

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

Emergency Application for Stay Pending Appeal to the Supreme Court of the United States from the January 22, 2018 Order, February 7, 2018 Opinion and February 19, 2018 Order of the Pennsylvania Supreme Court (159 MM 2017)

**RESPONSE IN OPPOSITION TO 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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*On behalf of Respondent Michael J.
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Lieutenant Governor of Pennsylvania
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TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE THIRD CIRCUIT:

Respondent Michael J. Stack, III, in his capacity as Lieutenant Governor of Pennsylvania and President of the Pennsylvania Senate, opposes the second Emergency Application for Stay Pending Resolution of Appeal to this Court of Pennsylvania Speaker of the House of Representatives Michael C. Turzai and Pennsylvania Senate President Pro Tempore Joseph B. Scarnati, III (“Applicants”). Respondent Stack joins in the opposition of the Petitioners, the League of Women Voters and individual voters from each of Pennsylvania’s eighteen congressional districts; and of the Executive Branch Respondents, Pennsylvania Governor Thomas W. Wolf, Acting Pennsylvania Secretary of State Robert Torres and Pennsylvania Bureau of Commissions, Elections and Legislation Commissioner Jonathan Marks.¹

I. INTRODUCTION

Lt. Gov. Stack opposes the Applicants’ second, duplicative attempt to encroach upon the fundamental right and duty of the Pennsylvania Supreme Court to “say what the law is” with regards to the Pennsylvania Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875). In response to Applicants’ previous application, Application No.

¹ Lt. Gov. Stack addresses this Court separately from the other Executive Branch Respondents because of his unique position as a both a member of Pennsylvania’s Executive Branch as Lt. Governor and as a member of the Legislative Branch as President of the Pennsylvania Senate. Lt. Gov. Stack sought the relief that the Pennsylvania Supreme Court granted below.

17A795, Lt. Gov. Stack, with Petitioners and the Executive Branch Respondents demonstrated why a stay is unwarranted in this matter. Nothing that has happened since the denial of the previous Emergency Application could justify the relief they again demand. In fact, Applicants' dilatory conduct since the filing of their first Emergency Application reinforces why they should not be afforded relief now.

Lt. Gov. Stack joins Petitioners and Executive Respondents in opposing this second Emergency Application. Lt. Gov. Stack writes separately to briefly address certain key points: Applicants were fully capable of developing a map in response to the Pennsylvania Supreme Court's orders; and their actions since that time demonstrate that capability. Further, the confusion Applicants assert will result from the Pennsylvania Supreme Court's Orders is speculative and is outweighed by the harms created by the stay they ask this Court to impose. An emergency stay should not be granted.

II. ARGUMENT

To grant an emergency stay, this Court requires an applicant to demonstrate a reasonable probability that this Court will grant certiorari; a fair prospect that this Court will reverse the decision below; and a likelihood that irreparable harm will result from the denial of a stay. *Maryland v. King*, 133 S. Ct. 1, 2 (2012 Roberts, C.J.). Applicants cannot meet these requirements.

Applicants seek reversal of the Pennsylvania Supreme Court's Order through two substantive arguments. The first is that the United States Constitution

permits only state legislatures to promulgate federal redistricting plans immune from state constitutional review. Three years ago, this Court rejected that argument in *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015). Further, this Court has recognized that a state supreme court may correct a constitutional infirmity by creating a new congressional map. *Grove v. Emison*, 507 U.S. 25 (1993).²

Secondly, Applicants argue that the Pennsylvania Supreme Court provided insufficient time, which prevented the Pennsylvania General Assembly from enacting a remedial map. Applicants' behavior since the filing of their first Emergency Application, however, demonstrates the absence of credibility of that claim.

A. Applicants Had Ample Time To Draft And Pass A Remedial Map In Response To The Pennsylvania Supreme Court's Order.

As the Commonwealth's Lieutenant Governor, Respondent Stack also serves as President of the Pennsylvania Senate. Pa. Const. art. IV, sec. 4. He has a unique perspective as to the 2011 Plan because he was a State Senator in the General Assembly when it was created. Only eight days elapsed between the 2011 Plan's release and its enactment, with the Pennsylvania Senate passing the 2011 Plan on the same day as its release. See Joint Stipulation of Facts, 261 M.D. 2017 (Pa. Commw. Ct. Dec. 8, 2017 3:35 p.m.) at ¶¶ 46-47, 50, 60. Given its historical

² In *Grove*, this Court held that federal courts should, in fact, defer to state courts in redistricting disputes whenever possible. 507 U.S. at 37.

experience, the Pennsylvania General Assembly clearly had the ability to implement the Pennsylvania Supreme Court's order within the established timeframe.

