No._____

# In The
# Supreme Court of the United States

In re Michael C. Turzai, In His Official Capacity as Speaker of the Pennsylvania House of Representatives & Joseph B. Scarnati, III, In His Official Capacity as Pennsylvania Senate President Pro Tempore,

On Petition for a Writ of Mansdamus to the United States District Court for the Eastern District of Pennsylvania

## EMERGENCY PETITION FOR WRIT OF MANDAMUS


Jason Torchinsky*
*Counsel of Record*
Shawn Sheehy
HOLTZMAN VOGEL
JOSEFIAK TORCHINSKY PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186
Phone: (540) 341-8808
Fax: (540) 341-8809
*Attorneys for Applicants Senator Joseph Scarnati, III and Representative Michael Turzai*

Brian S. Paszamant
Jason A. Snyderman
John P. Wixted
BLANK ROME LLP
One Logan Square
130 N. 18th Street
Philadelphia, PA 19103
Phone: (215) 569-5791
Fax: (215) 569-5555
*Attorneys for Applicant Senator Joseph Scarnati, III*

Kathleen A. Gallagher
Carolyn Batz McGee
Jason McLean
CIPRIANI & WERNER PC
650 Washington Road, Suite 700
Pittsburg, PA 15228
Phone: (412) 563-4978
*Attorneys for Applicant Representative Michael Turzai*



LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

## QUESTION PRESENTED

Under this Court's precedent in *Growe v. Emison*, 507 U.S. 25 (1993) requiring a federal district court to stay its hand and defer to state courts and legislatures adjudicating challenges to redistricting plans, did the three-judge court below err when it—without analysis or opinion—denied Intervenor-Defendants' Motion to Stay or Abstain the case pending resolution of a substantially similar challenge to Pennsylvania's Congressional Districts asking for the substantially same remedy that is currently proceeding in Pennsylvania's Commonwealth Court and the Supreme Court of Pennsylvania.

## PARTIES TO THE PROCEEDING

Louis Agre, William Ewing, Floyd Montgomery, Joy Montgomery, and Rayman Solomon are Plaintiffs in the District Court action below (the "Federal Action"). Thomas W. Wolf, in his official capacity as Governor of Pennsylvania; Pedro Cortes, in his official capacity as Secretary of State of Pennsylvania; and Jonathan Marks, in his official capacity as Commissioner of the Pennsylvania Bureau of Elections, are named Defendants in the Federal Action. Applicants are Intervenor Defendants in the Federal Action.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**STATUTES**



**OTHER AUTHORITIES**

## PRELIMINARY STATEMENT

In *Growe v. Emison*, 507 U.S. 25 (1993), this Court recognized that federal district courts are ***required*** to defer adjudicating a state's congressional apportionment plan when the state's legislature or judiciary is already addressing this "highly political task." Notwithstanding that both the Pennsylvania Commonwealth Court (one of Pennsylvania's two intermediate appellate courts) *and* the Supreme Court of Pennsylvania are currently considering a partisan gerrymandering challenge to Pennsylvania's congressional redistricting map that was filed June 15, 2017, a three-judge panel of the Eastern District of Pennsylvania (the "District Court") has refused to stay or abstain from hearing substantively identical claims filed on October 2, 2017, and has instead issued an expedited scheduling order in which trial is tentatively scheduled for December 4, 2017 (a mere 63 days after the Complaint was filed).

Not only does the District Court's decision to decline to stay or abstain run contrary to the separation of federal and state authority as required by this Court in *Growe*, it has left Applicants 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 (collectively, "Applicants") with no other means by which to attain the relief they seek but to approach this Court, for several reasons.

First, Applicants are members of Pennsylvania's General Assembly, which is responsible for drafting and enacting congressional apportionment plans. The Pennsylvania Constitution's Speech or Debate Clause affords members of the General Assembly a Legislative Privilege that protects their deliberative and communicative processes. The scope and application of the Legislative Privilege in the context of a partisan gerrymandering challenge is currently being litigated in the Pennsylvania Commonwealth Court, but will not be resolved likely until the first quarter of 2018, at the earliest. Notably, the same issues underlying the Legislative Privilege in the Commonwealth Court are implicated by the discovery sought from Applicants in the District Court. As such, under the expedited trial schedule, the District Court will likely reach a full disposition on the merits—including ruling on these important Legislative Privilege issues—before the Commonwealth Court decides a critical question of Pennsylvania Constitutional law. This would have a potentially harmful and irreversible effect on Applicants and the Pennsylvania General Assembly, especially if the District Court compels the disclosure of documents, information, or testimony that the Commonwealth Court (and thereafter likely the Pennsylvania Supreme Court) ultimately concludes is protected by the Legislative or other privilege.

Second, the District Court's decision to not only deny Applicants' Abstention Motion, but to proceed on an expedited schedule could create substantial uncertainty regarding the 2018 elections.

Many individuals have already announced their candidacies and raised millions of dollars in reliance on the existing congressional apportionment plan, and would be severely prejudiced if their existing districts were reshaped or eliminated entirely at the eleventh hour. This inherent unfairness is exacerbated by the fact that the current congressional map went into effect nearly *six years ago*, and had been in use for three complete federal election cycles, but the plaintiffs in the District Court action inexplicably waited until October 2, 2017 to first advance their claims.

