No. 17A795

In The
Supreme Court of the United States

Michael C. Turzai, in his capacity as Speaker of the Pennsylvania House of Representatives, et al.,
Applicants,
v.
League of Women Voters of Pennsylvania, et al.,
Respondents

Emergency Application for Stay Pending Appeal
to the Supreme Court of the United States from the January 22 and 26, 2018 Orders of the Pennsylvania Supreme Court (159 MM 2017)

OPPOSITION TO EMERGENCY APPLICATION FOR STAY PENDING RESOLUTION OF APPEAL TO THIS COURT

To the Honorable Samuel A. Alito, Jr.
Associate Justice of the United States and
Circuit Justice for the Third Circuit

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On behalf of Respondent Michael J. Stack III, in his Capacity as Lieutenant Governor of Pennsylvania and President of the Pennsylvania Senate

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TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE THIRD CIRCUIT:

Respondent Michael J. Stack, III, in his capacity as Lieutenant Governor of Pennsylvania and President of the Pennsylvania Senate, opposes the Emergency Application for Stay Pending Resolution of Appeal to this Court of Pennsylvania Speaker of the House of Representative Michael C. Turzai and Pennsylvania Senate President Pro Tempore Joseph B. Scarnati, III ("Applicants").[1] Respondent Stack joins in the opposition of the Petitioners, the League of Women Voters and individual voters from each of Pennsylvania's eighteen congressional districts; and of the Executive Branch Respondents, Pennsylvania Governor Thomas W. Wolf, Acting Pennsylvania Secretary of State Robert Torres and Pennsylvania Bureau of Commissions, Elections and Legislation Commissioner Jonathan Marks.[2]

I. INTRODUCTION

For the reasons that Petitioners and Executive Respondents address, Lt. Gov. Stack opposes the Applicants' attempt to encroach upon the fundamental right and duty of the Pennsylvania Supreme Court "to say what the law is" with regards to the Pennsylvania Constitution. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803);

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[1] Lt. Gov. Stack similarly opposes the Emergency Application for Stay Pending Resolution of Appeal to this Court filed by the Intervenors (Pennsylvania Republicans who opposed Petitioners' action before the Pennsylvania Supreme Court), pending in this Court at Docket No. 17A802.

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

Murdock v. *City of Memphis*, 87 U.S. (20 Wall.) 590 (1875). Lt. Gov. Stack writes separately to address three points:

- Applicants' attack on the Pennsylvania Supreme Court's impartiality, through innuendo alone, must fail.
- Applicants' assertion that the Pennsylvania Supreme Court's January 22, 2018 Order allows for insufficient time and guidance to create a constitutional map defies both law and fact.
- In Pennsylvania, enactment of a redistricting plan follows the same process as any other Pennsylvania statute, subject to judicial review under the Pennsylvania Constitution, as interpreted by the Pennsylvania Supreme Court, and consistent with this Court's understanding of redistricting as state legislation. See *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015).

Here, the Pennsylvania Supreme Court properly reviewed the Pennsylvania General Assembly's legislative enactment, Act 131 of 2011 (the "2011 Plan"), and its order rejecting that plan and requiring the General Assembly to create a new plan – a plan that complies with the requirements of the Pennsylvania Constitution – should not be stayed.

II. ARGUMENT

The Pennsylvania Supreme Court has the right to review Pennsylvania law under the Pennsylvania Constitution. The Applicants' acceptance of this fundamental precept renders their request for any emergency relief from this Court improper. (Applicants' Br. 9); see, *e.g.*, *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590 (1875) (holding that state constitutional review is the province of state

supreme courts, and is not within the jurisdiction of this Court). Yet, because they are dissatisfied with how the Pennsylvania Supreme Court interpreted the Pennsylvania Constitution, Applicants attempt to contrive federal questions that might bring this Court into a dispute that involves only state law.

