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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

League of Women Voters of Pennsylvania, *et al.*,)
)
)
 Petitioners,)
)
) **No. 261 MD 2017**
)
 v.)
)
 The Commonwealth of Pennsylvania, *et al.*,)
)
)
)
 Respondents.)
)

PETITIONERS' APPLICATION FOR LEAVE TO FILE A SURREPLY IN FURTHER OPPOSITION TO APPLICATION TO STAY CASE PENDING THE U.S. SUPREME COURT'S RULING IN *GILL v. WHITFORD*

Petitioners request leave of the Court to file a Surreply in response to Respondents Pennsylvania General Assembly, Michael C. Turzai, and Joseph B.

Scarnati III's Reply Brief in Support of Their Application to Stay All Proceedings, dated September 25. Petitioners' proposed Surreply is attached as Exhibit A.

Petitioners submit this 3½-page Surreply to concisely address mischaracterizations in Respondents' Reply Brief. Petitioners' Surreply is intended to assist the Court in resolving the Application to Stay, which is scheduled to be heard on October 4.

Dated: September 28, 2017

Respectfully submitted,

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Exhibit A

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SURREPLY IN SUPPORT OF PETITIONERS' OPPOSITION TO STAY

The General Assembly's Reply Brief In Support of Their Application for a Stay ("Reply") states that it responds to "mischaracterizations of law and fact." Reply at 1. In fact, it is the General Assembly's Reply that makes statements that

are misleading and, in some instances, false. Petitioners submit this brief response, not to re-hash points already made, but to correct any misimpression that might result from the Reply.¹

1. The General Assembly states in the first substantive sentence of its Reply that Petitioners claimed *Gill* “will not affect Petitioners’ claims,” Reply at 1; *see also id.* at 5. Petitioners said *no* such thing. To the contrary, Petitioners expressly pointed out that *Gill* might well be of interest but that “the standard for a stay is not whether the pending case might merely ‘impact’ this matter (Stay Br. at 13); it is whether the pending case ‘might resolve or render moot’ the instant matter. *Israelit*, 703 A.2d at 724 n.3.” Stay Opp. at 3. This is the crux of the question before the Court, and precisely what Petitioners’ brief said.

2. The General Assembly makes a series of misstatements concerning the expert evidence in *Gill* and this case in an effort to minimize the differences between the two. In the interest of brevity, we simply state the true facts: Professor Chen, whose analysis is relied on in the Petition, Pet. ¶ 85 & n.14, was not designated as an expert in *Gill* and for this reason the three-judge panel explained in detail that it did not admit into evidence Professor Chen’s academic work or his amicus brief, nor did the Court rely on Professor Chen. *Whitford v. Gill*, 218 F. Supp. 3d 837, 918 n.350 (W.D. Wis. 2016). On appeal to the Supreme Court, both

¹ As used herein, the “General Assembly” refers collectively to the General Assembly, Michael C. Turzai and Joseph B. Scarnati III.

parties invoked Professor Chen’s work in support of their arguments.² None of this changes the fact that no analysis by Professor Chen is part of the record in *Gill*. Professor Chen’s work will be part of the record here. The Petition also relies on work from Carnegie Mellon University and the University of Pittsburgh using Markov chain analysis, Pet. ¶ 87, which also was not presented at the *Gill* trial. In short, this case will present important evidence substantially different from that in *Gill*.³

3. The General Assembly falsely states that Petitioners “failed to inform” the Court that the three-judge panel in Maryland “*did* grant a stay of all proceedings in a substantially similar partisan gerrymandering case.” Reply at 14 (emphasis in original). To the contrary, Petitioners expressly advised that “the Maryland Court has granted a stay.” Stay Opp. at 27. It is worth noting, however, that the stay issued immediately *after* the Maryland court that same day squarely addressed the merits of the case by denying plaintiffs’ request for a preliminary injunction, which followed the “completion of extensive discovery.” *Benisek v. Lamone*, No. CV JKB-13-3233, 2017 WL 3642928, at *23 (D. Md. Aug. 24, 2017)

² See Brief for Appellants at 50, *Gill v. Whitford*, No. 16-1161 (July 28, 2017), 2017 WL 348551, at *50; Brief for Appellees at 18-19, 55-56, *Gill v. Whitford*, No. 16-1161 (Aug. 28, 2017), 2017 WL 3726003 at *18-19, *55-56.

³ The Petition also relies on a mean-median gap analysis which is discussed very briefly in *Gill* briefs as well as on the efficiency gap analysis to which much of the *Gill* trial and appellate briefs was devoted.

(Niemeyer, J., dissenting). Thus, granting the stay did not delay discovery or deny the Maryland plaintiffs their day in court.

4. The General Assembly complains that “Petitioners’ Response to the Stay Application was filed five dates [sic] late.” Reply at 14, n.4. The General Assembly cites *no* rule that Petitioners supposedly violated and provides *no* explanation of how it calculated the supposed due date. This charge too is false.⁴

5. As to all other matters, Petitioners rest on their initial brief.

⁴ The General Assembly’s Stay Application was filed on August 9. By rule, Petitioners are allowed 14 days to file their Answer plus 3 additional days. *See* Pa.R.A.P. 123(b); 44 Pa.B. 482 § II(2)(G) (Jan. 25, 2014). Thus, Petitioners’ response was due on Saturday, August 26. By rule, filing is proper on the following Monday, here August 28, *see* Pa.R.C.P. 106(b), which is when Petitioners filed their Answer and opposing brief.

By contrast, the General Assembly’s Reply was filed without leave of court. The Reply is controlled either by Pa.R.A.P. 123, which governs applications for relief, in which case no reply is authorized, or by Pa.R.A.P. 2113 and 2185, which govern appellate briefs, in which case the General Assembly’s reply brief was due on September 14, eleven days before it was filed.

Dated: September 28, 2017

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