As stated in Lt. Gov. Stack's response to Application No. 17A795, the Pennsylvania Supreme Court's directive was consistent with the format previously used for the development of a new map in Pennsylvania following the 1990 Census, when the General Assembly and Governor were unable to agree on a map. As a result, the Pennsylvania Supreme Court appointed the President Judge of the Commonwealth Court as a special master. In 11 days, and without the sophisticated mapping tools now available, the judge was able to draft a compliant congressional map and to receive public input. *Mellow v. Mitchell*, 607 A.2d 204, 206 (Pa. 1992), *cert denied sub nom. Loeper v. Mitchell*, 506 U.S. 828 (1992).

Here, the Pennsylvania Supreme Court's January 22 Order and February 7 Opinion properly provided the General Assembly and Governor with an opportunity to draft and pass a compliant map with public input, consistent with the process in 1992, as described in *Mellow*, and with the compressed schedule the General Assembly used in 2011. Applicants' failure to pass a new map in accordance with the Pennsylvania Supreme Court's order here was their choice. Their dilatory and defiant behavior does not inject a federal constitutional issue into this dispute.

In this second Emergency Application, Applicants claim that it was "impossible" for them to pass a remedial redistricting plan because of provisions in the Pennsylvania Constitution that require every bill to be considered on three

separate days in each House. (App. at 3 citing Pa. Const. art. III, sec. 4).

Applicants' reliance on this provision is disingenuous. They assert that it was impossible for the Applicants to draft their remedial map until they received the Pennsylvania Supreme Court's February 7 Opinion, despite the fact that Opinion in no way altered the January 22 Order. In an effort to contrive some fundamental difference between those pronouncements, Applicants assert that a values statement in the Opinion—that the Pennsylvania Constitution's Free and Equal Elections clause requires that "all voters have an equal opportunity to translate their votes into representation"—somehow altered the specific requirements of the January 22 Order. This argument does not withstand analysis under basic common sense. Applicants had 19 days from the Court's January 22 Order to draft a remedial map. They failed to do so.

Even assuming, *arguendo*, that the Pennsylvania General Assembly could not finalize a map until the February 7 Opinion, the General Assembly could still have passed a remedial map—just as the Pennsylvania Senate managed to pass the 2011 Plan in one day. As Applicants stipulated, the Republican majority in the Pennsylvania Senate released the 2011 Plan on the same day they passed the plan. See Joint Stipulation of Facts, 261 M.D. 2017 (Pa. Commw. Ct. Dec. 8, 2017 3:35 p.m.) at ¶¶ 41-50. To comply with the three-day consideration requirement of the Pennsylvania Constitution, the Republican majority presented blank redistricting legislation for consideration on two days. *Id.* The Senate presented, reviewed, and passed the 2011 Plan in a single day. *Id.* Applicants' claim that they could not pass

a constitutional redistricting plan under the Pennsylvania Supreme Court's time frame would constitutionally invalidate the process used to pass the 2011 Plan, which Applicants are obviously desperate to reinstate.

When the Pennsylvania Supreme Court issued its January 22 Order, the General Assembly initiated the same procedural maneuvers it used in 2011. On January 29, 2018, Applicant Scarnati sponsored Senate Bill 1034 to begin the process to pass a new congressional map.³ On January 31, 2018, the Pennsylvania Senate voted 49-0 to refer the Bill to the House of Representatives. *Id.* The General Assembly could have timely passed a remedial map.

