In the Supreme Court of Pennsylvania
Middle District

No. 159 MM 2017

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA *et al.*,
Petitioners/Appellants,

v.

THE COMMONWEALTH OF PENNSYLVANIA *et al.*,
Respondents/Appellees.

Review of Recommended Findings of Fact and Conclusions of Law from the Commonwealth Court No. 261 M.D. 2017

RESPONDENTS/APPELLEES MICHAEL C. TURZAI, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES AND JOSEPH B. SCARNATI III, IN HIS OFFICIAL CAPACITY AS PENNSYLVANIA SENATE PRESIDENT PRO TEMPORE APPLICATION FOR STAY OF COURT'S ORDER OF JANUARY 22, 2018

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APPLICATION FOR STAY OF COURT'S ORDER OF JANUARY 22, 2018

Legislative Respondents respectfully request a stay of the Court's Order of January 22, 2018 on two grounds.

First, the decision throws the 2018 Congressional elections into chaos, as the General Assembly is now tasked with redrawing the Congressional plan using new constraints never before applicable to Congressional redistricting, with minimal guidance, and without reasoning explaining why the existing plan violates the State's Constitution. And it must do all this on the eve of candidate qualification for the upcoming primary elections. The Court therefore should exercise its equitable discretion and stay its Order to redraw the districts until after this election year.

Second, the decision raises a profoundly important question under federal law that is ripe for resolution by the United States Supreme Court. The question is whether a state judicial branch can seize control of redistricting Congressional seats from the state legislature, and the answer is no. Although this Court has the final say on the substantive law of Pennsylvania, U.S. Supreme Court precedent makes clear that the identity of "appropriate state decisionmakers for redistricting purposes" is a question of *federal*, not *state,* law under the Elections Clause. *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2666 (2015). And the U.S. Supreme Court has held, as a matter of federal

law, that "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking." *Id.* at 2668.

For these reasons, Legislative Respondents respectfully submit that the Court should (1) stay its Order for the creation of a new Congressional districting plan until after this election year, or, alternatively, (2) stay its Order pending the disposition of Legislative Respondents' forthcoming stay application and petition for writ of certiorari to the U.S. Supreme Court.

ARGUMENT

I. The Court Should Exercise Its Equitable Discretion to Delay Implementation of Its Decision Pending the 2018 Elections

The Court's decision poses a profound threat to the integrity of Pennsylvania's upcoming Congressional elections. The current Plan has been in effect since 2011 and has governed three elections, thereby acclimating voters and potential candidates alike to the current district lines. Now, only three weeks prior to the nominating-petition period, this Court has ordered a new plan and has ordered Executive Respondents to rewrite the Commonwealth's 2018 election calendar to accommodate the map-drawing process. Notably, Executive Respondents represented to the Court in the *Agre* case that the last possible date that a new map would need to be in place in order to effectively administer the 2018 elections would be January 23, 2018. Although Executive Respondents have

now changed their position, their prior representation calls into question whether the time frame established in the Court's Order could be implemented in a way that does not have negative implications for the elections.

With this in mind, the Court should revisit its Order in light of "considerations specific to election cases." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). As the U.S. Supreme Court has recognized, "Court orders affecting elections…can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.* at 4-5. And, "[a]s an election draws closer, that risk will increase." *Id.* at 5. The Court therefore should weigh such factors as "the harms attendant upon issuance or nonissuance of an injunction," the proximity of the upcoming election, the "possibility that the nonprevailing parties would want to seek" further review, and the risk of "conflicting orders" from such review. *See id.*; *Liddy v. Lamone*, 398 Md. 233, 250, 919 A.2d 1276, 1288 (2007) (following *Purcell* in assessing challenge under state law). Other relevant factors include "the severity and nature of the particular constitutional violation," the "extent of the likely disruption" to the upcoming election, and "the need to act with proper judicial restraint" in light of the General Assembly's heightened interest in creating Congressional districts. *North Carolina v. Covington*, 137 S. Ct. 1624, 1626 (2017).

