Court concluded that the 2011 Pennsylvania Congressional plan (the "2011 Plan") violates "requirements" that Congressional districts be "composed of compact and contiguous territory" and "do not divide any county, city, incorporated town, borough, township, or ward, except when necessary to ensure equality of population"—rules that exist nowhere in the Pennsylvania Constitution or any Pennsylvania statute. In fact, the same Pennsylvania Supreme Court, in adjudicating Pennsylvania's 2001 Congressional plan, expressly *disclaimed* the applicability of any such requirements to Pennsylvania Congressional districts. *Erfer v. Commonwealth*, 794 A.2d 325, 334 n.4 (Pa. 2002).

Rather than apply the law as handed down from Pennsylvania's proper lawmakers, the Pennsylvania Supreme Court has apparently divined its new criteria from generic state constitutional guarantees of free speech and equal protection, the bases of the claims filed below. But if a state free-speech clause can

be manipulated to mean that districts must be "compact," or an equal-protection guarantee can mean that districts must "not divide any county," then *anything* is possible. State courts would be free to legislate an infinite number of requirements and impose them on state legislatures, thereby seizing control of elections to *federal office*. Indeed, that has happened here, as the Pennsylvania Supreme Court's Order, on its face, even fails to require compliance with federal legal standards, including the Voting Rights Act and population equality.

The Elections Clause prohibits this arrogation of legislative power by a state judicial branch. Under that Clause, "the legislature is not acting solely under the authority given 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). Thus, while a state court's construction of a state constitution would ordinarily not be this Court's concern, where a state court's purported interpretation is not interpretation at all, but rank legislation at the expense of the branch of state government charged with legislation under *federal law*, this Court is both empowered and duty-bound to intervene. It has done so in the past, and multiple Justices of this Court have signaled a willingness to entertain cases involving such encroachments in the future. *See Colorado Gen. Assemb. v. Salazar*, 541 U.S. 1093 (2004) (Rehnquist, C.J., Scalia and Thomas, JJ., dissenting from the denial of certiorari).

In short, the question in this case is whether the Pennsylvania Supreme Court is the Pennsylvania "Legislature" under the federal Constitution, and the

answer to that question is a resounding no. This is not simply a question of a state supreme court interpreting its state constitution, but a state supreme court usurping that state's legislature's authority expressly granted under Article I, § 4. There is therefore a high likelihood that this Court will grant certiorari and reverse the decision below.

Additionally, the equities of this case overwhelmingly support a stay. The Pennsylvania Supreme Court has required Pennsylvania's General Assembly (the "General Assembly") to offer a new plan by February 9, 2018, and the Governor to sign it by February 15, 2018, or else the Pennsylvania Supreme Court will impose a map of its own. (Indeed, the court signaled it may well impose its own map *even if the General Assembly adopts a remedial map*, as it has reserved for itself review of any map created by the General Assembly and signed by the Governor.) This state-court decision therefore has cast Pennsylvania's Congressional elections into chaos on the eve of the 2018 primary elections, causing substantial injury to the public. The Court should therefore issue a stay to preserve Pennsylvania's election integrity and to allow proceedings to advance in this Court for determination of when, if ever, a state judiciary may legislate Congressional redistricting criteria.

OPINION BELOW

The order of the Pennsylvania Supreme Court enjoining the use of Pennsylvania's Congressional map (i.e. the 2011 Plan), along with a concurring and dissenting statement, and two dissenting statements, are reproduced at Appendix

A. The Report and Recommendation of the Commonwealth Court (Pennsylvania's intermediate level appellate court) is reproduced at Appendix B.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257.

