No. 17A909

In the Supreme Court of the United States

MICHAEL C. TURZAI, IN HIS CAPACITY AS SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, AND JOSEPH B. SCARNATI, III, IN HIS CAPACITY AS PENNSYLVANIA SENATE PRESIDENT *PRO TEMPORE*,
Applicants,

v.

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, *ET AL.*,
Respondents.

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

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

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF, MOTION FOR LEAVE TO FILE BRIEF ON 8 1/2 BY 11 INCH PAPER, *AMICUS CURIAE* BRIEF OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPLICANTS

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MOTION FOR LEAVE TO FILE *AMICUS* BRIEF

Movant Eagle Forum Education & Legal Defense Fund respectfully requests leave to file the accompanying brief as *amicus curiae* in support of the application to stay the decision and remedy of the Pennsylvania Supreme Court in the above-captioned matter.* Of the various parties involved, the applicants consented to the filing of the brief, and the defendants, the original petitioners – *i.e.*, the League of Women Voters of Pennsylvania and the allied 18 voters – and the state intervenors Brian McCann *et al.* do not oppose the filing of the brief.

* By analogy to FED. R. APP. P. 29(c)(5) and this Court's Rule 37.6, counsel for movant and *amicus curiae* authored these motions and brief in whole, and no counsel for a party authored the motions and brief in whole or in part, nor did any person or entity, other than the movant/*amicus* and its counsel make a monetary contribution to preparation or submission of the motions and brief.

IDENTITY AND INTERESTS OF MOVANT

Eagle Forum Education & Legal Defense Fund ("EFELDF") is a nonprofit corporation founded in 1981 and headquartered in Saint Louis, Missouri. For more than thirty-five years, EFELDF has consistently defended the Constitution's federalist structure and the separation of powers. In the context of the integrity of the elections on which the Nation has based its political community, EFELDF has supported efforts both to ensure equality of voters consistent with the written Constitution and validly enacted laws. For the foregoing reasons, movant EFELDF has direct and vital interests in the issues before this Court and respectfully requests leave to file the accompanying *amicus* brief in support of the stay applicants.

REASONS TO GRANT LEAVE TO FILE

By analogy to Rule 37.2(b) of the Rules of the Supreme Court, movant respectfully seeks leave to file the accompanying *amici curiae* brief in support of the stay applicants. By filing this motion contemporaneously with the respondents' deadline to file an opposition, this filing should not disturb the accelerated briefing schedule ordered in this matter.

Movant EFELDF respectfully submits that the proffered *amicus* brief will bring two categories of relevant matters to the Court's attention:

- First, the EFELDF brief discusses the All Writs Act, 28 U.S.C. §1651(a), as well as 28 U.S.C. §2106, which aid this Court's jurisdiction to apply a stay and remedial power not only to issue a stay but also to remedy the eventual merits. *See* EFELDF Br. at 11, 14-18.

- Second, the EFELDF brief addresses the Due Process Clause as a federal basis for this Court to hear the merits of this action, in addition to the federal issues presented by the Elections Clause. *See* EFELDF Br. at 14, 19-22.

These issues are all relevant to deciding the stay application, and movant EFELDF respectfully submits that filing the brief will aid the Court.

Dated: March 5, 2018

Respectfully submitted,

/s/ Lawrence J. Joseph

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MOTION FOR LEAVE TO FILE ON 8 1/2 BY 11 INCH FORMAT

Eagle Forum Education & Legal Defense Fund ("EFELDF") respectfully submits that the Court's rules require those moving or applying to a single Justice to file in 8½-by 11-inch format pursuant to Rule 22.2, as EFELDF has done here. If Rule 21.2(b)'s requirements for motions to the Court for leave to file an *amicus* brief applied here, however, EFELDF would need to file 40 copies in booklet format, even though the Circuit Justice may not refer this matter to the full Court. Due to the expedited briefing schedule, the expense and especially the delay of booklet-format printing, and the rules' ambiguity on the appropriate procedure, EFELDF has elected to file pursuant to Rule 22.2. To address the possibility that the Circuit Justice may refer this matter to the full Court, however, movant files an original plus ten copies, rather than Rule 22.2's required original plus two copies.

