

No. 17A-909

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,

vs.

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, et al.,

Respondents.

*On Application for a Stay of the Judgment of
the Supreme Court of Pennsylvania*

**MOTION FOR LEAVE TO FILE BRIEF OF DICK THORNBURGH
AND BILL McCOLLUM AS *AMICI CURIAE* IN SUPPORT
OF APPLICATION FOR STAY PENDING RESOLUTION
OF PETITION FOR A WRIT OF *CERTIORARI***

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Pursuant to U.S. Supreme Ct. R. 37, *Amici Curiae* Dick Thornburgh and Bill McCollum respectfully move for leave of Court to file the accompanying *amicus curiae* brief in support of the pending emergency application for a stay.

Dick Thornburgh served as Attorney General of the United States between 1988 and 1991 and as Governor of Pennsylvania between 1979 and 1987. Mr. Thornburgh was a delegate to the 1967-68 convention that drafted the current Pennsylvania Constitution.

Bill McCollum represented Florida in the United States House of Representatives between 1981 and 2001. Mr. McCollum then served as Attorney General of Florida between 2007 and 2011. Mr. McCollum currently serves as chairman of the Republican State Leadership Committee.

Messrs. Thornburgh and McCollum believe the analysis set out briefly in their proposed *amicus* filing would be of benefit to the Court in its consideration of the pending stay application.

Respectfully submitted,



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IDENTITY AND INTEREST OF *AMICI CURIAE*¹

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¹ *Amici curiae* certify that no counsel for any party authored this brief in whole or in part, no party or its counsel made any monetary contribution intended to fund the preparation or submission of this brief and that no person or entity other than the *amici* or their counsel made such a contribution.

Messrs. Thornburgh and McCollum participate in their individual capacities and not as representatives of their law firms or their clients.

**REASONS FOR GRANTING A STAY OF THE JUDGMENT OF THE
PENNSYLVANIA SUPREME COURT PENDING RESOLUTION
OF A PETITION FOR A WRIT OF *CERTIORARI***

The drawing—and redrawing—of congressional districts implicate important federal and state interests, and the constitutional commitment of authority reflects those interests. Thus, redistricting serves to protect the people’s right to choose their federal representatives, but the task falls to the states to perform according to their prescribed mechanisms for enacting legislation.

As this case demonstrates, redistricting implicates another, related interest: the delegation by the United States Constitution—through Article I, Section 4 (the “Elections Clause”—and federal statute—through 2 U.S.C. § 2a—of authority at the state level to the legislature or, in certain situations, other mechanisms that a state has prescribed for legislating.

The Pennsylvania Supreme Court’s 4-3 order implementing a congressional redistricting plan developed by that court and its own expert amounts to a form of judicial legislation that neither the Pennsylvania Constitution nor the United States Constitution permits. That plan, established at breakneck speed and mandated for use in primary elections less than three months after entry of the state court’s order, works a sea change in district lines that has created chaos for candidates, their supporters and voters.

There is a broader concern. This Court may take notice of the nation’s contentious political climate and particularly vigorous efforts by both major political

parties either to maintain or take control of the United States House of Representatives. More than one commentator has noted that the Pennsylvania Supreme Court's newly imposed district lines, when mapped onto historic voting data in the Commonwealth, will likely yield a significant shift in representation from one party to another. That means that the Pennsylvania Supreme Court's action, if left undisturbed, could affect not only representation in the Commonwealth but control of one House of the Congress.

There is, of course, nothing inherently wrong with a modification of district lines that causes significant effects. But any such change must be accomplished in accordance with the provisions of the U.S. Constitution and state law that govern the process and in a manner calculated to avoid or ameliorate the harms that may attend the implementation of such change.

That did not happen here.

The petitioners to this Court, the Speaker of the Pennsylvania House of Representatives and the President *Pro Tempore* of the Pennsylvania Senate (collectively, the "Legislative Leaders"), assert that the 2011 redistricting statute was not gerrymandered and that, in any event, the Pennsylvania Supreme Court lacked authority to impose as a remedy a court-originated plan.

Amici curiae take no position here on the suitability of Pennsylvania's 2011 redistricting plan. Their focus instead is on the propriety of the Pennsylvania Supreme Court's creating and implementing its own plan and the likely harm to arise

from a too-quick implementation of such a court-created plan. The implications of the court's action are significant not only for Pennsylvania but for the nation and not only in the upcoming congressional elections but in the long term.

