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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

RESPONDENTS PENNSYLVANIA GENERAL ASSEMBLY, MICHAEL C. TURZAI, AND JOSEPH B. SCARNATI III'S APPLICATION TO STAY CASE PENDING THE U.S. SUPREME COURT'S RULING IN *GILL V. WHITFORD*

Respondents/Applicants Pennsylvania General Assembly, Michael C. Turzai, and Joseph B. Scarnati III (collectively, "Applicants") submit this Brief in support of their Application to Stay All Proceedings.

INTRODUCTION

This matter should be stayed because the U.S. Supreme Court's forthcoming decision in *Gill v. Whitford*, No. 16-1161, 2017 U.S. LEXIS 4040 (U.S. June 19, 2017) may render this entire action moot. Petitioners League of Women Voters of Pennsylvania, *et al.* ("Petitioners"), like the plaintiffs in *Whitford,* consist primarily of registered Democrats who are challenging a legislative redistricting plan on the basis that such plan is an unlawful partisan gerrymander that favors Republicans. Given the substantial similarities between *Whitford* and the present matter, there are at least four reasons why this Court should stay all proceedings, including discovery, until the U.S. Supreme Court issues its ruling in *Whitford*.

First, the Supreme Court in *Whitford* will determine whether judicially manageable standards to determine a partisan gerrymandering claim even exist, or whether such claims are non-justiciable political questions. Indeed, a plurality of the Supreme Court has previously ruled that partisan gerrymandering claims are

non-justiciable political questions. Should the Supreme Court find that such claims are non-justiciable, this matter could be rendered entirely moot.

Second, even if the U.S. Supreme Court concludes that partisan gerrymandering claims are justiciable, the *Whitford* decision may establish the standards governing such claims under the Equal Protection Clause of the Fourteenth Amendment and the Free Speech and Association Clauses of the First Amendment to the U.S. Constitution.

Third, *Whitford* will necessarily impact this action even though Petitioners' equal protection and free speech and association claims are advanced only under the Pennsylvania Constitution. The equal protection provisions of Pennsylvania's Constitution are co-extensive with the Fourteenth Amendment's Equal Protection Clause. And, although Pennsylvania's free speech and association provisions are broader than those of the U.S. Constitution, the Pennsylvania Supreme Court has expressly held that it looks to U.S. Supreme Court precedent for guidance in addressing free expression claims.

Fourth, consideration of traditional factors relating to the stay of proceedings weighs in favor of issuing a stay. Petitioners, who have been fully aware of the 2011 Plan for more than five years but failed to take any action until now, cannot claim any prejudice by a slight delay of these proceedings. By contrast, the amount of time, effort, and resources that will be spent on this matter (should it be

permitted to proceed) will be significant. And, if the Supreme Court in *Whitford* issues a decision that renders this matter moot, or sets forth a new rule governing partisan gerrymandering claims that significantly alters the course of this action, the time, money, and other resources spent prior to the *Whitford* decision will have been wasted unnecessarily.

Applicants therefore respectfully request that this Court stay this entire action pending a decision by the Supreme Court.

I. RELEVANT FACTUAL AND PROCEDURAL HISTORY

1. Petitioners are the League of Women Voters of Pennsylvania and individual voters who are all registered Democrats, consistently vote for Democratic candidates, and reside in all of Pennsylvania's 18 Congressional Districts. (Pet. ¶¶ 14-31).[1]

2. Petitioners allege that Republican legislators, in conjunction with National Republican leaders, devised the 2011 Plan in a manner that would maximize the number of Republican congressional representatives. (Pet. ¶¶ 42-49); *compare Gill v. Whitford*, 218 F. Supp. 3d 837, 854 (W.D. Wis. 2016) (stating that plaintiffs are all supporters of the Democratic party and almost always vote for Democrat candidates, and alleging the plan was devised to dilute the power of Democrats statewide).

[1] Applicants accept the allegations of the Petition as true only for purposes of this Application.

3. Petitioners allege that 2011 Plan violates their rights under several provisions of the Pennsylvania Constitution.

4. First, Petitioners claim that the 2011 Plan violates the Free Speech and Expression and Freedom of Association Clauses codified at Art. I, §§ 7 and 20 of Pennsylvania's Constitution because it prevents Democratic voters from electing the representatives of their choice and from influencing the legislative process, and suppresses their political views. (Pet. ¶¶ 99-112); *compare Whitford*, 218 F. Supp. 3d at 855.