Should the Clerk's Office, the Circuit Justice, or the Court so require, EFELDF

commits to re-filing expeditiously in booklet format. *See* S.Ct. Rule 21.2(c) (Court may direct the re-filing of documents in booklet-format). Movant EFELDF respectfully requests leave to file the accompanying brief as *amicus curiae* to the Pennsylvania legislative leaders' stay application – at least initially – in 8½-by 11-inch format pursuant to Rules 22 and 33.2, rather than booklet format pursuant to Rule 21.2(b) and 33.1.

For the foregoing reasons, the motion for leave to file in 8½-by 11-inch format should be granted.

Dated: March 5, 2018

Respectfully submitted,

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AMICUS CURIAE BRIEF IN SUPPORT OF APPLICANTS

Amicus Curiae Eagle Forum Education & Legal Defense Fund ("EFELDF") respectfully submits that the Circuit Justice (or the full Court if referred to the full Court) should stay the decision and remedial orders of the Pennsylvania Supreme Court in this action until the applicants here – the leaders of Pennsylvania's House of Representative and its Senate (collectively, hereinafter the "Legislators") – timely file and this Court duly resolves a petition for a writ of *certiorari*. *Amicus* EFELDF's interests are set out in the accompanying motion for leave to file.

INTRODUCTION

Although this litigation began as a traditional case or controversy,[1] it became a legislative vehicle for a partisan majority of the Pennsylvania Supreme Court to enact a new law out of generally worded language – "Elections shall be free and equal," PA. CONST. art. I, §5, cl. 1 – in the Pennsylvania Constitution. The new law is that "congressional districts composed of compact and contiguous territory; as nearly equal in population as practicable; and which do not divide any county, city, incorporated town, borough, township, or ward, except where necessary to ensure equality of population." Order, at 3 (Jan. 22, 2018) (App. A., at 3). Significantly, the constitutional basis for the new law – PA. CONST. art. I, §5, cl. 1 – is not new, and that same language was in the same constitution when that same court repeatedly held that it does not mean what – *hey, presto*! – it now means. *See*, *e.g., Erfer v. Commonwealth*, 568 Pa. 128, 142 n.4, 794 A.2d 325, 334 n.4 (Pa. 2002); *Holt v. 2011 Legislative Reapportionment Comm'n*, 620 Pa. 373, 412, 67 A.3d 1211, 1235 (Pa. 2013). But it gets worse.

Investing the new criteria into the free-and-equal clause renders another provision of the same constitution mere surplusage, *see* PA. CONST. art. VII, §9 (expressly setting same criteria for *state* legislative districts), which normally would suggest that the new interpretation is wrong: "[A] *bedrock* principle of statutory

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[1] Pennsylvania has its own state-law equivalent of the federal Article III case-or-controversy requirement. *See Rendell v. Pa. State Ethics Comm'n*, 603 Pa. 292, 307-08, 983 A.2d 708, 717-18 (Pa. 2009).

construction *requires* that a statute be construed, if possible, to give effect to all its provisions, so that no provision is mere surplusage." *Commonwealth v. Gilmour Mfg. Co.*, 573 Pa. 143, 149, 822 A.2d 676, 679 (Pa. 2003) (interior quotations omitted, emphasis added). But it get worse.

Although the order dated January 22, 2018, announced some new standards for congressional maps and "as a matter of law that the Congressional Redistricting Act of 2011 clearly, plainly and palpably violates the Constitution of the Commonwealth of Pennsylvania," Order, at 2 (Jan. 22, 2018) (App. A., at 2), the order did not identify the basis for its conclusions: "Opinion to follow." *Id.* at 3 (App. A., at 3). Although the U.S. Constitution assigns map-drawing to state *legislatures*, U.S. CONST. art. I, §4, the order was at best indifferent as to whether Pennsylvania's legislature cured the ill-described constitutional failing(s): "should the Pennsylvania General Assembly choose to submit a congressional districting plan that satisfies the requirements of the Pennsylvania Constitution, it shall submit such plan for consideration by the Governor on or before **February 9, 2018**." Order, at 2 (Jan. 22, 2018) (App. A., at 2) (emphasis in original). In other words, the state-court majority gave Pennsylvania's legislature just 18 days to complete a significant legislative task that normally takes months of analysis and negotiation. But it get worse.