Applicants insinuate that three of the seven Pennsylvania Supreme Court justices were impermissibly biased; assert that the court has seized redistricting powers for itself at the expense of the state legislature, citing the Elections Clause of the United States Constitution (art. I, § 4); and claim that they are incapable of drawing a compliant map in time for the May 15, 2018 primary, despite the fact that the Applicants themselves were able to draw their unconstitutional plan in only eight days. Their arguments are baseless and should be seen for what they are: rank alchemy that fails to transmute Pennsylvania constitutional issues into purported federal transgressions.

A. Applicants' Attack On The Integrity Of The Pennsylvania Supreme Court Is Unfounded And Offensive, And Has Been Waived

Applicants insinuate that Petitioners counsel's single reference, in oral argument, to an amicus brief filed on behalf of the Pennsylvania AFL-CIO and other labor unions, had the effect of irreparably biasing three of the seven Pennsylvania Supreme Court Justices. This attack on the integrity and credibility of the Pennsylvania Supreme Court is an offensive attempt to inject a federal question into this state matter. Applicants had no basis to assert any conflict of

interest issue to the Pennsylvania justices themselves and waived any possible claim by failing to do so.[3]

1. The Applicants Failed To Seek Recusal Before The Pennsylvania Supreme Court And Have Waived Any Issue

On October 11, 2017, the League of Women Voters filed an Application for Extraordinary Relief with the Pennsylvania Supreme Court, asking the Court to take jurisdiction over a challenge to the 2011 Plan as an impermissible partisan gerrymander under the Pennsylvania Constitution. Application for Extraordinary Relief, 159 MM 2017 (Pa. Oct. 11, 2017 10:54 p.m.). On November 9, 2017, the Pennsylvania Supreme Court accepted jurisdiction over the case. Order Granting Application for Extraordinary Relief, 159 MM 2017 (Pa. Nov. 9, 2017 3:18 p.m.). During the more than four months that the Pennsylvania Supreme Court reviewed this matter, Applicants never requested the recusal of any of the Court's justices,

[3] In a footnote, Applicants allude to the fact that Pennsylvania elects its Supreme Court Justices on partisan ballots. They juxtapose a reference to the Pennsylvania Supreme Court's 2017 decision to invalidate the 2011 congressional redistricting map with a 5-2 vote with a reference to the Pennsylvania AFL-CIO's independent expenditures and direct contributions to three of the justices in the majority in the 2015 election. (Br. at 5-6 n.1). Applicants close this miasma of implications with a *conferatur* citation to this Court's opinion in *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009), where this Court held that the United States Constitution required a West Virginia Supreme Court of Appeals Justice to recuse himself when a party in a case pending during a judicial election was the source of the majority of money spent in favor of that Justice's election. The facts in that case are in no way comparable to those here.

nor did they otherwise present any information to the justices to allow them to evaluate any putative concerns.

Applicants failed to take any action, despite that court's invitation to do so. Multiple Pennsylvania Supreme Court justices filed Notices of Disclosure indicating their relationship with different parties and counsel involved in the case. *See, e.g.,* Notice of Disclosure of Justice Christine Donohue, 159 MM 2017 (Pa. Jan. 11, 2018 12:11 p.m.); Amended Notice of Disclosure of Justice Sallie Updyke Mundy, 159 MM 2017 (Pa. Nov. 3, 2017 11:07 a.m.); Notice of Disclosure of Debra Todd, 159 MM 2017 (Pa. Oct. 20, 2017 3:15 p.m.). Justice Debra Todd noted that she had received a $6,000 donation to her campaign from counsel for the Intervenors, who filed an Emergency Application to this Court seeking a stay of the decision she joined. Each Notice of Disclosure indicated that the Justice would consider recusal if a party filed a motion explaining why they believed it was necessary. *Id.* Applicants took ***no*** action with respect to any of the Justices' Notices nor on any other basis.