STATEMENT OF THE CASE

On December 22, 2011, the Pennsylvania General Assembly passed a bipartisan redistricting plan, which apportioned Pennsylvania into 18 Congressional districts. The 2011 Plan remained unchallenged for over five years and was used in three congressional elections. On June 15, 2017, 18 Pennsylvania residents (the "Challengers") commenced this action against the 2011 Plan, alleging that the Plan violated their rights to free expression and association under Article I, Sections 7 and 20 of the Pennsylvania Constitution, equal protection provisions of Article I, Sections 1 and 26 of the Pennsylvania Constitution, and the Free and Equal Protection Clause of Article I, Section 5 of the Pennsylvania Constitution. The Challengers contended that the General Assembly violated these provisions by drawing the 2011 Plan to enhance the Republican Party's representation in Congress. They theorized that *any* partisan motive in Congressional redistricting is unlawful under the Pennsylvania Constitution, "full stop" according to what the Petitioners below told the Pennsylvania Supreme Court. *See* Opening Brief for Petitioners, *League of Women Voters of Pa., et al. v. Commonwealth of Pa., et al.*, (No. 159 MM 2017), 2018 Pa. LEXIS 438 at 56.

After a five-day trial, the Pennsylvania Commonwealth Court (the Pennsylvania intermediate court with jurisdiction over election matters) concluded that the Challengers had failed to show a violation of any Pennsylvania constitutional provision. Commonwealth Court Conclusions of Law, App. Ex. B at ¶ 64. The court observed that Pennsylvania Supreme Court precedent previously construed the governing Pennsylvania constitutional provisions as "coterminous" with their federal constitutional analogues and applied the standard adopted by the Pennsylvania Supreme Court in *Erfer*, which employed this Court's plurality's opinion in *Davis v. Bandemer*, 478 U.S. 109 (1986), to claims of unlawful partisan considerations in redistricting. *Id.* ¶ 45. The court then found that the Challengers had failed to present a "judicially manageable standard" by which to adjudicate a free-speech partisan gerrymandering claim (*id.* at ¶ 31), and that the Challengers had failed to satisfy the equal-protection standard in *Erfer/Bandemer*, because the Challengers had failed to identify an "identifiable" political group that suffered a cognizable burden on its representational rights. Commonwealth Court Conclusions of Law, App. Ex. B at ¶¶ 54–57.

The Pennsylvania Supreme Court expedited its review of the Commonwealth Court's recommendation, and, on January 22, 2018, issued an order ("Order") by a 5-2 vote that the 2011 Plan "plainly and palpably violates the Constitution of the Commonwealth of Pennsylvania," but did not specifically identify which of the constitutional provisions the 2011 Plan violated.[1] Supreme Court of Pennsylvania

[1] Pennsylvania Supreme Court Justices are elected on partisan platforms, and the vote was 5-2 along partisan lines. The Challengers' lead counsel endorsed—in the opening seconds of his oral argument

Order, App. Ex. A at 2. The court enjoined the 2011 Plan's "further use in elections for Pennsylvania seats in the United States House of Representatives, commencing with the upcoming May 15, 2018 primary." *Id.* The court afforded the Pennsylvania General Assembly until February 9, 2018, to submit a proposed alternative plan to the Governor and specified that, if the Governor "accepts" such a plan[2], it must be submitted for the court's further review. The Order instructed 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. The court also ordered the Pennsylvania executive branch to reschedule the 2018 elections "if necessary." *Id.* Finally, the court stated that it "shall proceed expeditiously to adopt a plan" if the General Assembly fails to comply by February 9. *Id.* at 2.

The court did not provide a basis for its ruling or indicate how—other than complying with the compactness, contiguity, equal-population, and subdivision-integrity requirements—the General Assembly could satisfy the Pennsylvania

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before the Pennsylvania Supreme Court—an amicus brief authored by the AFL-CIO and other labor unions, which had spent over two million dollars on independent expenditures in the 2015 Pennsylvania Supreme Court elections and contributed approximately five million dollars in direct contributions for three of the Pennsylvania Supreme Court Justices participating in the majority opinion below, *see* Pennsylvania Dep't of State, Campaign Finance Reports, https://www.campaignfinanceonline.pa.gov/Pages/CFReportSearch.aspx, and whose election in 2015 changed the partisan majority on the court. *Cf. Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009).

[2] The Order contemplates that in the event that the General Assembly overrides a veto by the Governor, as it is permitted to do under the Pennsylvania Constitution, then the Court will ignore the General Assembly's bill and implement its own.

