No. 17A-795, 17A-802

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.

BRIAN MCCANN, ET AL.,

Applicants,

v.

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, ET AL.,

Respondents.

RESPONSE IN OPPOSITION TO EMERGENCY APPLICATIONS FOR STAY PENDING RESOLUTION OF APPEAL TO THIS COURT

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INTRODUCTION

It is a "fundamental" feature of federalism that state courts are "free and unfettered" by this Court "in interpreting their state constitutions." *Florida* v. *Powell*, 559 U.S. 50, 56 (2010) (internal quotation marks omitted). Accordingly, when a state court "indicates clearly and expressly" that its decision is based on state constitutional law, this Court does not have jurisdiction to review that decision. *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983). The Pennsylvania Supreme Court did precisely that: It found that the law defining Pennsylvania's congressional districts "clearly, plainly and palpably violates the Constitution of the Commonwealth of Pennsylvania, and, *on that sole basis*," struck it down. Legislative Appl. A at 2 (emphasis added). In other words, the Pennsylvania Supreme Court determined that partisan gerrymandering violates the state constitution, and ordered an appropriate remedy. That should be the end of this matter: This Court is not and should not be in the business of policing the correctness of state courts' interpretation of their own constitutions. Accordingly, these stay applications should be denied.

Applicants argue, however, that this Court's intervention is urgently needed because implementing the Pennsylvania Supreme Court's redistricting order in time for the 2018 election cycle is practically impossible and likely to result in confusion. Applicants are simply wrong. The legislature has repeatedly demonstrated that it is capable of passing a new plan in the time ordered by the court. As for implementation, the head of the Pennsylvania agency in charge of elections has explained that the schedule ordered by the court will permit the

elections to occur with minimal disruption. History from redistricting efforts in Pennsylvania and nationwide confirms as much; indeed, the schedule here is remarkably similar to the one that the Commonwealth followed when it adopted the challenged plan in 2011. For the same reason, the risk of voter confusion is purely imaginary. Applicants have produced no evidence of any such confusion in connection with *any* court-ordered redistricting effort in the past, and in this case there will be no change to the date, time, or location of any elections. By contrast, the threat of irreparable harm from the *grant* of a stay is very real. Delaying the implementation of the Pennsylvania Supreme Court's order creates a risk that the forthcoming elections will occur under a redistricting plan that violates the Commonwealth's constitution as interpreted and applied by the Commonwealth's supreme court. That extreme constitutional burden cannot possibly be outweighed by the arguments regarding administrative convenience put forward by Applicants. The equities demand that the stay be denied.

Nor are the equities the only sticking point with respect to the stay request. Applicants cannot demonstrate that there is any likelihood that certiorari will be granted; still less can they show that the decision below will be reversed on the merits. Applicants do not contest the basic principles of federalism limiting this Court's jurisdiction or the fact that the decision below, on its face, rested exclusively on state law. Instead, they attempt to use the Elections Clause of the federal Constitution to manufacture a federal issue where none exists. In particular, they argue that the Pennsylvania Supreme Court, by misinterpreting the state

constitution, has "legislat[ed] from the bench" and thus usurped the role of the state "Legislature" under the Elections Clause. *Id.* at 11. That is plainly wrong.

The Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, § 4. The Clause thus empowers the states to regulate congressional elections through their own "lawmaking processes." *Ariz. State Legislature* v. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015). But it does *not* liberate state "Legislature[s]" from the strictures of their own constitutions. "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.* at 2673. In this case, all the Pennsylvania Supreme Court did was hold that the state's election "regulations" were inconsistent with the "provisions of the State's constitution," as it is clearly entitled to do under the Elections Clause. *Id.*

Applicants counter that that decision was improper judicial "legislation" because the state constitution does not expressly "enumerate" any restrictions on partisan gerrymandering. That is irrelevant. As Chief Justice Marshall wrote, constitutions are not comprehensive "legal code[s];" rather, the whole project of Constitutional Law is deducing specific doctrines from open-textured provisions. *See McCulloch* v. *Maryland*, 17 U.S. (4. Wheat.) 316, 406-407 (1819). And there is nothing even remotely outlandish about the Pennsylvania Supreme Court's constitutional holding here. "[S]tate courts are absolutely free to interpret state

constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." *Arizona* v. *Evans*, 514 U.S. 1, 8 (1995). And, while Applicants attempt to challenge the specific remedy ordered by the Pennsylvania Supreme Court, the order here was simply an application of the court's well-worn equitable authority to fashion a remedy tailored to the constitutional violation that it has found.

In short, this is a dispute about the meaning of the state constitution that was appropriately and finally resolved in the Pennsylvania Supreme Court. The Elections Clause does not give this Court a mandate to second-guess whether the Pennsylvania Supreme Court. There is no federal issue warranting this Court's review, and the equities do not favor a stay. Applicants' request should be denied.

STATEMENT

1. Every ten years, each state uses the national census results to redraw its congressional districts. *See* Legislative Appl. B ¶¶ 82-84. In Pennsylvania, that process last took place in 2011, a year when Republicans held Pennsylvania's House of Representatives, Senate, and Governor's office. *Id.* ¶¶ 90-92. The Republican majority in Pennsylvania's General Assembly controlled the process and carried it out in secret, with no opportunity for public input. They first made their proposed map public on December 14, 2011, and suspended Senate rules to rush the map through the legislative process. On December 22, 2011, just over a week after the proposed district lines were first made public, Pennsylvania's Republican Governor signed the bill, now known as the "2011 Plan," into law. *Id.* ¶¶ 104-126.

The 2011 Plan divides Pennsylvania into eighteen bizarrely shaped districts, with most Democratic voters packed into five solidly Democratic districts and the rest spread out among the remaining thirteen Republican-leaning districts. The Seventh District, for example, features three jagged segments, connected by narrow land bridges, that split five counties. *Id.* ¶¶ 136, 323. This district's unique shape has earned it the nickname "Goofy Kicking Donald Duck." *Id.* Another district, the First, is largely in the Democratic stronghold of Philadelphia, but reaches tentacles into suburban counties to pull in a number of Democratic-leaning communities. *Id.* ¶¶ 321-322. Other Democratic-leaning areas are divided up and parceled out among strongly Republican districts. *Id.* ¶¶ 325, 330. In each of the three congressional elections held under the 2011 Plan, Republicans won thirteen seats to Democrats' five, although Republicans candidates' percentage of the statewide vote ranged from 49.2% in 2012 to 54.1% in 2016 to 55.5% in 2014. *Id.* ¶¶ 185, 192, 198.

2. In June of 2017, the League of Women Voters and a group of Pennsylvania voters ("Challengers") filed a Petition for Review in Pennsylvania's Commonwealth Court, claiming that the 2011 Plan violated several provisions of the Pennsylvania Constitution.[1] Importantly, Challengers did not claim any

[1] Challengers filed their petition against several governmental officials in their official capacities: Speaker of the Pennsylvania House of Representatives Michael C. Turzai and Pennsylvania Senate President Pro Tempore Joseph B. Scarnati, III (the "Legislative Applicants"); Pennsylvania Governor Thomas W. Wolf, Secretary of the Commonwealth Pedro A. Cortes (later substituted with Robert Torres in his capacity as Acting Secretary), and Commissioner of the Bureau of Commissions, Elections, and Legislation Jonathan Marks (the "Executive Branch Parties"); and Lieutenant Governor Michael J. Stack, III (the "Lieutenant Governor"). *See* Legislative Appl. B at 1-2. Challengers also named the Pennsylvania General Assembly and the Commonwealth of Pennsylvania as respondents; the

violations of federal law. *Id*. at 1-3. After the Commonwealth Court judge advised the parties that he would stay the case, Challengers asked the Pennsylvania Supreme Court to exercise its plenary jurisdiction, expedite resolution of the case, and rule in time for the 2018 elections. The Pennsylvania Supreme Court accepted jurisdiction and, on November 9, 2017, ordered the Commonwealth Court to create an evidentiary record and submit proposed findings of fact and conclusions of law by December 31, 2017. *Id*. at 3-4.

