

No. 17A802

In The
Supreme Court of the United States

Brian McCann, et al.,
Applicants,

v.

League of Women Voters of Pennsylvania, et al.,
Respondents

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

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

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

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*On behalf of Respondent Michael J.
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Governor of Pennsylvania and
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TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE THIRD CIRCUIT:

Respondent Michael J. Stack, III, in his capacity as Lieutenant Governor of Pennsylvania and President of the Pennsylvania Senate, opposes the Emergency Application for Stay Pending Resolution of Appeal to this Court filed by the Intervenor Republicans who opposed Petitioners' action before the Pennsylvania Supreme Court ("Applicants").¹ Respondent Stack joins in the opposition of the Petitioners, the League of Women Voters and individual voters from each of Pennsylvania's eighteen congressional districts; and of the Executive Branch Respondents, Pennsylvania Governor Thomas W. Wolf, Acting Pennsylvania Secretary of State Robert Torres and Pennsylvania Bureau of Commissions, Elections and Legislation Commissioner Jonathan Marks.²

I. INTRODUCTION

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

¹ Lt. Gov. Stack similarly opposes the Emergency Application for Stay Pending Resolution of Appeal to this Court filed by Pennsylvania President Pro Tempore of the Senate Joseph B. Scarnati, III and Pennsylvania Speaker of the House of Representatives Michael Turzai, pending in this Court at Docket No. 17A795.

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

Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875). Lt. Gov. Stack writes separately to address one key point: contrary to Applicants’ feigned dismay and speculation of mass confusion, the Pennsylvania Supreme Court’s January 22, 2018 Order allows for ample time and guidance to create a constitutional map and will not burden Applicants’ rights. The Pennsylvania Supreme Court properly reviewed the Pennsylvania General Assembly’s legislative enactment, Act 131 of 2011 (the “2011 Plan”), and the court’s order rejecting that plan and requiring the General Assembly to create a new plan – one that complies with the requirements of the Pennsylvania Constitution – should not be stayed.

II. ARGUMENT

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

Applicants maintain that the Pennsylvania Supreme Court’s Order to draw a new congressional map in 19 days provides insufficient time and guidance. Yet, the General Assembly managed to enact the 2011 Plan in only 8 days and the Pennsylvania Supreme Court provided clear guidance as to the familiar and constitutionally-appropriate parameters they must use.

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

As the Commonwealth’s Lieutenant Governor, Respondent Stack also serves as President of the Pennsylvania Senate. Pa. Const. art. IV, § 4. He has a unique perspective as to the 2011 Plan because he was a State Senator in the General Assembly when it was created. Eight days elapsed between the 2011 Plan’s release

and its enactment, with the Pennsylvania Senate passing the 2011 Plan on the same day as its release. See Joint Stipulation of Facts, 261 M.D. 2017 (Pa. Commw. Ct. Dec. 8, 2017 3:35 p.m.) at ¶¶ 46-47, 50, 60. Given its historical experience, the Pennsylvania General Assembly clearly has the ability to implement the Pennsylvania Supreme Court's order in the established timeframe. In fact, since the Pennsylvania Supreme Court issued its Order, the General Assembly has begun the process for passage of legislation to create a new congressional map.³

The court's January 22 Order gave the General Assembly and the Governor the first opportunity to enact a constitutional map for Pennsylvania. Only if those parties fail to timely present a constitutionally-valid map would the court adopt a map. The court's directive is consistent with the format previously used in Pennsylvania for the development of a new map following the 1990 Census, when the General Assembly and Governor were unable to agree on a map. As a result, the Pennsylvania Supreme Court then appointed the President Judge of the Commonwealth Court as a special master. In 11 days, and without the sophisticated mapping tools now available, the judge was able to draft a compliant