Third, there is simply not enough time under the District Court's expedited schedule to properly address the multitude of complex issues underlying partisan gerrymandering claims. This is especially true considering that substantively identical claims are pending before this Court in *Gill v. Whitford*, No. 16-1161 (U.S.). If this Court's decision in *Whitford* sets forth new standards governing partisan gerrymandering claims—or concludes that such claim are non-justiciable political questions—then the claims pending before the District Court may be narrowed or rendered moot. The District Court's decision to proceed now—when Pennsylvania's highest appellate courts are already squarely addressing Pennsylvania's congressional apportionment plan—is not only unnecessary and prejudicial to Applicants, it is completely at odds with this Court's binding precedent in *Growe*.

For all of these reasons and those set forth more fully herein, Applicants respectfully request that this Court issue a writ of Mandamus to the

District Court, ordering that Court to abstain from proceeding until a final adjudication on the merits is issued in actions pending before the Pennsylvania Commonwealth Court and the Supreme Court of Pennsylvania.

## JUDICIAL ORDER BELOW

The October 25 Order—in which the District Court, Smith, Chief Circuit Judge; Shwartz, Circuit Judge; Baylson, District Judge, denied the Abstention Motion notwithstanding the pendency of the Pennsylvania Action—is attached as Appendix A.

## JURISDICTION

This Court has jurisdiction to grant a writ of Mandamus. *See* 28 U.S.C. § 1651(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Const. art. I, § 4.

**a)** The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

**(b)** An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.
28 U.S.C. § 1651.

## STATEMENT OF THE CASE

### I. THE PENNSYLVANIA STATE COURT ACTION

#### A. The Commencement of the Pennsylvania Action

On June 15, 2017, the League of Women Voters of Pennsylvania and individual voters who are all registered Democrats (the "State Petitioners") filed in the Pennsylvania Commonwealth Court a Petition for Review of Pennsylvania's 2011 congressional redistricting plan (the "2011 Plan"). *See League of Women Voters of Pennsylvania, et al. v. Commonwealth, et al.*, No. 261 MD 2017 (Pa. Commw. Ct. June 15, 2017) (the "Pennsylvania Action").[1] State Petitioners allege that the 2011 Plan was devised to maximize impermissibly the number of Republican congressional representatives. (*Id.* ¶¶ 42-49.) According to State Petitioners, the Senate sponsors of the 2011 Plan accomplished this goal by "packing" Democrat leaning jurisdictions and "cracking" Democrat leaning jurisdictions into multiple Republican leaning jurisdictions. (*Id.* ¶¶ 61-66, 73-74.)

State Petitioners have advanced two claims for relief in the Pennsylvania Action against Applicants and others. First, Petitioners contend

---

[1] A copy of the Petition for Review in the Pennsylvania Action is attached as Exhibit B to the Emergency Application for a Stay filed simultaneously with this Application.

that the 2011 Plan violates Pennsylvania's Free Speech and Expression Clause and the Freedom of Association Clause codified at Art. I, §§ 7, 20 of the Constitution of the Commonwealth of Pennsylvania. According to State Petitioners, the 2011 Plan violates these provisions because, among other things, it prevents Democratic voters from electing the representatives of their choice and from influencing the legislative process, and suppresses their political views. (*Id.* ¶¶ 99-112.) Second, State Petitioners contend that the 2011 Plan violates the equal protection provisions in Pennsylvania's Constitution, codified at Art. I, §§ 1 and 26, and Art. I, §5, because the 2011 Plan was enacted with discriminatory intent and has had a discriminatory effect. (*Id.* ¶¶ 116-17.) State Petitioners allege that Democrats, as an identifiable group, are disadvantaged at the polls and are consequently denied fair representation. (*Id.* ¶ 117.)

### B. The Commonwealth Court Partially Stays Proceedings Pending This Court's Decision in *Whitford*, and State Petitioners Seek Relief in the Pennsylvania Supreme Court

Following a hearing on October 4, 2017, the Commonwealth Court on October 16, 2017 ordered a partial stay of the Pennsylvania Action pending this Court's disposition of *Whitford*. While the stay is pending, the Commonwealth Court has ordered the parties to submit briefing related to the applicability of the Legislative Privilege set forth in the Pennsylvania Constitution. The Commonwealth

Court recognized that these privilege issues would have a significant impact on the scope of the discovery sought by State Petitioners. Briefing on those issues is scheduled to conclude on December 29, 2017.