In fact, Applicants' behavior since the Pennsylvania Supreme Court's January 22 Order reflects a strategy of defiance rather than an effort at compliance. During those 19 days, Applicants, instead of passing a remedial map, filed an unusual post-hoc recusal motion with the Pennsylvania Supreme Court. *See* Application for Disqualification of Justice Wecht and for Full Disclosure by Justice Donohue, 159 MM 2017 (Pa. Feb. 2, 2018, 2:59 p.m.). Applicant Scarnati additionally filed a letter with the Pennsylvania Supreme Court indicating that he would not comply with the Pennsylvania Supreme Court's January 22 Order as it related to certain Pennsylvania demographic data. *See* Letter Regarding Census block equivalency and ESRI shape files, 159 MM 2017 (Pa. Jan. 31, 2018, 11:35

³ See BILL INFORMATION – HISTORY, SENATE BILL 1034, http://www.legis.state.pa.us/cfdocs/billInfo/bill_history.cfm?syear=2017&sind=0&body=S&type=B&bn=1034 (last visited Mar. 4, 2018).

a.m.). Applicants' caucuses further explored impeaching all Pennsylvania Supreme Court Justices who were elected as Democratic Candidates.⁴

Nothing in the Pennsylvania Constitution prevented the Applicants from passing a remedial map in response to the Pennsylvania Supreme Court's Order and Opinion. The fact that they failed to do so is a self-created harm that was calculated to support the baseless attempt to again seek this Court's review. Applicants misrepresent the facts and their misrepresentations should not be rewarded.

B. The Applicants Prepared A Map, But Failed To Present That Map To The General Assembly For Passage

The Applicants' assertion that the General Assembly could not produce a remedial map in time is demonstrably false. Applicants produced a proposed remedial map during this process and filed the map with the Pennsylvania Supreme Court before that court's deadline. Applicants, however, failed to even present that map to the General Assembly for consideration. Further, Applicants demonstrated the technical sophistication at their disposal by rapidly generating and analyzing potential remedial congressional maps.

As Lt. Gov. Stack stated in his Answer to Applicants' previous Emergency Application, Applicants were aware of the familiar, neutral redistricting criteria

⁴ See MEGHAN LEONARD, REPUBLICANS ARE CALLING FOR THE IMPEACHMENT OF PENNSYLVANIA JUDGES. IT'S NOTHING NEW, WASHINGTON POST, available at https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/05/are-recent-calls-to-impeach-pennsylvania-judges-unusual-not-so-much/?utm_term=.fd5ac8bbeb8f (last accessed Mar. 5, 2018).

that the Supreme Court explicitly set forth in its January 22 Order – “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.” See Jan. 22 Order at 3. Indeed, at oral argument, counsel for the Applicants conceded that these neutral redistricting criteria already existed as a matter of Pennsylvania constitutional jurisprudence as set forth in *Mellow*, 607 A.2d at 207. See also *Holt v. 2011 Legislative Reapportionment Commission*, 38 A.3d 711, 730 (Pa. 2012) (addressing traditional redistricting criteria under Pennsylvania law). Further, Dr. Wendy Cho, the testifying expert who defended the 2011 Plan identified these criteria in her own peer-reviewed work, which was presented to the trial court. (Tr. 1332-34).⁵

Applicants were able to generate a remedial map with a detailed report explaining its compliance with these factors. They did so on the evening of February 9, when they filed a proposed remedial map with the Pennsylvania Supreme Court. See Brief of Legislative Respondents in Support of Proposed Remedial Congressional Districting, Map 159 MM 2017, (Pa. Feb. 9, 2018, 9:51 p.m.). Applicants, as leaders of the majority parties in both houses of Pennsylvania’s General Assembly, could have presented this remedial plan to the

⁵ At trial, Dr. Cho discussed her peer-reviewed work, in which she identified that the factors of “population, equality, contiguity, compactness, preserving communities of interest” as uncontroversial redistricting criteria. (Tr. 1333). She admitted that partisan gerrymandering can be demonstrated by showing that an enacted map significantly underperforms a set of randomly drawn maps on these factors. (*Id.* at 1334).

General Assembly on or before February 9, and thus could have complied with the Pennsylvania Supreme Court's January 22 Order. Their failure to do so does not serve as a basis for their request for relief from this Court.

Applicants further demonstrated their technical ability to generate and analyze remedial congressional maps when they prepared a comprehensive analysis and report on all of the remedial maps that the various parties submitted to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court's January 22 Order provided for all parties to submit, by February 15, remedial maps with a report that provided justification for that map under the Order's substantive requirements. The parties submitted those reports through 11:52 p.m. on the night of February 15. *See* Governor Wolf's Statement in Support of Proposed Remedial Congressional Map, 159 MM 2017 (Pa. Feb. 15, 2018 11:52 p.m.).