5. Petitioners also claim that the 2011 Plan violates the equal protection provisions of the Pennsylvania Constitution codified at Art. I, §§ 1 and 26, and Art. I, § 5 because the Plan was allegedly enacted with discriminatory intent and has a discriminatory effect. (Pet. ¶¶ 116-17); *compare Whitford*, 218 F. Supp. 3d at 855.

6. Petitioners allege that Democrats, as an identifiable group, are disadvantaged at the polls, which consequently denies Democrats fair representation. (Pet. ¶ 117).

7. Under Petitioners' theory, this has the effect of preventing Democrat voters from participating in the political process and from having a meaningful opportunity to influence legislative outcomes. (Pet. ¶¶ 119-20).

8. To prove the alleged constitutional violation, Petitioners rely upon the same two-part test that the plaintiffs proposed in *Whitford*, namely, that the plan: (1) was adopted with partisan intent; and (2) had a partisan effect. *See* (Pet. ¶ 115) (citing *Whitford*, 218 F. Supp. 3d at 837).

9. With regard to partisan intent, Petitioners allege that Republicans utilized an opaque process producing districts that transformed competitive districts into reliably Republican districts. This was supposedly accomplished by "packing" and "cracking" Democrat leaning jurisdictions into multiple Republican leaning jurisdictions. (Pet. ¶¶ 61-66, 73-74).

10. In terms of partisan effect, Petitioners rely in part on an "efficiency gap" analysis identical to that which was relied upon by the district court in *Whitford* in declaring Wisconsin's districts unconstitutional. (Pet. ¶ 88).

11. The "efficiency gap" is determined by dividing the difference between the alleged "wasted votes" between the parties by the total number of votes in an election. (Pet. ¶ 88).[2]

12. Petitioners allege that Pennsylvania's efficiency gap is the highest in the nation, (Pet. ¶ 89), and that this proves that Democrats were "packed" and

[2] According to Petitioners, "wasted votes" are "defined as the number of votes cast for losing candidates of that party (as a measure of cracked votes) plus the number of votes cast for winning candidates in excess of 50% (as a measure of packed votes)." (*Id.*).

"cracked" on a large scale, depriving voters of the ability to elect officials of their choice. (Pet. ¶ 88); *compare Whitford*, 218 F. Supp. 3d at 854-55.

13. It is against this backdrop that Petitioners have advanced their claims and, despite the fact that none of the parties have yet responded to the Petition, Petitioners have already sought to commence extensive and extremely broad discovery.

14. Among other things, Petitioners have served requests upon Respondents for any documents of any nature whatsoever related to the 2011 Plan, and have notified Respondents of their intent to serve *seventeen* separate document subpoenas (each seeking similarly broad discovery) on those who may have worked on the Plan, including former Legislators, Chiefs of Staff, Legislative Assistants, and current and/or former employees of Respondents.

II. STANDARD OF REVIEW

15. In Pennsylvania, "[e]very court has the inherent power to schedule disposition of the cases on its docket to advance a fair and efficient adjudication. Incidental to this power is the power to stay proceedings, including discovery." *Luckett v. Blaine*, 850 A.2d 811, 818-19 (Pa. Commw. Ct. May 21, 2004).

16. As discussed in detail below, because the Supreme Court's resolution of *Whitford* will provide legal standards and guidance to this Court for resolving Petitioners' claims, this Court should exercise its power to stay these proceedings.

See Israelit v. Montgomery County, 703 A.2d 722, 724 n.3 (Pa. Commw. Ct. 1997) ("Trial courts have the inherent power to stay proceedings in a case pending the outcome of another case, where the latter's result might resolve or render moot the stayed case.").

17. On this point, it is notable that after the Supreme Court granted the stay in *Whitford*, another federal three-judge district court panel stayed proceedings, *sua sponte*, in a partisan gerrymandering action. *See Common Cause, et al. v. Rucho, et al*., No. 16-1026 (M.D.N.C. June 19, 2017) (three-judge court) (minute entry) (minute entry postponing the imminent trial indefinitely). Another federal court is contemplating a similar stay. *See Benisek, et al. v. Lamone, et al.* No. 13-03233, slip op. at 1-2 (D. Md. June 28, 2017) (three-judge court) (Dkt. No. 185) (stating that in addition to hearing oral argument on a motion for a preliminary injunction, that counsel also brief and be prepared to discuss whether the Court should stay all proceedings—other than the motion for preliminary injunction—in light of the Supreme Court's granting of the appeal and stay in *Whitford*).