The circumstances here overwhelmingly warrant a delay in enactment of new Congressional boundaries. The change in the elections schedule is highly likely to cause voter confusion and depress turnout. Moreover, the voting public in Pennsylvania is familiar with the 2011 Plan's district boundaries. A shift would drive perhaps millions of Pennsylvania residents out of their current districts and into unfamiliar territory with unfamiliar candidates. Separately, these candidates will face an uncertain configuration of voters just before the petition process begins. This means that innumerable Pennsylvanians expecting to vote for or against specific candidates on the bases of specific issues will be required to return to the drawing board and relearn the facts, issues, and players in new completely reconfigured districts. Voters who fail to make those efforts will face only confusion when they arrive at their precincts on Election Day and potential conflict with poll workers about the contents of the ballots they are given. That state of affairs plainly poses a substantial risk of undermining the will of the electorate.

The effect of this radical change will be felt most acutely by the very persons the Court presumably most intended to benefit: individuals intent on speaking out concerning, and participating in, the upcoming elections. Those individuals began investing time, effort, and money in the upcoming election as soon as the dust settled on the 2016 race, and they made that investment on the assumption that the 2011 Plan would continue to govern in 2018. While

implementing a new plan on the eve of the elections might allow Petitioners to vote for and potentially elect their preferred candidates, it conflicts directly with the rights of those individuals who have spent valuable time and resources with the expectation that the 2011 Plan would remain in effect. . All of these concerns motivated Justice Baer to dissent from the timing of the remedy this Court ordered (Baer, J., concurring and dissenting, at 2-3), and rightfully so.

Also at stake is the General Assembly's interest in enacting the Pennsylvania Congressional districting plan, which it derives directly from the Elections Clause of the *federal* Constitution. U.S. Const. Art. I, § iv, cl. 1; *see infra* § II.A. Both that provision and separation-of-powers principles require affording the General Assembly a *genuine* opportunity to remedy the violation. *See Butcher v. Bloom*, 203 A.2d 556, 568–71 (1964). But, the Court's Order does not afford the General Assembly a genuine opportunity to enact legislation creating a new map. First, the Court's Order provides the General Assembly with only 19 days to create and secure the Governor's approval for a new plan, after which the Court will decide what map to implement. Indeed, the Order establishes that even if the Governor accepts a plan crafted by the General Assembly and signs it into law, such plan must still be submitted to the court for approval. *See* Order at para. "Second". And should the Governor *not* approve a plan passed by the General Assembly, the Court has established that it will adopt a new plan on its own (even if the

Governor's veto is overruled by the General Assembly). *Id.* at para. "Third". Accordingly, the Court's Order establishes that it will be the court – not the State's legislature – that will determine what map will be used for the upcoming elections. That directly contravenes the plain language of the Elections Clause.

Second, although the court has ordered that a new map be passed as legislation within 19 days in accordance with the principles applicable to state reapportionment principles, it fails to provide any guidance regarding *how* this can be done in a manner that does not run afoul of Pennsylvania's Constitution. Petitioners' entire case has been based on the foundation that the 2011 Plan was unconstitutional because of *how* it was passed. Petitioners claimed, among other things, that: there was too much partisan influence; certain election-related data should not have been considered; the Plan was passed "in secret" behind closed doors; the Plan ran afoul of metrics like the efficiency gap etc. But putting Legislative Respondents on the clock without an opinion instructing the General Assembly how and why its prior efforts were unconstitutional, the Court forces the General Assembly to fly blind, virtually guaranteeing that any new map will be subject to further challenge and that the Court – and not the General Assembly – will therefore ultimately have to adopt a map of its own creation regardless of any efforts by the General Assembly. Under these circumstances, the emergency timeframe imposed by the Court is altogether insufficient, and a sufficient

timeframe would only push the date the new plan will take effect closer to Election Day further compounding the level of confusion and chaos. Either way, the General Assembly has a compelling interest in maintaining the status quo in 2018.

Against those weighty interests, Petitioners can claim only the paltriest countervailing concerns. Their own actions in delaying for over six years and three election cycles (not to mention waiting until over midway through the 2018 cycle) before filing this case demonstrate the level of significance that they attach to the interests impacted by their claims. Ultimately, it is unclear why the districts in the 2011 Plan were good enough to remain unchallenged for primary and general elections in 2012, 2014, and 2016 but are suddenly so deficient as to require an emergency remedy.