The Commonwealth Court held a five-day non-jury trial on December 11-15, 2017. At trial, Challengers presented compelling expert testimony that Pennsylvania's oddly shaped congressional districts are just what they appear to be: the products of a deliberate effort to minimize the value of votes for Democratic congressional candidates and maximize the number of congressional seats held by Republicans. Among other things, Challengers' experts showed that the 2011 Plan could not have come about through the sole application of "traditional districting criteria," which one expert "identified as equalizing population, contiguity, maximizing geographic compactness, and preserving county and municipal boundaries." *Id*. ¶¶ 239-240, 276.

The Executive Branch Parties, who were respondents below, did not introduce evidence attacking or defending the 2011 Plan. They concluded, however, that although they would enforce the 2011 Plan unless and until a court ordered

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Commonwealth was ultimately dismissed from the matter. *Id.* App. B at 2 n.4. A group of registered Republican voters later intervened in the suit (the "McCann Applicants"). *Id.* App. B at 2 n.6.

otherwise, the evidence left them deeply concerned that the 2011 Plan was an unconstitutional manipulation of political boundaries intended to secure lasting Republican dominance of Pennsylvania's congressional delegation. *See* Br. of Respondents Gov. Thomas W. Wolf, Acting Secretary Robert Torres, and Commissioner Jonathan Marks, *League of Women Voters of Pennsylvania v. Commonwealth of Pennsylvania*, No. 159 MM 2017 (Pa. Jan. 10, 2018), at 2. Anticipating that the Pennsylvania Supreme Court might agree with this conclusion and order redistricting in advance of the 2018 elections, Commissioner Marks assessed potential remedies, considering whether a new districting map could be introduced in early 2018 without disrupting preparations for the 2018 primary elections.

Commissioner Marks heads the Pennsylvania Department of State's Bureau of Commissions, Elections and Legislation. EBR Ex. 2, dated December 14, 2017, reproduced at Appendix A ("App. A"), ¶ 1; *see also* Legislative Appl. B ¶ 33. He has held this position for more than six years, during both Democratic and Republican administrations, and has served in the Bureau since 2002. App. A ¶¶ 2-5; Legislative Appl. B ¶¶ 33-34. Commissioner Marks has supervised the Department's elections management duties in more than 20 regularly scheduled elections and a number of special elections. Legislative Appl. B ¶ 35. He determined that if a new map was issued by February 20, 2018, it would be possible for the Pennsylvania Department of State to hold the 2018 primary elections on their scheduled date of May 15, 2018, while keeping disruption of election

preparations at a minimum. *Id.* ¶ 448. At trial, the Executive Branch Parties submitted Mr. Marks's affidavit, which explained how, if a new districting map was put in place by February 20, a slight shift of some of the dates on the elections calendar would allow the 2018 primaries to proceed as scheduled. *See* App. A. Under Commissioner Marks's plan, only deadlines relating to circulating and filing nomination petitions would need to be postponed; other dates, including the deadlines for voter registration and mailing military-overseas absentee ballots, would remain unchanged.[2] The other parties did not object to the introduction of Mr. Marks's affidavit into evidence, and did not dispute his conclusions. The Commonwealth Court ultimately incorporated his conclusions about potential revisions to the elections schedule into its Findings of Fact. Legislative Appl. B ¶¶ 447-454.

In its Findings of Fact, the Commonwealth Court found, *inter alia*, that Challengers' expert witnesses were all credible, *see id.* ¶¶ 339, 360, 389, and that Legislative Applicants' expert witnesses were not credible in significant respects, *id.* ¶¶ 398, 409. It held that "partisan considerations are evident" in the 2011 Plan, that the Plan was "intentionally drawn so as to grant Republican candidates an advantage in certain districts within the Commonwealth," and that it "overall favors Republican Party candidates in certain congressional districts." *Id.* ¶¶ 51, 58. Nonetheless, the Commonwealth Court held that Challengers had failed to

[2] *See* Legislative Appl. B ¶ 451 (close of nomination petitions period could be moved back two weeks), ¶ 452 (candidates could be given two weeks instead of three to circulate and file petitions), ¶ 453 (Department of State could prepare for nominations period in two weeks instead of three); *see infra* 29-30.

make out a claim because, *inter alia*, they had not "articulated a judicially manageable standard" for identifying unconstitutional partisan gerrymandering under the Pennsylvania Constitution. *Id.* at 126-27 ¶ 61.

The Pennsylvania Supreme Court immediately ordered briefing and heard oral argument. On January 22, 2018, the court issued a *per curiam* Order, holding that the 2011 Plan "clearly, plainly and palpably violates the Constitution of the Commonwealth of Pennsylvania, and, on that sole basis, we hereby strike it as unconstitutional." Legislative Appl. A at 2. The Order enjoined use of the 2011 Plan in the May 2018 primary elections, set a February 9 deadline for the General Assembly to pass a replacement districting plan and a February 15 deadline for the Governor to decide whether or not to approve it, and gave all parties an opportunity to submit proposed remedial plans.

The court explained 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.* 3. It directed the Executive Branch Parties to "anticipate that a congressional districting plan will be available by **February 19, 2018**" and "take all measures, including adjusting the election calendar if necessary, to ensure that the May 15, 2018 primary election takes place as scheduled …." *Id.* Four days later, the court appointed a redistricting expert, Professor Nathaniel Persily, to help it draw a new, constitutional map in the event

that the General Assembly was unable to submit a map or the Governor was unable to approve one. *See* Pennsylvania Supreme Court Order dated Jan. 26, 2018.

3. After the Order issued, the Department of State further refined its procedures and determined that it would need only one week to prepare for the nomination petitions period. This allowed the Department of State to extend candidates' time period for circulating and filing nomination petitions from the two weeks contemplated in Commissioner Marks's Affidavit to three weeks.[3] Members of the General Assembly also began taking steps toward compliance with the Order by "advancing bills aimed at creating an alternate map." *See* Joseph B. Scarnati III Letter to the Pennsylvania Supreme Court, Jan. 31, 2018, at 2 n.2 (citing S.B. 1034 (2018), H.B. 2020 (2018)). At the same time, however, Legislative Applicants and McCann Applicants bent their efforts toward blocking the Order and holding the 2018 elections under the unconstitutional 2011 Plan. They sought a stay from the Pennsylvania Supreme Court, which that court denied on January 25. Applicants then filed their Applications with this Court on January 25 (Legislative Applicants) and January 26 (McCann Applicants).

[3] The Department of State has posted the new schedule on its website. *See* Revised Petition Filing Calendar for Congressional Candidates, http://www.dos.pa.gov/VotingElections/CandidatesCommittees/RunningforOffice/Pages/Petition-Notice.aspx. If the Court so wishes, the Executive Branch Parties stand ready to submit a supplemental affidavit confirming these deadlines, pursuant to Supreme Court Rule 32.3.

ARGUMENT

"Stays pending appeal to this Court are granted only in extraordinary circumstances." *Graves* v. *Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers). "To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment 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) (per curiam). Applicants cannot establish any one of those things here, and thus fall well short of the "extraordinary" showing necessary to obtain a stay. *Graves*, 405 U.S. at 1203.

I. Basic Principles Of Federalism Dictate That The Supreme Court Should Not Review A State Court Decision Interpreting That State's Constitution.

1. It is a bedrock principle of federalism that "state courts are the ultimate expositors of state law." *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975). In particular, "[i]t is fundamental * * * that state courts be left free and unfettered by us in interpreting their state constitutions." *Florida* v. *Powell*, 559 U.S. 50, 56 (2010) (internal quotation marks omitted). Accordingly, this Court has recognized for well over a century that it lacks authority to review whether a state court has correctly interpreted that state's own laws. *See Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590, 626, 633 (1874). That longstanding rule is currently reflected in the statute governing this Court's jurisdiction to review decisions "rendered by the highest court of a State," which permits this Court to consider such a case *only*

"where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States." 28 U.S.C. § 1257(a). This language permits the Court to decide whether a state constitutional provision, as interpreted by a state court, is compatible with federal law. It does not authorize the Court to determine whether the state court correctly interpreted the state constitution in the first place. *See, e.g.*, *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935) ("jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment").