On October 11, 2017, State Petitioners filed an Application for Extraordinary Relief with the Pennsylvania Supreme Court, seeking to have that court exercise its extraordinary jurisdiction over the Pennsylvania Action and lift the stay. *See League of Women Voters of Pennsylvania, et al. v. Commonwealth*, *et al.*, No. 159 MM 2017 (Pa. Oct. 11, 2017).[2]

## II. THE FEDERAL ACTION

### A. Plaintiffs Herein Commence A Substantively Identical Action in Federal Court Months After State Petitioners Filed the Pennsylvania Action

On October 2, 2017—nearly four months after State Petitioners filed the Pennsylvania Action—Louis Agre, William Ewing, Floyd Montgomery, Joy Montgomery, and Rayman Solomon (collectively, "Plaintiffs") filed a three-count Complaint in the District Court. *See Agre v. Wolf*, 2:17-cv-4392-MBB (E.D. Pa. 2017) (ECF No. 1.) The Complaint seeks declaratory and injunctive relief based on the claim

[2] As of the time of this filing, the Application remains pending before the Supreme Court of Pennsylvania.

that the 2011 Plan is an unconstitutional gerrymander under the Elections Clause of the United States Constitution, Article I, Section 4. (ECF No. 1, ¶ 1.)[3]

In Count I of their Complaint, Plaintiffs allege that by continuing to implement the 2011 Plan, Defendants have deprived Plaintiffs of their rights under the Fourteenth Amendment's Privileges or Immunities Clause "to be free of State interference in the election of their Representatives to the National Legislature." (*Id.* ¶ 33.) In Count II, Plaintiffs allege that "the 2011 Plan intentionally treats Plaintiffs and other citizens in a discriminatory and unequal manner" in violation of the Fourteenth Amendment's Equal Protection Clause. (*Id.* ¶ 43.) Count III alleges that the 2011 Plan "determin[es] the times and places and manner in which [P]laintiffs can speak and be heard based on their likely voting behavior" in violation of the First Amendment to the Constitution. (*Id.* ¶ 51.) Plaintiffs seek to enjoin further implementation of the 2011 Plan in the upcoming congressional elections scheduled for 2018, and further request that the District Court order Defendants (Executive Branch Officials from the Commonwealth of Pennsylvania) to submit proposed alternatives to the 2011 Plan to Pennsylvania's General Assembly for

---

[3] The Complaint was filed only against Democratic members of Pennsylvania's executive branch, presumably in an effort to overturn the 2011 Plan with minimal resistance (if any). As discussed below, Applicants have been permitted to intervene as Defendants in the Federal Action.

consideration and implementation before the 2018 elections. (*Id.* ¶¶ 33-52.)

### B. The District Court Issues An Expedited Schedule and Refuses To Abstain, Notwithstanding the Pendency of the Pennsylvania Action

Following a scheduling conference on October 10, 2017, the District Court issued an expedited pretrial scheduling order (the "October 10 Scheduling Order") in which it tentatively scheduled trial to commence on December 5, 2017—just 64 days after Plaintiffs filed the Complaint, and before the Commonwealth Court will have addressed the Legislative Privilege issues arising under Pennsylvania's Constitution. (ECF No. 20.)[4]

At the time of the October 10, 2017 conference, the full three-judge panel required by 28 U.S.C. § 2284(a)—which applies to actions challenging the constitutionality of congressional district apportionment—had not yet been convened. Therefore, on October 16, 2017, Applicants filed a Motion for Review and Reconsideration (the "Motion for Review"), asking the full three-judge panel to vacate the October 10 Scheduling Order. In the

---

[4] Counsel for Applicants sent a letter to the District Court on October 6, 2017, explaining their intent to seek intervention, notifying the District Court of the Pennsylvania Action, and invoking *Growe*. A copy of that letter is included at Exhibit E to the Petitioner's Emergency Application for a Stay.

Motion for Review, Applicants explained that precedent from this Court (including *Growe*) requires district courts to defer the adjudication of a redistricting matter where a state is already addressing the matter through its own legislative and/or judicial branches.

On October 24, 2017, Applicants filed a Motion to Intervene, a Motion to Dismiss, and a Motion to Stay and/or Abstain (the "Abstention Motion"). (ECF No. 45.) In the Abstention Motion, Applicants again explained that this Court's decision in *Growe* requires that the District Court abstain from proceeding with the Federal Action given that the 2011 Plan—and related issues of Legislative Privilege—were already being addressed in the Pennsylvania Action, as well as for other, independently sufficient reasons. Applicants also explained that there was simply no need to rush the Federal Action to judgment given that it was already far too late to have any impact on the 2018 election cycle, and that this Court's decision in *Whitford* could moot or otherwise severely impact the claims at issue.

The following day, the District Court issued an order (the "October 25 Order") in which, among other things, it granted the Motion to Intervene, but denied the Abstention Motion. (Attached as Appendix A) (ECF No. 47.) The October 25 Order was issued before any other party filed a response or opposition to the Abstention Motion, and was not accompanied by an opinion or any other explanation for the District Court's decision.

## STANDARD OF REVIEW

The Supreme Court has the power to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). To obtain a writ of mandamus, the applicant must demonstrate that he has "no other adequate means to attain the relief he desires." *Cheney v. United States Dist. Court*, 542 U.S. 367, 380 (2004). The applicant must then demonstrate that the applicant's right to the writ is "clear and indisputable." *Id.* at 381. Finally, the applicant must demonstrate that the writ is otherwise appropriate under the circumstances. *See id.*

A writ is appropriate in matters where the applicant can demonstrate a "judicial usurpation of power" or a clear abuse of discretion. *See id.* at 380 (citations and quotations omitted); *see also Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943) ("The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been 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."). This Court has issued writs to restrain federal district courts from intruding into areas involving delicate federal-state relations. *Id.* at 381; *see also Maryland v. Soper*, 270 U.S. 9 (1926).

