IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, ET AL.,	:	CIVIL DIVISION
Petitioners,	:	
vs.	:	CASE NO. 261 MD 2017
THE COMMONWEALTH OF PENNSYLVANIA, ET AL.,	:	
Respondents.	:	

[PROPOSED] ORDER

AND NOW, this _____day of _____, 2017, upon consideration of the Application to Stay, and any answer thereto, it is hereby ORDERED that the Application to Stay is DENIED.

BY THE COURT:

_____, J.

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RESPONDENT MICHAEL J. STACK III, IN HIS CAPACITY AS LIEUTENANT GOVERNOR OF PENNSYLVANIA AND PRESIDENT OF THE PENNSYLVANIA SENATE,
ANSWER TO APPLICATION TO STAY

AND NOW COMES, Michael J. Stack III, in his Capacity as Lieutenant Governor of Pennsylvania and President of the Pennsylvania Senate, Respondent, by and through his attorneys, and pursuant to Rule 123 of the Pennsylvania Rules of Appellate Procedure, files this Answer in Opposition to the Application to Stay ("Application") filed by Respondents Turzai and Scarnati ("Applicants"), and in support thereof, states the following:

SUMMARY

Applicants seek a stay of this matter until the United States Supreme Court issues its decision in *Gill v. Whitford*, No. 11-1161 (U.S. Mar. 24, 2017). The lower court in that matter held that Wisconsin's state legislative district lines violated the Equal Protection Clause of the Fourteenth Amendment of the United

States Constitution. *Whitford v. Gill*, 218 F. Supp. 3d 387 (W.D. Wis. 2016). This matter includes no challenge under that clause of the U.S. Constitution, nor does it include any challenge under the federal Constitution. Instead, the Petition in this Matter only asserts challenges under the Pennsylvania Constitution, which has consistently extended greater protections than the federal constitution. The U.S. Supreme Court's decision in *Gill*, then, has little import on the development of this case.

Further, this matter, at the moment, has no factual record. In contrast, *Gill*, and other recent redistricting decisions, have been decided upon thoroughly developed factual records. As a result, delaying this action for an inapposite U.S. Supreme Court decision to then only begin to start the discovery process threatens to deny relief through the 2020 elections, denying Petitioners of any chance of relief. The Application should be rejected.

ARGUMENT

I. The *Gill* Decision Does Not Address Any of the Constitutional Provisions in This Matter and the Pennsylvania Constitution Protects Rights Beyond the Limits of the U.S. Constitution.

Petitioners have challenged Pennsylvania's 2011 federal congressional redistricting plan (the "2011 Plan") under five provisions of the Pennsylvania Constitution. Pa. Const. art. I, §§ 1, 5, 7, 20, 26. Petitioners do not challenge the 2011 Plan under any provisions of the federal constitution. In *Gill*, the United

States Supreme Court is only reviewing a state legislative redistricting plan under the federal constitution, specifically the Equal Protection Clause of the Fourteenth Amendment. *See* Statement of Jurisdiction, *Gill v. Whitford*, No. 11-1161 (U.S. Mar. 24, 2017).

As a result, the outcome in *Gill* has no bearing on the outcome in this matter. The Pennsylvania Constitution is not coterminous with the federal constitution. The Pennsylvania Supreme Court has repeatedly recognized that numerous provisions of the Pennsylvania Constitution protect a broader scope of activities than their counterparts in the federal Constitution. This expansion of rights includes the free expression clauses at issue here. *See Pap's A.M. v. City of Erie*, 812 A.2d 591, 605 (Pa. 2002) (finding that Article I, § 7 of the Pennsylvania Constitution provides broader protection for freedom of expression than the federal Constitution).

Other provisions across the Pennsylvania Constitution are similarly held to afford broader protections. *See, e.g., Commonwealth v. Muniz*, No. 47 MAP 2016, 2017 WL 3173066, at *26 (Pa. July 19, 2017) (holding that the Pennsylvania Constitution's *ex post facto* clause is broader than its federal counterpart); *Commonwealth v. Edmunds*, 586 A.2d 887, 905–06 (Pa. 1991) (holding that Article I, § 8 of the Pennsylvania Constitution provides greater protection for individuals against invalid warrants than the federal Constitution). The

Pennsylvania Supreme Court also has previously rejected importing decisional law on federal constitution provisions into their Pennsylvania constitutional counterparts. *See, e.g., Commonwealth v. Sell*, 470 A.2d 457, 458 (Pa. 1983) (holding that the U.S. Supreme Court's abolition of "automatic standing" doctrine under the Fourth Amendment did not warrant the abolition of the same doctrine under the Pennsylvania Constitution.).

Applicants' argument makes even less sense after a passing review of existing pre-*Gill* precedent. Here, Applicants hope for a decision in *Gill* where the U.S. Supreme Court will hold that partisan gerrymandering is never susceptible to constitutional review under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. The U.S. Supreme Court has never so held. *See Vieth v. Jubelirer*, 541 U.S. 267, 311 (2004) (Kennedy, J., concurring in the judgment but indicating that partisan gerrymandering may be justiciable); *see also Davis v. Bandemer*, 478 U.S. 109 (1986) (finding partisan gerrymandering claims justiciable). Applicants then further hope that the Pennsylvania Supreme Court will find this argument so persuasive as to import it wholesale into state constitutional jurisprudence without a developed factual record. That unfounded wish cannot justify a year of delay.

Against that backdrop, waiting for the U.S. Supreme Court's decision in *Gill* is nonsensical. It addresses completely different constitutional protections than

those at issue here, and analyzes a constitution that affords fewer protections than the Constitution of the Commonwealth. Applicants' argument is meritless; the Application should be denied.

