

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LEAGUE OF WOMEN VOTERS OF	:	
PENNSYLVANIA, et al.,	:	
Petitioners,	:	
	:	
v.	:	No. 261 M.D. 2017
	:	
THE COMMONWEALTH OF	:	
PENNSYLVANIA, et al.,	:	
Respondents.	:	

**[PROPOSED] ORDER**

AND NOW, this \_\_\_\_ day of \_\_\_\_\_, 2017, upon consideration of the Application to Stay filed by the Pennsylvania General Assembly, the Honorable Michael C. Turzai, and the Honorable Joseph B. Scarnati, III, and any answer thereto, it is hereby ORDERED that the Application to Stay is DENIED.

BY THE COURT:

\_\_\_\_\_

, J.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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PENNSYLVANIA, et al., :  
Petitioners, :  
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v. : No. 261 M.D. 2017  
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THE COMMONWEALTH OF :  
PENNSYLVANIA, et al., :  
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**ANSWER OF SECRETARY OF THE COMMONWEALTH PEDRO A. CORTÉS AND COMMISSIONER OF ELECTIONS JONATHAN MARKS IN OPPOSITION TO APPLICATION TO STAY CASE OF THE PENNSYLVANIA GENERAL ASSEMBLY, MICHAEL C. TURZAI, AND JOSEPH B. SCARNATI III**

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Secretary of the Commonwealth Pedro A. Cortés and Commissioner Jonathan M. Marks (hereinafter collectively referred to as “Secretary Cortés”), by and through his undersigned counsel, and pursuant to Rule 123 of the Pennsylvania Rules of Appellate Procedure, file this Answer in Opposition to the Application to Stay Case Pending the U.S. Supreme Court’s Ruling in *Gill v. Whitford* (“Application”) filed by the Pennsylvania General Assembly, the Honorable Michael C. Turzai, and the Honorable Joseph B. Scarnati, III (“Applicants”). For the Court’s benefit, this response is presented as a narrative statement, rather than a point-by-point response to the numbered paragraphs of the original Application.

Secretary Cortés requests that this Honorable Court deny the Application, given the independently-existing protections offered by the Pennsylvania

Constitution and the likely need to develop a record to adjudicate this case. The delay which would be occasioned by the granting of a stay would also further postpone the resolution of this case and push a final decision past the time when election administrators and candidates will need to know congressional district boundaries.

**I. Federal courts do not supply the rules of decision for Pennsylvania courts for the interpretation of state law.**

While Applicants' discussion of the procedural and factual history of *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), *juris. statement filed*, No. 11-1161 (U.S. Mar. 24, 2017), is generally correct, they overstate the effect that the ultimate disposition in *Whitford* will have.

At various places throughout their Application and the accompanying Brief in Support of Their Application to Stay All Proceedings ("Brief"), Applicants suggest that the U.S. Supreme Court's decision will be all but dispositive in this case. *See, e.g.*, Appl. at 3 ("Should the [U.S.] Supreme Court find that such [partisan gerrymandering] claims are non-justiciable, this matter could be rendered entirely moot.")<sup>1</sup> They acknowledge that the Pennsylvania state courts need not

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<sup>1</sup> Although Applicants suggest that precedent forecloses this case in that "a four justice plurality of the [U.S.] Supreme Court has previously ruled that partisan gerrymandering claims are non-justiciable because there are no judicially manageable standards to govern the disposition of such claims," Appl. at 10, ¶ 23, Brief at 11-12, they neglect to note that five justices in that case agreed that such a category of claim was indeed justiciable. Justice Kennedy joined with the four-

harmonize their jurisprudence to conform with the federal courts' interpretation of related provisions of federal law; Appl. at 14-15, Parts III.C.1 and III.C.2, Brief at 15-16; but conclude that the state courts always, or at least "often follow[] the lead of the U.S. Supreme Court" in interpreting state constitutional provisions. Appl. at 14-16, Brief at 16, *quoting Pap's A.M. v. City of Erie*, 812 A.2d 591, 611 (Pa. 2002).

Of course, if the state courts "**often** follow[] the lead of the U.S. Supreme Court," that means that the state courts will at least **sometimes** diverge from their federal counterparts. Because the Pennsylvania Constitution's protections for free speech and association are "broader" than their federal homologues, Appl. at 14, Brief at 16, there is no reason to believe that the rejection of the plaintiffs' claims in *Whitford* necessarily spells doom for Petitioners' claims here.

