Received 1/25/2018 8:51:25 AM Supreme Court Middle District

Filed 1/25/2018 8:51:00 AM Supreme Court Middle District
159 MM 2017

IN THE SUPREME COURT OF PENNSYLVANIA

No. 159 MM 2017

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

Petitioners,

v.

THE COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Respondents.

PETITIONERS' ANSWER TO LEGISLATIVE RESPONDENTS' AND INTERVENORS' APPLICATIONS FOR STAY

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INTRODUCTION

On January 22, 2018, this Court struck down the 2011 map on the "sole basis" that the map "clearly, plainly and palpably" violates the Pennsylvania Constitution. For good reason: the map was the worst partisan gerrymander in Pennsylvania's history and among the worst in American history. The mapmakers deliberately and successfully manipulated district boundaries to an unprecedented degree to rig the outcome of elections and deny voters a fair say. The map's ridiculous district shapes and persistent 13-5 Republican advantage made a mockery of representative government. Rather than get to work drawing a new map, Legislative Respondents return to this Court claiming that they need a stay to preserve the "integrity" of Pennsylvania's congressional elections. There is no basis to stay this Court's order, and the applications for a stay should be denied.

No "equitable" consideration supports delaying the adoption of a new map until after the 2018 elections. Pennsylvania voters already have suffered three election cycles under an unconstitutional map intentionally drawn to preordain the outcome of Pennsylvania elections. The 2011 map violates the most fundamental rights of Pennsylvania voters and undermines the legitimacy of the electoral process as well as citizens' trust in representative government. There is ample time for the political branches to enact a new map, or, if they fail to do so, for this Court to adopt a remedial map. And Legislative Respondents' and Intervenors'

unsubstantiated claims of chaos and confusion are just another partisan ploy to hold on to an unconstitutional map that greatly benefits them at the expense of their fellow citizens. This Court and the U.S. Supreme Court have approved the use of new congressional maps with less notice that this Court's order affords. In these circumstances, using the 2011 map again is as unnecessary as it is unfair.

Nor is there any basis to stay this Court's order pending Legislative Respondents' forthcoming petition for certiorari. As Legislative Respondents acknowledge, the U.S. Supreme Court cannot review this Court's determination that the 2011 map violates the Pennsylvania Constitution. Their argument that the U.S. Supreme Court will nonetheless grant certiorari and hold that this Court's order violates the federal Elections Clause is fanciful. This will not happen.

For one, Legislative Respondents are procedurally barred from raising an Elections Clause defense. Under Pennsylvania's judicial estoppel doctrine, Legislative Respondents cannot argue that this Court lacks authority to review and remedy the 2011 map because they successfully argued the exact opposite in a pending federal lawsuit challenging the map. This Court thus should hold that their Elections Clause argument is unavailable as a matter of Pennsylvania law.

In any case, Legislative Respondents' Elections Clause argument is utterly meritless. In a series of decisions dating back a century, the U.S. Supreme Court has repeatedly and expressly held that state courts may adjudicate challenges to

congressional redistricting plans under state constitutions, and may adopt a new plan as a remedy when the existing plan is found invalid and the state legislature fails to take remedial action.

Legislative Respondents' and Intervenors' stay applications should be denied.

ARGUMENT

I. There Is No Basis for a Stay Pending the 2018 Elections

Legislative Respondents and Intervenors urge this Court to exercise its "equitable discretion" to delay the adoption of a new map until after the 2018 congressional elections and instead allow those elections to go forward using the unconstitutional 2011 map. LR Appl. 2; *see* Int. Appl. 2. But the equities overwhelmingly support adopting a new map now, without delay. Pennsylvania voters shouldn't have to suffer one more unfair election under an invalid map.