On February 7, 2018 – just two days before its already tight deadline – the court issued an extensive opinion adding new criteria (*e.g.*, efficiency gaps, proportional representation) and finally identifying the mystery source of the "palpable violations." Under Pennsylvania's constitution, "[e]very bill shall be

considered on three different days in *each House*," PA. CONST. art. III, §4 (emphasis added), which means that six days is the barest minimum number of days needed to pass a bill, assuming improbably that the originating house could write and publish a bill on the first day. In sum, the state-court majority made it literally impossible for Pennsylvania's legislature to meet its obligation under the Elections Clause of the U.S. Constitution.

The solution here is easy: stay the Pennsylvania Supreme Court's decision and orders, pending the Legislators' timely petition for a writ of *certiorari* and this Court's resolution of that appeal. When such late-breaking election-law rulings surface near an election – Pennsylvania's congressional primaries are in May – this Court has not hesitated to issue stays,[2] presumably to avoid electoral chaos and voter confusion. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) ("Court orders affecting elections … can result in voter confusion and consequent incentive to remain away from the polls"). *Amicus* EFELDF respectfully submits that the Court must again do so here.

The stakes could not be higher for our system of government: If the electorate believes that "judges are just politicians in robes – then there is no reason to prefer their interpretation of the law or Constitution over the opinions of the real politicians representing the electorate." Sandra Day O'Connor, *Symposium: The 2009 Earl F. Nelson Lecture: The Essentials and Expendables of the Missouri Plan*, 74 MO. L. REV.

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[2] *See*, *e.g.*, *Frank v. Walker,* 135 S.Ct. 7 (2014); *Husted v. Ohio State Conf. of the NAACP,* 135 S.Ct. 42 (2014); *North Carolina v. League of Women Voters,* 135 S.Ct. 6 (2014).

479, 489 (2009). If it does not plug this Pennsylvania leak immediately, this Court will face a deluge of similar actions from all points of the geographic and political compass, coupled with a massive wave of public cynicism toward government.

STANDARD OF REVIEW

A stay pending the timely filing and ultimate resolution of a petition for a writ of *certiorari* is appropriate when there is a "(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). For "close cases," the Court "will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.*

Where the All Writs Act, 28 U.S.C. §1651(a) is implicated, the Court also considers the necessity or appropriateness of interim relief *now* to aid the Court's *future* jurisdiction. *See Edwards v. Hope Med. Group for Women,* 512 U.S. 1301 (1994) (requiring "reasonable probability that *certiorari* will be granted," a "significant possibility" of reversal, and a "likelihood of irreparable harm") (Scalia, J., in chambers). Although "a single Circuit Justice has no authority to summarily reverse a judgment of the highest court of a State," he or she can "grant interim relief in order to preserve the jurisdiction of the full Court to consider an applicant's claim on the merits." *Kimble v. Swackhamer*, 439 U.S. 1385 (1978) (Rehnquist, J., in chambers) (interior quotations omitted).

SUMMARY OF ARGUMENT

With respect to the likelihood of this Court's granting a writ of *certiorari*, the Court's resolution of the partisan-gerrymandering issue in *Gill v. Whitford*, No. 16-1161, may *require* it; in any event, this Court has often reviewed Elections Clause cases that go to which state actors have authority to act as the legislature (Section I). Notwithstanding the Pennsylvania Supreme Court's purportedly ruling on a state-law ground, this Court has jurisdiction because both the procedure and the substance of the state court's ruling violate not only the Elections Clause (Section II.A.1) but also the Due Process Clause (Section II.A.2), which of course fall within this Court's jurisdiction. Moreover, the All Writs Act, 28 U.S.C. §1651(a) provides a supplemental basis for jurisdiction and relief (Section II.A.3), as does 28 U.S.C. §2106 (Section II.A.4).