Two and a half days later, Applicants filed a brief in opposition to the other parties' remedial congressional maps with the Pennsylvania Supreme Court. *See* Legislative Respondents' Brief in Opposition, 159 MM 2017 (Pa. Feb. 18, 2018 2:53 p.m.). That filing included detailed, comprehensive analyses of each of the other parties' remedial maps. *Id.* It included two expert reports, one from trial expert Dr. Wendy Cho, and one from an entirely new expert, Prof. M.V. Hood, III, which analyzed each of the factors the Pennsylvania Supreme Court set forth in its January 22 Order. *Id.*

In light of the Applicants' demonstrated technical expertise and capabilities, and their reliance on procedural maneuvers following the Pennsylvania Supreme

Court's January 22, 2018 Order that duplicated the same procedural process employed in 2011, Applicants cannot credibly claim here that they were unable to promulgate a remedial map within the time the Pennsylvania Supreme Court provided. Applicants cannot be permitted to repackage their failure to timely legislate a remedial map as the Pennsylvania Supreme Court usurping their legislative authority. This Emergency Application should be rejected.

C. Speculative Fears About Voter Confusion Cannot Support A Stay, Especially Where Nomination Petitions Are Already Circulating For The New Map

As Lt. Gov. Stack stated in his response to Applicants' first Emergency Application, the testimony at trial established that the gerrymandered shapes of the 2011 Plan frequently confuse voters, who are often in different districts from their own neighbors. (Tr. 138, 678-80). As the Pennsylvania Supreme Court recognized, a new constitutionally-valid map will respect the boundaries of counties and municipalities and address the confusion that has resulted from the current map.

In their second Emergency Application, Applicants continue to speculate about "voter confusion" and the potential influx of new candidates as they seek to protect the illegally gerrymandered 2011 map and their preferred candidates. Given the fluid dynamic within Pennsylvania's current congressional delegation, the Applicants' claim of voter confusion is disingenuous. Since June 15, 2017, when the League of Women Voters filed its petition for review in the Pennsylvania Commonwealth Court, 6 of Pennsylvania's 18 incumbent members of Congress have

either resigned or announced their retirement.⁶ These changes within the delegation reflect the natural ebb and flow of politics. Regardless of any map changes, voters will have to select among many new candidates.

Further, since February 27, 2018, candidates have been circulating nomination petitions in the new congressional districts that the Pennsylvania Supreme Court set in place.⁷ *See* Opinion and Order Adopting Remedial Plan, App'x C, 159 MM 2017 (Pa. Feb. 19, 2018 2:21 p.m.). Individual candidates have already begun campaigning for these new districts. To grant a stay now and reinstate the 2011 Plan would inject far more voter confusion into the process than any speculative voter confusion Applicants have raised.

The Pennsylvania Election Code will allow voters more than sufficient time to evaluate candidates before both the May primary and the November general election. The Election Code provides for several weeks in advance of the primaries for signature-gathering, which is already occurring, and additional weeks for any court-challenges before ballots are printed. These provisions relate to the candidates' qualifications to be on the ballot. Only potential candidates – not voters – are impacted when these timeframes are limited by a few days. Given the

⁶ Representative Tim Murphy resigned as of October 21, 2017. Representatives Bill Shuster, Pat Meehan, Robert Brady and Charlie Dent have decided to retire. Representative Lou Barletta has entered the race for the United States Senate. Representatives Brady and Meehan announced their decisions to retire after the Pennsylvania's Supreme Court's January 22 Order.

⁷ Under the Pennsylvania Election Code, a congressional candidate must collect 1,000 signatures to appear on the primary ballot. *See* 25 P.S. § 2872.1.

number of incumbent resignations, voters in the May primary and November general election will be introduced to new candidates, who will have months to campaign.

The primary election is scheduled for May 15, 2018 and the general election is scheduled for November 6, 2018. Thus, voters will have more than enough time to understand the new districts. Furthermore, to the extent entire counties are now included within one (instead of four or five) distorted districts, a new map will be far less confusing to all involved. Compare February 19 Remedial Map with Pet. Ex. 1.

D. Because The Pennsylvania Supreme Court Specifically Exempted The March 13, 2018 Special Election From Its Order, The Applicants Cannot Plausibly Assert Any Harm Resulting From That Special Election.