Constitution. The Order only provides: "Opinion to follow." *Id.* at 3. Simply put, the General Assembly has now been placed on the clock without fulsome guidance.

Two Justices dissented, and a third dissented from the remedial order. One dissenting opinion expressed concern that "the order striking down the 2011 Congressional map on the eve of our midterm elections, as well as the remedy proposed by the Court" raise "the implication that this Court may undertake the task of drawing a congressional map on its own," which "raises a serious federal constitutional concern." Supreme Court of Pennsylvania Dissenting Statement, Mundy, J., App. Ex. A at 12 (citing U.S. CONST. art. I, § 4, cl. 1, and *Arizona State Legis.*, 135 S. Ct. at 2667-68 (2015); *see also* Supreme Court of Pennsylvania Dissenting Statement, Saylor, C.J., App. Ex. A at 9 (recognizing that "[t]he crafting of congressional district boundaries is quintessentially a political endeavor assigned to state legislatures by the United States Constitution.").[3]

REASONS FOR GRANTING THE APPLICATION

To obtain a stay pending appeal, an applicant must show (1) a reasonable probability that the Court will consider the case on the merits; (2) a fair prospect that a majority of the Court will vote to reverse the decision 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).

[3] On January 23, 2018, the Applicants here sought a stay of the Pennsylvania Supreme Court's Order in the Pennsylvania Supreme Court. Stay Application to the Pennsylvania Supreme Court, App. Ex. C. The Pennsylvania Supreme Court denied the request for stay on January 25, 2018, on a 4-3 vote. Order Denying Stay from the Pennsylvania Supreme Court, App. Ex. D.

Those factors are satisfied here. First, the federal question in this case—under what circumstances a state court improperly intrudes on authority allocated to the "Legislature" by the Elections Clause—has specifically been identified as meriting review by multiple Justices of this Court, and the Court has reviewed Elections Clause challenges and their kin in the past. Second, the specific form of intrusion at issue here presents a plain violation of the Elections Clause because, while close cases can and have arisen as to whether a specific type of lawmaking function falls within the term "Legislature," it is beyond dispute that the Pennsylvania Supreme Court lacks any legislative power. Third, the irreparable harm in this case is immediate and palpable: the Pennsylvania Supreme Court's order inflicts confusion on the Commonwealth's upcoming congressional elections, and, without intervention from this Court, elections will not proceed under the lawfully enacted 2011 Plan, even if (as is likely) the Court grants certiorari and reverses or vacates the decision below. That is the paradigmatic form of harm necessitating a stay pending appeal.

I. There Is a Reasonable Probability That the Court Will Review This Case on the Merits and a Fair Prospect That It Will Vacate Or Reverse the Decision Below

There is, at minimum, a "reasonable probability" that the Court will set this case for consideration on the merits and a "fair prospect" that it will reverse or vacate the decision below. *See Hollingsworth*, 558 U.S. at 190. The January 22 Order intrudes on power delegated expressly to Pennsylvania's legislature under

the *federal* Constitution, presenting an issue of federal law long overdue for definitive resolution by this Court.

The 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 two locations: (1) the state legislature and (2) Congress. State courts enjoy none of this delegated authority.[4]

Consistent with that plain language, this Court has held "that redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking." *Arizona State Legis.*, 135 S. Ct. at 2668. While five Justices in *Arizona State Legislature* construed "prescriptions for lawmaking" broadly enough to include "the referendum," and four believed only the state's formal *legislature* qualifies, (*compare id. with id.* at 2677-2692 (Roberts, C.J., dissenting)), *all* the Justices agreed that redistricting is *legislative* in character. No Justice suggested that state courts might share in that legislative function.