As to the merits, the Legislators are likely to prevail because the Pennsylvania Supreme Court usurped the legislature's authority under the Elections Clause (Section II.B.1) and violated procedural and substantive due process in doing so (Section II.B.2). The other stay factors also favor the Legislators because the irreparable harm – namely, chaos and voter confusion in the 2018 elections and the resulting changes in congressional offices and staff – will not be fixable if the elections proceed under the state court's map and this Court later reverses (Section III.A. The other stay factors merge with the merits, which – as indicated – tip to the Legislators (Sections III.B-III.C).

ARGUMENT

I. THE GRANT OF A WRIT OF *CERTIORARI* IS LIKELY.

There is a reasonable possibility that this Court will grant the Legislators' forthcoming petition for a writ of certiorari. Perhaps most obviously, depending on how the Court resolves the issue of partisan gerrymandering in *Gill v. Whitford*, No. 16-1161 – which seemed a "toss-up" at oral argument – it is easy to envision a grant, if only to be followed by an immediate *vacatur* and remand for further consideration in light of *Gill*. But even if partisan gerrymanders remain non-justiciable, this Court is likely to grant the writ to consider the issue of whether the Pennsylvania Supreme Court's actions here run afoul of the Elections Clause's delegation to the "Legislature" of a state, U.S. CONST. art. I, §4, as this Court recently did with respect to independent commissions. *Arizona State Leg. v. Ariz. Indep. Redistricting Comm'n*, 135 S.Ct. 2652 (2015). Accordingly, the Legislators meet the first criterion for a stay.

II. THE LEGISLATORS ARE LIKELY TO PREVAIL.

This section demonstrates that the Legislators are likely to prevail on the merits. To make that showing, *amicus* EFELDF first shows that the Legislators' petition will present a federal question, notwithstanding the state-court majority's transparent effort to insulate their ruling from review by claiming to have relied on the "sole basis" of the Pennsylvania Constitution. Order, at 2 (Jan. 22, 2018) (App. A., at 2). After establishing this Court's jurisdiction to act, *amicus* EFELDF then shows why the Legislators are likely to prevail on the federal merits presented here.

A. Both this Court and the Circuit Justice have the jurisdiction to act, notwithstanding the Pennsylvania Supreme Court's effort to mask this as a purely state-law question.

Before reaching the question of the Legislators' likelihood of prevailing on the merits, this Court – or the Circuit Justice – first must establish federal jurisdiction. *Steel Co. v. Citizens for a Better Env't.,* 523 U.S. 83, 95 (1998). But this Court considers issues either pressed or passed upon in the lower court, *U.S. v. Williams*, 504 U.S. 36, 41 (1992), and a state-court majority cannot avoid a federal question by ignoring it. While it is true that this Court would lack authority to review issues solely based on state-law issues, that does not prevent review when those state-law issues or the processes through which they were reached violate federal law.

1. The Elections Clause is implicated.

The Legislators' application and the Thornburg-McCollum *amicus* brief make clear that this case presents an issue under the Elections Clause, even though the state-court majority attempts to evade that issue by ignoring it and offering a purely state-law basis for its holding. At a minimum, the issue was pressed below, and that is all that this Court requires. *Williams*, 504 U.S. at 41. Although *amicus* EFELDF will argue that the Legislators are likely to prevail, *see* Section II.B, *infra*, parties do not need winning hands for the Court to have jurisdiction. Instead, jurisdiction exists when "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction," even if the right "will be defeated if they are given another." *Bell v. Hood*, 327 U.S. 678, 685 (1946). At least as to *jurisdiction*, the Legislators need only survive the low threshold "where the alleged claim under the Constitution or federal statutes clearly appears

to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Id.* at 682. The Legislators plausibly allege that the Pennsylvania Supreme Court violated the Elections Clause, which is enough for jurisdictional purposes.

2. The Due Process Clause is implicated.

In addition to the Elections Clause, *amicus* EFELDF respectfully submits that the Due Process Clause also provides a federal basis for this Court's reviewing the state-court decision, notwithstanding the state-law basis for the ultimate holding. The Due Process Clause prohibits *inter alia* the denial of liberty without due process of law. While the "doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States," *Whalen v. U.S.,* 445 U.S. 684, 689 (1980); *accord Dreyer v. People of State of Illinois,* 187 U.S. 71, 84 (1902), the states still must run their judicial proceedings in compliance with the Due Process Clause: "nor shall any state deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, §1, cl. 3. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner," *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), and that was sorely lacking here.