Legislative Respondents baldly assert, without any citation, that adopting a new map for 2018 will cause "voter confusion" and "depress turnout." LR Appl. 4; *see* Int. Appl. 4. It will not. This argument is nothing but rhetoric untethered to evidence, reality, or history. There will be three months between the adoption of the new map in mid-February and the May 15 primaries, and nine months until the general elections in November. The Executive Branch Respondents have made clear that they are fully capable of educating voters throughout the Commonwealth

about the new district boundaries in those timeframes. If anything, there will be less confusion under a new map that respects traditional districting criteria than under the existing map's infamously ridiculous district boundaries. Legislative Respondents cannot argue with a straight face that remedying the constitutional violation will cause more confusion than they did by splitting Erie County and Harrisburg, by extracting Reading from the rest of Berks County, or by creating the tortured and barely contiguous 7th District.

There is ample precedent for adopting a new congressional map on the schedule here. Under this Court's order, Pennsylvania voters will have almost as much time to acquaint themselves with the new district boundaries as they did following enactment of the 2011 map itself. The 2011 map was signed into law on December 22, 2011 and used in the primaries four months later on April 24, 2012. Here, a new map will be in place by February 19, 2018, three months before the May 15, 2018 primaries. There is zero indication that Pennsylvanians had any difficulty learning the "facts, issues, and players" in the four months from December 2011 to April 2012, LR Appl. 4, even though the 2011 map dramatically changed district boundaries. Legislative Respondents and Intervenors offer no reason whatsoever to believe that the three months from February to May 2018 will be any different.

Legislative Respondents and Intervenors also ignore that this Court has in fact adopted a new congressional districting map much closer to an election. In *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992), after the General Assembly failed to enact a valid map in response to a court order, this Court adopted a new map on March 10, 1992, *id.* at 206, and that map was used at the April 28, 1992 primary elections, just a month and a half later, *id.* at 225. That's *half* the time there will be here. In the interim, this Court gave candidates nine days to circulate and file nominating petitions, *id.* at 244, also less time than the 15 days they will have here.

Similarly, the U.S. Supreme Court has held that state courts may properly adopt a new congressional districting map *less than two months* before the elections. In *Growe v. Emison*, 507 U.S. 25 (1993), a Minnesota state court had planned to adopt a new congressional map in early March 1992, less than two months before primary elections in late April and early May 1992. After a federal court enjoined the state court from imposing this new map, the Supreme Court reversed, rejecting the view that "the state court was … unable to adopt a congressional plan in time for the elections." *Id.* at 37. With almost two months to go, there was no need for a "last-minute federal-court rescue of the Minnesota electoral process." *Id.*

Courts typically have stayed orders affecting elections only when those orders were entered much closer to the election at issue. In *Purcell v. Gonzalez*,

549 U.S. 1 (2006)—the lead case cited by Legislative Respondents—the U.S. Supreme Court blocked a lower court's order enjoining enforcement of Arizona's voter identification law barely four weeks before the 2006 general elections. In *Liddy v. Lamone*, 919 A.2d 1276 (Md. 2007), the court refused to add an attorney general candidate to the ballot with "only *5 days* remaining before the general election." *Id.* at 1288-89 (emphasis added). And in *Butcher v. Bloom*, 203 A.2d 556 (Pa. 1964), a case cited by Intervenors, the decision was rendered on September 29, 1964—"months *after* the April 28, 1964 primary election." *Id.* at 568 (emphasis added).[1] By contrast, here, the May 2018 primaries are still almost four months away. The state agencies charged with implementing the new plan have concluded that adopting a new plan by February 19 will not "compromis[e] the election process in any way." FOF ¶¶35, 448-51.

Legislative Respondents and Intervenors contend that adopting a new map for 2018 will intrude on the "rights of those individuals who have spent valuable time and resources with the expectation that the 2011 Plan would remain in effect." LR Appl. 4-5; *see* Int. Appl. 3-5. But no voter, volunteer, donor, or candidate has a "right" to perpetuate unconstitutional congressional districts because they would be prefer to vote under an unconstitutional map or because a constitutional map would

[1] Intervenors argue that *Butcher* is like this case because a primary election is just as important as a general election. Int. Appl. 8. But the issue in *Butcher* was that the primary would have needed to be *redone*.

disrupt political activities. And under their theory that the Court should not remedy an unconstitutional map once campaign-related activities have begun, there is never time to bring a redistricting challenge, since "individuals began investing time, effort, and money in the upcoming election as soon as the dust settled on the 2016 race." LR Appl. 4; *see* Int. Appl. 3.