As a result, Applicants waived any argument as to any claims of bias against any Justices of the Pennsylvania Supreme Court. In *Caperton*, a party sought recusal of the allegedly biased justice in the West Virginia courts not once, but three times. 556 U.S. at 875. By contrast, Applicants here attack the dignity and integrity of the Pennsylvania Supreme Court despite not once seeking recusal of any of the justices. See *U.S.* v. *Rodriguez*, 627 F.3d 1372, 1379 (11th Cir. 2010) (recognizing the "contemporaneous objection" requirement for seeking recusal of a judicial officer); see also *McKernan* v. *Superintendent Smithfield SCI*, 849 F.3d 557

(3d Cir. 2017) (holding that failure to seek recusal of a biased judicial officer constituted ineffective assistance of counsel).

2. Even If Applicants Had Not Waived This Argument, Their Insinuation Of Bias Is Unprofessional And Inconsistent With This Court's Understanding Of Bias In The Context Of An Elected Judiciary

If Applicants truly question the integrity of Pennsylvania Supreme Court justices, their counsel may have violated their professional obligations under the Pennsylvania Rules of Professional Conduct by failing to raise this claim sooner. See Pa. Rule of Professional Conduct 8.3 (b).[4] Applicants have waived any issues related to bias. [5]

Further, Applicants have failed to show that any conduct in this case in any way reflects the unique and extreme circumstances that were present in *Caperton.* 556 U.S. at 886-87 ("on these extreme facts…").[6] In the context of independent

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[4] Because this argument is a baseless attempt to seek to inject a purported federal issue into this matter, Applicants have similarly violated Pa. Rule of Professional Conduct 8.2(a), which prohibits reckless statements regarding the qualifications or integrity of a judge.

[5] It is noteworthy that counsel for Intervenors, a member of the Pennsylvania bar, has not questioned the impartiality of the Pennsylvania Supreme Court. Lead counsel who signed this Application are not admitted to the Pennsylvania bar and were serving pro hac vice under supervision of local Pennsylvania counsel.

[6] In *Caperton*, a West Virginia jury entered a judgment against A.T. Massey Coal Co. in the amount of $50 million dollars. 556 U.S. at 872. After the verdict, but before the appeal, West Virginia held a partisan election for a seat on its Supreme Court of Appeals. *Id.* at 873. Massey's Chairman, Don Blankenship, spent $3 million in support of a candidate for that position. *Id.* Blankenship's $3 million was more than the total amount spent by all other supporters of that candidate and three times the amount the candidate himself spent. *Id.* In fact, Blankenship's

expenditures, this Court has noted that *Caperton* only requires a judge "to recuse himself 'when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case…when the case was pending or imminent.'" *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310, 360 (*quoting Caperton*, 129 S. Ct. at 2263-64).

The League of Women Voters, and individual citizens of Pennsylvania, brought claims as Petitioners against the Applicants, seeking relief under the Pennsylvania Constitution. Because Applicants cannot assert any bias among the Justices and Petitioners, Applicants instead single out the Pennsylvania AFL-CIO, one of the eight entities that filed an amicus brief to the Pennsylvania Supreme Court on behalf of the Petitioners.[7] The Pennsylvania AFL-CIO's brief presented a scholarly examination of a Pennsylvania Constitutional provision under a *Commonwealth* v. *Edmunds* analysis.[8] For the Applicants to target the

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spent $1 million more than both candidates' campaign committees, combined. *Id.* Blankenship's selected candidate won, and refused to recuse himself on Massey's pending appeal. *Id.* at 874.

