

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

<hr/>)	
League of Women Voters of Pennsylvania, <i>et al.</i> ,)	
)	
	<i>Petitioners,</i>)	
)	
)	No. 261 MD 2017
	v.)	
)	
The Commonwealth of Pennsylvania, <i>et al.</i> ,)	
)	
)	
	<i>Respondents.</i>)	
<hr/>)	

[PROPOSED] ORDER

AND NOW, this day of , 2017, upon consideration of Petitioners’ Motion for a Scheduling Conference and to Expedite Argument, it is hereby **ORDERED** that:

1. The hearing originally scheduled for October 4, 2017 shall be moved forward to _____, 2017, at _____ a.m./p.m., in Courtroom _____.
2. The Court will conduct a scheduling conference immediately after the hearing.

BY THE COURT:

J.

David P. Gersch
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001-3743

Mary M. McKenzie
Attorney ID No. 47434
PUBLIC INTEREST LAW CENTER
1709 Benjamin Franklin Parkway, 2nd Floor
Philadelphia, PA 19103

Counsel for Petitioners;
additional counsel appear on the signature page

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

League of Women Voters of Pennsylvania, <i>et al.</i> ,)	
)	
<i>Petitioners,</i>)	
)	
)	No. 261 MD 2017
v.)	
)	
The Commonwealth of Pennsylvania, <i>et al.</i> ,)	
)	
<i>Respondents.</i>)	
)	

**MOTION FOR A SCHEDULING CONFERENCE
AND TO EXPEDITE ARGUMENT**

There are now pending before the Court a number of issues, some of which are ready for disposition, some of which await briefing schedules. Petitioners request that the Court hold a scheduling conference to set a timetable for efficient

resolution of those matters so as to permit expeditious resolution of this important case concerning congressional elections in Pennsylvania. The goal should be to try this case in early January 2018, in time for any relief to be available for the 2018 elections, for which the primaries are scheduled for May 15, 2018. Even if this matter ultimately is not resolved in time for the 2018 elections, this matter should proceed promptly to avoid delays resulting in a compression of time for consideration before the 2020 elections.¹

To avoid delay, Petitioners also request that the Court move the hearing on the Application for a Stay filed by Respondents the General Assembly, Michael C. Turzai, and Joseph B. Scarnati III (collectively the “General Assembly”) currently scheduled for October 4, 2017 to an earlier date, and that the scheduling conference be set for the same day as the hearing on the Application for Stay.

BACKGROUND

1. There is little doubt that the General Assembly deliberately rigged the congressional redistricting map passed in 2011 (the “2011 Plan”) so as to advantage Republican candidates for Congress and to burden and disfavor the

¹ As the Secretary of State and the Commissioner of Elections point out, “[p]ostponing 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,” especially given that the 2020 deadlines will be earlier given that it is a Presidential election year. Answer of Secretary of the Commonwealth Pedro A. Cortés and Commissioner of Elections Jonathan Marks in Opposition to Application to Stay at 7 n.3. Because 2020 will be the final election under the 2011 Plan, this case needs to move forward as expeditiously as possible to avoid any risk that the case will not be resolved in time for that election.

Petitioners and other Democratic voters. The evidence of impermissible partisan intent and effect is overwhelming. The tortured shapes of the districts, unexplainable by any neutral principle, are alone damning evidence that the 2011 Plan was concocted for brazenly partisan purposes.

2. The purpose and effect of the General Assembly's gerrymandering are confirmed by an array of recently developed statistical tests and modeling techniques. The proof is in the pudding: there have been three straight congressional elections in which Republicans won the exact same 13-5 split of congressional seats despite different statewide votes, including the 2012 election in which Democrats won a majority of the statewide vote and yet only 5 of 13 congressional seats. Such outcomes are not accidental. These elections are not being decided by the voters; they have been predetermined by the General Assembly.

3. Perhaps then it is not a surprise that the General Assembly has raised a multitude of defenses and objections that have nothing to do with the merits but are all about delay. The General Assembly asks that the case be stayed, argues that the case is not justiciable, and claims that Petitioners lack standing. The General Assembly has also raised blanket objections to every single discovery request. It even objects to discovery being served on third parties, including on various organizations of the national Republican Party, and on Thomas Hofeller and Adam

Kincaid, national Republican operatives who drew the congressional maps in, respectively, North Carolina and Ohio. The Court should not permit the General Assembly to postpone this case simply by filing a lot of paper. The Court can and should move to clear away these roadblocks.

PENDING MATTERS

4. Below is a list of the pending matters and a statement of whether further briefing is required. For those matters requiring briefing, Petitioners request that it be set at the scheduling conference.