Nor does this Court's order deny the political branches a "genuine opportunity to enact legislation creating a new map," as Legislative Respondents claim. LR Appl. 5. Legislative Respondents have waived any such argument. Petitioners' opening brief on the merits requested that the General Assembly and Governor be given two weeks to enact a new map, Petrs. Br. 74, and Legislative Respondents did not argue in their response brief that a two-week window was legally or practically inadequate. And at oral argument, Legislative Respondents' counsel Mr. Torchinsky told this Court that they "would like at least three weeks." Oral Argument Video at 1:46:05-1:46:13. This Court's order gives them what they asked for—19 days for the General Assembly to pass a districting bill and six days after that for the Governor to sign or veto it. This is at least as much time as it took to enact the 2011 map, if not more. Republicans in the General Assembly first revealed the 2011 map on December 14, 2011, and within *eight days* the bill had been passed by the Pennsylvania Senate and House, and signed into law.

Legislative Respondents' contention that the Court's order requires the General Assembly to "fly blind" without "any guidance" on how to draw a valid map is simply wrong. LR Appl. 6. This Court explicitly ordered that the new map must have "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." Order at 3. With this clear guidance, Legislative Respondents' position that they can't possibly figure out how to draw a map that passes constitutional muster is hardly credible.

Legislative Respondents argue, incredibly, that their constitutional violation was "not severe." LR Appl. 7. Quite the contrary, the 2011 map is the worst partisan gerrymander in Pennsylvania's history and among the worst in American history. The map delivered 13 of 18 seats to Republicans in 2012, 2014, and 2016. This extreme gerrymander gave Republicans up to five seats beyond what they would have won under a non-partisan map. How many more seats does it take to qualify as a "severe" violation?

It is shameful for Legislative Respondents to suggest that this case involves only the "paltriest" of rights, and that Petitioners don't attach any real "significance" to those rights because they brought this lawsuit in 2017 rather than 2011. LR Appl. 7; *see also id.* at 13 (similarly asserting that Petitioners' "interests

in this case are barely more substantial than academic interest"). Petitioner Beth Lawn attaches great significance to having a fair opportunity to elect a candidate who will support healthcare rights for her son with a disability. Tom Rentschler fears losing health coverage because of his pre-existing condition. And this case matters enormously to Bill Marx, a former Army helicopter pilot, because "people have died to give me the right to vote, so I really honor them by voting." Tr.106:23-107:3. Petitioners and millions of other Pennsylvanians have an overwhelming interest in participating in fair elections under a valid map, and neither Speaker Turzai, Senator Scarnati, nor any other political leader should ever say otherwise.

If that weren't enough, Legislative Respondents argue that adopting a new map for 2018 will undermine the "integrity" of the elections. LR Appl. 2. Nothing has done more damage to the integrity of Pennsylvania's elections than Legislative Respondents' historically extreme gerrymander in 2011. The district shapes are a national laughingstock. Gerrymandering undermines citizens' trust in government and strikes at the foundation of representative democracy. Conducting the 2018 elections under a gerrymandered map that has been declared unconstitutional would only further erode that trust.

Intervenors rehash their argument that this Court should stay its order pending the U.S. Supreme Court's decisions in *Whitford v. Gill*, No. 16-1161, and

Benisek v. Lamone, No. 17-333. This Court has now twice rejected this argument—first when it granted Petitioners' application for extraordinary jurisdiction, and second when it ordered a new map in time for the May 2018 primaries. Intervenors do not dispute that *Gill* and *Lamone* cannot affect *this* case, but they speculate that *Gill* and *Lamone* "could affect Pennsylvania jurisprudence" in the future, and worry about the "possibility" that Pennsylvania's congressional districts will need to be redrawn again after *Gill* and *Lamone*. Int. Appl. 5. This is nonsense. A remedial plan approved or imposed by this Court is, to put it mildly, unlikely to violate a federal prohibition against partisan gerrymandering.