III. ARGUMENT – THIS COURT SHOULD STAY THIS ACTION PENDING THE U.S. SUPREME COURT'S DECISION IN *WHITFORD*

18. As set forth above, the facts and legal theories at issue in *Whitford* are substantively similar to those set forth in the Petition for Review; indeed, both

matters involve registered Democrats challenging legislative redistricting plans as unconstitutional partisan gerrymanders favoring Republicans.[3]

19. In light of these similarities, the Supreme Court's decision in *Whitford* will have a significant impact on this action, and may render the entire case moot.

20. On this point, it is notable that when the U.S. Supreme Court granted the *Whitford* defendants' appeal on June 19, 2017, a majority of justices concurrently granted a stay of the three-judge district court's remedial order. *Whitford*, 218 F. Supp. 3d at 855.

21. In redistricting cases, the Supreme Court's grant of a stay pending appeal is not routine and a denial of a stay indicates a likely affirmance. *See, e.g.*, *McCrory v. Harris*, 136 S. Ct. 1001 (2016) (denying appellants' application for stay of district court order requiring remedial districts pending appeal). Thus, the fact that a majority of the Supreme Court decided to stay implementation of the *Whitford* ruling suggests that the *Whitford* decision is likely to be reversed.

[3] Applicants recognize that this matter differs from *Whitford* in that it involves congressional redistricting instead of state legislative redistricting. Because the same legal theories and requested remedies are advanced in both matters, however, different treatment is unwarranted.

A. The U.S. Supreme Court May Rule That Partisan Gerrymandering Claims Are Non-Justiciable

22. The law governing the justiciability of partisan gerrymandering claims is, at best, tenuous.

23. Indeed, a four justice plurality of the 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. *See Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004); *see also League of United Latin Am. Citizens v. Perry,* 548 U.S. 399, 511 (2006) (hereinafter "LULAC") (Scalia, J., and Thomas, J., concurring in judgment in part and dissenting in part); *see id*. at 493 (Roberts, C.J., and Alito, J., concurring in judgment in part and dissenting in part) (reserving judgment as to whether partisan gerrymandering claims are non-justiciable because the parties did not argue the issue).

24. Consequently, the defendants/appellants in *Whitford* have urged the Supreme Court to hold that partisan gerrymandering claims are non-justiciable political questions. *Whitford*, No. 16-1161, *jurisdictional statement* at 40 (U.S. March 24, 2017).

25. Furthermore, one *amicus* supporting the defendants/appellants dedicated an entire brief to demonstrating how partisan gerrymandering claims are

non-justiciable. *See* Brief of the Wisconsin Institute for Law and Liberty as *amicus curiae Gill v. Whitford*, No. 16-1161, 3-23 (*filed* April 24, 2017).

26. The Supreme Court's grant of probable jurisdiction established appellate review of all the issues appellants raised, including justiciability. The U.S. Supreme Court may therefore determine, for example, that there are no judicially manageable standards to determine whether a partisan gerrymander has occurred (or that no such standards could ever be established).

27. If the Supreme Court should hold that partisan gerrymander claims are not even justiciable, this action would be mooted. Thus, to preserve taxpayer and judicial resources, as well as the Court's valuable time, the Court should stay all proceedings pending the U.S. Supreme Court's decision in *Whitford*.

B. Even if the U.S. Supreme Court Concludes That Partisan Gerrymandering Claims Are Justiciable, the *Whitford* Decision Will Necessarily Still Have a Major Impact on This Action

28. Even if the U.S. Supreme Court recognizes the potential viability of a partisan gerrymandering claim, the governing standards for such a claim are currently unknown.

29. The partisan intent/effect test—upon which both Petitioners and the *Whitford* plaintiffs rely—was first announced in *Davis v. Bandemer*, 478 U.S. 109, 127-37 (1986), and subsequently recognized by the Pennsylvania Supreme Court in *In re 1991 Pa. Legislative Reapportionment Comm'n*, 609 A.2d 132, 141-142

(Pa. 1992) ("This Court is persuaded by the holding of the Supreme Court of the United States [in *Bandemer*] with regard to the elements of a prima facie case of political gerrymandering."); *Erfer v. Commonwealth*, 794 A.2d 325, 332 (Pa. 2002).

30. Notably, however, there were two standards proposed in *Bandemer*. 478 U.S. at 127-37 (plurality op.); *id*. at 161-62 (Powell, J., concurring in part and dissenting in part).