Applicants' arguments regarding a single March 13, 2018 special election are also unfounded. The Pennsylvania Supreme Court's January 22 Order specifically exempts that special election, which will merely fill a vacant seat, in an existing district, through the end of 2018.⁸ The winner of that special election, like all incumbents, may seek to run in the new districts designated in a map that complies with the Pennsylvania Constitution. Indeed, both candidates in the special election

⁸ The special election is to occur in Pennsylvania's 18th congressional district following Rep. Murphy's resignation. Under Pennsylvania law, parties select candidates to run in special elections, and the candidates have already been chosen. See Joint Stipulation of Facts, 261 M.D. 2017 (Pa. Commw. Ct. Dec. 8, 2017 3:35 p.m.) at ¶ 156. This special election was always intended to allow the voters of that district an opportunity to fill the seat through 2018. It simply has no relevance in respect to the upcoming elections to select members of Congress for the 2019-2020 term.

are actively considering their positions for the May primary and November general election.⁹

Despite the Applicants' feigned hysteria over this remedial process, Pennsylvania voters are able to appreciate the distinction between old and new maps and special elections. Those same concerns were easily resolved only a few years ago in a nearly identical situation. In *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711 (Pa. 2012), the Pennsylvania Supreme Court rejected a redistricting map for both houses of the Pennsylvania General Assembly and the claim that it created uncertainty as to the district boundaries of a legislative map for legislators whose terms of office were to commence in January 2013. While the new map was being developed, special elections were required for six vacant state House seats. In early 2012, the Pennsylvania Speaker of the House took the position that he did not have to issue writs for the special elections for the six vacant seats because the legislative map for future sessions had not yet been drawn. In *Fagan v. Smith*, 41 A.2d 816 (Pa. 2012), the Pennsylvania Supreme Court rejected this argument and directed the Speaker to issue the writs. The court explained why the uncertainty associated with the future legislative map was irrelevant to the obligations to immediately fill the vacant seats:

⁹ See POLITICSPA, SACCONI TO RUN IN NEW 14TH DISTRICT IF MAP STANDS, available at <http://www.politicspa.com/saccone-to-run-in-new-14th-district-if-map-stands/86603/> (last visited Mar. 4, 2018); CHRIST POTTER, LAMB WINS LGBT ENDORSEMENT IN 17TH DISTRICT WHILE RUNNING FOR 18TH, PITTSBURGH POST-GAZETTE, available at <http://www.post-gazette.com/news/politics-local/2018/02/25/Lamb-wins-LGBT-endorsement-in-17th-District-without-saying-that-s-where-he-hoped-to-run/stories/201802250178> (last visited Mar. 4, 2018).

The district boundaries for the six vacant seats at issue here were set in the 2001 Final Reapportionment Plan, and the new members who would be elected to serve the remainder of their terms will merely step into the shoes of their predecessors—just as the Speaker and every other sitting House member who is currently seated under the districts set forth in the 2001 redistricting map. While the 2011 Legislative Reapportionment Commission continues its work on a new reapportionment plan going forward, there is no question about what districts are involved here; they are the six districts whose seats have been vacant since January 2012.

41 A.3d at 821. Consistent with the court’s appreciation of the voters’ understanding, no mass confusion at the polls resulted.

Speculative fears about confusion over new maps, which are routinely created in Pennsylvania with every redistricting, should not overcome the actual demonstrated harms from the current unconstitutional map. A court cannot be powerless to remedy unconstitutional acts. See *Grove v. Emison*, 507 U.S. at 36-37 (holding that federal courts should defer to state judicial process in redistricting challenges wherever possible); see also *Bush v. Lucas*, 462 U.S. 367, 374 (1983) (holding that courts have “the authority to choose among available judicial remedies in order to vindicate remedies.”).¹⁰ The Applicants’ speculation as to possible voter confusion about a new map does not justify a stay.

¹⁰ William Penn, the first proprietor within the Colony of Pennsylvania, was loath to let injustice fester, famously noting that “Our Law says well, to delay Justice is Injustice.” See WILLIAM PENN, SOME FRUITS OF SOLITUDE (1693 (HEADLEY BROS. 1905)) MAXIM 393.

III. CONCLUSION

For all the reasons cited herein, the Emergency Application of Applicants Turzai and Scarnati to stay the Pennsylvania Supreme Court's January 22, 2018 Order, February 7, 2018 Opinion, and February 19, 2018 Opinion should be DENIED.

Respectfully submitted,

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Dated: March 5, 2018