II. There Is No Basis for a Stay Pending a Petition for Certiorari

Legislative Respondents do not meet any of the factors for a stay of this Court's order pending a petition for a writ of certiorari. *Cf.* LR Appl. 8.

A. Legislative Respondents Have No Likelihood of Success

On the first factor—the likelihood that Legislative Respondents will prevail on appeal—there is zero "probability" that the U.S. Supreme Court will grant certiorari, and in any event there is zero "prospect" that the U.S. Supreme Court would reverse this Court's decision. LR Appl. 8.

1. The Elections Clause Argument Is Judicially Estopped

This Court should hold that, as a matter of Pennsylvania law, Legislative Respondents are judicially estopped from arguing that the U.S. Constitution's Elections Clause denies state courts authority to adjudicate and order relief in a

challenge to a state's congressional districting map. Under Pennsylvania law, judicial estoppel applies when (1) a party takes a position "inconsistent" with a position taken in a separate litigation; and (2) the inconsistent position was "successfully maintained" in the other action. *In re Adoption of S.A.J.*, 838 A.2d 616, 620 (Pa. 2003) (quotations omitted); *see also Gross v. City of Pittsburgh*, 686 A.2d 864, 866-67 (Pa. Commw. Ct. 1996) (party estopped from asserting position contrary to that taken in separate federal litigation). Both elements are met here. Indeed, it is difficult to imagine a clearer case where a finding of estoppel is necessary "to uphold the integrity of the courts by preventing parties from abusing the judicial process by changing positions as the moment requires." *S.A.J.*, 838 A.2d at 621 (quotations omitted).

First, in separate litigation Legislative Respondents have argued exactly the opposite position regarding the authority of state courts. On November 20, 2017, Legislative Respondents—represented by the same counsel as in this case—filed a motion to intervene in the second federal lawsuit challenging the 2011 map, *Diamond v. Torres*, 5:17-cv-05054-MMB (E.D. Pa. 2017). As part of their intervention request, Legislative Respondents asked the federal court to stay and/or abstain based on the pendency of this state court action as well as the first federal lawsuit (*Agre v. Wolf*). *See Diamond*, ECF No. 26-4. With respect to this action, Legislative Respondents argued that state courts not only have authority to

adjudicate congressional districting challenges, but that under the U.S. Supreme Court's decision in *Growe v. Emison*, 507 U.S. 25 (1993), state courts have "primacy" in doing so. *Diamond*, ECF No. 26-4 at 23-26. Legislative Respondents argued that the federal court was "required" to defer to the Pennsylvania state courts, because a state's "legislative *or* judicial branch" is a valid and preferable "agent[] of apportionment" with respect to congressional redistricting. *Id.* at 24 (emphasis in original).

On November 22, 2017, the federal court in *Diamond* granted Legislative Respondents' request and stayed the case until at least the end of the *Agre* trial. *Diamond*, ECF No. 40. On December 7, 2017, the *Diamond* extended the stay until January 8, 2017, specifically citing this state court action as a basis for the extended stay. *Diamond*, ECF No. 48. The *Diamond* court held that "principles of orderly adjudication require the continued stay of this case pending decision in *Agre, et al. v. Wolf, et al.* and in the Commonwealth Court case." *Id.* at 2.

On January 11, 2018, after the initial stay had expired, Legislative Respondents filed a new motion in *Diamond* to stay and/or abstain. *Diamond*, ECF No. 69-2. Legislative Respondents again asserted that state courts not only have authority to address state constitutional challenges to congressional redistricting plans, but that they have priority over federal courts in addressing challenges to such plans. Legislative Respondents asserted:

> The U.S. Supreme Court has … held that federal judges are "**required** … to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself." *Growe*, 507 U.S. at 33. In fact, federal judges are to "prefer[] *both* state branches to federal courts as agents of apportionment." *Id.* at 34.