The *Amici Curiae* focus on the Pennsylvania Supreme Court's remedy because it is particular concerning. Having found an unconstitutional gerrymander, the Pennsylvania Supreme Court acted with remarkable haste and, in doing so, acted in derogation of the Elections Clause and Section 2a, which grant the power to draw congressional-district lines only to the state legislature or other means the state's constitution permits for implementing legislation.

The state court did not need to go that far. As one dissenting justice noted, having found an impermissible gerrymander, the court could instead have stricken the existing plan and instructed the Pennsylvania General Assembly to enact a new, compliant plan. *See League of Women Voters v. Comm. of Pa.*, No. 159 MM 2017 at Typescript 1 (Baer, J., dissenting) (Pa. Feb. 19, 2018). In view of the rapidly approaching primary election, the state court could have allowed the election to proceed under the preexisting plan. Both that court and this Court have allowed such elections to go forward while plans are corrected. *See Butcher v. Bloom*, 203 A.2d 556, 568-69 (Pa. 1964); *Lucas v. Forty-Fourth General Assembly of State of Colorado*, 377 U.S. 713, 738-39 (1964).

This Court should grant the Legislative Leaders’ application for a stay and then accept the case for full merits review.²

I. Article I, Section 4 and Section 2a commit redistricting to the processes the state has established for legislating.

Article I, Section 4 of the United States Constitution, known as the “Elections Clause,” provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof ...”

Acting under the authority granted it by the Elections Clause, the Congress enacted 2 U.S.C. § 2a, which among other things indicates that congressional district lines be drawn by each state “in the manner provided by the law thereof.” 2 U.S.C. § 2a(c).

The Court interpreted the Elections Clause and Section 2a in *Arizona State Legis. v. Arizona Indep. Redistricting Comm’n*, 135 S.Ct. 2652 (2015). Arizona voters by initiative created a commission separate from their state legislature to create redistricting maps for both congressional and state-legislative districts. The state legislature brought suit and alleged that the commission’s 2011 congressional map was in violation of the Elections Clause because only the state legislature could draw a new district map.

² It is also possible that a stay would allow the political process in Pennsylvania to proceed and enact an acceptable redistricting plan prior to the 2020 congressional elections.

The Court rejected the legislature’s argument. The Court canvassed its precedent and concluded that “redistricting is a legislative function, to be performed in accordance with the State’s prescriptions for lawmaking” The Court explained that “the Arizona Constitution establishes the electorate [of Arizona] as a coordinate source of legislation on equal footing with the representative legislative body.” 135 S.Ct. at 2660 (citations and quotations omitted). The Court noted that the section of the Arizona Constitution concerning the “Legislative Department” reserves for the people of Arizona “the power to propose laws and amendments to the constitution” and further states that “[a]ny law which may be enacted by the Legislature under this Constitution may be enacted by the people under the Initiative.” 135 S.Ct. at 2660-61 (citations and quotations omitted). Thus, the Court concluded, general references to the authority to legislate in Arizona include the people’s right to bypass the legislature and legislate directly by initiative. *Id.* at 2661.

While *Arizona State Legis.* is the Court’s most recent elucidation of the meaning of the Elections Clause and Section 2a, it followed logically from the Court’s prior precedents.

In *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), Ohio’s constitution allowed the citizenry, by referendum, to approve or disapprove any action of the legislature. The people disapproved a 1915 statute redistricting Ohio’s congressional districts, and legislators sought review. This Court ultimately held that the Elections Clause permitted such a veto by referendum because Ohio had made that

mechanism part of its means for legislating. *See* 241 U.S. at 569 (Elections Clause permitted “treating the referendum as part of the legislative power for the purpose of apportionment, where so ordained by the state constitutions and laws.”).

Smiley v. Holm, 285 U.S. 355 (1932), is to similar effect. That case focused on whether the Elections Clause permitted the governor of Minnesota to veto the legislature’s redistricting plan. The Court focused on the language of the Elections Clause and held that, “[a]s the authority is conferred for the purpose of making laws for the state, it follows, in the absence of an indication of a contrary intent, that the exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments.” 285 U.S. at 367. Because Minnesota’s constitution included gubernatorial vetoes as part of the legislative process, the Elections Clause permitted an executive veto in that state. *Id.* at 368-69.