³ Respondent Stack would ask this Court to take judicial notice of the fact that, on January 29, 2018, Applicant Scarnati sponsored Senate Bill 1034 to begin the process to pass a new congressional map, which was reported out of the Senate State Government Committee 11-0, with one member not voting. On January 31, 2018, the Pennsylvania Senate voted 49-0 to refer the Bill to the House of Representatives. See BILL INFORMATION – HISTORY, SENATE BILL 1034, http://www.legis.state.pa.us/cfdocs/billInfo/bill_history.cfm?syear=2017&sind=0&body=S&type=B&bn=1034 (last visited Feb. 1, 2018). The House of Representatives is now addressing redistricting under House Bill 2020. See BILL INFORMATION – HISTORY, HOUSE BILL 2020, <http://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2017&sInd=0&body=H&type=B&bn=2020> (last visited Feb. 1, 2018).

congressional map, and to receive public input. *Mellow v. Mitchell*, 607 A.2d 204, 206 (Pa. 1992), *cert denied sub nom. Loeper v. Mitchell*, 506 U.S. 828 (1992).

Here, the Pennsylvania Supreme Court’s January 22 and 26 Orders properly provide the General Assembly and Governor with an opportunity to draft a compliant map and allow for court action in the event they are not able to agree, consistent with the process in *Mellow* and the General Assembly’s compressed schedule in 2011. Any argument that a new map could not be drawn in 19 days fails to recognize the historical record; the extensive record developed before the Pennsylvania Commonwealth Court; the mapping tools available; and the work the General Assembly has already completed to pass a new map.⁴

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

The Applicants’ assertion that the General Assembly is without guidance to draw a new map fails to acknowledge the familiar, neutral redistricting criteria that the Supreme Court explicitly set forth in its January 22 Order – “compact and

⁴ Here, unlike in *Mellow*, the parties already have had the opportunity to prepare and draw maps that adhere to traditional redistricting criteria, and they have access to far more sophisticated tools at their disposal. Dr. Chen produced 1,000 valid maps. (Pet. Ex. 1). Legislative Respondents’ expert witness, Dr. Wendy Cho, in her peer-reviewed work, acknowledged the traditional redistricting criteria the Pennsylvania Supreme Court has required. (Tr. 1332-34). She further stated that her supercomputer could produce one trillion valid maps for Pennsylvania in “about three hours.” (Tr. 1348-49). Further, throughout this proceeding, Respondent Stack himself has consistently supported Chen Figure 1 as an existing map that complies with all of the Pennsylvania Supreme Court’s neutral redistricting criteria, and restores the various communities of interest that were the subject of trial testimony. See (Tr. 579-667), Brief of Respondent Michael Stack, 159 MM 2017 (Pa. Jan. 10, 2018 2:04 p.m.), at 10-15. The parties here are significantly further along with the development of a new map and have more time than in *Mellow*.

contiguous territory; as nearly equal in population as practicable; and which do not divide any county, city, incorporated town, borough, township, or ward, except where necessary to ensure equality of population.” See Jan. 22 Order at 3. Indeed, at oral argument, counsel for the Legislative Respondents conceded that these neutral redistricting criteria already existed as a matter of Pennsylvania constitutional jurisprudence as set forth in *Mellow*, 607 A.2d at 207. See also *Holt v. 2011 Legislative Reapportionment Commission*, 38 A.3d 711, 730 (Pa. 2012) (addressing traditional redistricting criteria under Pennsylvania law). Further, the testifying expert defending the 2011 Plan, Dr. Wendy Cho, identified these criteria in her own peer-reviewed work, which was presented to the trial court. (Tr. 1332-34).⁵ Finally, using one of the nonpartisan maps that Dr. Chen created, Lt. Gov. Stack highlighted at trial, and before the Pennsylvania Supreme Court, a map that meets the traditionally recognized criteria and consolidates virtually every regional community of interest that the 2011 Plan improperly divided. Brief of Respondent Michael Stack, 159 MM 2017 (Pa. Jan. 10, 2018 2:04 p.m.), at 10-15.