3. The All Writs Act gives this Court jurisdiction *now* to preserve its *future* jurisdiction over the Legislators' petition for a writ of *certiorari.*

The All Writs Act provides an alternate, supplemental form of jurisdiction to stay the Pennsylvania Supreme Court's action here, if only to preserve the full range of the controversy *now* for this Court's consideration upon the Legislators' *future* appeal to this Court:

> The All Writs Act empowers the federal courts to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. The exercise of this power is in the nature of appellate jurisdiction where directed to an inferior court, and *extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected*.

FTC v. Dean Foods Co., 384 U.S. 597, 603 (1966) (interior quotations and citations omitted, emphasis added) (*citing Ex parte Crane*, 5 Pet. 190, 193 (1832) (Marshall, C.J.); *Ex parte Bradstreet*, 7 Pet. 634 (1833) (Marshall, C.J.)). Although this Court's jurisdiction to provide interim relief does not *require* resort to the All Writs Act, that Act nonetheless ensures the Court's jurisdiction here. The All Writs Act provides "a limited judicial power to preserve the court's jurisdiction or maintain the *status quo* by injunction pending review of an agency's action through the prescribed statutory channels," and that "power has been deemed merely incidental to the courts' jurisdiction to review" the ultimate merits of the future appeal. *Id.* at 604 (alterations omitted). As explained in this section, that power is appropriate in this case.

Without a stay, the congressional offices that exist under the bipartisan 2011 map will certainly be dispersed and perhaps lost outright if the Pennsylvania Supreme Court succeeds in pushing through its rival map for the May 2018 primaries. That is the type of harm that justifies action under the All Writs Act. For example, in *Sampson v. Murray*, 415 U.S. 61, 76-77 (1974), the Court was concerned "that refusal to grant the injunction would result in the practical disappearance of one of the entities whose merger the [applicant] sought to challenge" and that "[t]he disappearance, in turn, would mean that the [applicant] and the court entrusted … to review the … decision, would be incapable of … fashioning effective relief." Under

the circumstances, "invocation of the All Writs Act, as a preservative of jurisdiction, was considered appropriate," *id.*, which applies equally here as in *Sampson*.

In another instance where the Court's invoking the All Writs Act shares themes at issue here, *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259 (1957), refused to permit reference of antitrust cases to a master. "In *La Buy,* the District Judge on his own motion referred to a special master two complex, protracted antitrust cases on the eve of trial. … The master, a member of the bar, was to hear and decide the entire case, subject to review by the District Judge under the 'clearly erroneous' test." *Mathews v. Weber*, 423 U.S. 261, 274 (1976). Assuming *arguendo* that the state court's expert here was not – in fact – doing the court majority's *political* bidding – this would case would repeat aspects of *La Buy* that justified resort to the All Writs Act.

Although resort to the All Writs Act is an extraordinary remedy – as indeed is any stay – the writ "has traditionally been used in the federal courts only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Will v. U.S.*, 389 U.S. 90, 95 (1967) (interior quotations omitted). While "only exceptional circumstances … will justify the invocation of this extraordinary remedy," those circumstances certainly include a "judicial usurpation of power" as happened here. *Id.* (interior quotations omitted); *accord Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980); *Cheney v. United States Dist. Court*, 542 U.S. 367, 380 (2004). For partisan ends, a partisan majority of elected judges on a state supreme court have attempted to seize the Legislature's constitutional power, which easily meets the "judicial usurpation of power" test that

this Court has repeatedly set.

While the All Writs Act perhaps may seem too obvious to mention, *amicus* EFELDF respectfully submits that it bears explicit emphasis[3] because it can provide the difference in a close case: "where a case is within the appellate jurisdiction of the higher court a writ may issue in aid of the appellate jurisdiction which might otherwise be defeated." *Dean Foods*, 384 U.S. at 604. Accordingly, *amicus* EFELDF respectfully submits that the Circuit Justice or the full Court should consider the appropriateness of relief to preserve the full controversy for review.