It is undisputed that the Pennsylvania Supreme Court does not exercise a legislative function when it decides cases. *See Watson v. Witkin*, 22 A.2d 17, 23 (Pa. 1941) ("[T]he duty of courts is to interpret laws, not to make them."). Yet, the

[4] The Elections Clause was a source of significant debate during the Constitutional Convention, and its allocation of authority is not an accident. *See Agre v. Wolf*, 2018 U.S. Dist. LEXIS 4316, *9 (E.D. Pa. January 10, 2018) (quoting and citing THE FEDERALIST NO. 59 (A. Hamilton)). As noted in *Agre*, "the States' authority to redistrict is a power delegated by Art. I, § 4, and not a power reserved by the Tenth Amendment." *Id.* at *22 (analyzing decisions from this Court in so concluding). The *Agre* decision has been appealed to this Court. *In Re Michael C. Turzai, Speaker of the Pennsylvania House of Representatives, et al.*, No. 17-631 (U.S.).

Pennsylvania Supreme Court has now *legislated* criteria the Pennsylvania General Assembly must satisfy when drawing a congressional districting plan, such as contiguity, compactness, equal population,[5] and limiting subdivision splits. These standards amount to mandatory redistricting criteria of the type typically found in a legislatively enacted elections code. But no Pennsylvania legislative process—not the General Assembly itself, not a constitutional convention, not a referendum, not even an administrative agency with delegated rulemaking authority—adopted or ratified those criteria. Rather, the Pennsylvania Supreme Court wove them from whole cloth. Indeed, the January 22 Order does not even identify the constitutional provision from which they purportedly arise.[6]

In fact, the Pennsylvania Constitution *does* enumerate very similar redistricting criteria, which were carefully crafted by the Pennsylvania Constitutional Convention of 1968, for state *legislative* districts, but not *congressional* districts:

> The Commonwealth shall be divided into fifty senatorial and two hundred three representative districts, which shall be composed of compact and contiguous territory as nearly equal in population as practicable. Each senatorial district shall elect one Senator, and each representative

[5] The Order actually requires districts be drawn "as nearly equal in population as practicable." Supreme Court of Pennsylvania Order, App. Ex. A at 3.

[6] In prior litigation, state courts have reviewed congressional districting only in limited circumstances where a statutory or constitutional provision plainly empowered such review. *See e.g.*, *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992) (implementing a congressional redistricting plan when the political branches failed to adopt a map following the 1990 census); *Guy v. Miller*, 2011 Nev. Dist. LEXIS 32 (outlining procedure for state court review of proposed plans for congressional districts following the political branches failure to adopt a map following the 2010 census); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015) (holding that congressional plan violated the "Fair Districts" amendment to the state constitution); *Pearson v. Koster*, 367 S.W.3d 36 (Mo. 2012) (upholding congressional maps under a challenge asserting a violation of the state constitutional requirements for compactness of Congressional districts).

> district one Representative. Unless absolutely necessary no county, city, incorporated town, borough, township or ward shall be divided in forming either a senatorial or representative district.

Compare Pa. Const. art. II, § 16 *with* Supreme Court of Pennsylvania Order, App. Ex. A at 3.

> [T]o 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.

But no criteria or other restrictions on the General Assembly's legislative power to enact congressional district plans exist in the Pennsylvania Constitution, and have not since the adoption of Pennsylvania's 1790 Constitution. Indeed, the Pennsylvania Supreme Court itself has confirmed 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). Now, a decade and a half later, the Pennsylvania Supreme Court has found that they have magically appeared in the state constitution. But, in reality, the court's imposition of nearly identical criteria to those duly enacted by Pennsylvania's "prescriptions for lawmaking" was simply legislation from the bench.[7] And, in this context, such judicial activism violates Article I, § 4 of the U.S. Constitution.

[7] The fact that the Pennsylvania Supreme Court is an elected body makes no difference to this analysis as this Court has a long history of distinguishing between elected judges and other elected representatives. *See Republican Party of Minn. v. White*, 536 U.S. 765, 806 (2002) (Ginsburg, J. dissenting) (Judges "do not sit as representatives of particular persons, communities, or parties; they