## ARGUMENT

### I. THIS COURT'S PRECEDENTS REQUIRED THE DISTRICT COURT TO STAY OR ABSTAIN FROM PROCEEDING WITH THE FEDERAL ACTION

#### A. A District Court Must "Stay its Hand" When State Courts Have Already Begun To Address The Highly Political Task Of Redistricting

This Court has held that federal judges are "***required*** . . . to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself." *Growe*, 507 U.S. 25, 33 (1993) (emphasis added). In doing so, the Court has relied on principles of federalism and explained that it has "required deferral, causing a federal court to 'stay its hands,' when a constitutional issue in the federal action will be mooted or presented in a different posture following conclusion of the state-court case." *Id*. at 32;[5] *see also Scott v. Germano*, 381 U.S. 407, 409 (1965) (noting the preference to have state legislatures and state courts, rather than

---

[5] Notably, what mattered in *Growe* was that the two complaints asked for the same relief, the reapportionment of districts. *Id*. at 35. As this Court explained, a state can only have one set of districts, and the primacy of the state in drawing those districts "compels a federal court to defer." *Id*.

federal courts, address reapportionment). The Court has therefore mandated that "[a]bsent evidence that these state branches will fail timely to perform [their] duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Growe*, 507 U.S. at 34.

Other courts have recognized this requirement of *Growe* and appropriately complied with the Court's mandate. *See Miss. State Conf. of the NAACP v. Barbour*, Civ. A. No. 11-159, 2011 U.S. Dist. LEXIS 52822, *14, 2011 WL 1870222 (S.D. Miss. May 16, 2011) (three judge court), *aff'd sub nom Miss. State Conf. of the NAACP v. Barbour*, 132 S. Ct. 542 (2011); *Rice v. Smith*, 988 F. Supp. 1437, 1439 (M.D. Ala. 1997); *Pileggi v. Aichele*, 843 F. Supp. 2d 584, 592 (E.D. Pa. Feb. 8, 2012) (Surrick, J.) ("[T]he 'Constitution leaves with the States [the] primary responsibility for apportionment of their federal congressional and state legislative districts.'").

Moreover, the Court has held that there are "certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress," in which a court may withhold the granting of relief, "*even though the existing apportionment scheme was found invalid*." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (emphasis added). In *Reynolds,* the Court recognized:

> In awarding or withholding immediate

> relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably attempt to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.

*Id.*; *see also Purcell v. Gonzalez*, 549 U.S. 1, 5-6 (2004) ("Given the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction suspending the voter identification rules."); *North Carolina v. Covington*, 137 S. Ct. 1624, 1626 (2017) (noting that before ordering special elections as a remedy for racial gerrymandering violations, federal courts must "act with proper judicial restraint when intruding on state sovereignty"); *Upham v. Seamon*, 456 U.S. 37, 44 (1982) ("It is true that we have authorized District Courts to order or to permit elections to be

held pursuant to apportionment plans that do not in all respects measure up to the legal requirements, even constitutional requirements. Necessity has been the motivating factor in these situations.") (internal citation omitted).

Although it ordered a partial stay pending the outcome of *Whitford*, the Commonwealth Court has issued a timely briefing schedule to properly adjudicate the most contentious discovery issue in the case, namely the application of Pennsylvania's Speech or Debate Clause privilege to legislators' communications in drafting and crafting redistricting legislation.

Furthermore, the Commonwealth Court has already acknowledged that it was impossible to issue a ruling in time for the 2018 elections. *League of Women Voters of Pennsylvania, et al. v. Commonwealth, et al.*, No. 261 MD 2017, Or. Ar. Tr. at 27-29 (Pa. Commw. Ct. Oct. 4, 2017) (attached to Petitioner's Emergency Application for a Stay as Exhibit I) ("I don't see—if we moved as fast as possible—the decision in *Whitford* came down by the three-judge panel a year ago, and that's an automatic appeal to the Supremes. If we do this in six months, everything, all the Pennsylvania state proceedings, we don't—we don't make it… I don't know how we can affect the 2018 elections… The present status of the case you can hope, but I can tell you that [affecting the 2018 elections] isn't going to happen."). Since it was already too late to impact the 2018 election cycle, there was no reason the case could not be stayed.

During the October 10 scheduling conference before the District Court, Defendant Cortes, the Secretary of State, also acknowledged that even under the expedited trial schedule, a ruling from the District Court was not likely to be in sufficient time for the General Assembly to draw new maps and pass new legislation, if required. (ECF No. 35) (Tr. at 18) (stating that there would be "chaos" if any new map was not in place by January 2018 given that the petition circulation period begins on February 13, and that the District Court's expedited schedule is "actually too long, but the dates that you've mentioned, it's hard to understand how we can have a map in place by the beginning of January."). Accordingly, notwithstanding the expedited schedule currently in place, it would be too late to impact the 2018 election cycle even if Plaintiffs prevail at trial. There is therefore no reason why the District Court must rush this case to judgment. *See Growe*, 507 U.S. at 37.