4. 28 U.S.C. §2106 gives this Court further authority to remedy the situation that the Pennsylvania Supreme Court has created.

In addition to the All Writs Act, this Court also can rely on §2106 for additional authority to resolve this matter:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

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[3] It is irrelevant that the Legislators did not cite the All Writs Act in their stay application. *First,* if "jurisdiction … actually exists," plaintiffs – or, here, applicants – can cite that jurisdiction for the first time on appeal. *Newman-Green, Inc. v. Alfonzo-Larrain,* 490 U.S. 826, 831 (1989); 28 U.S.C. §1653. *Second,* subject-matter jurisdiction does not require specific citations where the "facts alleged and the claim asserted … were sufficient to demonstrate [jurisdiction's] existence." *Schlesinger v. Councilman,* 420 U.S. 738, 745 (1975). *Third,* failure to raise jurisdictional arguments does not waive those arguments. *Sochor v. Florida,* 504 U.S. 527, 534 n.* (1992) ("this defense goes to our jurisdiction and therefore cannot be waived"). Certainly, they can cite the All Writs Act in their reply.

28 U.S.C. §2106. As §2106 makes clear, this Court can not only alter the judgment from the lower court but also require further proceedings. Indeed, given the questions about the partisanship of the Pennsylvania Supreme Court majority and their expert, this Court could even assign a special master to work with the General Assembly to resolve any state-law issues, assuming that any state-law issues remained after this Court's review of the federal issues.

B. The Legislators are likely to prevail on the merits.

In order to warrant a stay, there must be a "fair prospect" of the Legislators' prevailing. *Hollingsworth*, 558 U.S. at 190. As explained in the next two sections, the Legislators likely will prevail under both the Elections Clause and the Due Process Clause.

1. The Pennsylvania Supreme Court violated the Elections Clause.

Even accepting that the Pennsylvania Supreme Court correctly interpreted that state's constitution, the remedy that the state court imposed usurped the power that the Elections Clause gives to the General Assembly. *See* Appl. 14-22; Thornburg-McCollum *Amicus* Br. at 8-10. On the subject of a court's needing to usurp legislative power to remedy a case or controversy properly before the court, this Court has taken a jaundiced, wait-and-see view:

> The grave consequences which it is asserted must arise in the future if the right to levy a progressive tax be recognized involves in its ultimate aspect the mere assertion that free and representative government is a failure, and that the grossest abuses of power are foreshadowed unless the courts usurp a purely legislative function. If a case should ever arise, where an arbitrary and confiscatory exaction is imposed bearing the guise of a

> progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so. That the law which we have construed affords no ground for the contention that the tax imposed is arbitrary and confiscatory, is obvious.

Knowlton v. Moore, 178 U.S. 41, 109-10 (1900). As with the tax in *Knowlton*, the congressional map here is not so egregiously out of the norm to justify a judicial remedy egregiously out of the norm.

With statutes, this Court has readily recognized the judiciary's role as arbiter, not author, of our laws: "it is not this Court's function to sit as a super-legislature and create statutory distinctions where none were intended." *Securities Industry Ass'n v. Bd. of Governors of Fed'l Reserve Sys.,* 468 U.S. 137, 153 (1984) (interior quotations omitted). The same is true in Pennsylvania, as it would have to be true under our Constitution. U.S. CONST. art. IV, §4, cl. 1. When asked what form of government the Framers had given us, Benjamin Franklin reportedly replied "A republic … if you can keep it." Terence Ball, "*A Republic - If You Can Keep It*", in CONCEPTUAL CHANGE AND THE CONSTITUTION 35, 137 (Terence Ball & J.G.A. Pocock eds., 1988). It now – once again – falls to the Circuit Justice or the full Court to endeavor to keep the republic.

Amicus EFELDF respectfully submits that these considerations weigh in favor of this Court's rejecting the state court's usurpation of the state legislature's power under the Elections Clause.

2. The Pennsylvania Supreme Court violated the Due Process Clause.

The Due Process Clause has not only procedural aspects, but also substantive

aspects. The Pennsylvania Supreme Court's decision fell afoul of both aspects.