Petitioners seek relief pursuant to Pennsylvania state constitutional provisions only. Because "[t]he United States Supreme Court has repeatedly affirmed that the states are not only free to, but also encouraged to engage in independent analysis in drawing meaning from their own state constitutions," the justice bloc identified by Applicants to uphold the existing district maps only because he did not discern a suitable standard at that time.

He left open the possibility that there might yet be a suitable standard: "That no such standard has emerged in this case should not be taken to prove that none will emerge in the future." *Vieth v. Jubelirer*, 541 U.S. 267, 311 (2004) (Kennedy, J., concurring in the judgment). Perhaps *Whitford* and this case offer just such a standard as Justice Kennedy envisioned in 2004.

Pennsylvania courts “are not bound to interpret the two provisions [of the state and federal constitutions] as if they were mirror images, even where the text is similar or identical.” *Commw. v. Edmunds*, 586 A.2d 887, 894, 895-96 (Pa. 1991). As Applicants suggest, the state courts will adhere to federal precedent where it is “found to be logically persuasive and well-reasoned,” *Commw. v. Tarbert*, 535 A.2d 1035, 1038 (Pa. 1987), but the state courts are “free to reject the conclusions of the United States Supreme Court so long as [they] remain faithful to the minimum guarantees established by the United States Constitution.” *Edmunds*, 583 A.2d at 895.

**II. Discovery and the creation of a record will be necessary for the disposition of this fact-intensive case.**

Unless the Pennsylvania Supreme Court determines that the “broad” protections of the state constitution have no application in the realm of partisan gerrymandering, the Court will have to compare the facts of this case against those governing legal principles to determine whether or not any relief should be granted in favor of Petitioners. The tests proposed by Petitioners to demonstrate the extreme nature of the 2011 maps—the “efficiency gap,” “wasted votes,” “Markov chain” and the “mean-median gap,” *see, e.g.*, Pet. ¶¶ 87-90, will likely require extensive testimony from both fact and expert witnesses.

To the extent that this case is justiciable under the Pennsylvania standards, Petitioners would be called upon to prove facts which would then be held up

against those standards—whether those state standards are coterminous with those under the federal constitution, or if those state standards exceed the federal protections.

Given the expected necessity of a record in this case, there is no reason to postpone the collection of discovery materials in this case, which would be one consequence of granting a stay.

**III. Key deadlines in the election calendar are rapidly approaching; candidates, election administrators, and voters will benefit from timely resolution of this case.**

Pennsylvanians will go to the polls on November 6, 2018, to elect the Commonwealth’s delegation to the 116th Congress. While that election is more than a year away, other deadlines related to the election process come far earlier—two of the most salient being the date of the primary election (May 15, 2018) and the deadline for filing nomination petitions (March 6, 2018).<sup>2</sup>

As this case proceeds in this Court—with the prospect of an appeal almost certain, regardless of who prevails at trial—hopes are quickly fading for a resolution before some of the key deadlines on the election calendar.

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<sup>2</sup> The period for circulating nomination petitions is tied to the date of the primary; it will open February 13 and close on March 6, 2018. 25 P.S. §§ 2753(a), 2868, 2873(d). These and other key dates in the 2018 election calendar are shown in the document 2018 Pennsylvania Elections Important Dates to Remember, attached as Appendix 1.

Traditionally, candidates seek to lay the groundwork for a campaign well in advance of those deadlines.

Here, eight short months separated the filing of this suit from the deadline by which all candidates seeking to run for Congress must submit their nomination petitions to Secretary Cortés—who must, in turn, process that paperwork and, in conjunction with the sixty-seven county boards of election, prepare to run the general election on November 6, 2018. It would be remarkable for any case to undergo a full trial and appeal in that time, and any delay now, on the front end of the case, will eat into time needed for a smooth election cycle in 2018.