### B. The Complaint in the Federal Action is Substantially Similar to the Complaint in the Pennsylvania Action

Plaintiffs' Complaint in the District Court requests the same relief as State Petitioners in the Pennsylvania Action, namely, the reapportionment of Pennsylvania's congressional districts. *Compare* Pls.' Compl. ¶1 and Request for Relief ¶ B (ECF No. 1) (requesting that the court order Defendants to draw a new Congressional districting plan for the approval of the legislature in time before the 2018 elections) *with* Petition for Review, Prayer for Relief

¶¶ a-c (attached to Petitioner's Emergency Application for a Stay as Exhibit B) (requesting that the Commonwealth Court declare unconstitutional Pennsylvania's congressional district maps, enjoin Defendants from holding elections using the map, and order the legislature to draw new maps). This requirement from *Growe* is therefore satisfied and this Court should order the District Court to stay all proceedings pending the disposition of the state court litigation. *See Growe*, 507 U.S. at 32-34.

### C. In Denying The Abstention Motion, The District Court Usurped the Power of the Pennsylvania State Courts

In denying the Abstention Motion, the District Court intruded into redistricting legislation, an area of the law that the U.S. Constitution vests in the state legislatures. *See* U.S. Const. art. I, § 4. As described above, similar constitutional challenges to the 2011 Plan are currently pending in Pennsylvania's appellate courts (including the Pennsylvania Supreme Court). The Pennsylvania Action has been sufficiently briefed, and the Commonwealth Court—recognizing the impossibility of making any changes to the congressional map before the 2018 primaries—has stayed the proceedings in part to await important guidance from this Court in *Whitford*. While the stay is pending, the Commonwealth Court has ordered extensive briefing on the Legislative Privilege arising under Pennsylvania's Constitution, and that briefing is currently underway. Meanwhile, State Petitioners have sought review of the

Commonwealth Court's stay by filing their Application for Extraordinary Relief in the Pennsylvania Supreme Court.

In other words, there can be no question that the Pennsylvania state courts have already begun the "highly political task" of addressing the challenges to the 2011 Plan. Because federal courts are ***required*** to defer adjudication of a redistricting matter that a state legislative or judicial branch is already considering, the District Court usurped the power of the Pennsylvania appellate courts—and committed a clear abuse of discretion—when it denied the Abstention Motion and elected to proceed with the Federal Action. This Court should therefore grant the Writ.[6]

## II. THERE ARE NO OTHER ADEQUATE MEANS TO OBTAIN THE RELIEF APPLICANTS SEEK

Applicants do not have any adequate alternative means to obtain the relief they seek because denials of stays or abstention motions are not appealable as a final judgment. *See Catlin v. United States*, 324 U.S. 229, 233 (1945) ("A 'final decision' generally is one which ends the litigation

---

[6] Given the pendency of the parallel actions in Pennsylvania's state courts, Applicants further requested that the District Court abstain from proceeding under this Court's decision in *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). The District Court denied this request without explanation. (ECF No. 47).

on the merits and leaves nothing for the court to do but execute the judgment."); *see also Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 277-78 (1988) (holding that a three-judge court's denial of a stay or abstention is not appealable under the collateral-order doctrine, but noting the availability of an extraordinary writ when entitlement to relief is clear); *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83 (1981) (recognizing that the denial of a stay or abstention is not appealable through the interlocutory appeal statute because it is not an injunction altering the status quo of the parties).

Here, Applicants cannot wait for the Federal Action to run its course before appealing to this Court for several reasons.

### A. The District Court's Refusal to Abstain May Disrupt the Pennsylvania Appellate Courts' Decision on Important Questions of Pennsylvania Constitutional Law

In the Pennsylvania Action, the Commonwealth Court recognized that the application of the Legislative and other privileges will have a significant impact on the scope of discoverable and admissible evidence when the partial stay is lifted and the case proceeds.[7] To that

[7] Among other things, the Legislative Privilege "protects legislators from judicial interference with their legitimate legislative activities, and even where the activity questioned is not literally speech or

end, on October 16, 2017, the Commonwealth Court ordered the parties to submit briefing over the course of the next 75 days to address the application of the privileges in the Pennsylvania Action.

In the Federal Action, Plaintiffs have served upon each Applicant over 100 Requests for Admission in addition to Interrogatories and Requests for the Production Documents. In response to those discovery requests, Applicants have raised privilege objections that are nearly identical to the objections at issue in the Pennsylvania Action; as such, it is beyond dispute that uncertain issues of Pennsylvania Constitutional law will be implicated if the Federal Action is permitted to proceed.

By protecting legislators from judicial interference with their legislative activities, Pennsylvania has clearly sought to protect the deliberative and communicative process under which lawmakers make law. [8] If the District Court

---

debate, it is entitled to protection if it falls within the legitimate legislative sphere[.]" *Commonwealth v. Orie*, 88 A.3d 983, 1011-12 (Pa. Super. 2014) (citations and quotations omitted).