[7] Other amici included: 1) The Campaign Legal Center; 2) the American Civil Liberties Union; 3) Common Cause; 4) The Brennan Center; 5) The Pittsburgh Foundation; 6) A collection of nationally recognized political scientists; and 7) Political scientists Bernard Grofman and Ronald Keith Gaddie. All of these amici wrote to oppose unchecked partisan gerrymandering, and come from a variety of viewpoints. For example, The Pittsburgh Foundation manages over one billion dollars in assets devoted to philanthropic causes in western Pennsylvania. *See* THE PITTSBURGH FOUNDATION, https://pittsburghfoundation.org/financials (last accessed Feb. 2, 2018). Applicants were apparently unable to enlist any third party willing to support their position favoring extreme gerrymandering.

[8] 586 A.2d 887 (Pa. 1991). There, the Pennsylvania Supreme Court held that when a party argues that a constitutional provision under the Pennsylvania Constitution

Pennsylvania AFL-CIO in an effort to support their claims of bias highlights their desperation to inject a federal issue into this dispute—where none exists.

In *Caperton,* Chief Justice Roberts expressed concerns that this Court's opinion would "inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be." 556 U.S. at 891 (Roberts, C.J., dissenting). The standard that Applicants advocate here would substantially increase the potential for unfounded allegations of bias.[9] This Court has recognized the permissibility of partisan judicial elections. *Republican Party of Minn.* v. *White*, 536 U.S. 765 (2002). Pennsylvania's constitution has long provided for judicial elections. Pa. Const. art. V, § 13 ("justices…shall be elected at the municipal election next preceding the commencement of their respective terms of office by the electors of the Commonwealth…"). *Caperton* cannot be invoked before every Pennsylvania judicial officer. See *Freeman* v. *Pittsburgh Glass Works, LLC*, 709 F.3d 240, 254-55 (3d Cir. 2013) (analyzing *Caperton* and holding that donation and

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affords greater protections than its federal counterpart, it must also present a particular historical analysis of that Pennsylvania constitutional provision. See Brief of Amici Curiae, Pennsylvania AFL-CIO and Other Pennsylvania Unions in Support of Petitioners, 159 MM 2017 (Pa. Jan. 5, 2017 2:05 p.m.) at 13-15. Under that analysis, the Pennsylvania Supreme Court has already determined that the Pennsylvania Constitution affords greater protections with respect to political activity and viewpoint-neutrality than does the federal constitution. See *Pap's A.M.* v. *City of Erie*, 812 A.2d 591, 601 (Pa. 2002); *DePaul* v. *Commonwealth*, 969 A.2d 536, 546 (Pa. 2009).

[9] The standard Applicants would set, in their post-hoc demand for recusal, would require all judges to recuse themselves on any case that addresses any issue on which any significant contributor or helpful independent expenditure party has expressed an opinion. This standard would defy this Court's recognition of the right of interested citizens and groups to make independent expenditures on behalf of candidates. *Citizens United*, 558 U.S. at 360.

expenditure on partisan judicial elections under the Pennsylvania Election Code does not automatically result in partiality, as partisan judicial elections invite donations and expenditures from interested parties).

3. Despite Applicants' Insinuations, The Facts Here Do Not Support Their Efforts To Imply Bias

This Emergency Application does not address a situation remotely resembling the facts in *Caperton*. This matter was not pending before the Pennsylvania Supreme Court, or any court, at the time of the 2015 Pennsylvania elections. Further, the conduct of the Pennsylvania Supreme Court Justices themselves during the case demonstrates the absence of any bias. On November 9, 2017, the Pennsylvania Supreme Court took this matter "under continuing supervision." Order Granting Application for Extraordinary Relief, 159 MM 2017 (Pa. Nov. 9, 2017 3:18 p.m.). That Order required the President Judge of the Pennsylvania Commonwealth Court, who was elected as a Republican candidate, to assign a commissioned judge of the Commonwealth Court for the development of an evidentiary record and proposed findings of fact and conclusions of law. (*Id.*). [10]

The Commonwealth Court President Judge chose Judge P. Kevin Brobson, who was also elected to the Commonwealth Court as a Republican candidate, to