Applicants allude to the U.S. Supreme Court’s calendar, noting that oral argument for *Whitford* is set for October 3, 2017, with a decision expected by June 30, 2018. Appl. at 16, ¶ 45, Brief at 18. Applicants stress that the mere eleven month delay in waiting for a resolution in *Whitford* is just a fraction of the six years Petitioners waited to file this case. Appl. at 16-17, ¶ 45, Brief at 18. Postponing discovery, in Applicants’ view, is of little consequence. *Id.*

Were this Court to commence the collection of discovery materials only after a decision is released by the U.S. Supreme Court in June 2018, it would, in essence, permit the nomination petition and primary election process to proceed, only to be possibly halted or invalidated by subsequent intervention by the Court. Potential post-primary remedies, such as ordering a new primary, or ordering some other means to nominate congressional candidates, or declaring the maps unconstitutional yet letting the 2018 election proceed regardless, are all decidedly

second-best solutions. Engaging in but one primary, held pursuant to a plan which meets the requirements of the state and federal constitutions, is manifestly the optimal solution, and is even more desirable when one considers the advantages to all sides to having some advance notice of what the district boundaries will be.<sup>3</sup>

#### **IV. Conclusion.**

The clock is ticking on the 2018 election cycle. Candidates and their supporters will venture forth to collect petition signatures starting February 13, 2018, and dutifully submit their paperwork three weeks later, by March 6, 2018—all of this following weeks and months of preparations to run for office. Those candidates who gather enough signatures will, naturally enough, expect to see their names printed on the ballot on primary election day, May 15, 2018. But postponing discovery now could leave candidates and election administrators with little to no breathing room or margin for error. If the U.S. Supreme Court's ruling were truly determinative on the outcome of this case, that might be an argument in

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<sup>3</sup> Postponing all proceedings until the resolution of *Whitford* also carries with it the risk that the present litigation may introduce some uncertainty into the 2020 election cycle—when much of the election calendar will be advanced by three weeks (compared with the 2018 dates) to accommodate the different schedule for presidential election years. *See* 25 P.S. § 2753(a).

*Whitford* itself was commenced with the filing of a complaint on July 8, 2015, suggesting that a final affirmance or reversal on appeal in this case could take nearly three years. If the Court pauses proceedings until after *Whitford* is decided, a final decision might not be forthcoming until the 2020 election cycle is come and gone (in the case litigation lasts as long as it did in *Whitford*), or in time to instruct the next period of congressional redistricting in 2021.



favor of a stay. But given that the federal courts offer only persuasive precedent as to the construction of the Pennsylvania Constitution, there is no reason not to let necessary and valuable discovery proceed.

For these reasons, Secretary Cortés respectfully requests that this Honorable Court deny the Application.

Respectfully submitted,

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Date: August 23, 2017

**CERTIFICATE OF SERVICE**

I, TIMOTHY E. GATES, hereby certify that on this 23<sup>rd</sup> day of August 2017, the foregoing **Answer of Secretary of the Commonwealth Pedro A. Cortés and Commissioner of Elections Jonathan Marks in Opposition to Application to Stay Case of Pennsylvania General Assembly, Michael C. Turzai and Joseph B. Scarnati III** has been served upon counsel in the manner indicated below, which service satisfies the requirements of Pennsylvania Rule of Appellate Procedure 121:

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# **APPENDIX 1**

Commonwealth of Pennsylvania  
Department of State  
Bureau of Commissions, Elections & Legislation

**2018 PENNSYLVANIA ELECTIONS IMPORTANT DATES TO REMEMBER**

First day to circulate and file nomination petitions.....	February 13
Last day to circulate and file nomination petitions.....	March 6
First day to circulate and file nomination papers.....	March 7
Last day for withdrawal by candidates who filed nomination petitions .....	March 21
Last day to REGISTER before the primary election.....	April 16
Last day to apply for a civilian absentee ballot.....	May 8
Last day for CBEs to receive voted civilian absentee ballots .....	May 11
<b>GENERAL PRIMARY .....</b>	<b>May 15</b>
First day to register after the primary election .....	May 16
Last day for CBEs to receive voted military-overseas ballots.....	May 22
Last day to circulate and file nomination papers .....	August 1
Last day for withdrawal by minor political party and political body candidates who filed nomination papers .....	August 8
Last day for withdrawal by candidates nominated by a political party .....	August 13
Last day to REGISTER before the November election .....	October 9
Last day to apply for a civilian absentee ballot.....	October 30
Last day for CBEs to receive voted civilian absentee ballots .....	November 2
<b>GENERAL ELECTION.....</b>	<b>November 6</b>
First day to register after the November election .....	November 7
Last day for CBEs to receive voted military-overseas ballots.....	November 13