In this case, the Pennsylvania Supreme Court could not have been more explicit that it was rendering an interpretation of its own constitution. It held that "the Court finds as a matter of law that the Congressional Redistricting Act of 2011 clearly, plainly and palpably violates the Constitution of the Commonwealth of Pennsylvania, and, *on that sole basis*, we hereby strike it as unconstitutional." Legislative Appl. A at 2 (emphasis added). The Pennsylvania Supreme Court thus "indicate[d] clearly and expressly" that its decision was "based on bona fide separate, adequate, and independent grounds." *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983). This Court does not have jurisdiction to review whether that issue of state law was correctly decided. *Muller*, 296 U.S. at 210.[4]

[4] The McCann Applicants suggest that the case might still implicate federal law because the Pennsylvania Supreme Court's decisions regarding the state Equal Protection guarantee have, in the past, tracked this Court's Equal Protection jurisprudence. McCann Appl. 12. They suggest that—at a minimum—this fact means the Court should stay this case until the Court issues its decision in *Gill* v. *Whitford*, which may provide further insights into federal constitutional protections against political gerrymandering. *Id.* at 14. But the Pennsylvania Supreme Court rejected an identical argument just eight days ago, making it abundantly clear that

2. This conclusion is not altered by the fact that this case involves a question of redistricting. There is no provision of federal law granting this Court authority to intrude on a state court's interpretation of its state election laws. Nor can Applicants point to a single precedent in this Court's history in which it has done so.

Indeed, Applicants' own authorities make clear that the normal limits on this Court's authority apply to state-court decisions regarding redistricting. *See Smiley* v. *Holm*, 285 U.S. 355, 363–64 (1932); *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565 (1916). In these cases, the Court reviewed whether the *federal* Elections Clause rendered invalid a state constitutional limit as understood by a state's high court; the Court did not review—and made clear it lacked authority to review—whether the state high court correctly interpreted the *state* constitution in the first place.

The Court's decision in *Hildebrant* is illustrative. In the decision under review in that case, the Ohio Supreme Court issued two holdings: First, that the state constitution permitted voters to override the legislature's congressional districting plan by referendum; and, second, that this feature of the Ohio

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its decision is in no way based on—and will in no way be influenced by—the contours of the federal constitutional guarantees in this arena. Indeed, that was already obvious from the Pennsylvania Supreme Court's statement that its decision was based "sole[ly]" on the state constitution. Legislative Appl. A at 2.

In any event, the McCann Applicants' discussion of the Pennsylvania Supreme Court's past practice with respect to the state constitution's Equal Protection guarantee ignores that Challengers' arguments are also predicated heavily on the Pennsylvania constitution's free expression provision, *see* Petitioners' Opening Br. at 44-64 (Pa. Jan. 5, 2018) (No. 159 MM 2017), which has long afforded "protection for freedom of expression that is broader than the federal constitutional guarantee." *Pap's A.M.* v. *City of Erie*, 812 A.2d 591, 605 (Pa. 2002) (internal quotation marks omitted).

constitution did not run afoul of the federal Elections Clause. 241 U.S. at 567. In reviewing the Ohio Supreme Court's decision, this Court made clear that it would not consider whether the Ohio court correctly understood the dictates of the Ohio constitution, because it was "obvious that the decision below [wa]s conclusive on that subject." *Id.* at 567-568. Rather, the *Hildebrandt* Court limited its review to the question of whether the Ohio state constitution's referendum provision—as interpreted by the Ohio state court—was consistent with the federal Elections Clause. *Id.* at 569-570.

Similarly, in *Smiley*, this Court reversed a state high court's determination that a state constitutional provision permitting the governor to veto state legislation regarding redistricting was incompatible with the federal Elections Clause. The *Smiley* Court took pains to emphasize, however, that it was merely correcting the state court's erroneous interpretation of the requirements of the *federal* Elections Clause. 285 U.S. at 363-364. Indeed, a full paragraph of the *Smiley* opinion is devoted to explaining that the state supreme court had not held as a matter of *state* law that the Minnesota constitution made the gubernatorial veto inapplicable to redistricting. *Id.* The *Smiley* Court did not review whether the state constitution in fact permitted the gubernatorial veto, a question that was exclusively within the purview of the state supreme court.

These decisions make sense. The principle that state courts are the conclusive expositors of state law applies if anything with *greater* force to decisions concerning congressional redistricting. "[T]he Constitution leaves with the States

primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe* v. *Emison*, 507 U.S. 25, 34 (1993); *see Miller* v. *Johnson*, 515 U.S. 900, 915 (1995) ("Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions."). Accordingly, even in redistricting cases involving the application of *federal* law, "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." *Growe*, 507 U.S. at 33. It should be beyond dispute that a federal court cannot second-guess a state court's interpretation and application of limits on redistricting imposed by the *state* constitution.

3. Nevertheless, in requesting their stay, Applicants hypothesize that the Court will grant review in order to engage in precisely this form of second-guessing. Applicants have never suggested that a state constitutional bar on political gerrymandering violates the federal Elections Clause.[5] Instead, Applicants allege that the Pennsylvania Supreme Court erred in holding that the Pennsylvania constitution contains such a bar because the Pennsylvania constitution itself imposes no such requirement. But whether and to what extent the Pennsylvania *state* constitution prohibits political gerrymandering is a quintessential question of

[5] Nor could they. As this Court has explained, "[n]othing 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." *Ariz. State Legislature* v. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015). Numerous states have limited political gerrymandering through their constitutions, and Pennsylvania is of course free to do the same. Moreover, because Applicants failed to raise any such argument before the state supreme court, it is waived and jurisdictionally barred.

state law, committed exclusively to the jurisdiction of the state courts by statute, and by basic bedrock constitutional principles of federalism.

Applicants seek to evade this difficulty by asserting that the Elections Clause contemplates at least *some* federal review of state court interpretations of a state constitution because it entrusts election regulations to the state "Legislature." According to Applicants, when a state court's interpretation of the state constitution is too aggressive, the court improperly usurps a role the U.S. Constitution gives to the legislature alone. But this Court has already rejected that argument several times over.

In *Smiley*, for example, this Court held that a state governor may veto redistricting legislation without running afoul of the Elections Clause. The Court explained that "there is nothing in article 1, s 4, which precludes a state from providing that legislative action in districting * * * shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power." 285 U.S. at 372-373. By the same token, there is nothing in article 1, Section 4 that precludes redistricting legislation from being subject to the usual check on state lawmaking power that is provided by judicial review. If the Elections Clause tolerates an executive branch official wielding complete discretion to invalidate a legislature's redistricting plan, it only stands to reason that the Clause tolerates the far more limited discretion wielded by the state courts when they invalidate a redistricting law as inconsistent with the state constitution.

This Court's more recent decision in *Arizona State Legislature* confirms as much. In that case, the Court explicitly affirmed that "[n]othing in th[e Elections] 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*." 135 S. Ct. at 2673 (emphasis added). Moreover, the Court reiterated that "it is characteristic of our federal system that States retain autonomy to establish their own governmental processes," because it is "[t]hrough the structure of its government and the character of those who exercise government authority," that "a State defines itself as a sovereign." *Id.* (internal quotation marks omitted). It is thus well within Pennsylvania's authority to impose limits on the legislature's redistricting power by means of the state constitution, and to entrust to the courts the responsibility to interpret and enforce those limits.

Nor is there any need for this Court to grant review to reiterate the unremarkable principle that federal courts may not police state court interpretations of state constitutional provisions that apply to congressional redistricting. Applicants do not cite a single lower court decision embracing their startling position that the Elections Clause permits federal courts to reject a state supreme court's understanding of their own state constitution. Instead, they rely primarily on a concurrence in *Bush* v. *Gore*, and on a dissent from denial of certiorari in a 2004 Colorado redistricting case. Neither decision is precedential and neither supports Applicants' position. The fact that Applicants can muster no

greater support than a concurrence and a dissent is itself telling: Over the last decades countless redistricting determinations have taken place without any Elections Clause precedent to support Applicants. Not one.