D. The Applicants Cannot Justify A Stay

The testimony at trial established that the gerrymandered shapes of the 2011 Plan frequently confuse voters, who are often in different districts from their own neighbors. (Tr. 138, 678-80). For instance, the population of Montgomery County,

⁵ At trial, Dr. Cho discussed her peer-reviewed work, in which she identified that the factors of “population, equality, contiguity, compactness, preserving communities of interest” as uncontroversial redistricting criteria. (Tr. 1333). She admitted that partisan gerrymandering can be demonstrated by showing that an enacted map significantly underperforms a set of randomly drawn maps on these factors. (*Id.* at 1334).

Pennsylvania's third largest county, is large enough to encompass a single district within its boundaries. Yet, under the 2011 Plan, five separate districts wind through Montgomery County, with shapes that are so contorted that one district is referred to as "Goofy Kicking Donald Duck." (Tr. 599). As the Pennsylvania Supreme Court recognized, a new constitutionally-valid map will respect the boundaries of counties and municipalities and address the confusion that has resulted from the current map.

In their emergency petition, the Applicants use speculative "voter confusion" about the new map and the potential influx of new candidates as an argument against altering the illegally gerrymandered map and as a means to protect their preferred candidates. Given the fluid dynamic within Pennsylvania's current congressional delegation, the Applicants' claim of voter confusion is disingenuous. Since June 15, 2017, when the League of Women Voters filed its petition for review in the Pennsylvania Commonwealth Court, 6 of Pennsylvania's 18 incumbent members of Congress have either resigned or announced their retirement.⁶ These changes within the delegation reflect the natural ebb and flow of politics.

The Applicants' assertion that the unconstitutional map should not be remedied immediately – on a claim of voter confusion – insults the voters' ability to understand map amendments, which occur with every redistricting process, and to

⁶ Representative Tim Murphy resigned as of October 21, 2017. Representatives Bill Shuster, Pat Meehan, Robert Brady and Charlie Dent have decided to retire. Representative Lou Barletta has entered the race for the United States Senate. Representatives Brady and Meehan announced their decisions to retire after the Pennsylvania's Supreme Court's January 22 Order.

assess new candidates, who routinely introduce themselves to the electorate. The facts at trial demonstrate that a new map, with fewer county and municipal splits, fewer twists and turns and no cartoonish shapes, will be infinitely easier for voters to understand than the unconstitutional map that has been in place.

Further, the Pennsylvania Election Code will allow voters more than sufficient time to evaluate candidates before both the May primary and the November general election. The Election Code provides for several weeks in advance of the primaries for signature-gathering and additional weeks for any court-challenges before ballots are printed. These provisions relate to the candidates' qualifications to be on the ballot. Only potential candidates – not voters – are impacted when these timeframes are limited by a few days. Given the number of incumbent resignations, voters in the May primary and November general election will be introduced to new candidates who will have months to campaign, regardless of the replacement of the constitutionally-infirm 2011 Plan.

Here, with its order, the Pennsylvania Supreme Court, with the express concurrence of the Pennsylvania Secretary of State, made only the most minor adjustment to the year-long schedule to allow a constitutionally valid map to be put in place well before the May primary and the November general election.⁷ See

⁷The Applicants, and their allies, foster a false narrative intended to invent a federal issue and to preserve partisan advantage for one party. They would create the impression that the Pennsylvania Supreme Court somehow “ordered” legislators to convene an emergency session, with insufficient time to prepare a remedial map, without acknowledging that the General Assembly has proved itself well-able to expeditiously adopt a new map when it is in its partisan interest to do so. They shed crocodile tears as they cynically protest that they seek only to protect what

Affidavit of Secretary of State (Wolf Ex. 2); *see also Mellow v. Mitchell*, 607 A.2d 204, 206 (Pa. 1992), *cert denied sub nom. Loeper v. Mitchell*, 506 U.S. 828 (1992) (denying certiorari when, after the General Assembly and the Governor were unable to agree on a new map after the 1990 Census, the Pennsylvania Supreme Court did not approve a new map until March, 1992).

The primary election is scheduled for May 15, 2018 and the general election is scheduled for November 6, 2018. Thus, voters will have more than enough time to understand the new districts. To the extent entire counties are included within one (instead of four or five) distorted districts, a new map will be far less confusing to all involved. Compare Joint Ex. 1 with Pet. Ex. 1.