[10] At the time, the Pennsylvania Commonwealth Court had eight judges who were elected as Republican candidates and only one judge elected as a Democratic candidate. Nothing prohibited the Pennsylvania Supreme Court from issuing an Order specifying a specific person to develop that evidentiary record, but the court chose to allow a judge who was elected as a Republican to hear evidence, evaluate witnesses and testimony and make findings of fact for them in the first instance.

conduct the hearing. Judge Brobson developed a factual record that included, among other findings, the following:

- Judge Brobson found that Petitioners' expert witnesses were credible. (Finding of Fact ¶ 414). Judge Brobson accepted their opinions and determined that "the 2011 Plan has a partisan skew in favor of Republican candidates. Indeed, by their respective measures, the skew is substantial in relation to their method of comparison." (*Id.*);

- With respect to the Applicants' two expert witnesses (their only witnesses), Judge Brobson found "the testimony of Drs. Cho and McCarty largely not credible in their criticisms of Petitioners' expert witnesses, and the testimony of Drs. Cho and McCarty did not provide the Court with any guidance as to the test for when a legislature's use of partisan consideration results in unconstitutional gerrymandering." (*Id.* ¶ 415); and

- In his conclusions of law, Judge Brobson determined that "a lot can and has been said about the 2011 Plan, much of which is unflattering and yet justified." (Conclusion of Law ¶ 63).

Recommended Findings of Fact and Conclusions of Law, 261 M.D. 2017 (Pa. Commw. Ct. Dec. 29, 2017 2:34 p.m.). Applicants presented nothing at trial to defend the 2011 Plan under any traditional redistricting criteria. Given that factual record, the Pennsylvania Supreme Court's ruling is unsurprising.

Applicants had no basis for asking any of the Justices of the Pennsylvania Supreme Court to recuse themselves when they appeared before that court and they have waived any claim of bias. Yet, here, after receiving a ruling they do not like, they cavalierly impugn the integrity of the entire court. Applicants' effort to assert

that the Pennsylvania Justices must be biased against them is substantively nonsense and provides no basis for the relief Applicants seek from this Court.

B. The Schedule That The Pennsylvania Supreme Court Has Established Is Appropriate.

Applicants maintain that the Pennsylvania Supreme Court's Order to draw a new congressional map in 19 days provides insufficient time and guidance. Yet, the General Assembly, under the Applicants' leadership, enacted the 2011 Plan in only 8 days and the Pennsylvania Supreme Court provided clear guidance as to the familiar and constitutionally-appropriate parameters they must use. Applicants have shown ***no*** likelihood of success on the merits on this basis.

1. The General Assembly Can Draw The Map Within The Requisite Time

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

the Pennsylvania Supreme Court's Order, the General Assembly has been proceeding with the passage of legislation to create a new congressional map.[11]

The court's January 22 Order gave the General Assembly and the Governor the first opportunity to pass a constitutional map for Pennsylvania. Only if those parties fail to timely present a constitutionally-valid map would the court adopt a map. The court's directive is consistent with the format previously used in Pennsylvania for the development of a new map following the 1990 Census, when the General Assembly and Governor were unable to agree on a map. As a result, the Pennsylvania Supreme Court appointed the President Judge of the Commonwealth Court as a special master. In 11 days, and without the sophisticated mapping tools now available, the judge was able to draft a compliant congressional map, and to receive public input. *Mellow* v. *Mitchell*, 607 A.2d 204, 206 (Pa. 1992), *cert denied sub nom. Loeper* v. *Mitchell*, 506 U.S. 828 (1992).[12]

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[11] Respondent Stack would ask this Court to take judicial notice of the fact that, on January 29, 2018, Applicant Scarnati sponsored Senate Bill 1034 to begin the process to pass a new congressional map, which was reported out of the Senate State Government Committee 11-0, with one member not voting. On January 31, 2018, the Pennsylvania Senate voted 49-0 to refer the Bill to the House of Representatives. See BILL INFORMATION – HISTORY, SENATE BILL 1034, http://www.legis.state.pa.us/cfdocs/billInfo/bill_history.cfm?syear=2017&sind=0&body=S&type=B&bn=1034 (last visited Feb. 1, 2018). The House of Representatives is addressing redistricting under House Bill 2020. See BILL INFORMATION – HISTORY, HOUSE BILL 2020, http://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2017&sInd=0&body=H&type=B&bn=2020 (last visited Feb. 1, 2018).