As to *Bush* v. *Gore*, Applicants rely on a concurrence joined by only three members of the Court. Legislative Appl. 14 (citing *Bush* v. *Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring)). That concurrence obviously is not controlling, especially in the context of *Bush* v. *Gore*, a case that even the *per curiam* opinion discouraged litigants from using as precedent in future litigation. 531 U.S. at 109 (holding that the Court's "consideration is limited to the present circumstances"). Moreover, the concurrence addressed a different provision of the United States Constitution entirely, the clause governing the state legislatures' selection of presidential electors, which it said "implicate[d] a uniquely important national interest," given that it concerned the selection of a President who "represent[ed] *all* the voters in the Nation." *Id.* at 112 (emphasis added and internal quotation marks omitted) (citing U.S. Const. art. II, § 1). Even on its own terms, then, the concurrence's analysis does not apply to the Elections Clause, which reaffirms each State's traditional authority to select representatives of the state itself. *See also, e.g.*, *Ariz. State Legislature*, 135 S. Ct. at 2668 (recognizing that the constitutional considerations that apply with respect to the state legislature's role in electing the president do not apply equally to the legislature's role in setting time, place, and manner restrictions for congressional elections); *Smiley*, 285 U.S. at 365-366 (same).

Applicants' reliance on *Colorado General Assembly* v. *Salazar*, 541 U.S. 1093 (2004), is even further afield. *Salazar* is a dissent from denial of certiorari, again joined by only three members of the Court. *Id.* (Rehnquist, C.J., dissenting from denial of certiorari). And even those dissenters did not suggest it was appropriate for the Court to review the Colorado Supreme Court's application of its own law. The court below had held that the Colorado constitution prevented the state legislature from enacting a redistricting plan if less than ten years had passed since the last plan was implemented, even if the last plan was created by a court as a result of the legislature's failure to agree on an acceptable map. The *Salazar* dissenters did *not* suggest that the Court should review the Colorado Supreme Court's interpretation of the Colorado constitution. Instead, much as in *Smiley* and *Hildebrant*, they suggested that the Court should have granted review in order to consider the Colorado court's holding that the state constitutional bar on legislative redistricting was compatible with the federal Elections Clause. *Id.*

In short, granting review of this case would represent an unprecedented encroachment on the rights of state courts to delineate the boundaries of state law. The Elections Clause does not sanction that encroachment, and Applicants have not offered any decisions—precedential or otherwise—suggesting the contrary. The Court is therefore extremely unlikely to grant certiorari and even less likely to reverse the Pennsylvania Supreme Court's decision interpreting and applying the Pennsylvania constitution. That is fatal to Applicants' stay request.

II. Even If The Decision Below Presented A Valid Federal Question, Applicants Could Not Prevail.

Even if Applicants were somehow right in their assertion that the Elections Clause allows this Court to police a state court's interpretation of a state constitutional provision, Applicants still could not show the requisite likelihood of success in this case. The order below represents an ordinary exercise of the judicial review power, *not* a usurpation of legislative authority. Applicants' arguments to the contrary are universally meritless.

1. To begin, Applicants wrongly assert that the Pennsylvania Supreme Court has "legislat[ed] from the bench" because the rule of constitutional law here was not encoded expressly in the state constitution. Legislative Appl. 10-11. That is clearly wrong. To derive specific doctrines from open-textured provisions is the basic task of constitutional adjudication. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 406-407 (1819); *see NLRB* v. *Noel Canning*, 134 S. Ct. 2550, 2565 (2014). To insist, as Applicants do, that state constitutional "requirements" must be expressly "enumerate[d]" to be justiciable in the elections context is to insist that the constitution "partake of the prolixity of a legal code." *McCulloch*, 17 U.S. (4 Wheat.) at 407. Applicants would thus contravene two centuries of judicial practice. The "nature" of a constitution is "that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves." *Id.* Indeed, if the exercise of deducing constitutional doctrine from constitutional text were deemed "legislation," Legislative Appl. 11, then this Court would be guilty of judicial

legislation in countless cases. *E.g.*, *Reynolds* v. *Sims*, 377 U.S. 533, 557 (1964) (deriving the one-person, one-vote principle from the Equal Protection Clause, which "provides discoverable and manageable standards").

Nor is there anything outlandish or untoward in the interpretation adopted by the Pennsylvania Supreme Court here. Partisan gerrymanders violate equal protection principles because they dilute the value of votes on the basis of political affiliation. "Partisan gerrymanders" are thus "incompatible with democratic principles." *Ariz. State. Legislature*, 135 S. Ct. at 2658 (brackets omitted). And they violate free expression principles because they burden voters based on their political viewpoints. They thus "penaliz[e] citizens"—by diluting their electoral influence—"because of their * * * association with a political party, or their expression of political views." *Vieth* v. *Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment). Indeed, this Court is itself considering whether partisan gerrymanders comport with the First Amendment and Equal Protection Clause this Term. *Gill* v. *Whitford*, No. 16-1161 (U.S.). Whatever one thinks of the ultimate merits of that case, there is no question that a Justice who considers partisan gerrymanders unconstitutional is not acting in bad faith or usurping legislative power.

2. Applicants are equally off base in their assertion that the Pennsylvania Supreme Court must have been acting as a legislature because its constitutional interpretation in this case is allegedly a departure from that court's dictates in past cases. That contention is obviously mistaken because the Pennsylvania Supreme

Court has never addressed a gerrymandering challenge under its free expression provisions, so there is no precedent in that arena to depart from. And even focusing exclusively on equal protection, Applicants' argument is doubly wrong. First, courts often reconsider their past decisions. It is the "prerogative" of a court to "overrule one of its precedents." *Bosse* v. *Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam) (internal quotation marks omitted). This Court has done so time and again. *See, e.g.*, *Citizens United* v. *FEC*, 558 U.S. 310, 365 (2010) (overruling *Austin* v. *Mich. Chamber of Commerce*, 494 U.S. 652 (1990)); *Lawrence* v. *Texas*, 539 U.S. 558, 578 (2003) (overruling *Bowers* v. *Hardwick*, 478 U.S. 186 (1986)); *Brown* v. *Bd. of Educ.*, 347 U.S. 483, 494-495 (1954) (overruling *Plessy* v. *Ferguson*, 163 U.S. 537 (1896)). So has the Pennsylvania Supreme Court. *See, e.g.*, *In re 1991 Penn. Legislative Reapportionment Comm'n*, 609 A.2d 132, 142 (Pa. 1992) (overruling *Newbold* v. *Osser*, 230 A.2d 54 (Pa. 1967)). This practice does not mean that either court was legislating.

Second, Applicants' claims that the Pennsylvania Supreme Court has radically departed from its past precedent are at best exaggerated. For more than 30 years, the Pennsylvania Supreme Court has recognized that its state constitution imposes some impediments on partisan gerrymandering. *In re 1991 Penn. Legislative Reapportionment Comm'n*, 609 A.2d 132, 142 (Pa. 1992). Nothing in *Holt* v. *2011 Legislative Reapportionment Comm'n.*, 67 A.3d 1211 (Pa. 2013), suggests otherwise. That case merely explained that political considerations are not entirely forbidden by the state constitution. *Id.* at 1235-1236. That conclusion

does not undermine, much less abrogate, the Court's consistent position that a blatant partisan gerrymander would violate Pennsylvania's constitution.

3. In their effort to cast this conventional exercise in state constitutional interpretation as impermissible legislation, Applicants also point to the specificity of the remedy ordered by the court. They complain that the court's guidance about how to adopt a compliant plan "amount[s] to mandatory redistricting criteria of the type typically found in a legislatively enacted elections code." Legislative Appl. 10. And they object to the possibility that the court *might* have to engage in map-drawing if the legislature's remedial efforts fail. *Id.* at 13. These arguments are meritless.

What Applicants term "legislation" is, in reality, nothing more than an exercise of the familiar equitable power possessed by any court. *See id.* at 11. "Relief in redistricting cases is 'fashioned in the light of well-known principles of equity.'" *North Carolina* v. *Covington*, 137 S. Ct. 1624, 1625 (2017) (per curiam) (quoting *Reynolds*, 377 U.S. at 585). In crafting relief, a court must adopt a "fitting remedy for the legal violations it has identified, taking account of 'what is necessary, what is fair, and what is workable.'" *Id.* (citation omitted) (quoting *New York* v. *Cathedral Academy*, 434 U.S. 125, 129 (1977)). This is as true in Pennsylvania as it is in the federal system. *See, e.g.*, *Mellow* v. *Mitchell*, 607 A.2d 204, 205 (Pa.), *cert. denied sub nom Loeper* v. *Mitchell*, 506 U.S. 828 (1992); *Butcher* v. *Bloom*, 216 A.2d 457, 459 (Pa. 1966) (per curiam).