Diamond, ECF No. 69-2 at 16 (emphases in original). Legislative Respondents further argued that the U.S. Supreme Court in another case "noted the preference to have state legislatures and state courts, rather than federal courts, address reapportionment." *Id.* (discussing *Scott v. Germano*, 381 U.S. 407, 409 (1965)).

On January 22—the same day this Court struck down the 2011 map and only one day before Legislative Respondents filed their motion asking this Court to stay its order pending appeal—Legislative Respondents filed a reply brief in *Diamond* again asserting that the federal court had to defer to this Court. *Diamond*, ECF No. 81. Legislative Respondents advised that "today the Pennsylvania Supreme Court struck down the 2011 Plan as unconstitutional." *Id.* at 2. They argued that the *Diamond* court was "required to defer to Pennsylvania's legislative, executive and judicial branches" under the "plain language of *Growe*." *Id.* at 2, 5.

On January 23, the *Diamond* court granted Legislative Respondents' motion and stayed the case in light of this action. *Diamond*, ECF No. 84. The court granted the motion "upon consideration of Legislative Defendants' motion to stay (Doc. No. 69), as well as the *per curiam* order entered by the Supreme Court of

Pennsylvania on January 22, 2018 in *League of Women Voters of Penn. v. Commw. of Penn.*" *Id.*

There can be no dispute that Legislative Respondents have taken inconsistent positions across the two cases. In their stay application to this Court, Legislative Respondents argue that the federal Elections Clause "vests authority" over congressional redistricting *only* in state legislatures and Congress, and "[s]tate courts enjoy none of this delegated authority." LR Appl. 9. In their view, this entire state court action was a waste of time, because this Court never had authority to order relief in the first place. But Legislative Respondents said the opposite to the *Diamond* court. They asserted there that state courts are "agents of apportionment" whose authority to review congressional districting plans is so unquestioned that federal courts are "required" to defer to state courts in this arena.

Legislative Respondents "successfully maintained" their position in *Diamond*, meeting the second element of judicial estoppel. The *Diamond* court has now granted a full and indefinite stay based on Legislative Respondents' argument that state courts have authority and primacy in addressing congressional redistricting challenges. *Diamond*, ECF No. 84. Legislative Respondents have accrued and will continue to accrue significant benefits from this stay: it will allow them to fend off additional discovery in federal court and preclude the

Diamond plaintiffs from obtaining relief from the federal court in time for the 2018 elections.

Finally, a finding of judicial estoppel is necessary "to uphold the integrity of the courts by preventing parties from abusing the judicial process by changing positions as the moment requires." *S.A.J.*, 838 A.2d at 621 (quotations omitted). Legislative Respondents have asserted diametrically opposed legal positions to the state and federal courts *simultaneously*, without disclosing to either court that they were taking a contrary position before the other. After correctly telling the *Diamond* court on January 22 that state courts have primary authority over congressional redistricting, Legislative Respondents turned around and told this Court on January 23 that state courts have *no* authority over congressional redistricting. In their *Diamond* filing, they relied heavily on *Growe*, but in their stay application to this Court they don't even mention it.

Judicial estoppel squarely applies in these circumstances, and this Court should hold that Legislative Respondents are estopped from asserting their Elections Clause argument as a matter of Pennsylvania law. Their abuse of the judicial process and lack of candor with the courts should not be tolerated.

2. The Elections Clause Argument Is Wrong

Legislative Respondents' Elections Clause argument is not only procedurally barred as a matter of state law, it is wholly meritless as a matter of federal law. Both this Court and the U.S. Supreme Court have already so held.