Similarly, although the Court has now identified a constitutional violation, it is not severe. *See Covington*, 137 S. Ct. at 1626. In fact, the "violation" would not have been a violation four years ago, *see Holt*, 67 A.3d at 1234, fifteen years ago, *see Erfer*, 794 A.2d at 332, twenty-five years ago, *In re 1991 Pennsylvania Legislative Reapportionment Comm'n*, 609 A.2d at 142, or fifty years ago, *Newbold*, 230 A.2d at 59-60. If the rights at stake in this case could wait decades to be identified, they can wait another year to be remedied. The U.S. Supreme Court has applied a similar pragmatic judgment. *See, e.g.*, *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 655 (1964).

In short, the balance of equities, in light of unique concerns related to redistricting and elections, counsels overwhelmingly in favor of a stay. The Court should delay implementation of its new redistricting rules until after this year's election.

II. The Court Should Stay Its Decision Pending Appeal

On an application for stay pending appeal, the movant must (1) "make a substantial case on the merits," (2) "show that without the stay, irreparable injury will be suffered," and (3) that "the issuance of the stay will not substantially harm other interested parties in the proceedings and will not adversely affect the public interest." *Maritrans G.P., Inc. v. Pepper, Hamilton & Scheetz*, 573 A.2d 1001, 1003 (1990); *see also Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (enunciating similar considerations for stay applications to the U.S. Supreme Court). All of these elements are met here.

A. Legislative Respondents Are Likely to Succeed on Appeal

There is, at minimum, a "reasonable probability" that the U.S. Supreme Court will take Legislative Respondents' forthcoming appeal and a "fair prospect" that it will reverse this Court's decision. *See Hollingsorth*, 558 U.S. at 190 (enunciating stay standards). The Court's Order intrudes on power delegated expressly to Pennsylvania's *legislative* processes under the *federal* Constitution,

presenting an issue of federal law long overdue for definitive resolution by the U.S. Supreme Court.

The U.S. Constitution's Elections Clause provides that "[t]he Times, Places and Manner" of Congressional elections "shall be prescribed in each State by the Legislature thereof" unless "Congress" should "make or alter such Regulations." U.S. CONST. art. I, § 4, cl. 1. The Elections Clause vests authority in two locations: (1) the state legislature and (2) Congress. State courts enjoy none of this delegated authority.

Consistent with that plain language, the U.S. Supreme Court has held "that redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking." *Arizona State Legislature*, 135 S. Ct. at 2668. There were nine votes in *Arizona State Legislature* for this proposition. While five construed "prescriptions for lawmaking" broadly enough to include "the referendum," and four believed only the state's formal *legislature* qualifies, compare *id. with id.* at 2677-2692 (Roberts, C.J., dissenting), *all* the Justices agreed that redistricting is *legislative* in character. None of the Justices suggested that a state court may qualify as the "Legislature" under the Elections Clause.

It is undisputed that this Court does not exercise a legislative function when it decides cases. *Watson v. Witkin*, 22 A.2d 17, 23 (Pa. 1941) ("[T]he duty of courts is to interpret laws, not to make them."). Yet after striking down the current plan

for, to date, unspecified reasons, the standards the Court now requires amount to mandatory redistricting criteria of the type typically found in a legislatively enacted elections code. It is untenable that the Pennsylvania constitutional provisions at issue, which have been in existence for over 100 years, were intended to incorporate a limitation on partisan gerrymandering—which, in fact, can be traced "back to the Colony of Pennsylvania at the beginning of the 18th Century." *Vieth v. Jubelirer*, 541 U.S. 267, 274 (2004).

To be sure, the Court has the right as Pennsylvania's court of last resort to conclude that, under Pennsylvania's constitutional scheme, this genre of decision-making is properly judicial under state law. But the question of what constitutes a "legislative function" under the Elections Clause, is a question of federal, not state, law, and the U.S. Supreme Court is the arbiter of that distinction. *See Arizona State Legislature*, 135 S. Ct. at 2668; *Bush*, 531 U.S. at 76. In fact, the U.S. Supreme Court has twice reviewed the decisions of state courts of highest resort on this very question. *Smiley v. Holm*, 285 U.S. 355, 367 (1932); *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 569 (1916); *see also Ariz. State Legislature*, 135 S. Ct. at 2666 (discussing *Hildebrandt*). The U.S. Supreme Court has also reviewed state-court judgments about the meaning of the term "legislature" in other provisions of the Constitution. *See Hawke v. Smith*, 253 U.S. 221, 226-30 (1920) (reversing Ohio Supreme Court's decision as to the proper scope of legislative power afforded to