Similarly, the Pennsylvania Supreme Court's ostensible criteria of "non-political" districts also amount to legislation, not interpretation. It is untenable that the Pennsylvania Constitution's Free Speech provisions, which have been in existence since 1776, were intended to incorporate a ban on partisan gerrymandering—which existed long before 1776 and, in fact, can be traced "back to the Colony of Pennsylvania at the beginning of the 18th Century." *Vieth v. Jubelirer*, 541 U.S. 267, 274 (2004). It is similarly inconceivable that the Pennsylvania Constitution's Equal Protection provisions were understood by the lawmakers who ratified them to confer the rights the court has now divined. It is therefore not surprising that, in every instance prior to this case, the Pennsylvania Supreme Court has been in complete lockstep with this Court's jurisprudence on matters of congressional apportionment or that it rejected partisan-gerrymandering challenges each and every time. *Newbold v. Osser*, 230 A.2d 54 (Pa. 1967) (following *Baker v. Carr*, 369 U.S. 186 (1962)) (finding partisan gerrymandering claims to be non-justiciable); *In re 1991 Pa. Legis. Reapportionment Comm'n.*, 609 A.2d 132 (Pa. 1992) (following *Bandemer*, 478 U.S. at 109) (finding that partisan gerrymandering claims are justiciable); *Erfer,* 794 A.2d 325 (also finding that partisan gerrymandering claims are justiciable, adopting *Bandemer's* intent and effects test, and noting that no state constitutional requirements apply to congressional district maps). In fact, as recently as four years ago, the Pennsylvania Supreme Court itself found that there is "nothing in the [Pennsylvania] Constitution to prevent" partisan

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serve no faction or constituency."); *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1674 (2015) (Ginsburg, J. concurring) ("Unlike politicians, judges are not expected to be responsive to the concerns of constituents.") (internal quotations omitted).

redistricting. *Holt v. 2011 Legis. Reapportionment Comm'n*, 67 A.3d 1211, 1234, 1236 (Pa. 2013).

To make matters worse, the Pennsylvania Supreme Court has retained jurisdiction over the case both to review the General Assembly's remedial plan based on the newly-adopted criteria imposed on the congressional redistricting process, and to create its own map in the event the General Assembly does not comply with the unknown criteria by February 9. But it continues to withhold guidance as to how these criteria are to be interpreted or implemented. And, in fact, it has provided *no* guidance on the question the Challengers presented in this case—to what extent, if at all, political considerations may shape the map. The entirety of this case has been concerned about *the process* and how much partisan influence in map-drawing might be too much. This course of conduct all but guarantees a court-drawn map impermissibly substituting the Pennsylvania Supreme Court's policy judgments regarding redistricting for those of the General Assembly. *But see Perry v. Perez*, 565 U.S. 388, 396 (2012). Moreover, it expressly assumes supervisory authority over the General Assembly where, once a legislatively enacted map is codified, the case would ordinarily be moot. Here, even if the General Assembly enacts a plan and the Governor signs it, the Pennsylvania Supreme Court has reserved for itself the right to a veto over the plan—thereby only further injecting itself into the legislative process.

In short, none of the bases the Pennsylvania Supreme Court put forward or could put forward to justify invalidating the 2011 Plan have the slightest grounding

in Pennsylvania's "prescriptions for lawmaking." And, while judicial activism by a state supreme court would ordinarily be beyond this Court's purview, the question of what does and does not constitute a "legislative function" under the Elections Clause is a question of federal, not state, law, and this Court is the arbiter of that distinction. *See Arizona State Legis.*, 135 S. Ct. at 2668; *see also Palm Beach Cnty. Canvassing Bd.*, 531 U.S. at 76 ("As a general rule, this Court defers to a state court's interpretation of a state statute. But in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution."). In "a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government" the "text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance," thereby requiring this Court to make its own review of what Pennsylvania's lawmakers have written. *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring).

In fact, this Court has twice reviewed the decisions of state courts of highest resort on this very question. In *Smiley v. Holm*, the Court reversed the holding of the Minnesota Supreme Court that the Minnesota legislature's function in drawing congressional districts was free from the possibility of a gubernatorial veto. 285 U.S. 355, 367 (1932). The Court, interpreting the federal Constitution, disagreed and

held that "the exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments." *Id.* There, as here, was no dispute about how the state legislative process worked by operation of the state Constitution.[8] *See id.* at 363–64.