5. **The General Assembly’s Application for a Stay:** This application has been briefed and should be denied. Argument is currently set for October 4. If convenient for the Court, Petitioners request that this date be moved up. As set forth in the brief of Petitioners, there is *no* possibility that *Gill v. Whitford*, No. 16-1161 (S. Ct.), a case in federal court involving federal constitutional claims, “might resolve or render moot” Petitioners’ claims under the Pennsylvania Constitution. *Israelit v. Montgomery Cty.*, 703 A.2d 722, 724 n.3 (Pa. Commw. Ct. 1997). That is the standard for a stay, and there is no possibility of that here given that the Pennsylvania Supreme Court has twice held that political gerrymandering claims under the Pennsylvania Constitution are justiciable. *Erfer v. Commonwealth*, 794 A.2d 325 (Pa. 2002); *In re 1991 Reapportionment*, 609 A.2d 132 (Pa. 1992).

6. Friday's decision by the three-judge panel decision in *Common Cause v. Rucho*, 1:16-cv-01026-WO-JEP, ECF No. 87 (Sept. 8, 2017), to deny any stay pending *Gill* in the partisan gerrymander challenge to North Carolina's congressional districts map further illustrates why this case should go forward without delay. See Praecipe to Provide Supplemental Authority in Opposition to the Application to Stay, filed earlier today (Sept. 12, 2017). Finally, Petitioners note that Respondents the Lieutenant Governor, the Secretary of Commonwealth, and the Commissioner of the Bureau of Elections have all opposed a stay.

7. **Application for intervention:** 34 Republican "activists" are seeking leave to intervene in the lawsuit. Their Application for Leave to Intervene has been answered and should be denied. If granted leave to intervene, the Proposed Intervenors intend to file duplicative Preliminary Objections. Argument is currently scheduled for October 4 but it can be addressed anytime.

8. **Preliminary Objections filed by the General Assembly:** Petitioners have answered and ask that the Court enter a briefing schedule.

9. **Preliminary Objections filed by the Commonwealth and Governor Wolf:** The preliminary objections filed by the Commonwealth and Governor Wolf will not affect whether this case proceeds, only who is a party to it. These preliminary objections have all been answered and Petitioners request a briefing schedule.

10. **Discovery:** With the cooperation of all parties, discovery in this case should be straightforward. Discovery is already underway from parties other than the General Assembly. The central matters are simple questions of historical fact, such as: Who drew the 2011 Plan? What were the instructions given to the persons who drew the map and who gave the instructions? What criteria were used by the mapmakers to draw the 2011 Plan?

11. To that end, Petitioners have served notices of their intent to serve nonparty subpoenas, and have served interrogatories and document requests on all Respondents. In response, Respondents the General Assembly, Michael C. Turzai, and Joseph B. Scarnati III have asserted blanket objections to every single discovery request directed at them on numerous grounds including legislative privilege under the Speech and Debate clause in the Pennsylvania Constitution and the First Amendment. In addition, they have also asserted objections to the subpoenaing of documents from nonparty consultants on those same privilege grounds.

12. Petitioners have filed today a Motion to Strike Objections to Notice of Petitioners' Intent to Serve Subpoenas. As set forth in that motion, Petitioners believe this matter can and should be summarily denied so that the subpoenas can be served and that any objections may be raised to the actual subpoenas as opposed to objections to service of the subpoenas.

13. Lastly, Petitioners advise the Court that they have today also served the General Assembly with a notice for a Pa.R.C.P. 4007.1(e) deposition to obtain, *inter alia*, some of the basic factual information in this case and which will bear on resolution of pending privilege assertions.

CONCLUSION

Petitioners request that the Court set a scheduling conference for the same date at which the Stay Application is heard and that, if convenient for the Court, the current hearing date of October 4 be moved to an earlier date so that the various matters pending before the court can be addressed.

Dated: September 12, 2017

Mary M. McKenzie
Attorney ID No. 47434
Michael Churchill
Attorney ID No. 4661
Benjamin D. Geffen
Attorney ID No. 310134
PUBLIC INTEREST LAW CENTER
1709 Benjamin Franklin Parkway
2nd Floor
Philadelphia PA 19103
Telephone: +1 215.627.7100
Facsimile: +1 215.627.3183
mmckenzie@pubintl.org

Respectfully submitted,

/s/ Mary M. McKenzie

David P. Gersch*
John A. Freedman*
R. Stanton Jones*
Elisabeth S. Theodore*
Helen Mayer Clark*
Daniel F. Jacobson*
John Robinson*
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001-3743
Telephone: +1 202.942.5000
Facsimile: +1 202.942.5999
David.Gersch@apks.com
* Admitted pro hac vice.

Andrew D. Bergman*
ARNOLD & PORTER KAYE SCHOLER LLP
Suite 1600
700 Louisiana Street
Houston, TX 77002-2755
Telephone: +1 713.576.2400
Fax: +1 713.576.2499
* Admitted pro hac vice.

Counsel for Petitioners