First, in *Erfer*, this Court expressly considered and "reject[ed]" the argument that the Elections Clause's use of the word "Legislature" means that "Pennsylvania's Constitution is inapplicable to a congressional reapportionment plan." *Erfer v. Commonwealth*, 5794 A.2d 325, 330-31 (Pa. 2002). *Erfer* described as "radical" the notion that "our Commonwealth's Constitution is nullified in challenges to congressional reapportionment plans," and saw "no indication that" the U.S. Constitution's grant of power to state legislatures "simultaneously suspended the constitution of our Commonwealth vis-à-vis congressional reapportionment." *Id.* at 331. In light of that holding, Legislative Respondents cannot establish a "substantial case on the merits" of their Elections Clause argument. *Maritrans G.P., Inc. v. Pepper, Hamilton & Sheetz*, 573 A.2d 1001, 1003 (Pa. 1990).

Second, the U.S. Supreme Court has repeatedly and expressly rejected Legislative Respondents' Elections Clause argument in an unbroken line of cases spanning a century. In 1916, the Court considered a judgment of the Ohio Supreme Court invalidating under the state constitution a congressional districting

law passed by the legislature, because the state constitution allowed the people to reject such laws by referendum and they had done so. *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916). The U.S. Supreme Court rejected the notion that a congressional districting plan that was contrary to "the Constitution and laws of the state was yet valid and operative." *Id.* at 568. The Court explained that nothing in the Elections Clause precludes states from imposing additional restrictions on congressional districting plans by means of their state constitutions, or prevents state courts from enforcing those restrictions. *Id.* at 569-70.

Sixteen years later, in *Smiley v. Holm*, 285 U.S. 355 (1932), the Supreme Court held once more that the Elections Clause does not "endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *Id.* at 368. The Elections Clause, the Court held, does not "render[] inapplicable the conditions which attach to the making of state laws." *Id.* at 365. And again: "the exercise of the authority [under the Elections Clause] must be in accordance with the method which the state has prescribed for legislative enactments" under the state's constitution. *Id.* at 367; *see also id.* at 373 (similar). In Pennsylvania, one of the conditions that attaches to the making of state laws is compliance with the Pennsylvania Constitution, as interpreted by this Court. *Emerick v. Harris*, 1 Binn. 416, 1808 WL 1521 (Pa. 1808); *Fillman v. Rendell*, 986 A.2d 63, 75 (Pa. 2009);

Citizens Comm. to Recall Rizzo v. Bd. of Elec. of City and Cty. of Phila., 367 A.2d 232, 244 (Pa. 1976). "An unconstitutional statute is void ab initio." *Harrisburg Sch. Dist. v. Hickok*, 761 A.2d 1132, 1136 (Pa. 2000).

In two companion cases decided the same day as *Smiley*, the U.S. Supreme Court expressly affirmed the power of state courts to impose their own congressional districting plan as a remedy when the existing plan violates the state constitution. *Carroll v. Becker*, 285 U.S. 380, 382 (1932); *Koenig v. Flynn*, 285 U.S. 375, 379 (1932). In *Koenig*, for example, the New York Court of Appeals struck down the state's districting law because it violated "the requirements of the Constitution of the state in relation to the enactment of laws," and the state court ordered the election to proceed under a plan that the court devised. 285 U.S. at 379. Relying on *Smiley*'s holding that the Elections Clause does not empower state legislatures to enact congressional districting plans in a manner that violates the state constitution, the U.S. Supreme Court affirmed the decision and the state court's authority to impose its own plan. *Id.*; *see also Carroll*, 285 U.S. at 382 (same as to congressional districting plan imposed by Missouri Supreme Court).

Since *Smiley* and its companion cases, the U.S. Supreme Court has repeatedly reaffirmed the important role of state courts and state constitutions in congressional redistricting. In *Growe*, another case Legislative Respondents do not cite to this Court even though it featured prominently in their briefing to the

federal district court, the U.S. Supreme Court held that federal courts were required to *defer* to state courts in congressional redistricting. *Growe* explained:

- "In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself." 507 U.S. at 33 (emphasis in original).