[12] Here, unlike in *Mellow*, the parties already have had the opportunity to prepare and draw maps that adhere to traditional redistricting criteria, and they have access to far more sophisticated tools at their disposal. One expert witness, Dr. Jowei Chen, produced 1,000 valid maps. (Pet. Ex. 1). Applicants' own expert

Here, the Pennsylvania Supreme Court's January 22 and 26 Orders properly provide the General Assembly and Governor with an opportunity to draft a compliant map and allow for court action in the event they are not able to agree, consistent with the process in *Mellow* and the General Assembly's compressed schedule in 2011. Any argument that a new map could not be drawn in 19 days fails to recognize this historical record and is disingenuous as made by the same legislative leaders who controlled their 8-day schedule in 2011.

2. The Pennsylvania Supreme Court Has Provided Sufficient Guidance To Draw The Map And Hold The Primary And General Elections

The Applicants' assertion that the General Assembly is without guidance to draw a new map fails to acknowledge the familiar, neutral redistricting criteria that the Supreme Court explicitly set forth in its January 22 Order – "compact and contiguous territory; as nearly equal in population as practicable; and which do not divide any county, city, incorporated town, borough, township, or ward, except where necessary to ensure equality of population." See Jan. 22 Order at 3. Indeed, at oral argument, Applicants' counsel conceded that these neutral redistricting

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witness, Dr. Wendy Cho, in her peer-reviewed work, acknowledged the traditional redistricting criteria the Pennsylvania Supreme Court has required. (Tr.1332-34). She further stated that her supercomputer could produce one trillion valid maps for Pennsylvania in "about three hours." (Tr. 1348-49). Further, throughout this proceeding, Respondent Stack himself has consistently supported one of the 1,000 maps produced by Dr. Chen, Chen Figure 1 as an existing map that complies with all of the Pennsylvania Supreme Court's neutral redistricting criteria, including the use of compact districts to reduce political subdivision splits in a non-partisan manner. Brief of Respondent Michael Stack, 159 MM 2017 (Pa. Jan. 10, 2018 2:04 p.m.), at 10-15. The parties here are significantly further along with the development of a new map and have more time than in *Mellow*.

criteria already existed as a matter of Pennsylvania constitutional jurisprudence as set forth in *Mellow*, 607 A.2d at 207. See also *Holt* v. *2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 730 (Pa. 2012) (addressing traditional redistricting criteria under Pennsylvania law).[13] Further, Applicants' testifying expert, Dr. Wendy Cho, identified these criteria in her own peer-reviewed work, which was presented to the trial court. (Tr. 1332-34).[14] Finally, Lt. Gov. Stack highlighted at trial, and before the Pennsylvania Supreme Court, a map that meets the traditionally recognized criteria and consolidates virtually every regional community of interest that the 2011 Plan improperly divided. Brief of Respondent Michael Stack, 159 MM 2017 (Pa. Jan. 10, 2018 2:04 p.m.), at 10-15.

Applicants' claim that they simply cannot enact a map in the time allowed is disingenuous and does not warrant the stay they demand of this Court. They have shown no likelihood of success on the merits.