Thus, *Arizona State Legis.* and the cases on which its rests teach that, in order to determine who may exercise redistricting authority in any particular state, one must look principally to the state’s legislature or to other means of legislating permitted by the state’s constitution.

II. In Pennsylvania, the “prescriptions for lawmaking” vest legislative authority in the two Houses of the General Assembly and not in the Judicial Branch.

While the question at the heart of the stay application is a federal one regarding compliance with the Elections Clause, it must be answered in light of the provisions of the Pennsylvania Constitution.

Article II, Section 1 of the Pennsylvania Constitution of 1968 provides that “[t]he legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives.” Pa. Const. art. II, § 1. The Pennsylvania Supreme Court has interpreted that provision to mean “that the basic policy choices involved in ‘legislative power’ actually be made by the [I]legislature as constitutionally mandated.” *Tosto v. Pa. Nursing Home Loan Agency*, 331 A.2d 198, 202 (Pa. 1975); *see also, Blackwell v. State Ethics Comm’n*, 567 A.2d 630, 636 (Pa. 1989) (“legislative power” is in its most pristine form the power “to make, alter and repeal laws,” and the Constitution vests it in the General Assembly).

Importantly, the Pennsylvania Supreme Court has emphasized that “[t]he province of the judicial branch of the government is to construe and administer the laws, not to make them.” *Vare v. Walton*, 84 A. 962 (Pa. 1912); *see also, Glancey v. Casey*, 288 A.2d 812, 817 (Pa. 1972) (were the judiciary to legislate, it would intrude into the province of the General Assembly).

Thus, Pennsylvania’s Constitution includes no provision for the judiciary to legislate in general or to have any role in crafting congressional districts in particular.

III. The Pennsylvania Supreme Court’s order implementing a judicially crafted district map violates Article I, Section 4 and Section 2a.

Crafting and implementing a congressional-redistricting plan is a legislative task to be performed in accordance with a state’s prescriptions for lawmaking. *See*

Arizona State Legis., supra. In Pennsylvania, the Constitution vests the power to create laws only in the General Assembly.

While the three Pennsylvania justices who dissented from the *per curiam* order implementing the court-originated plan pointed to the inherent Elections Clause problem, *see League of Women Voters v. Comm. of Pa.*, No. 159 MM 2017 at Typescript at 1 (Pa. Feb. 19, 2018) (Mundy J., dissenting) (noting that, during the course of proceedings, three justices had urged caution in light of the Elections Clause), the majority largely sidestepped the issue with a citation to provisions of the state Constitution and statutory Judicial Code that generally allow the courts to grant remedies to see that justice is done. *See League of Women Voters v. Comm. of Pa.*, No. 159 MM 2017 at Typescript 5 n.6 (*per curiam*) (Pa. Feb. 19, 2018) (*citing* Pa. Const. art. V, §§ 1, 2, 10; 42 Pa.C.S. § 726 (granting power to “enter a final order or otherwise cause right and justice to be done”).

The majority’s reliance on its authority generally to provide judicial remedies is misplaced. The remedy in this case was the court’s order striking down the redistricting plan and requiring the General Assembly to enact a new plan. If the power to craft remedies reached so far as the majority suggested, there would be little left of separation of powers.

In its February 7, 2018, opinion, the Pennsylvania Supreme Court majority also cited this Court’s decision in *Scott v. Germano*, 381 U.S. 407 (1965), as approving active participation by state courts in crafting redistricting plans. *See League of*

Women Voters v. Comm. of Pa., No. 159 MM 2017 at Typescript at 134 (Pa. Feb. 7, 2018).

But *Scott* is thin support. That case considered the districts for the Illinois state senate such that the Elections Clause would have no application.³

Simply stated, the Elections Clause vested only in the Pennsylvania General Assembly the authority to draw congressional district lines within the Commonwealth. The Pennsylvania Supreme Court exceeded its authority in implementing its own plan—particularly in doing so without allowing the General Assembly a *meaningful* opportunity to enact a new, compliant plan.

IV. Because of the tumult threatened by the Pennsylvania Supreme Court’s order and the added disorder that would occur were this Court to grant *certiorari* and then conclude that the Pennsylvania court erred, the Court should stay the Pennsylvania Supreme Court’s judgment pending resolution of a *certiorari* petition and subsequent merits appeal.