Similarly, the Court in *Ohio ex rel. Davis v. Hildebrant* held that the Ohio Supreme Court's determination that a referendum vetoing the Ohio legislature's Congressional plan was properly within the legislative function under the Elections Clause. 241 U.S. 565, 569 (1916); *see also Arizona State Legis.*, 135 S. Ct. at 2666 (discussing *Hildebrant* for the proposition that "the word" "legislature" in the Elections Clause "encompassed a veto power lodged in the people"). This Court has also reviewed state-court judgments about the meaning of the term "legislature" in other provisions of the Constitution. *See Hawke v. Smith*, 253 U.S. 221, 226-30 (1920) (reversing Ohio Supreme Court's decision as to the proper scope of legislative power afforded to states under Article V); *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) (reviewing Michigan Supreme Court's interpretation of Article 3, § 1, art. 2); *see also Palm Beach Cnty. Canvassing Bd*, 531 U.S. at 76.

Thus, whether the Pennsylvania Supreme Court's new criteria and its bases for rejecting the 2011 Plan were ratified by a bona fide legislative process or, alternatively, arose from judicial prerogative presents a federal question squarely

[8] Under the Minnesota Constitution, there was no dispute that the Governor possessed the power to veto ordinary legislation, and thus participated in the state's lawmaking functions. Here, there is no question that the Pennsylvania Supreme Court does *not* participate in the state's lawmaking functions.

within this Court's jurisdiction and concern. And this Court's precedents virtually preordain the result.

Furthermore, review in this case does not amount to mere error correction; it presents precisely the type of issue that multiple Justices of this Court have previously suggested is ripe and appropriate for resolution in this Court. Three Justices voted to grant certiorari in order to review the Colorado Supreme Court's determination that a legislatively enacted Congressional redistricting plan violated a provision in the Colorado Constitution limiting redistricting to once per decade. *Salazar*, 541 U.S. at 1093 (2004) (Rehnquist, CJ., Scalia and Thomas, JJ., dissenting from the denial of certiorari). These Justices concluded that, although "purporting to decide the issues presented exclusively on state-law grounds," the Colorado Supreme Court "made an express and necessary interpretation of the term 'Legislature' in the Federal Elections Clause" in order to reject legislatively enacted congressional districts. *Id.* "And to be consistent with Article I, § 4, there must be some limit on the State's ability to define lawmaking by excluding the legislature itself in favor of the courts." *Id.*

Were it otherwise, no reins would exist to curb the influence of state courts in federal elections. If a state court can identify from an equal-protection or free-speech provision a requirement that congressional districts be "compact" or "not divide any county, city, incorporated town, borough, township, or ward," then *any* state-court created criteria are possible, if not likely. Supreme Court of Pennsylvania Order, App. Ex. A at 3. A free-speech clause could as easily be

construed to mean that redistricting plans must favor one political party or interest group, or that congresspersons must be elected at large rather than from single-member districts, or that political parties must obtain proportional representation in Congress. None of this is hypothetical: the January 22 Order requires the General Assembly to diverge from political-subdivision lines *only* to make population nearly equal in population as practicable, even though the Voting Rights Act may require splitting a political subdivision for creation of a majority-minority district. If this Court has *no* role in reviewing what state courts do in this regard, anything is possible.

Finally, it goes without saying that this case is one of many festering in the courts as the 2018 congressional election season is underway, and this Court has already issued stays under similar circumstances. *See e.g. See Gill v. Whitford*, No. 16-1161 (U.S.); *Benisek v. Lamone*, No. 17-333 (U.S.); *Rucho v. Common Cause*, No. 17A745 (U.S.); *see also Agre*, No. 17-631 (U.S.) (advancing claims under the Elections Clause). This Court has already issued stays in the two cases that have enjoined the use of the existing districting plan. *See Gill v. Whitford*, No. 16-1161 (U.S.); *Rucho v. Common Cause*, No. 17A745 (U.S.). Given the abundance of litigation in this area, and the important issues placed before this Court that will undoubtedly impact other cases, there is a reasonable probability this Court will review this case on the merits and reverse the Pennsylvania Supreme Court's decision.[9]

