No. 17A795

In the Supreme Court of the United States

MICHAEL C. TURZAI, SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, ET AL.,
Applicants,

v.

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

On Emergency Application for Stay of Order Invalidating Congressional Districts Pending Appeal to the Supreme Court of The United States

MOTION FOR LEAVE TO FILE AMICUS BRIEF, MOTION FOR LEAVE TO FILE BRIEF ON 8 1/2 BY 11 INCH PAPER, AMICUS BRIEF FOR THE SECRETARIES OF STATE OF ALABAMA, ARIZONA, ARKANSAS, KANSAS, MISSOURI, AND SOUTH CAROLINA AS AMICI CURIAE IN SUPPORT OF APPLICANTS

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

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Respondents.

MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR STAY FOR THE SECRETARIES OF STATE OF ALABAMA, ARIZONA, ARKANSAS, KANSAS, MISSOURI, AND SOUTH CAROLINA

John Merrill, Secretary of State of Alabama, Michele Reagan, Secretary of State of Arizona, Mark Martin, Secretary of State of Arkansas, Kris Kobach, Secretary of State of Kansas, John R. Ashcroft, Secretary of State of Missouri, and Mark Hammond, Secretary of State of South Carolina, in their official capacities. respectfully move for leave of Court to file the accompanying amicus brief in support of Applicants' Emergency Application for Stay.

In support of their motion, Amici assert that the district court ruling at issue raises grave concerns about disruption of 2018 elections. Amici also assert that the ruling creates exigent circumstances which warrant their being permitted to be heard on the issue of Applicants' Emergency Application for Stay and request their motion to

file the attached amicus brief be granted.

Respectfully submitted on this 29th day in January, 2018,

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In support of their motion, Amici assert that the Emergency Application for Stay filed by Speaker Turzai and the other Applicants in this matter was filed on Thursday, January 25, 2018. The expedited filing of Speaker Turzai's application and the resulting compressed deadline for any response prevented Amici from being able to get this brief prepared for printing and filing in booklet form. Nonetheless, Amici desire to

be heard on the application and request the Court grant this motion and accept the paper filing.

Respectfully submitted on this 29th day in January, 2018,

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AMICUS BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR STAY FOR THE SECRETARIES OF STATE OF ALABAMA, ARIZONA, ARKANSAS, KANSAS, MISSOURI, AND SOUTH CAROLINA[1]

STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae are John Merrill, Secretary of State of Alabama; Michele Reagan, Secretary of State of Arizona; Mark Martin, Secretary of State of Arkansas; Kris Kobach, Secretary of State of Kansas; John R. Ashcroft, Secretary of State of Missouri; and Mark Hammond, Secretary of State of South Carolina, in their official capacities, and have or share official responsibility for the conduct of elections

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The Republican State Leadership Committee, the largest caucus of Republican state leaders in the country and home to the Republican Secretaries of State Committee, provided funding for the preparation and submission of this brief. The National Republican Redistricting Trust also provided funding for the preparation and submission of this brief.

in their respective states. In nearly all instances, they are also, by virtue of federal law, the chief election officials in their respective states. *See* 52 U.S.C. § 20509. They are familiar with the process of preparing for and running elections on a statewide basis.

Amici are concerned by the tendency of courts, acting deep in the decade, to direct changes in state districting plans that were enacted soon after the last decennial Census in 2010. They are also concerned that injunctive relief, like that directed by the Pennsylvania Supreme Court in this case, will cause chaos in their States. The expectations of voters and candidates will be changed on short notice, and the interests of overseas and uniformed services voters will have to be protected. Strict federal time limits govern the transmittal of absentee ballots to overseas and uniformed services voters, and amici are legally responsible for compliance with those time limits.

ARGUMENT

I. The Pennsylvania Supreme Court's Order imposes an impossible schedule on state and local election officials.

In a Per Curiam Order issued on January 22, 2018, the Supreme Court of Pennsylvania, Middle District, found the state's congressional redistricting plan unconstitutional in violation of the Constitution of Pennsylvania because it was politically gerrymandered. With the exception of Pennsylvania's 18th Congressional District, the court told the State to expect that a new plan be in place by February 19, 2018. State officials are

then directed to "take all measures, including adjusting the election calendar if necessary, to ensure that the May 15, 2018 primary election takes place as scheduled under that remedial plan." *See* Emergency Application for Stay, Appendix A, at A2-A3.