Procedurally, the Pennsylvania Supreme Court announced its full verdict on February 7, 2018, just two days before its deadline to cure the purported defects of the 2011 map, when it was literally *impossible* for the General Assembly to respond. PA. CONST. art. III, §4 (requiring consideration of bills for *three days* in each house). On the other hand, if the Pennsylvania Supreme Court wanted to claim that the court had met its full obligations in its order dated January 22, 2018, that order was insufficient to alert the General Assembly of the legislature's purported obligations under the state court's brand new interpretation – then without citation, even – of the Pennsylvania Constitution. Both alternatives fail due process by denying the General Assembly an "opportunity to be heard at a meaningful time and in a meaningful manner," *Mathews*, 424 U.S. at 333, on an issue – namely, creating a new, compliant map – that is the exclusive purview of the legislature under the Elections Clause.

Significantly, our constitutional structure and heritage of divided power and dual federal-state sovereignty protects liberty. *Mistretta v. U.S.*, 488 U.S. 361, 380 (1989); *U.S. v. Munoz-Flores*, 495 U.S. 385, 394-96 (1990). Indeed, the "history of liberty has largely been the history of observance of procedural safeguards" *Corley v. U.S.*, 556 U.S. 303, 321 (2009) (interior quotations omitted), and thus "'procedural rights' are special." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 572 n.7 (1992) (interior quotations omitted). As this Court has explained, "Procedure of this style has been questioned even in systems, real and imaginary, less concerned than ours with the

right to due process," *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 468 (2000):

> "'Herald, read the accusation!' said the King.
>
> On this the White Rabbit blew three blasts on the trumpet, and then unrolled the parchment scroll, and read as follows:
>
> '*The Queen of Hearts, she made some tarts, All on a summer day: The Knave of Hearts, he stole those tarts,*
>
> *And took them quite away!*'
>
> 'Consider your verdict,' the King said to the jury.
>
> 'Not yet, not yet!' the Rabbit interrupted. 'There's a great deal to come before that!'"

Id. n.2 (*quoting* LEWIS CARROLL, ALICE IN WONDERLAND AND THROUGH THE LOOKING GLASS 108 (Messner, 1982) (emphasis in THROUGH THE LOOKING GLASS). *Amicus* EFELDF submits that, here too, the process requires a great deal more.

The Pennsylvania Supreme Court does not fare better under substantive due process. While the "power to interpret the Constitution … remains in the Judiciary," *City of Boerne v. Flores,* 521 U.S. 507, 524 (1997), the power to *amend* the Constitution remains with the states. U.S. CONST. art. V; PA. CONST. art. XI, §1. "Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process." *Ullmann v. U.S.*, 350 U.S. 422, 428 (1956), which is a principle that applies equally in Pennsylvania. *Pa. Prison Soc'y v. Commonwealth*, 727 A.2d 632, 635 (Pa. Commw. Ct. 1999) (invalidating a constitutional amendment because the process of its adoption violated another provision of the Pennsylvania Constitution). The federal and state constitutions are not blank checks with which judges can remake this Nation or a

state, wholly apart from the states' and the People's intent in ratifying a constitution's generally worded provisions. Accordingly, this Court already has recognized the limits posed on using the generally worded Due Process Clause to legislate beyond "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg,* 521 U.S. 702, 720-21 (1997). *Amicus* EFELDF respectfully submits that this Court should adopt a state-law version of *Glucksberg* to pare judicial activism. Although enforcing a republican form of government under U.S. CONST. art. IV, §4, cl. 1 for all state-court usurpations may be non-justiciable under *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912), enforcing the Elections Clause is entirely justiciable.

III. THE OTHER STAY CRITERIA TIP IN THE LEGISLATORS' FAVOR.

Although the likelihood of this Court's granting a writ of *certiorari* and ruling for the Legislators on the merits would alone justify granting a stay, *amici* EFELDF addresses the three other potential stay factors. All of these factors weigh in favor of staying the Pennsylvania Supreme Court's actions until the conclusion of any timely filed petition for a writ of *certiorari*.