E. Applicants Cannot Rely On The March 13, 2018 Special Election, As The Pennsylvania Supreme Court Specifically Exempted it From its Order.

Applicants' arguments regarding a single March 13, 2018 special election are also unfounded. (Br. at 8). The Pennsylvania Supreme Court's January 22 Order specifically exempts that special election, which will merely fill a vacant seat, in an

they apparently view as an apathetic and disengaged electorate from confusion. Their true intent is, quite obviously, to preserve their gerrymandered map, which is invalid under the Pennsylvania Constitution, and the imbedded 13-5 Republican advantage in Pennsylvania's Congressional delegation that the invalid map provides. As the Pennsylvania Supreme Court has determined, Pennsylvania voters must have an opportunity to participate in the electoral process on a level playing field. The efforts of the Applicants – and those who seek to support their undemocratic cause – must be rejected.

existing district, through the end of 2018.⁸ The winner of that special election, like all incumbents, may seek to run in the new districts designated in a map that complies with the Pennsylvania Constitution.

Despite the Applicants' feigned hysteria over this remedial process, Pennsylvania voters are able to appreciate the distinction between old and new maps and special elections. Those same concerns were easily resolved only a few years ago in a nearly identical situation. In *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711 (Pa. 2012), the Pennsylvania Supreme Court rejected a redistricting map for both houses of the Pennsylvania General Assembly and the claim that it created uncertainty as to the district boundaries of a legislative map for legislators whose terms of office were to commence in January 2013. While the new map was being developed, special elections were required for six vacant state House seats. In early 2012, the Pennsylvania Speaker of the House took the position that he did not have to issue writs for the special elections for the six vacant seats because the legislative map for future sessions had not yet been drawn. In *Fagan v. Smith*, 41 A.2d 816 (Pa. 2012), the Pennsylvania Supreme Court rejected this argument and directed the Speaker to issue the writs. The court explained why the uncertainty associated with the future legislative map was irrelevant to the obligations to immediately fill the vacant seats:

⁸ The special election is to occur in Pennsylvania's 18th congressional district following Rep. Murphy's resignation. Under Pennsylvania law, parties select candidates to run in special elections, and the candidates have already been chosen. See Joint Stipulation of Facts, 261 M.D. 2017 (Pa. Commw. Ct. Dec. 8, 2017 3:35 p.m.) at ¶ 156. As a result the effect of a new map for a future election is negligible.

The district boundaries for the six vacant seats at issue here were set in the 2001 Final Reapportionment Plan, and the new members who would be elected to serve the remainder of their terms will merely step into the shoes of their predecessors—just as the Speaker and every other sitting House member who is currently seated under the districts set forth in the 2001 redistricting map. While the 2011 Legislative Reapportionment Commission continues its work on a new reapportionment plan going forward, there is no question about what districts are involved here; they are the six districts whose seats have been vacant since January 2012.

41 A.3d at 821. Consistent with the court’s appreciation of the voters’ understanding, no mass confusion at the polls resulted.

Speculative fears about confusion over new maps, which are routinely created in Pennsylvania with every redistricting, should not overcome the actual demonstrated harms from the current unconstitutional map. A court cannot be powerless to remedy unconstitutional acts. See *Bush v. Lucas*, 462 U.S. 367, 374 (1983) (holding that courts have “the authority to choose among available judicial remedies in order to vindicate remedies.”).⁹ The Applicants’ speculation as to possible voter confusion about a new map does not justify a stay.

⁹ William Penn, the first proprietor within the Colony of Pennsylvania, was loath to let injustice fester, famously noting that “Our Law says well, to delay Justice is Injustice.” See WILLIAM PENN, SOME FRUITS OF SOLITUDE (1693 (HEADLEY BROS. 1905)) MAXIM 393.

III. CONCLUSION

For all the reasons cited herein, the Emergency Application of the Intervenor Republicans to stay the Pennsylvania Supreme Court's January 22, 2018 Order should be DENIED.

Respectfully submitted,

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Dated: February 2, 2017