The effect is to give the State election officials less than three months to implement the new plan and have it ready to go. To do that, election officials will have to reallocate voters and notify those voters of the changes in their districts. Potential candidates will need time to evaluate the new map and make filing decisions. Ballots, including absentee ballots will have to be prepared, printed, and distributed to all who request them.

The magnitude of those tasks and their disruptive effect will depend on the magnitude of the changes to Pennsylvania's congressional map, which will not be known until February 19, 2018, or shortly before that date. Until the changes can be identified, however, it is impossible for election officials to start on that work.

Nonetheless, "[i]t is naïve to think that disruption will not occur." Application at Appendix A, A6 (Baer, J., Concurring and Dissenting Statement). The activities of prospective candidates have been based on "a precise understanding of the districts in which they are to run, which have been in place since 2011." *Id.* Those prospective candidates may find all their efforts have been for naught if their district lines are changed. "This says nothing of the average voter, who thought he knew his Congressperson

and district, and now finds that all has changed within days of the circulation of nomination petitions." *Id.*

This relief comes deep in the decade, after three rounds of congressional elections conducted using these plans. As Justice Baer noted, voters, candidates, and state and local election officials are accustomed to working within the parameters of the current plan. Their expectations will all be upset.

Moreover, in congressional redistricting, the allowable population deviations between districts are minimal. In *Karcher v. Daggett*, 462 U.S. 725 (1983), this Court held that "absolute population equality be the paramount objective of apportionment" where congressional districts are concerned. *Id.* at 732. It "thus reaffirm[ed] that there are no *de minimis* population deviations, which could practically be avoided." *Id.* at 734.

The work of reapportioning citizens ordered by the Pennsylvania Supreme Court necessarily relies on the results of the 2010 Census. The Constitution calls for the apportionment of representatives among the States to be done on the basis of an "actual Enumeration." CONST. Art. I, § 2. "Article I, § 2 establishes a 'high standard of justice and common sense' for the apportionment of congressional districts: 'equal representation for equal numbers of people.'" *Karcher*, 462 U.S. at 730 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964)). The last Census, or enumeration, was done in 2010, so its results will have to be used.

The relief ordered by the court will last only until the next Census results are distributed to the states. The Census will be conducted in 2020, the results distributed in the first quarter of 2021, and the States will have to put new congressional plans in place for elections in 2022. In that next round of redistricting, any newly-developed parameters of any limitation on political gerrymandering can be taken into account. Put simply, there is no need to hurry.

II. The relief ordered by the Pennsylvania Supreme Court must be reviewed against well-established equitable principles.

The "well-known principles of equity" govern awards of relief in redistricting cases. *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). More generally, parties seeking injunctive relief must show that, among other things, the balance of equities favors those parties and an injunction serves the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Those general considerations are all the more pressing in the redistricting context.

As this Court has observed, "considerations specific to election cases and [a court's] institutional procedures" must be considered before a court interferes with an upcoming election. *Purcell v. Gonzalez*, 549 U.S. 1 (2006). In *Purcell*, the Court vacated an interlocutory injunction entered by a motions panel of the Ninth Circuit that barred Arizona from enforcing its voter identification law shortly before a scheduled election. It warned, "Court orders affecting elections ... can themselves result in voter confusion

and consequent incentive to remain away from the polls." *Id.* at 4-5. That is particularly the case "[a]s an election draws closer" when such "risk[s] will increase." *Id.* at 5.

This Court reinforced the importance of a state's interest in preserving the integrity of its election process in *North Carolina v. Covington*, 137 S. Ct. 1624 (2017). There, it first stayed and later vacated a district court's order ordering that the terms of some elected legislators be shortened and special elections be conducted. In a per curiam opinion, the Court observed, "[I]n the context of deciding whether to truncate existing legislators' terms and order a special election, there is much for a court to weigh." *Id.* at 1625. Indeed, whether to order a special election as a remedy for racial gerrymandering is a question the Court has "never addressed." *Id.* Assuming that such relief can be awarded, courts should "obvious[ly]" take "the severity and nature of the particular constitutional violation, the extent of the likely disruption to the ordinary processes of governance if early elections are imposed, and the need to act with proper judicial restraint when intruding on state sovereignty." *Id.* at 1626.