[8] The issue of legislative privilege in redistricting cases was recently presented to this Court by the Wisconsin State Senate and the Wisconsin State Assembly, who participated as *amici curiae* in *Whitford*:

> The combined effect of decisions devaluing legislative privilege and the

construes that privilege in a manner inconsistent with Pennsylvania's highest courts, it would disrupt these important policies, and could have far-reaching implications in other cases. On this point, it is significant that briefing on the privilege issues in the Pennsylvania Action is scheduled to conclude at the end of December 2017. On the other hand, under the current scheduling order governing Federal

---

> temptations provided by partisan gerrymandering claims offers plaintiffs easy access to their political rivals' otherwise confidential communications. That is no small concern, as legislative communications about redistricting are even more sensitive (and more valuable to the opposing party) than typical legislative deliberations. They can reveal how legislators think about particular political races, which incumbents they might view as vulnerable, which incumbents they considered pairing, and how they engage in intra-caucus decision-making. And on top of all that, there is at least some political value in subjecting a legislator from the other party to the "cost and inconvenience" of compulsory process.

Brief For Wisconsin State Senate and Wisconsin State Assembly as *amicus curiae*, *Gill v. Whitford*, No. 16-1161, at 13-14 (U.S. *filed* Aug. 4, 2017) (citations omitted).

Action, trial is scheduled to commence on December 4, 2017. As such, the District Court will likely reach a full disposition on the merits before the Commonwealth Court decides a critical question of Pennsylvania Constitutional law. This would have a potentially harmful and irreversible effect on the Pennsylvania Action and the Pennsylvania General Assembly, especially if the District Court orders the disclosure of documents, information, or testimony that the Commonwealth Court (and very likely the Pennsylvania Supreme Court thereafter) ultimately concludes is protected by the Legislative or other privileges.[9]

### B. The District Court's Refusal to Abstain May Negatively Impact Pennsylvania's 2018 Elections

The District Court's decision to not only deny the Abstention Motion, but to proceed on an expedited schedule, will create substantial uncertainty regarding the 2018 elections. Indeed, in reliance on the 2011 Plan, countless parties have

---

[9] Given that the District Court is adjudicating federal constitutional claims that may be narrowed by the Pennsylvania appellate courts' resolution of an unsettled issue of Pennsylvania constitutional law, Applicants moved the District Court to abstain under this Court's decision in *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496 (1941). As with Applicants' other grounds for staying or abstaining from hearing this matter, the District Court denied this request without explanation.

already expended time, money, and other resources funding the election campaigns. Upon information and belief, to date, at least 25 people have announced their candidacies to run against incumbents for Congressional seats, and as of March 2017, Pennsylvania candidates for the House of Representatives have raised over $3.5 million in an effort to win 2018 congressional elections.[10] Other non-quantifiable efforts related to the election are also well underway. Both Democrats and Republicans are actively recruiting candidates. The media has covered campaigns and campaign events. The non-parties who have already spent time and resources related to the 2018 congressional campaigns will clearly be prejudiced if the District Court modifies or eliminates certain of the current districts under the 2011 Plan. Indeed, it is entirely conceivable that candidates may learn that they no longer live in the district in which they have been campaigning for many months.

In addition, on October 23, 2017, the Governor of Pennsylvania called a Special Election to replace U.S. Representative Tim Murphy, who resigned effective October 21, 2017. That election will be held on March 13, 2017.[11] Pursuant to 52 U.S.C. §

---

[10] In the Pennsylvania Action, numerous parties who would be affected by overturning the 2011 Plan submitted affidavits detailing the actions they have taken in reliance on the continued validity of the 2011 Plan.

[11] *See* FEC *Dates and Deadlines*, *available at* https://www.fec.gov/help-candidates-and-committees/dates-and-deadlines (last accessed Oct. 27, 2017).

20302(a)(8)(A), overseas and military ballots for that election must be mailed no later than January 27, 2017. A rush to action by the District Court threatens to impede that ongoing federal election. *See Purcell,* 549 U.S. at 4-5 ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls."). *Covington*, 137 S. Ct. at 1626.

And the District Court's decision to rush the Federal Action is unnecessary. The current congressional map went into effect nearly *six years ago*, and has been in use for three full federal election cycles. Plaintiffs waited until October 2, 2017, just a few short months before the primary election cycle officially begins in February 2018, to assert claims they could have asserted years ago, but chose not to. Plaintiffs should not be permitted to benefit through any purported emergency arising out of their own delay and, in any event, their lawsuit was filed too late to affect the 2018 elections.

Specifically, at the October 10, 2017 conference held by the District Court, counsel for Pennsylvania's Commissioner of Elections represented that, in light of the size of the bureaucracy overseeing the state's elections, the Elections Bureau needs, at an absolute minimum, three weeks prior to February 13, 2018—which is the first day to file nomination petitions for Pennsylvania's primary—to prepare for the elections.[12] Factoring in this three-week period, the

---

[12] *See* Excerpts from Transcript of Oct. 10, 2017

Elections Bureau must have the final redistricting plan for the 2018 election, at the very latest, on or before January 23, 2018.

Assuming *arguendo* that the District Court rules in favor of Plaintiffs, it will then need to issue an Opinion and Order that provides Pennsylvania's General Assembly with specific guidance as to how a new redistricting plan must be drafted. Further assuming that the District Court can render such an Opinion and Order by the end of the year,[13] there would be only *23 days* for new maps to be created and then passed into law. By comparison, following the release of the 2010 and 2000 census results, it

---

conference at 17:22-25; 18:1-22, a copy of which is attached as Exhibit J to the Application for the Stay.