In this case, the Pennsylvania Supreme Court read the Election Clause, *Arizona State Legis.* and other authorities to allow it to remedy what it concluded to be a politically gerrymandered redistricting plan by engaging its own expert to create a court-originated redistricting plan. Thus, that court has now mandated use of a redistricting plan that has never been enacted by the Pennsylvania General As-

³ Neither does *Grove v. Emison*, 507 U.S. 25 (1993), provide support for the Pennsylvania Supreme Court’s remedy. While *Grove* referred to a state court’s drawing a map, that language was *dictum* since the issue was whether a federal court should have stepped in or deferred to state processes. The Court held that the federal court should have held off in deference to state processes; the language about state courts was not necessary to that holding, and there is no indication that the Court considered the Elections Clause implication of the *dictum*.

sembly and approved by the Governor. It has required that the court-originated plan be used immediately—in less than three months during the May 2018 primary election.

In order to obtain a stay pending resolution of a *certiorari* petition, an applicant must demonstrate that the Court is likely to grant a writ of *certiorari*, that the Court is likely to reverse and that the applicant or others are likely to suffer irreparable harm if the judgment is not stayed. *See Barnes v. E-Systems, Inc.*, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers).

For the reasons set out in the Legislative Leaders’ application and above, *Amici Curiae* believe it likely both that this Court will grant review and then reverse. In creating its own redistricting plan, the Pennsylvania Supreme Court contravened federal law in a way that conflicts with a decision of this Court. *See* U.S. Supreme Ct. R. 10(c). *Arizona State Legis.* interpreted the Elections Clause to mandate that only an entity permitted under state law to legislate may create congressional district maps. Even if there were some question about whether the Pennsylvania Supreme Court’s action directly conflicts with *Arizona State Legis.*, review is also appropriate when a state court has decided an important federal question of first impression. *Id.* Here, the Pennsylvania Supreme Court held that a state court may create a congressional redistricting plan as a remedy to partisan gerrymandering. This Court has not squarely held that a state court may do so.

There is then the question of irreparable harm.

First, the court-originated redistricting plan and the speed of its implementation have created significant confusion and concern for candidates and citizens across Pennsylvania. See “Map of confusion: The Supreme Court moved too fast on new districts,” Pittsburgh Post-Gazette (Feb. 21, 2018) (describing significant changes to and renumbering of 18 congressional districts and accompanying confusion and logistical problems).⁴

Second, there can likewise be no dispute about the potential national implications of the Pennsylvania Supreme Court’s action. See “New Pennsylvania congressional map could impact balance of power in the US House,” ABC News (Feb. 21, 2018) (quoting redistricting expert asserting that “[i]f the Pennsylvania map changes, it’s hard to imagine how the Republicans hold control of the House”⁵

Third, plaintiffs in cases elsewhere in the nation asserting that congressional lines in their states have been gerrymandered will no doubt treat the Pennsylvania case, including its remedy, as a roadmap. See “Where Redistricting Fights Stand Across The Country,” NPR News (Feb. 15, 2018).⁶

Some of these harms are already being felt and others are likely imminent. All may properly be regarded as irreparable. If the May 2018 primary election and

⁴ Available at <http://www.post-gazette.com/opinion/editorials/2018/02/21/Map-of-confusion-The-Supreme-Court-moved-too-fast-on-new-districts/stories/201802280036> (last visited Feb. 24, 2018).

⁵ Available at <http://abcnews.go.com/Politics/pennsylvania-congressional-map-impact-balance-power-us-house/story?id=53197211> (last visited Feb. 24, 2018).

⁶ Available at <https://www.npr.org/2018/02/15/585232149/where-redistricting-fights-stand-across-the-country> (last visited Feb. 24, 2018).

the November 2018 general election go forward according to the court-originated redistricting plan and this Court *then* determined that the Pennsylvania Supreme Court acted in derogation of the Elections Clause, it would be essentially impossible to imagine the *status quo ante*'s being restored without extraordinary chaos and, of course, in the interim, Pennsylvania voters would for some time have been deprived of representation in Congress chosen according to the federal Constitution.

This Court should grant the Legislative Leaders' stay application and consider this case on the merits so that, before this cascade of difficulties proceeds further, this Court can determine whether the state court acted with proper authority under the Elections Clause.

CONCLUSION

The Court should grant the Legislative Leaders' application for a stay of the Pennsylvania Supreme Court's judgment pending resolution of a soon-to-be-filed *certiorari* petition.

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