[9] There is little doubt that this Court's forthcoming decisions in *Gill*, *Benisek*, *Rucho* and *Agre* could affect Pennsylvania jurisprudence in this area, i.e. these decisions could impose requirements as a

II. Absent a Stay, Irreparable Harm Will Occur, and the Balance of Equities Favors a Stay.

Without a stay of the decision below, irreparable injury is certain. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012). This is even truer for statutes relating to elections because "[a] State indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). Accordingly, the Pennsylvania Supreme Court injunction is itself sufficient irreparable injury to warrant a stay.

The irreparable injury is all the more acute given the eleventh-hour issuance of the January 22 Order, and the confusion it injects into an election for federal office. The current Plan has been in effect since 2011 and has governed three elections, thereby acclimating voters and potential candidates alike to the current lines. Now, only three weeks prior to the nominating-petition period, this Court has ordered a new plan and has ordered the Executive Defendants to re-write the Commonwealth's entire 2018 election calendar to accommodate the map-drawing process.

An independent basis for a stay also lies in this Court's decisions holding that judicial intrusion into elections must take account of "considerations specific to election cases." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). "Court orders affecting elections...can themselves result in voter confusion and consequent incentive to

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matter of federal law that necessarily establish bounds as to what Pennsylvania partisan gerrymandering law can and cannot do.

remain away from the polls." *Id.* at 4-5. "As an election draws closer, that risk will increase." *Id.* at 5. The Court therefore should weigh such factors as "the harms attendant upon issuance or nonissuance of an injunction," the proximity of the upcoming election, the "possibility that the nonprevailing parties would want to seek" further review, and the risk of "conflicting orders" from such review. *See id.* Other relevant factors include "the severity and nature of the particular constitutional violation," the "extent of the likely disruption" to the upcoming election, and "the need to act with proper judicial restraint" in light of the General Assembly's heightened interest in creating Congressional districts. *North Carolina v. Covington*, 137 S. Ct. 1624, 1626 (2017).

The circumstances here overwhelmingly warrant a stay. The change in the elections schedule is highly likely to cause voter confusion and depress turnout. Moreover, the voting public in Pennsylvania is familiar with the 2011 Plan's district boundaries, and a shift would drive perhaps millions of Pennsylvania residents out of their current districts and into unfamiliar territory with unfamiliar candidates. This means that innumerable 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 new districts. Voters who fail to make those efforts will face only confusion when they arrive to their precincts on Election Day and potential conflict with poll workers about the

contents of the ballots they are given.[10] That state of affairs poses a substantial risk of undermining the will of the electorate.

Also at stake is the General Assembly's interest in enacting the Pennsylvania Congressional districting plan, which it derives directly from the Elections Clause. That provision requires that, if a plan is deemed to be invalid, the General Assembly receive a genuine opportunity to remedy any violation. But the January 22 Order provides the General Assembly with only 18 days to create and secure the Governor's approval for a new plan, and even if that occurs the Pennsylvania Supreme Court has still reserved for itself the ability to choose to implement another map. Supreme Court of Pennsylvania Order, App. Ex. A at 2. Furthermore, as discussed above, the Pennsylvania Supreme Court has failed to provide any guidance regarding how the General Assembly can comply with its new requirements. Perhaps most troublesome is that the Pennsylvania Supreme Court's order states that a political subdivision may only be split for equal population requirements, thus ignoring that federal law may require a split to comply with the Voting Rights Act, and that a district be drawn only "as nearly equal in population, as practical." Supreme Court of Pennsylvania Order, App. Ex. A at 3.