[13] In the *Whitford* case, which addressed issues similar to those presented here, the district court issued two separate opinions. *See Whitford v. Gill*, 218 F. Supp. 3d 837, 837-965 (W.D. Wis. 2016); *Whitford v. Gill*, 2017 WL 383360 (W.D. Wisc. Jan. 1, 2017). Collectively, the opinions were *over 125 pages*. The first opinion was issued *over five months* after the trial was completed, and the second opinion—the one that dictated specifically what would need to be included in a new redistricting plan—was not issued until *over seven months* after the trial. *Id.* In addition, the *Whitford* opinions were issued only after the district court resolved numerous post-trial motions and disputes.

took 6 months and 8 months, respectively, for new plans to be created.[14]

Moreover, even after a new plan is created, it would be extremely difficult to pass new legislation through both chambers of the General Assembly prior to January 23, 2018. Any new plan would need to be submitted to the Senate, which requires at least three session days to consider and pass any bill (assuming that the Senate engages in limited debate and that there are no amendments).[15] Similarly, the bill would also need to be submitted to the House,

---

[14] After the 2010 census, redistricting data was released on March 24, 2011, and the initial version of the 2011 Plan was not submitted to the General Assembly until September 14, 2011. *See* Legislative History of the 2011 Plan *available at* http://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?syear=2011&sind=0&body=S&type=B&bn=1249 2010 Census Data Products *available at* https://www.census.gov/population/www/cen2010/glance/ Similarly, following the 2000 census, redistricting data was released between March 7 and March 30, 2001, and the initial version of the 2002 redistricting plan was not submitted to the General Assembly until November 16, 2001. *See* Legislative History of the 2001 redistricting plan *available at* http://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?syear=2011&sind=0&body=S&type=B&bn=1249.

[15] Session days are days that the Pennsylvania Senate or House of Representatives are in session and can take legislative action.

which requires at least three session days of consideration (again assuming there are no debates or amendments).[16] Put differently, the General Assembly requires at least six separate session days for any new Plan to work its way through both the Senate and the House.[17]

In addition, if the District Court were to invalidate the congressional map, and the political branches of the Commonwealth's government were unable to reach agreement on a new plan, the District Court would then be required to either allow the 2018 elections to proceed under a map it had declared unconstitutional, or undertake a very hasty proceeding to create and implement a new map in time to conduct an orderly election process.

In sum, it is hard to imagine any scenario where the trial concludes; all post-trial motions are adjudicated; a final Order and Opinion are issued; a new congressional map is created consistent with the District Court's Order and passed by both chambers of the General Assembly and signed by the Governor

---

[16] *See* PA. CONST. ART. III § A(4) (requiring 3 days of consideration of bills in each house of the General Assembly).

[17] In exceedingly rare circumstances, the last session day in the Senate and the first session day in the House might overlap. Even if these rare circumstances occur, passage of a new redistricting bill would require at least five session days of consideration.

(or created and implemented by the federal court)—all before the January 23, 2018 deadline described by the Commissioner of Elections.[18]

### C. The District Court's Refusal to Abstain and Its Expedited Scheduling Order Will Negatively Affect Applicants' Ability to Defend Against Plaintiffs' Claims

The District Court's expedited schedule also prejudices Applicants' ability to fairly and effectively litigate the case, in which expert testimony will likely play an important role. Indeed, Plaintiffs have made clear that this case will in large part become a "battle of the experts," as they have already advised that they intend to have three expert witnesses.[19] On this point, it is significant that the District

---

[18] Moreover, if the District Court orders the 2011 Plan to be redrawn, the General Assembly will be required to rely upon data that is nearly eight years old. That data would not provide a "fair and accurate representation for the citizens" of Pennsylvania's congressional districts. *See White v Daniel*, 909 F.2d 99, 104 (4th Cir. 1990). Pennsylvania's citizens would also be prejudiced because a ruling in favor of Plaintiffs would require multiple reapportionments within a few years, one in 2018 and another in 2020, after the next Census.

[19] Notwithstanding this fact, the District Court has ruled that Plaintiffs need not even identify who those experts are or what topics they might address until November 1, 2017. (ECF No. 47.)

Court: (a) has afforded Applicants a mere 15 days from the time Plaintiffs' expert reports are served to identify and engage their own rebuttal experts, and for those experts to complete their reports and all of them be deposed; and (b) contemplates commencing trial less than two weeks after Applicants' expert reports are submitted. This is simply not enough time to properly address the multitude of complex and significant issues underlying Plaintiffs' partisan gerrymandering claims, which they allege would directly impact Pennsylvania's Congressional elections in 2018.

This is especially true considering that substantively identical claims are pending before this Court in *Whitford*. If this Court's decision in *Whitford* sets forth new standards governing partisan gerrymandering claims—or concludes that such claim are non-justiciable political questions—then the claims advanced within the Federal Action may be narrowed or eliminated entirely. The District Court's decision to rush this case to judgment now—especially when Pennsylvania's highest appellate courts are already addressing nearly identical challenges to the 2011 Plan—is not only unnecessary and prejudicial to Applicants, it is completely at odds with this Court's binding precedent in *Growe*.