- "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." *Id.*

- "[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts. We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court. Absent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Id.* at 34 (quotations omitted).

- "[T]he District Court's December injunction of state-court proceedings … was clear error. It seems to have been based upon the mistaken view that federal judges need defer only to the Minnesota Legislature and not at all to the State's courts. Thus, the January 20 deadline the District Court established was described as a deadline for the legislature, ignoring the possibility and legitimacy of state judicial redistricting. And the injunction itself treated the state court's provisional legislative redistricting plan as 'interfering' in the reapportionment process. But the doctrine of *Germano* prefers both state branches to federal courts as agents of apportionment." *Id.* at 34.

- "The Minnesota [court's] issuance of its plan (conditioned on the legislature's failure to enact a constitutionally acceptable plan in January), far from being a federally enjoinable 'interference,' was precisely the sort of state judicial supervision of redistricting we have encouraged." *Id.* at 34.

- "The District Court erred in not deferring to the state court's timely consideration of congressional reapportionment." *Id.* at 37.

This Court's order proceeds in precisely the way the U.S. Supreme Court has "encouraged": it gives the General Assembly a chance to redistrict and conditions the imposition of a state court plan on the General Assembly's failure to timely enact a constitutional plan. Legislative Respondents' suggestion that the Court should now stay its own decision to enable *federal court* review, when the U.S. Supreme Court has held that federal courts must defer to state courts in congressional redistricting, is upside down.

Arizona State Legislature v. Arizona Independent Redistricting Commission, 135 S. Ct. 2652 (2015), confirms that, when a state constitution empowers state courts to review and remedy state legislation under the state constitution, nothing in the Elections Clause precludes state courts from playing this role with respect to congressional redistricting legislation. The Court held: "[O]ur precedent teaches that redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking." *Id.* at 2668. The Court *rejected* the notion that the "Elections Clause renders the State's representative body the sole component of state government authorized to prescribe regulations for congressional redistricting." *Id.* at 2673 (quotations and alterations omitted). The Court explained that "it is characteristic of our federal system that States retain autonomy to establish their own governmental processes." *Id.* And the Court

concluded: "Nothing in that Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." *Id.* "The Clause surely was not adopted to diminish a State's authority to determine its own lawmaking processes." *Id.* at 2677.[2]

It's not just that the Elections Clause permits this Court's decision. In two federal statutes, Congress has affirmatively authorized state courts to evaluate whether congressional redistricting legislation violates a state constitution, and, if so, to implement a remedial plan. In *Branch v. Smith*, 538 U.S. 254 (2003), the Court held that 2 U.S.C. § 2c authorizes both state and federal courts to "remedy[] a failure" by the state legislature "to redistrict constitutionally," requiring state and federal courts to draw single-member districts when implementing a remedy in these circumstances. *Id.* at 270. The majority opinion made clear that § 2c "embraces action *by state and federal courts* when the prescribed legislative action has not been forthcoming." *Id.* at 272 (emphasis added). "[Section] 2c is as

[2] Although the dissent is not relevant, nothing in the dissent in *Arizona State Legislature* remotely disapproves the role of state courts in ensuring that congressional districting legislation complies with the state constitution. *Cf.* LR Appl. 9. Indeed, the *petitioners* in that case confirmed at oral argument that state courts had authority to issue remedial maps if the state legislature didn't act in time. Tr. 23-24, Oral Argument, *Arizona State Legislature* (Mar. 2, 2015), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2014/13-1314_ook3.pdf.

readily enforced by courts as it is by state legislatures, and is just as binding on courts—federal or state—as it is on legislatures." *Id.*[3]

In the plurality portion of *Branch*, the Court held that another federal statute, 2 U.S.C. § 2a(c), likewise recognizes state courts' power to adopt congressional redistricting plans pursuant to state law. Section 2a(c) prescribes procedures that apply "[u]ntil a State is redistricted in the manner provided by [state] law." The plurality held that the "[u]ntil a State is redistricted" language in this provision "can certainly refer to redistricting by courts as well as by legislatures," and that "when a court, *state or federal*, redistricts pursuant to § 2c, it necessarily does so 'in the manner provided by [state] law.'" *Id.* at 274 (emphasis added).