Time and again, this Court has recognized that judicial equitable authority includes the power to redraw legislative maps when legislatures have failed to cure violations of state or federal law. *See, e.g.*, *Abrams* v. *Johnson*, 521 U.S. 74, 101 (1997) (affirming a district court's redistricting plan that took "into account traditional state districting factors" and "remained sensitive to the constitutional requirement of equal protection"); *Connor* v. *Finch*, 431 U.S. 407, 425-426 (1977) (directing district court to fashion a "constitutionally permissible apportionment plan"); *Chapman* v. *Meier*, 420 U.S. 1, 27 (1975) (recognizing that district court will need to adopt a plan if the State legislature fails); *Md. Comm. for Fair Representation* v. *Tawes*, 377 U.S. 656, 676 (1964) (recognizing Maryland legislature may need to adopt a plan, and directing that "under no circumstances" was the existing unconstitutional plan to be used in another election cycle); *see also Balderas* v. *Texas*, No. 6:01CV158, 2001 WL 36403750 (E.D. Tex. Nov. 14, 2001) (per curiam), *summarily aff'd*, 536 U.S. 919 (2002) (summary affirmance of a court-ordered redistricting plan); *Loeper*, 506 U.S. 828 (denying certiorari after Pennsylvania Supreme Court adopted a new legislative apportionment scheme). Not only has this Court held that state courts are authorized to engage in this practice, it has "specifically *encouraged*" them to do so under certain circumstances. *Scott* v. *Germano*, 381 U.S. 407, 409 (1965) (per curiam) (emphasis added); *accord Growe*, 507 U.S. at 33.

For these reasons, there can be no dispute that a state court has the authority to redraw an electoral map when exigencies require it. *Reynolds*, 377

U.S. at 585. And a state court also possesses the lesser power to instruct the legislature on how to adopt its own compliant plan. This Court has expressly directed lower courts to provide such guidance in the context of crafting remedies to *federal* constitutional violations. *Id.* at 578 ("Lower courts can and assuredly will work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation."). And as recently as last Term it has endorsed efforts by lower courts to do just that. *See Covington* v. *North Carolina*, 316 F.R.D. 117, 178 (M.D.N.C. 2016) (offering two ways the legislature could have satisfied its constitutional obligations), *summarily aff'd*, 137 S. Ct. 2211 (2017).

Thus, when the Pennsylvania Supreme Court issued its guidance to the legislature regarding how it may engage in a redistricting process that comports with the state constitution, it did not usurp the legislature's lawmaking power. It exercised the traditional judicial role in the state lawmaking process by evaluating the constitutionality of the legislature's enactments and fashioning equitable relief for the constitutional violation it detected therein.[6] *See Ariz. State Legislature*, 135 S. Ct. at 2670.

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[6] Applicants' claim to the contrary rings especially hollow in light of Applicants' complaint elsewhere that the Pennsylvania court provided *too little* guidance. *Compare* Legislative Appl. 10 (calling the court's standards "mandatory redistricting criteria of the type typically found in a legislatively enacted elections code"), *with id.* at 13 (referring to the criteria as "unknown" and accusing the court of "withhold[ing] guidance as to how these criteria are to be implemented or interpreted"). Applicants cannot have it both ways; they cannot simultaneously demand more guidance from the Pennsylvania Supreme Court and then argue that overly-specific guidance amounts to usurpation of the legislative function.

III. Applicants Have Not Shown Irreparable Harm.

"[O]nce a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." *Reynolds* v. *Sims*, 377 U.S. 533, 585 (1964). To determine that a case is "unusual" in this way, a court should look closely at the "proximity of a forthcoming election and the mechanics and complexities of state election laws" and ask whether relief would cause "a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State." *Id.*

This is not the "unusual" case in which a court must sit on its hands. At trial, the Executive Branch Parties provided extensive evidence that the timeline established by the court's order will not significantly disrupt the upcoming elections schedule. None of the Applicants disputed this evidence at trial, and none of them contended that instituting a new map by February 20 would make "unreasonable or embarrassing demands" on the Commonwealth of Pennsylvania. On the contrary, at oral argument before the Pennsylvania Supreme Court, Legislative Applicants' counsel said that they "would like at least three weeks" to adopt a compliant plan if the court ruled against them.[7]

[7] See Pennsylvania Supreme Court Oral Argument, January 17, 2018 (Torchinsky) at 1:46:05 (PNCTV television broadcast Jan. 19, 2018), available at https://pcntv.com/pacourts/.

Now, however, Applicants invite this Court to find, contrary to the undisputed evidence below, that the prospect of instituting a districting map that complies with the Pennsylvania Constitution has "cast Pennsylvania's Congressional elections into chaos on the eve of the 2018 primary elections, causing substantial injury to the public." Legislative Appl. 3. They present no evidence of this so-called "chaos." Given Applicants' failure to make these arguments to the courts below, it should not fall to this Court to delve into the "mechanics and complexities," *Reynolds*, 377 U.S. at 584, of Pennsylvania election laws to test Applicants' "chaos and confusion" arguments. In fact, examining these "mechanics and complexities" shows that Pennsylvania's 2018 primary elections can proceed smoothly under a new and constitutionally sound map.

A. The Record Establishes That Pennsylvania's Statewide Election Authorities Will Have No Difficulty Complying With The Order.

Respondent Jonathan Marks is an experienced public servant who is well positioned to know what is and is not possible in Pennsylvania elections management. Commissioner Marks has every incentive to avoid changes to the elections schedule that would cause "confusion" or "chaos." Marks's explanation of how the election schedule can be adjusted to accommodate a new map, which was uncontradicted at trial, demonstrates that this is not one of the "unusual" cases in which the replacement of an unconstitutional districting plan may be deferred. *See Reynolds*, 377 U.S. at 585. Applicants do not cite a single case in which this Court, or any court, stayed an election-related proceeding over the objections of state

elections officials; Commissioner Marks's well-founded assurances should outweigh Applicants' bare statements that there will be "chaos" and "confusion."

If the Court wishes to probe Commissioner Marks's position, however, it will find ample reason to agree with his conclusion that the 2011 Plan can be replaced without disrupting the 2018 primary elections. First, redistricting the congressional maps will affect preparations for only 18 congressional races. The races for the hundreds of other seats involved in the 2018 primary, including U.S. Senator, Governor, state legislators, and local officers, will not change at all. Second, the date changes relating to the congressional races are minimal. The Department of State has not, as Legislative Applicants allege, been ordered to "re-write the Commonwealth's entire 2018 election calendar," Legislative Appl. 18, and does not intend to do so.[8] The very earliest dates on the elections calendar, those relating to the circulation of nominations petitions, will be postponed by two to

[8] The Pennsylvania Supreme Court ordered the Executive Branch Parties to "take all measures, including adjusting the election calendar if necessary, to ensure that the May 15, 2018 primary election takes place as scheduled * * * *" Legislative Appl. A at 3. This means that the Executive Branch Parties must implement the internal adjustments to the elections calendar discussed in the Marks Affidavit and listed above. Thus, by planning for adjusted deadlines, the Executive Branch Respondents are complying with a court order; they are not "disregard[ing] * * * statutory election deadlines", as the McCann Applicants argue. *See* McCann Appl. 2. There is nothing unprecedented about the Pennsylvania Supreme Court ordering adjustments to the election schedule and the Department of State complying with that order. *See, e.g., Holt* v. *2011 Legislative Reapportionment Comm'n.,* 38 A.3d 711, 715-16 (Pa. 2012) (striking down reapportionment plan and ordering changes to the primary election calendar to provide sufficient time for approval of a new map); *Mellow* v. *Mitchell,* 607 A.2d 204, 224 (Pa. 1992) (adopting lower court decision invalidating existing map and referencing memoranda filed by the Secretary of the Commonwealth and Election Commissioner in ordering revision of the election calendar).