## CONCLUSION

Applicants respectfully request that this Court issue the requested writ of Mandamus to the United States District Court for the Eastern District of Pennsylvania, ordering that court to abstain from

proceeding with *Agre v. Wolf*, Civ. No. 17-4392 (E.D. Pa. filed Oct. 2, 2017) until a final adjudication on the merits is issued in *League of Women Voters of Pennsylvania, et al. v. Commonwealth*, *et al.*, No. 261 MD 2017 (Pa. Commw. Ct. June 15, 2017) and *League of Women Voters of Pennsylvania, et al. v. Commonwealth*, *et al.*, No. 159 MM 2017 (Pa. Oct. 11, 2017).

Respectfully Submitted on this 30th day in October, 2017.

/s/ *Jason Torchinsky*
Jason Torchinsky
*Counsel of Record
Shawn Sheehy
HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC
45 North Hill Drive, Suite 100
Warrenton, Virginia 20186
Phone: (540) 341-8808
Fax: (540) 341-8809
Email: jt@hvjt.law
Ssheehy@hvjt.law

*Attorneys for Applicants Senator Joseph Scarnati, III and Representative Michael Turzai*

/s/ *Brian Paszamant*
Brian S. Paszamant
Jason A. Snyderman
John P. Wixted
Blank Rome LLP
One Logan Square
130 N. 18th Street
Philadelphia, Pennsylvania 19103
Phone: (215) 569-5791
Fax: (215) 569-5555
Email:
Paszamant@blankrome.com
Snyderman@blankrome.com
JWixted@blankrome.com

*Attorneys for Applicant Senator Joseph Scarnati, III*

/s/ *Kathleen A. Gallagher*
Kathleen A. Gallagher
Carolyn Batz McGee
Jason McLean
Cipriani & Werner, PC
650 Washington Road, Suite 700
Pittsburg, Pennsylvania 15228
Phone: (412) 563-4978
Email: KGallagher@c-wlaw.com
CMcgee@c-wlaw.com
JrMcLean@c-wlaw.com

*Attorneys for Applicant Representative Michael Turzai*

# APPENDIX A

**IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | |
|---|---|
| **LOUIS AGRE,** **WILLIAM EWING,** **FLOYD MONTGOMERY,** **JOY MONTGOMERY,** **RAYMAN SOLOMON** | **CIVIL ACTION** **NO. 17-4392** |

**v.**

**THOMAS W. WOLF,** Governor of Pennsylvania, **PEDRO CORTES,** Secretary of State of Pennsylvania, **JONATHAN MARKS**, Commissioner of the Bureau of Elections – in their official capacities

**ORDER**

**BEFORE: Smith, Chief Circuit Judge; Shwartz, Circuit Judge; Baylson, District Judge: AND NOW**, this 25th day of October, 2017, the Court having considered various motions,

**ORDERS** as follows:

1. The Motion to Intervene by 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, as defendants as a matter of right (ECF 45), is **GRANTED**.

2. As to Defendant-Intervenors' Motion to Dismiss Plaintiffs' Complaint, Plaintiffs shall respond, as previously scheduled, by October 31, 2017, with a 20 page limit. Defendants and/or Intervenors shall file a reply brief by November 3, 2017, limited to 15 pages.

3. As to the Defendant-Intervenors' Motion to Stay and/or Abstain (ECF 45), the Motion is **DENIED**.

4. Defendant-Intervenors' Motions for Review and Reconsideration of the October 10, 2017 Order (ECF 31) and to Amend the Pretrial Schedule (ECF 46) are **GRANTED** in part and **DENIED** in part:

   a. Plaintiffs shall disclose the identity of their experts (with a current C.V.), and the topic(s) of each report by November 1, 2017.

   b. Defendants' expert report(s) shall be served by November 22, 2017, rather than by the current deadline of November 21, 2017.

5. The Court has previously reserved November 7, 2017 for argument on any open motions and currently intends to hold argument on that date, with the time and location at 601 Market Street, Philadelphia PA to be determined.

6. The Court will adhere to the current schedule of hearing any motions in limine or other pretrial matters on Monday, December 4, 2017 and

will begin the trial on that same day as soon as the hearing on any motions are completed. The trial will continue into that week. It appearing that there are approximately 30 hours available for testimony that week, the Court will tentatively allow Plaintiffs 15 hours to present their testimony and Defendants and/or Intervenors 15 hours (split however they agree) to present their testimony, allocated approximately 10 hours for direct testimony and 5 hours for cross-examination. These time limits are subject to modification.

7. The Court is not available for trial during the week of December 11, 2017. If the parties request and/or the Court determines additional time for testimony is needed, it may be scheduled during the week of December 18, 2017 or in January.

8. Counsel are expected to agree to stipulate to all undisputed facts, and to any other matters which shall further the just and speedy disposition of this case.

BY THE COURT:

**/s/ Michael M. Baylson**

**MICHAEL M. BAYLSON, U.S.D.J.**