The majority in *Arizona State Legislature* upheld this interpretation. It held that, under § 2a(c), "Congress expressly directed that when a State has been redistricted in the manner provided by state law—whether by the legislature, *court decree*, or a commission established by the people's exercise of the initiative—the resulting districts are the ones that presumptively will be used to elect Representatives." *Id.* at 2670 (emphasis added) (quotations and alterations

[3] *Branch*'s holding with respect to § 2c was joined by a majority of the Court, while a plurality joined the portion of the opinion interpreting § 2a(c). The dissent in *Branch* disagreed with the plurality not on the theory that state courts lack authority to impose a redistricting plan, but because the dissent thought that *only* state courts (and not federal courts) may undertake an initial redistricting. *Id.* at 277. But every Justice agreed that, as compared to federal courts, it is "preferable for the State's legislature to complete its constitutionally required redistricting … or for the state courts to do so if they can." *Id.* at 278.

omitted). Congress thus "accorded full respect to the redistricting procedures adopted by the States," including any procedures adopted by state courts. *Id.*

In sum, contrary to Legislative Respondents' argument that this Court's order "present[s] an issue of federal law long overdue for definitive resolution by the U.S. Supreme Court," LR Appl. 8-9, the U.S. Supreme Court has already definitively resolved this question against Legislative Respondents. Legislative Respondents acknowledge two of these cases, *Smiley* and *Davis*, suggesting that U.S. Supreme Court review is likely here because the Court "reviewed the decisions of state courts of highest resort on this very question" in those cases. LR Appl. 10. But the fact that the Court has resolved "this very question" in prior cases makes it *less* likely, not more, that the Court will take up the question again.

B. None of the Equitable Factors Supports a Stay

On the first equitable factor, Legislative Respondents assert that "the mere enjoinment of validly enacted legislation amounts to irreparable injury." LR Appl. 12. But the 2011 map was not "validly enacted" at all. This Court has ruled that the map was invalidly enacted in violation of the Pennsylvania Constitution, and that ruling is unreviewable, as even Legislative Respondents concede. *See id.* at 1 ("[T]his Court has the final say on the substantive law of Pennsylvania"). And Legislative Respondents' arguments that adopting a new map for 2018 will engender "confusion and uncertainty" fail for all the reasons described above. *Id.*

at 12. Nor does Legislative Respondents' speculation that someone might challenge a remedial map constitute irreparable injury. Nor do Intervenors have any irreparable injury. Int. Appl. 3. For three election cycles, Intervenors have reaped the cynical benefits of the worst gerrymander in Pennsylvania's history. There is no constitutional right to continue benefiting from an unconstitutional map. The only irreparable injury here is the one Petitioners would suffer if forced to endure more congressional elections under an unconstitutional map.

Second, Legislative Respondents assert, astonishingly, that using the 2011 map in 2018 "will not materially impair the rights of other litigants in these proceedings." LR Appl. 13. Manipulating district boundaries to preordain the outcome of elections significantly impairs the rights of voters. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

Finally, Legislative Respondents again unabashedly assert that using the unconstitutional 2011 map in another round of congressional elections will somehow serve an "interest in election integrity." LR Appl. 13. Nothing could be further from the truth. The integrity of Pennsylvania's elections will be best served by adopting a new, fair map without delay.

CONCLUSION

For the foregoing reasons, this Court should deny a stay.

Dated: January 25, 2018

Respectfully submitted,

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I hereby certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Record of the Appellate and Trial Courts that require filing confidential information and documents differently than confidential information and documents.

I certify that this Answer does not contain confidential information.

/s/ Benjamin D. Geffen
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Dated: January 25, 2018