three weeks. As set forth below, later dates on the calendar, including the deadlines that Pennsylvania's counties must meet,[9] will remain the same:

Event	Original Date	Date Under Revised Schedule
First date to circulate/file nomination petitions	February 13, 2018 (Legislative Appl. B ¶ 423)	February 27, 2018 (Department of State website[10])
Last day to circulate/file nomination petitions	March 6, 2018 (Legislative Appl. B ¶ 424)	March 20, 2018 (Legislative Appl. B ¶ 451)
First day to circulate and file nomination papers	March 7, 2018 (Legislative Appl. B ¶ 425)	unchanged
Last day for withdrawal by candidates who filed nomination petitions	March 21, 2018 (Legislative Appl. B ¶ 426)	March 27, 2018 (Department of State website[11])
Date for sending remote military-overseas absentee ballots	March 26, 2018 (Legislative Appl. B ¶ 427)	unchanged (*see* 25 Pa. C.S. § 3508(b)(1))[12]
Date by which Secretary of State must transmit list of candidates to County Boards of Elections	March 26, 2018 (25 P.S. § 3146.5a(a))	unchanged
Date for sending remaining military-overseas absentee ballots	March 30, 2018 (Legislative Appl. B ¶ 428)	unchanged (*see* 25 Pa. C.S. § 3508(b)(1))
Remaining dates on pre-primary schedule	April-May 2018 (Legislative Appl. B ¶¶ 429-431)	unchanged

[9] *See* Amicus Brief of Republican Party of Pennsylvania at 13-14 (listing various election-related responsibilities of Pennsylvania counties, none of which will be affected by the modified schedule).

[10] *See* Revised Petition Filing Calendar for Congressional Candidates, http://www.dos.pa.gov/VotingElections/CandidatesCommittees/RunningforOffice/Pages/Petition-Notice.aspx; *see also supra* 10.

[11] *Id.*

[12] The deadlines for mailing absentee ballots often occur before nomination petition objections procedures have been completed, and therefore before the ballots are finalized. The Pennsylvania Elections Code provides for this possibility by allowing counties to mail "special write-in absentee ballots," along with a list of potential candidates and ballot questions. 25 P.S. § 3146.3(d).

Event	Original Date	Date Under Revised Schedule
Primary election	May 15, 2018 (Legislative Appl. B ¶ 422)	unchanged

Finally, the Pennsylvania Department of State is well accustomed to handling alterations to districts and ballots in the months – or weeks, or days – before an election. On some recent occasions, the General Assembly has been responsible for these late-breaking changes, suggesting that Pennsylvania legislators generally have confidence in the Department of State's ability to react to new circumstances without causing electoral chaos or confusion. For example, the General Assembly enacted the 2011 Plan on December 22, 2011; the scheduled petition circulation period began just over a month later, on January 24, 2012, and the primary date was four months and two days later, on April 24, 2012. Thus, the Department of State had just a little more time to implement the 2011 Plan than it will have to implement a 2018 plan, at a time when its technology was likely less advanced than it is today. Nonetheless, there is no evidence that anyone in the General Assembly expressed any concern about casting the 2012 primary into confusion or chaos, and there is no evidence that confusion or chaos ensued. To give another example, on April 11, 2016, only 14 days before the 2016 primary, the General Assembly voted to remove a ballot question about judicial retirement age from the statewide ballot. *See* "Referendum on Raising Judges' Retirement Age Delayed Until Fall Election," Apr. 11, 2016.[13] The Pennsylvania Supreme Court

[13] *See* Jan Murphy, *Referendum on raiding judges' retirement age delayed until fall election*, PennLive, Apr. 11, 2016,

has also ordered last minute changes to ballots; in 2014, for example, it removed a Republican gubernatorial candidate from the ballot 19 days before the primary, *see In re Guzzardi*, 91 A.3d 701 (Pa. 2014), and in 2016, it reinstated a Democratic candidate for U.S. Senate on the ballot one week before the primary. *See In re Vodvarka*, 135 A.3d 1017 (Pa. 2016).[14]

B. Redistricting Will Have No Effect On Election Dates, Locations Or Procedures, And Does Not Risk Voter Confusion.

Applicants paint a picture of a chaotic election, with millions of voters being so confused by the process that they stay home. Legislative Appl. 19. This prediction defies common sense, and there is no evidence to support it. Applicants' speculative and implausible arguments cannot help them meet their burden of showing irreparable harm.

First, the Court can look to the most recent parallel situation – the 2012 primary election, which took place four months after the 2011 Plan went into effect. Voters in that election faced the same changes that they will face here. Presumably, if there were any evidence that they were confused or that turnout was depressed, Applicants would have presented it at some point in these proceedings. Even if Applicants lacked evidence that the 2011 Pennsylvania redistricting caused

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http://www.pennlive.com/politics/index.ssf/2016/04/referendum_on_raising_judges_r.html

[14] Moreover, if the Pennsylvania Supreme Court had had any concern about elections management, it could have postponed the 2018 primary, a solution that would have given the Department of State more time to prepare but would also have increased counties' costs and logistical challenges. *See* App. A ¶¶ 22-27. The court, with its deep institutional knowledge of Pennsylvania elections, chose to maintain the scheduled primary date, signaling its confidence in the Department of State's ability to put a new districting map in place.

confusion or depressed turnout, they could have turned to evidence that *other* redistrictings caused these problems – if such evidence existed. There is not, however, any body of literature discussing "problems" caused by congressional redistrictings, which take place in every state at least every ten years, because redistricting is something that voters, election officials and candidates take in their stride.

Second, from the voter's point of view, a redistricting, without more, simply does not carry much potential for confusion. The boundary changes at issue here will have very little effect on voters' experiences. The changes will not affect the election date, the location or hours of polling places, the identities or roles of local elections officials, voters' registration status, the procedures they must follow, or the machines they use. Voters will see the same ballot, with the same names of candidates for U.S. Senator and state and local offices, that they would have seen without the redistricting. Absentee voters will receive their ballots from the same county. The only change, for *only some* of the voters, will be the names of candidates for U.S. Congress.[15]

Seeing a ballot that is missing a familiar name in the list of congressional candidates, however, is not unusual – that happens whenever an incumbent steps down. It seems implausible that voters would be so distressed by such a change

[15] Voters in one-third of Pennsylvania's 18 current districts will not see their current Congressman on the ballot in any event, because there will be six open seats. Rep. Tim Murphy, the incumbent in the 18th District, resigned in October 2017, Rep. Lou Barletta is running for a Senate seat, and between September 2017 and January 2018, four other Congressmen announced that they would not run for reelection.

that "chaos" or mass confusion will ensue. Moreover, education is the remedy to voter confusion, and before this election there will be extensive education about what the new congressional boundaries are. In its 2011 statute, the General Assembly required the Department of State to publish written descriptions of the new districts in newspapers throughout the Commonwealth. 25 P.S. § 3596.304. Before this election, the Department of State will comply with any such provisions, and will also make a separate effort to educate the public through social media updates, press releases, and website postings. Political parties and community groups will undoubtedly carry out their own education efforts. It is not uncommon for this reeducation to happen quickly. The 2011 Plan, for example, became law on December 22, 2011, the Department of State advertised the new lines in newspapers on January 18, 19, and 20, and the petition filing period began on January 24, 2012.