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[13] Applicants' suggestion that the Pennsylvania Supreme Court's January 22 Order refuses to recognize federal legal requirements that are not expressly laid out applies *expressio unius est exclusio alterius* to the point of absurdity. (See Applicants' Br. at 16-17). Pennsylvania courts have consistently recognized the supremacy of federal law, including the Voting Rights Act, in the context of redistricting, and Petitioners and Lt. Gov. Stack recognized the requirements of the VRA in their case-in-chief. See *Mellow*, 607 A.2d at 208; Recommended Findings of Fact and Conclusions of Law, 261 M.D. 2017 (Pa. Commw. Ct. Dec. 29, 2017 2:34 p.m.) ¶ 303.

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

C. The 2011 Plan Is Pennsylvania Legislation And Is Thus Subject To The Pennsylvania Supreme Court's Review Under The Pennsylvania Constitution.

Under the Pennsylvania Constitution, congressional redistricting is accomplished like any other piece of legislation: through bicameralism and presentment. Joint Stipulation of Facts, 261 M.D. 2017 (Pa. Commw. Ct. Dec. 8, 2017 3:35 p.m.) at ¶ 6. In 2011, Republicans controlled both houses of Pennsylvania's General Assembly and the Governor's office. *Id.* ¶¶ 7-9. In 8 days, from introduction to final passage, both houses and the Governor were able to enact the 2011 Plan, which set forth the boundaries of Pennsylvania's 18 Congressional districts. *Id.* at ¶¶ 46-47, 50, 60. The Pennsylvania Supreme Court has found that the 2011 Plan is unconstitutional under the Pennsylvania Constitution and provided the General Assembly with sufficient time to create a new map, reserving jurisdiction to take action itself, if necessary.

For almost 150 years, this Court has held that the state supreme courts are the final arbiters of state legislation. *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590 (1875). Contrary to Applicants' assertions, the Elections Clause of the U.S. Constitution in no way affects the right of state supreme courts to review state redistricting plans under the state constitution. In *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015), this Court expressly stated that "[n]othing in [the 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." The Pennsylvania General Assembly cannot pass legislation affecting elections that violates the Pennsylvania Constitution.

The Pennsylvania Supreme Court has determined that the Pennsylvania General Assembly defied the Pennsylvania Constitution with the 2011 Plan. The Republican-controlled legislature made ***no*** effort to affirmatively justify or explain the 2011 Plan or to assert that it was drawn to comply with traditional redistricting criteria. Further, the Pennsylvania Commonwealth Court judge, who had been elected as a Republican candidate, determined that the map was drawn with overt partisan intent. See Sections A and B, *supra.* The Applicants' complaint to this Court, on an Elections Clause theory that this Court expressly rejected in *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, should be rejected.

The Pennsylvania Supreme Court did not usurp the Pennsylvania General Assembly's authority to draw the map. The Court has provided ample time for the General Assembly to correct its errors. See Section B, *supra.* Although the Pennsylvania Supreme Court has retained jurisdiction to implement a remedy if the General Assembly refuses to act, its efforts to ensure a constitutional map and the rights of Pennsylvania voters under the Pennsylvania Constitution does not preempt the General Assembly's role. Indeed, Pennsylvania's highest court is fulfilling its duty to check legislative overreach, a judicial check on the legislature that should not be made toothless.[15] Applicants' demand for this Court's

[15] William Penn, the first proprietor within the Colony of Pennsylvania, was loath to let injustice fester, famously noting that "Our Law says well, to delay Justice is

intervention in Pennsylvania's redistricting process should be rejected outright, for want of any federal question for this Court to address.

III. CONCLUSION

For all the reasons cited, herein, the Emergency Application of Speaker Turzai and President Pro Tem. Scarnati to stay the Pennsylvania Supreme Court's January 22, 2018 Order should be DENIED.

Respectfully submitted,

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On behalf of Respondent Michael J. Stack III, in his Capacity as Lieutenant Governor of Pennsylvania and President of the Pennsylvania Senate

Dated: February 2, 2017

Injustice. See WILLIAM PENN, SOME FRUITS OF SOLITUDE (1693 (HEADLEY BROS. 1905)) MAXIM 393.