Against those weighty interests, the Petitioners can claim only the paltriest countervailing concerns. Their own actions in delaying for nearly six years and three election cycles (and half way through the 2018 cycle) before filing this case

[10] Voter confusion is only more likely in Pennsylvania's 18th Congressional District. While the Pennsylvania Supreme Court has enjoined use of the 2011 Plan for the upcoming elections, with regard to Pennsylvania's 18th Congressional District the court ruled: "[T[he March 13, 2018 special election for Pennsylvania's 18th Congressional District, which will fill a vacancy in an existing congressional seat for which the term of office ends in 11 months, shall proceed under the [2011 Plan] and is unaffected by this Order." Supreme Court of Pennsylvania Order, App. Ex. A at 3.

demonstrates little more than their lofty rhetoric about the significance they attach to their interest in purportedly "fair" districts. There is no indication on the record as to why districts good enough for primary and general elections in 2012, 2014, and 2016 are suddenly so deficient as to require an emergency remedy.

Similarly, even if the Pennsylvania Supreme Court's finding of a violation is ultimately affirmed, the violation is not severe. *See Covington*, 137 S. Ct. at 1626. In fact, the "violation" would not have been a violation under Pennsylvania law four years ago, *see Holt*, 67 A.3d at 1234, fifteen years ago, *See Erfer*, 794 A.2d at 332, twenty-five years ago, *In re 1991 Pa. Legis. Reapportionment Comm'n*, 609 A.2d at 142, or fifty years ago, *Newbold*, 230 A.2d at 59-60. If the rights at stake in this case could wait decades to be identified, they can wait another year to be enforced.

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 decision barely three weeks before ballot access process for the 2018 election cycle is set to commence, giving the General Assembly a mere 18 days to enact a new map. And far from suggesting that enacting a new map that passes muster with the court

would be an easy task, the court declared itself so lacking in confidence in the General Assembly's ability to accomplish that task that it announced that even if a map is passed by the General Assembly and signed by the Governor, it still reserves the right to ignore the coordinate political branches and draft its own plan. *See* Supreme Court of Pennsylvania Order, App. Ex. A at 2.

A stay pending appeal is also in the public interest. The public is always well-served by stability and certainty, and always disserved when the state legislature is forced to devote considerable resources to empty gestures. And the public interest will further be served by preserving this Court's ability to consider the merits of this case before the state supreme court's order inflicts irreparable harm on the state's legislature.

This Court should therefore follow its "ordinary practice" and prevent the Pennsylvania Supreme Court's order "from taking effect pending appellate review." *Strange v. Searcy*, 135 S. Ct. 940, 940 (2015) (Thomas, J., dissenting) (citing *Herbert v. Kitchen*, 134 S. Ct. 893 (2014), and *San Diegans for Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301 (2006) (Kennedy, J., in chambers)).

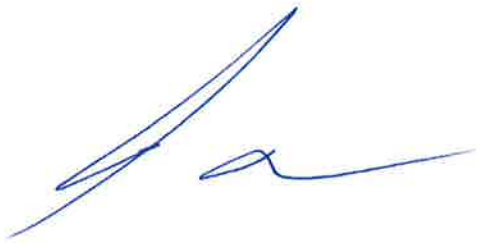
CONCLUSION

For the foregoing reasons, Applicants respectfully request that this Court grant this emergency application for a stay of the Pennsylvania Supreme Court's order pending resolution of Applicants' petition for certiorari. The Court would be justified in staying the Pennsylvania Supreme Court's decision in whole. Alternatively, the Court should consider the approach it took in *Palm Beach Cnty.*

Canvassing Bd., 531 U.S. at 78, where the scope and basis of a state-court intrusion into a federal election was unclear, so the court vacated the state court's judgment and remanded to allow that court to attempt to resolve the potential federal-law problems this Court identified.

However the Court chooses to proceed, time is of the essence, and Applicants therefore request that, if possible, the Court rule on this application by January 31, 2018.

Respectfully Submitted,



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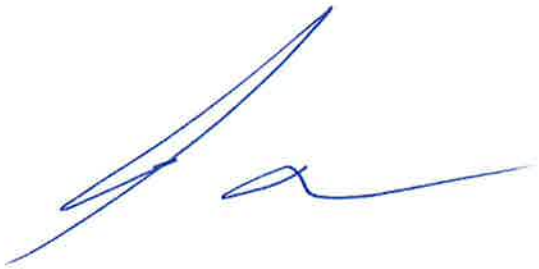

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