All of this education will come in the context of the enormous interest that this lawsuit has generated in the Commonwealth. The Pennsylvania Supreme Court's Order and the ongoing redistricting efforts have been reported widely. *See, e.g.*, David Weigel, '*A democracy that's anything but democratic': A gerrymandering Q&A with Pennsylvania Gov. Tom Wolf,* THE WASHINGTON POST, Jan. 26, 2018.[16]

[16] *See* https://www.washingtonpost.com/news/powerpost/wp/2018/01/26/a-democracy-thats-anything-but-democratic-a-gerrymandering-qa-with-pennsylvania-gov-tom-wolf/?utm_term=.cd008a4df9b0. In a local example, the *Allentown Morning Call* published a primer on gerrymandering issues and the status of this case. *See* Steve Esack and Lauar Olson, *Confused About the Pennsylvania Congressional Map Ruling?* ALLENTOWN MORNING CALL, Jan. 25, 2018, http://www.mcall.com/news/nationworld/pennsylvania/mc-nws-congressional-districts-explained-20180123-story.html. In their amicus brief, Pennsylvania state

The Governor recently held three redistricting "listening sessions" across Pennsylvania[17], and local Pennsylvania publications are publishing analyses of how redistricting might affect local congressional races. *See* Matthew Rink, *State's Congressional Districts Ruled Unconstitutional*, GOERIE.COM, Jan. 23, 2018.[18]

Unable to make a persuasive argument that redistricting will confuse Pennsylvania voters on Election Day, Applicants present a list of reasons that a new map will somehow confuse voters *before* Election Day in a way that education cannot remedy. For example, Applicants argue that if a voter is asked to sign a nominating petition for an unfamiliar district, the voter may be confused. *See* McCann Appl. 19-20. This seems unlikely. Only a small fraction of voters will be called upon to sign a petition, because a congressional candidate needs only 1,000 valid signatures to run (each current district has a population of more than 700,000). Moreover, the people circulating petitions will presumably tell voters what they are asking them to sign and why they are asking them to sign it.

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legislators take the article's title literally, citing it as evidence that voters are, in fact, "confused." *See* Amicus Brief of Members of Congress at 20. In fact, that article, shows how voters are being educated about what redistricting is and why it is happening.

[17] *See, e.g.,* Press Release, Governor Wolf Holds Non-Partisan Redistricting Listening Session in Western Pennsylvania (Feb. 1, 2018) https://www.governor.pa.gov/governor-wolf-holds-non-partisan-redistricting-listening-session-western-pennsylvania/ and Press Release, Governor Wolf Hosts Non-Partisan Redistricting Listening Session with Philadelphia Residents (Jan. 31, 2018), https://www.governor.pa.gov/governor-wolf-hosts-non-partisan-redistricting-listening-session-philadelphia-residents/.

[18] http://www.goerie.com/news/20180123/states-congressional-districts-ruled-unconstitutional

To give another example, Applicants speculate that voters in the 18th District, which is holding a special election on March 13, will also be confounded by the redistricting. Again, the likelihood of confusion is slim. There will not be competing petitions circulating for two different districts, because the candidates for the special election were nominated by their parties. Petition circulators can and will use the opportunity to explain the difference between the special election and the primary election and urge voters to vote in both – just as they would have done if the district boundaries had remained the same. And that election's high national profile and enormous spending by outside groups means that voters will have more opportunities than usual to become educated about the process. *See, e.g.*, David Weigel, *GOP super PAC puts $1.5 million into tight Pennsylvania special election,* THE WASHINGTON POST, Jan. 23, 2018.[19] Once the special election is over, candidates for the May 2018 primary will have two months to educate voters about any changes to the district boundaries.

C. The General Assembly Is More Than Capable Of Creating A New Map In The Time Allowed.

Applicant Scarnati has represented to the Pennsylvania Supreme Court that the Pennsylvania General Assembly is beginning the process of enacting a new map, as the Order contemplates. *See* Joseph B. Scarnati III Letter to Pennsylvania Supreme Court, Jan. 31, 2018, at 2 n.2 (citing S.B. 1034 (2018), H.B. 2020 (2018)). Nonetheless, Legislative Applicants complain that the Court has given the

[19] *See* https://www.washingtonpost.com/news/powerpost/wp/2018/01/23/gop-super-pac-puts-1-5-million-into-tight-pennsylvania-special-election/.

legislature "only 18 days to create and secure the Governor's approval for a new plan." Legislative Appl. 20. However, they point to no authority suggesting that this is not enough time.[20]

In fact, the General Assembly moved the 2011 Plan through the legislative process in far less than that amount of time, suspending procedural rules to push the plan through the Senate on the same day it was introduced and getting it signed into law within eight days. (Legislative Appl. B ¶¶104-109, 114-121, 126, 128.)

Courts have routinely ordered the enactment of new redistricting plans in similar timeframes. In *Mellow*, the Pennsylvania Supreme Court affirmed an order that required the General Assembly to enact a redistricting map within 12 days of its ruling. *Mellow* v. *Mitchell*, 607 A.2d 204 (1992), *cert denied sub nom Loeper* v. *Mitchell*, 506 U.S. 828 (1992). *See also Larios* v. *Cox*, 305 F. Supp. 2d 1335, 1342 (N.D. Ga. 2004) (giving state legislature three weeks to craft a new plan); *League of United Latin Am. Citizens* v. *Perry*, 457 F. Supp. 2d 716, 718 (E.D. Tex. 2006) (setting a deadline of 16 days for the parties to submit new maps).[21]

Applicants' own admissions belie their protests. At oral argument before the Pennsylvania Supreme Court, Legislative Respondents' counsel represented that

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[20] Instead, they cite to the inapposite *Butcher* v. *Bloom*, in which this Court allowed elections to proceed under an existing map after striking it down a mere six weeks before the general election in November, and more than five months *after* the primary. *Butcher* v. *Bloom*, 203 A.2d 556, 568 (Pa. 1964). Here, there are four months left until the primary and more than nine months until the general election.

[21] North Carolina has codified a two-week rule for remedying districting plans: under N.C. Gen. Stat. § 120–2.4, North Carolina's General Assembly is afforded two weeks to remedy any defect identified by a North Carolina court, after which the court is free to impose its own interim plan.

the General Assembly "would like at least three weeks" to draw a new map. *See* Pennsylvania Supreme Court Oral Argument, January 17, 2018 (Torchinsky) at 1:46:05.[22] If the General Assembly's leadership fails to move this legislation at the pace the Court contemplates, it will be because they lack the will to do so, not because they are not able to do so.

D. Congressional Candidates' Inconvenience Is Not A Cognizable Harm.

There is no right, under either Pennsylvania or federal law, to proceed under an unconstitutional redistricting map. Nevertheless, the McCann Applicants beseech this Court to protect their "right" to carry out various election activities "in reliance on Pennsylvania's existing congressional districts." McCann Appl. 1. The McCann Applicants' position—that because they have benefited from an unconstitutional map for three election cycles, they have earned the right to enjoy a fourth—has no basis in the law, and the McCann Applicants do not cite a single authority to support it. Instead, they lean heavily on the same claims of chaos and confusion that Legislative Applicants make.

The McCann Applicants' claims of harm are merely claims of inconvenience. For example, they claim that "[c]andidates for Congress will not have the advantage of state and local parties to circulate petitions or volunteers who circulate petitions for all offices" if congressional candidates circulate nomination petitions a few

[22] Legislative Respondents' co-counsel suggested the General Assembly "need[s] a month" – only slightly more time than the Court has allotted. See Pennsylvania Supreme Court Oral Argument, January 17, 2018 (Braden) at 2:12:45 (PNCTV television broadcast Jan. 19, 2018, available at https://pcntv.com/pacourts/).

weeks after other candidates. McCann Appl. 17. These alleged inefficiencies do not rise to the level of irreparable injury required to warrant a stay.

Even in their own right, the McCann Applicants' concerns are overblown. Candidates running for Congress will have all the tools they need to campaign in their reconfigured districts. Although Applicants complain that "changing congressional districts during the nomination petition circulation period" could cause a voter to sign a nomination petition for the wrong district (McCann Appl. 19), the districts will be redrawn before the circulation period for congressional candidates begins.[23] And despite applicants' protests that their opportunity to campaign will be cut short (McCann Appl. 17), candidates will be able to identify the voters in their new districts as soon as new district lines are in place. Because the Department of State uses a computer-based system to create and update the eligible voter rolls, the Department can generate the list of voters in each county and district and provide them to candidates within a few days – at most – of learning the new district boundaries. Indeed, the Statewide Uniform Registry of Electors ("SURE") system, which electronically stores each voter's name, address, county, and district, along with other information, is updated in real-time and releases a new version of the complete voter list weekly.[24] This list, which tells candidates where and from whom they should seek petition signatures, is available online on a few minutes' notice.

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[23] In fact, even under the original election calendar, candidates would not have been permitted to circulate petitions until February 13, 2018. Legislative Appl. B ¶ 423.

[24] *See* Pa. Dept. of State, Full Voter Export, https://www.pavoterservices.pa.gov/Pages/PurchasePAFULLVoterExport.aspx.