states under Article V); *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) (reviewing Michigan Supreme Court's interpretation of Article 3, § 1, art. 2); *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring) (observing that in "a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government" the federal judiciary is tasked with enforcing that allotment of power); *see also Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70, 77 (2000) ("'There are expressions in the opinion of the Supreme Court of Florida that may be read to indicate that it construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl. 2 circumscribe the legislative power") (internal quotations omitted); *cf. Colorado Gen. Assembly v. Salazar*, 541 U.S. 1093 (2004) (Rehnquist, C.J., Scalia and Thomas, JJ., dissenting from the denial of certiorari).

Whether the Court has acted in a legislative or judicial capacity within the meaning of the Elections Clause, then, is not ultimately for this Court to decide. It is for the U.S. Supreme Court to decide, and its precedent strongly suggests what that decision will be.

B. The Equitable Factors Support a Stay

All the equitable factors weigh in favor of a stay.

First, Legislative Respondents and the Commonwealth will suffer irreparable harm if the case is not stayed. For one thing, the mere enjoinment of validly enacted legislation amounts to irreparable injury because "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012).

Moreover, the Court's Order engenders certain confusion and uncertainty about the rules governing the fast-approaching 2018 elections. According to the Court's schedule, the General Assembly has until only days before the first day for circulation of nominating petitions to pass a new plan, so in a *best case scenario*, participants and voters will not know until the eve of the opening of the petitioning process how Pennsylvania's 18 Congressional districts will be configured. Aspiring candidates will not know where they will run or who their opponents will be or who their constituents or voters might be, and voters and advocates will not know which candidates will be on the ballot. Additionally, there is no guarantee that the plan the General Assembly passes will not be further challenged in federal or state court, thereby necessitating further judicial review to ascertain whether the yet-to-be identified standards this Court now found in the State's Constitution have been satisfied in the remedial plan. And, if further remedial proceedings are required—which appears likely, given the difficulty in meeting the Court's

demanding schedule—the plan governing the 2018 elections surely will not be in place until at least mid-way through the Spring, thereby tossing primary dates and contests into chaos.

Second, the issuance of a stay will not materially impair the rights of other litigants in these proceedings. A stay would, of course, result in a modest delay to the implementation of the districts that Petitioners desire, but that is their fault. They could have filed this case any time between 2011 through 2016 (or over ½ way through the 2018 cycle) and obtained the relief they seek. Indeed, their choice in timing, along with their trial testimony, indicates that their interests in this case are barely more substantial than academic interest in a generic goal of non-partisan redistricting. And, this Court's Order says nothing about the assessment or role of partisanship or political considerations in implementing a new Congressional redistricting plan.

Third, the Commonwealth's interest in election integrity and the general public's interest in predictable procedures outweighs the private interest advanced here. After waiting more than five years, eighteen Petitioners filed this case seeking to advance their private rights; millions of *other* citizens did not. Those citizens have a right to an Election Day at a predictable time according to predictable procedures that does not overly confuse the average person as to who will be on his ballot when he shows up to vote. As of this moment, *no one* knows

who that will be as to *any* Pennsylvania citizen's ballot, and, as far as anyone can tell, no one will know any of that information for months. The public interest weighs overwhelmingly in favor of the status quo.

CONCLUSION

For these reasons, Legislative Respondents respectfully submit that the Court should stay its Order (1) to create a new districting plan until after this election year, or, alternatively, (2) pending Legislative Respondents' appeal to the U.S. Supreme Court.

Dated: January 23, 2018

Respectfully submitted,

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PROPOSED ORDER

AND NOW, this _____ day of January, 2018, upon consideration of Legislative Respondents' Application for Stay of Court's Order of January 22, 2018, it is hereby ORDERERD, ADJUDGED, and DECREED that the Application is GRANTED.

This Court's Order of January 22, 2018 requiring the creation of a new districting plan is stayed pending the Legislative Respondents' appeal to the Supreme Court of the United States and the completion of the 2018 midterm elections.

BY THE COURT:

_____