II. The Development of a Record Is a Prerequisite and Should Not Be Delayed for a Year.

Applicants' argument makes even less sense against the demonstrated need for the development of a factual record. In *Gill*, on which Applicants set all their hopes, the trial court required the development of a factual record and, at the motion for summary judgment stage, the parties presented over 200 proposed findings of fact. *Whitford*, 218 F. Supp. 3d at 387 [ECF 46]. Further, the trial court held a trial over four days with eight witnesses. *Id.* A developed factual record is part and parcel of the *Gill* challenge.[1] Other redistricting challenges have had similar discovery collection efforts. *See, e.g., Covington v. North Carolina*, M.D.N.C. 1:15-cv-399 (redistricting challenge with 1 year and 3 month discovery period).

[1] Further, even if Applicants' hopes about the *Gill* decision are realized, their Application would have to assume that the Pennsylvania Supreme Court would adopt it wholesale into Pennsylvania jurisprudence without the benefit of a developed record. That assumption summarily discounts the inordinate emphasis placed on one-party dominance as the driving force in designing the 2011 Plan as alleged by the Petitioners. This Court can allow discovery to proceed and an evidentiary record to develop without having to address whatever issues may arise upon receiving a U.S. Supreme Court decision in *Gill*.

This matter deserves the development of a factual record. As he has previously stated, Respondent Stack was a Democratic member of the Pennsylvania State Senate at the time of the development and promulgation of the challenged 2011 Plan. (Lt. Gov. Response ¶ 50). Further, the Republican members of the General Assembly prevented then-Sen. Stack, and all other Democratic members from participating in the creation and promulgation of the 2011 Plan. (Id.) There is a story here, a story which was withheld from Respondent and his former Democratic Senate colleagues. That story goes to the heart of this matter; it should be allowed to develop and come to light.

Were this matter to be stayed pending the *Gill* decision, it is possible that nothing would happen until late June 2018. After that decision, a year of discovery could push the hearing in this matter to late 2019 or early 2020. With the requisite appeals, a decision on this matter could be delayed until the next redistricting process. That would deprive Petitioners, and the voters of Pennsylvania, from the relief they seek, and hand Applicants a technical victory on the merits of the Petition. That procedural posture is unjust and should not be permitted to occur.

CONCLUSION

For all the reasons cited herein, Applicants' request should be denied. A case examining a different provision of a different constitution does not warrant a

year's delay in this matter, especially when such a delay would hand the Applicants a technical victory on the merits of the Petition.

For these reasons, Respondent Stack respectfully requests that this Honorable Court deny the Application.

Respectfully submitted,

Clifford B. Levine
Pa. Id. No. 33507
Alice B. Mitinger
Pa. Id. No. 56781
Alex M. Lacey
Pa. Id. No. 313538
Cohen & Grigsby, P.C.
Firm No. 621
625 Liberty Avenue
Pittsburgh, PA 15222-3152
(412) 297-4900

Lazar M. Palnick
Pa. Id. No. 52762
1216 Heberton Street
Pittsburgh, PA 15206
(412) 661-3633

On behalf of Respondent Michael J. Stack III, in his Capacity as Lieutenant Governor of Pennsylvania and President of the Pennsylvania Senate

Dated: August 28, 2017

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on this 28th day of August 2017, a true and correct copy of the foregoing RESPONSE TO APPLICATION TO STAY was served via U.S. First Class mail, postage-paid upon the following:

Jonathan Scott Goldman
Kenneth Lawson Joel
Commonwealth of Pennsylvania
Pennsylvania Office of Attorney General
Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120
Counsel for the Commonwealth of Pennsylvania

Kathleen A. Gallagher
Carolyn Batz McGee
John E. Hall
Cipriani & Werner, P.C.
650 Washington Road, Suite 700
Pittsburgh, PA 15228
Counsel for The Pennsylvania General Assembly

Jason Torchinsky
Shawn Sheehy
Holtzman Vogel Josefiak Torchinsky, PLLC
45 North Hill Drive, Suite 100
Warrentown, VA 20186
Counsel for Michael C. Turzai, in his Capacity as Speaker of the Pennsylvania House of Representatives

Linda C. Barrett
Sean M. Concannon
Thomas P. Howell
Office of General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17101
Counsel for Respondent Tom Wolf

Timothy E. Gates
Ian B. Everhart
Kathleen M. Kotula
Department of State
Office of Chief Counsel
306 North Office Building
Harrisburg, PA 17120
Counsel for Secretary Pedro A. Cortés and Commissioner Jonathan M. Marks

Brian S. Paszamant
Jason A. Snyderman
John P. Wixted
Blank Rome, LLP
One Logan Square
130 North 18th Street
Philadelphia, PA 19103-6998
Counsel for Senator Joseph B. Scarnati III, in his Capacity as Pennsylvania Senate President Pro Tempore

Andrew David Bergman
Arnold & Porter Kaye Scholer LLP
700 Louisiana Street
Ste. No. 4000
Houston, TX 77002

Helen Mayer Clark
John Arak Freedman
David Paul Gersch
Daniel Frederick Jacobson
R. Stanton Jones
John Robinson
Elisabeth S. Theodore
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Avenue, NW
Washington, DC 20001

Mary M. McKenzie
Michael Churchill
Benjamin D. Geffen
Public Interest Law Center
1709 Benjamin Franklin Parkway, 2nd Floor
Philadelphia, PA 19103
Counsel for Petitioners

Chairman Lawrence J. Tabas
Rebecca Lee Warren
Obermayer Rebmann Maxwell & Hippell LLP
Centre Square West
1500 Market Street, Suite 3400
Philadelphia, PA 19102
Counsel for Possible Intervenors

Clifford B. Levine

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