IV. The Equities Do Not Favor A Stay.

In "close cases," the Court will "balance the equities and weigh the relative harms to the applicant and to the respondent" of granting or denying a stay. *Hollingsworth*, 558 U.S. at 190. This is not a close case; Applicants are incapable of establishing any of the requisite standards for relief. They have not made a credible claim of irreparable harm. Nor is the Court faced here with competing rights, where free speech and equal protection interests pull in one direction and the right to proceed under the existing districting map pulls in the other. The contest before this Court is one between an ongoing state constitutional violation and a speculative logistical burden. The equities overwhelmingly counsel against a stay.

At stake for Challengers is their fundamental interest in participating in fair elections under a valid districting map. Under Pennsylvania's Free Expression and Free Association Clauses, the government cannot discriminate or retaliate against protected political expression and association. Pa. Const. art. I, §§ 7, 20. Pennsylvania's equal protection guarantees prohibit intentional discrimination against individuals based on their political views. Pa. Const. art. I, §§ 1, 5, 26. These doctrines are not mere "lofty rhetoric," nor are they "paltr[y] … concerns" (Legislative Appl. 20-21): they are core constitutional principles that recognize the central importance of voting in the Commonwealth. The harm Challengers would suffer if forced to proceed through a fourth consecutive election cycle under a map that has been declared constitutionally invalid by the Pennsylvania Supreme Court is staggering. Many courts have denied stays in redistricting precisely because they recognize that the practical effect of a stay is the perpetuation of a constitutional

violation. *See, e.g.*, *Personhuballah* v. *Alcorn*, 155 F. Supp. 3d 552, 560 (E.D. Va. 2016); *Larios* v. *Cox*, 305 F. Supp. 2d 1335, 1336, 1344 (N.D. Ga. 2004); *Vera* v. *Bush*, 933 F. Supp. 1341, 1348 (S.D. Tex. 1996).

As the timeline set out above makes clear, *supra* § III.A, time is of the essence. Any stay by this Court will impede Pennsylvania's ability to hold elections using a map that complies with the Commonwealth's constitution. Even a short stay may well require more drastic changes to the current calendar, and a lengthier one may jeopardize any prospect of holding this year's elections under a constitutional map. A stay therefore threatens to impose a harm of constitutional dimensions on the Challengers (and the Commonwealth itself) by postponing or denying them their rights under the state constitution as authoritatively determined by the Commonwealth's highest court.

By contrast, Applicants' harm will be administrative, taking the form of increased resources and potential inconvenience. Although Applicants claim that their interest is in the "integrity" of the 2018 elections (Legislative Appl. 3) and the "constitutional rights of all voters" (McCann Appl. 14), their concerns appear to rise and fall on the election's administrative predictability – the fact that the current map has been in effect for several years and has "acclimat[ed] voters and potential candidates alike to the current lines" (Legislative Appl. 18), and the expectation that districts "will not be changed mid-Plan" (McCann Appl. 21). To the extent that Applicants can claim a valid interest in maintaining the status quo, that interest must cede to the constitutional concerns at stake. *Cf. Steagald* v. *United States*, 451

U.S. 204, 222 (1981) ("Whatever practical problems remain, however, cannot outweigh the constitutional interests at stake.").

CONCLUSION

For the reasons stated above, the Applications for Stay should be denied.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER

Dated: February 2, 2018

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APPENDIX A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

League of Women Voters of Pennsylvania, *et al.*, *Petitioners,* v. The Commonwealth of Pennsylvania, *et al.*, *Respondents.*	**No. 261 MD 2017**

AFFIDAVIT OF JONATHAN MARKS

Jonathan Marks, being duly sworn, deposes and says:

1. I am Commissioner of the Bureau of Commissions, Elections and Legislation (the "Bureau"), a bureau of the Commonwealth's Department of State (the "Department").

2. I was appointed to the position of Commissioner in October 2011.

3. I have been with the Bureau since the Fall of 2002.

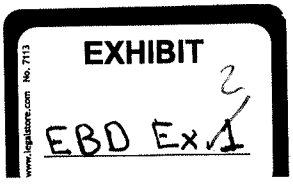
4. From 2008 to 2011, I served as the Chief of the Division of the Statewide Uniform Registry of Electors.

5. Prior to that, from 2004 to 2008, I served as the Chief of the Division of Elections.

6. I am responsible for overseeing the day to day operations of the Bureau, which include election administration.

7. I have supervised the administration of the Department's duties in more than 20 regularly scheduled elections and a number of special elections.

8. The next Congressional primary is scheduled for May 15, 2018.



9. The current timeline of deadlines leading up to the May 15 primary is set forth at paragraphs 130-152 of the Joint Stipulation of Facts filed on December 8, 2017.

10. All of the deadlines set forth in paragraphs 130-152 of the Joint Stipulation of Facts are required by federal or state law.

11. The earliest deadline on the current election calendar is February 13, 2018, the first day for circulating and filing nomination petitions. *See* Joint Stipulation of Facts ¶ 131.

12. In order to prepare for this February 13 deadline, it would be highly preferable to have all Congressional district boundaries finalized and in place by January 23, 2018, which would give the Department three weeks to prepare.

13. However, should there be a Court order directing that a new plan be put in place, and that plan is not ready until after January 23, it may still be possible for the 2018 primaries to proceed as scheduled using the new plan.

14. Through a combination of internal administrative adjustments and Court-ordered date changes, it would be possible to hold the primaries on the scheduled May 15 date even if a new plan is not put into place until on or before February 20, 2018.

15. First, the current elections schedule gives the Counties ten weeks between the last date for circulating and filing nomination petitions (currently March 6) and the primary election date to prepare for the primary election.

16. Based on my experience, the Counties could fully prepare for the primary election in six to eight weeks.

17. Therefore, I believe that the close of the nomination petitions period could be moved back two weeks to March 20, without compromising the elections process in any way.

18. Second, if the Court were to order a time period for circulating and filing nomination petitions that lasted two weeks, instead of three, the nominations period could start on March 6.

19. Third, as stated above, the Department would normally need three weeks of preparation time before the first date for filing and circulating nomination petitions.

20. However, with the addition of staff and increased staff hours, it would be possible for the Department to complete its preparations in two weeks instead of three.

21. Accordingly, if the first date for filing and circulating nomination petitions was moved to March 6, as described above, the Department would need to have a final plan in place by approximately February 20, 2018.

22. Should there be a Court order directing that a new plan be put in place, and that plan is not ready until after February 20, 2018, it would also be possible, if the Court so ordered, to postpone the 2018 primary elections from May 15 to a date in the summer of 2018.

23. There would be two options under this scenario: (1) the Court could postpone all of the primary elections currently scheduled for May 15; or (2) the Court could postpone the Congressional primary election alone. Either option would require a primary date no later than July 31, 2018.

24. Depending on the date of the postponed primary election, the date by which the new plan would be put in place could be as late as the beginning of April 2018.

25. Postponement of the primary in any manner would not be preferable, because it would result in significant logistical challenges for County election administrators. If postponement takes place, for administrative and cost savings reasons, the Department's preferred option would be postponement of the entire primary.

26. Postponing the Congressional primary alone would require the administration of two separate primary elections (one for Congressional seats and one for other positions), which would result in an additional expenditure of a significant amount of public funds.

27. The cost of holding a single primary in 2018 would be approximately $20 million. If two primaries are held, each will cost approximately $20 million.

28. For each primary, Pennsylvania's 67 Counties will be reimbursed a portion of the costs associated with mailing absentee ballots to certain military and overseas civilian voters and bedridden or hospitalized veterans. The other costs of the primary are paid by the Counties. This is similar to the way that costs are allocated in special Congressional elections.

29. Should the Court wish for more details regarding the costs of postponing a primary or the timeline leading up to any primary date that the Court selects, I stand ready to provide them.

30. The Department will make every effort to comply with any schedule that the Court puts in place.

Jonathan Marks

Sworn to and subscribed before me

This 14 day of December, 2017

Notary Public

Commonwealth of Pennsylvania
NOTARIAL SEAL
Danielle Renee Osman, Notary Public
City of Harrisburg, Dauphin County
My Commission Expires June 26, 2018