III. The balance of equities does not favor Respondents.

This Court has observed that, in an appropriate case, "a Circuit Justice will balance the equities to determine whether the injury asserted by the applicant outweighs the harm to other parties or to the public." *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers). In this

case, the equities clearly favor the Applicants and the public.

Amici have already pointed to how the directive will disrupt the expectations of voters, candidates, and state and local election officials. Against that, Respondents can point to the unexplained ruling in their favor on an unsettled legal issue now pending before this Court. They have no reliance interests and cannot pretermit a State appeal. *Cf. Riley v. Kennedy*, 553 U.S. 406, 425 (2008) (State law challenged in state court at the first opportunity, with one election conducted under it, and later struck down by state supreme court was never "in force or effect" for preclearance purposes).

Moreover, the court's order barely leaves time to comply with the mandates of federal law governing the voting rights of overseas and uniformed services voters. In particular, federal law provides "Each state shall ... transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter ... not later than 45 days before the election." 52 U.S.C. § 20302(a)(8)(A). Those voters need to know enough about the ruling to request an absentee ballot, and those absentee ballots cannot be printed, much less transmitted, before the closing of candidate qualification.

There is, accordingly, room for doubt as to whether states in the position of Pennsylvania can comply with federal law. The point is that claims of non-compliance can get *amici* hauled into court. *See, e.g. United States v. Georgia*, 952 U.S. 1318 (N.D. Ga. 2013); *United States v. Georgia*,

892 F. Supp. 2d 1367 (N.D. Ga. 2012).

Under the Pennsylvania Supreme Court schedule, those absentee ballots will have to be transmitted on or before March 31, 2018. That leaves only some 40 days, from February 19 when the plan is to be available until March 31, for the sorting of voters, candidate qualification, preparation of ballots, and the affected overseas and uniformed services voters to request a ballot. All in all, that is a recipe for chaos.

IV. The unsettled nature of the underlying issue and this Court's actions in other cases counsel strongly in favor of a stay.

Amici recognize that the primary concern of Applicants is that the Pennsylvania Supreme Court inserted itself into a fundamentally legislative process in contravention of the separation of powers. In addition, though, the Pennsylvania Supreme Court also expressed its view on an unsettled area of law currently under consideration at this Court.

The justiciability and parameters of a legitimate claim of political gerrymandering have not yet been established. This Court was twice unable to come up with a test to govern the adjudication of those claims. *See Vieth v. Jubelirer*, 541 U.S. 267 (2004); *Davis v. Bandemer*, 478 U.S. 109 (1986). Thus, based on current law, there is no standard to govern claims of political gerrymandering.

This term, this Court has two cases in which to consider the justiciability and parameters of such claims. *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), *stayed pending disposition*, 137 S. Ct. 2289 (2017);

Benisek v. Lamone, 266 F. Supp. 3d 799 (D. Md. 2017), *postponing jurisdictional statement*, No. 17-333 (U.S. Dec. 8, 2017). *Whitford*, which involved an equal protection based partisan gerrymandering claim, was argued on October 3, 2017, and *Benisek*, which involves a First Amendment claim, will be argued on March 28, 2018. The future of the Pennsylvania Supreme Court's decision may well turn on the resolution of these cases.

This Court did not stay only the *Gill* district court's order directing Wisconsin to enact a conditional remedial districting plan for its 2018 elections by November 1, 2017. It recently stayed the remedy in a partisan gerrymandering case in a North Carolina federal court pending appeal. *Common Cause v. Rucho*, 2018 U.S. Dist. Lexis 5191 (M.D. N.C. Jan. 9, 2018), *stayed*, 2018 U.S. Lexis 758 (U.S. Jan. 18, 2018). This case is equally deserving of a stay given the unsettled nature of the legal issue.

CONCLUSION

For the foregoing reasons, this Court should issue a stay of the injunctive relief awarded by the Supreme Court of Pennsylvania pending this Court's disposition of Applicants' Petition for Certiorari.

Respectfully submitted on this 29th day in January, 2018,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of January, 2018, a copy of the forgoing Motion for Leave to File Amicus Brief in Support of Emergency Application for Stay has been served via e-mail and USPS First Class Mail on the following:

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