A. The Legislators' harm is irreparable.

For stays, the question of irreparable injury requires a two-part "showing of a threat of irreparable injury to interests that [the applicant] properly represents." *Graddick v. Newman,* 453 U.S. 928, 933 (1981) (Powell, J., for the Court[4]). "The first,

[4] Although *Graddick* began as an application to a circuit justice, the Chief Justice referred the application to the full Court. *Graddick,* 453 U.S. at 929.

embraced by the concept of 'standing,' looks to the status of the party to redress the injury of which he complains." *Id.* "The second aspect of the inquiry involves the nature and severity of the actual or threatened harm alleged by the applicant." *Id.* The Legislators meet both tests.

As to standing, the Legislators have standing not only to defend state law in the form of the 2011 map, *Diamond v. Charles,* 476 U.S. 54, 62-63 (1986), but also to defend the legislative prerogatives under the Elections Clause from encroachment by the partisan state-court majority. *Karcher v. May,* 484 U.S. 72, 82 (1987). Moreover, because they have independent constitutional standing and a close relationship with the federal legislators that serve Pennsylvania and the Pennsylvania electorate, the Legislators also can press the harms that will afflict Pennsylvania and its delegations to Congress.

As to irreparable harm, *amicus* EFELDF agrees with *amici* Thornburg and McCollum that it would be essentially impossible to restore the *status quo ante* if this Court allows the state-court map to govern the 2018 primaries and mid-term election and later reverses the state court. *See* Thornburg-McCollum *Amicus* Br. at 13. Candidates will win or lose, offices will be disbanded and staff will move on. Moreover, the electoral confusion will be complete with the election, and the stain of illegitimacy will hang over the election results.

B. The equities balance in favor of the Legislators.

The third stay criterion is the balance of equities, which tips in the Legislators' favor because the merits tip in their favor.

C. The public interest favors a stay.

The last stay criterion is the public interest. While the Pennsylvania Supreme Court majority has injected itself into this litigation as a judicial challenger to state law, the case began as – and, for stay purposes, remains – litigation by voters against the state's electoral map. Where the parties dispute the lawfulness of government programs, this last criterion collapses into the merits. 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FED. PRAC. & PROC. Civ.2d §2948.4. If the Court sides with the Legislators on the merits, the public interest will tilt decidedly toward the Legislators: "It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." *Burford v. Sun Oil Co.,* 319 U.S. 315, 318 (1943). As between the Legislators and the original petitioners, the public-interest factor favors the Legislators.

Using a writ of mandamus can "ha[ve] the unfortunate consequence of making a district court judge a litigant," *Daiflon, Inc.*, 449 U.S. at 35, but here it would not be this Court's or the Legislators doing: the Pennsylvania Supreme Court majority made themselves a virtual litigant here all by themselves. As to the judicial attempt to usurp the General Assembly's obligations under the Elections Clause, the public-interest criterion heavily favors the Legislators.

CONCLUSION

This Court should stay the actions of the Pennsylvania Supreme Court in this litigation, pending the timely filing and resolution of a petition for a writ of *certiorari.*

Dated: March 5, 2018

Respectfully submitted,

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CERTIFICATE AS TO FORM

Pursuant to Sup. Ct. Rules 22 and 33, I certify that the foregoing motion for leave to file, motion for leave to file in 8.5-by-11-inch format, and the accompanying *amicus* brief are proportionately spaced, have a typeface of Century Schoolbook, 12 points, and contain 3, 2, and 19 pages (and 470, 251, and 5,092 words) respectively, excluding this Certificate as to Form, the Table of Authorities, the Table of Contents, and the Certificate of Service.

Dated: March 5, 2018

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CERTIFICATE OF SERVICE

The undersigned certifies that, on this 5th day of March, 2018, in addition to filing the foregoing document via the Court's electronic filing system, one true and correct copy of the foregoing document was served by U.S. Mail, postage pre-paid, with a PDF copy was served via electronic mail on the following counsel:

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The undersigned further certifies that, on this 5th day of March, 2018, an original and ten true and correct copies of the foregoing document were served on the Court by hand delivery.

Executed March 5, 2018, at Washington, DC,

/s/ Lawrence J. Joseph

Lawrence J. Joseph