31. The Supreme Court thereafter discarded the *Bandemer* plurality's tests in *Vieth*. *See* 541 U.S. at 283-84 (plurality op.); *id*. at 308 (Kennedy, J., concurring); *id*. at 318 (Stevens, J., dissenting); *id*. at 346 (Souter and Ginsburg, JJ., dissenting); *id*. at 355-56 (Breyer, J., dissenting).

32. In place of the *Bandemer* test, *Vieth* produced several different proposed standards for determining whether a partisan gerrymandering violation has occurred. *Vieth*, 541 U.S. at 292 (noting that the four dissenters proposed three different standards to determine a partisan gerrymandering claim that were different from the two proposed standards in *Bandemer* and the one proposed by the *Vieth* appellants).

33. The Supreme Court's disagreement concerning the applicable standard (if any) for assessing a partisan gerrymandering claim persisted in *LULAC*. 548 U.S. at 414; *see also id*. at 417-19 (rejecting plaintiffs proposed test

to prove partisan gerrymandering); *id*. at 471-72 (Stevens, J., and Breyer, J., concurring in part and dissenting in part) (stating that plaintiffs proved a partisan gerrymandering under proposed test); *id*. at 492 (Roberts, C.J., and Alito, J., concurring in judgment in part and dissenting in part) (rejecting plaintiffs' proposed standing to prove partisan gerrymandering); *id*. at 512 (Scalia, J., and Thomas, J., concurring in judgment in part and dissenting) ("[W]e again dispose of this claim in a way that provides no guidance to lower court judges and perpetuates a cause of action with no discernible content.").

34. In light of the foregoing, it is plain that the standard, if any, to be utilized in evaluating a partisan gerrymandering claim is unknown.

35. Because the Pennsylvania Supreme Court has not had the opportunity to address political gerrymandering claims subsequent to *Vieth* or *LULAC*, and because a case advancing one potential standard is now before the U.S. Supreme Court in *Whitford*, this Court should stay the present action pending *Whitford*'s resolution.

C. Petitioners Cannot Escape The Effect Of *Whitford* By Advancing Claims Solely Under The Pennsylvania Constitution

1. The Pennsylvania Constitution's Equal Protection Clause is Co-extensive With the Equal Protection Clause Set Forth in the U.S. Constitution

36. As stated *supra*, the Pennsylvania Supreme Court has held that the equal protection provisions in Pennsylvania's Constitution are co-extensive with the Fourteenth Amendment's Equal Protection Clause. *See Erfer*, 794 A.2d at 332.

37. Thus, there can be no dispute that any standards set forth by the U.S. Supreme Court in *Whitford* will necessarily apply to partisan gerrymandering challenges brought under the Equal Protection Clause of Pennsylvania's Constitution.

2. Pennsylvania Courts Also Rely Upon U.S. Supreme Court Precedent When Construing Article I, Section 7 of the Pennsylvania Constitution

38. Although broader than the federal free speech and association constitutional provisions, the Pennsylvania Supreme Court relies upon U.S. Supreme Court First Amendment precedent to interpret Pennsylvania's constitutional free speech and freedom of association provisions. *See Pap's A.M. v. City of Erie*, 812 A.2d 591, 611 (Pa. 2002) ("[T]his Court has often followed the lead of the U.S. Supreme Court in matters of free expression under Article I, § 7[.]"); *see also DePaul v. Commonwealth*, 969 A.2d 536, 547 (Pa. 2009)

("[R]eference to First Amendment authority remains instructive in construing Article I, Section 7" of the Pennsylvania Constitution).

39. Pennsylvania's reliance upon Supreme Court authority in matters of free expression further counsels in favor of a stay.

3. Analysis Of Petitioners' Claims Under The Pennsylvania Constitution May Be Rendered Unnecessary If The Supreme Court Affirms *Whitford*

40. A Supreme Court affirmance in *Whitford* would also materially impact these proceedings, and may even render an analysis of Petitioners' claims under the Pennsylvania Constitution completely unnecessary, because any minimum guarantee of federal constitutional rights in this context would be binding upon Pennsylvania under the Supremacy Clause. *See Krentz v. CONRAIL*, 910 A.2d 20, 31-32 (Pa. 2006) ("The Supremacy Clause of the United States Constitution prohibits states from enacting laws that are contrary to the laws of our federal government: 'This Constitution and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'") (quoting U.S. Const. art. VI, cl. 2) (further citations and quotations omitted).

41. As such, the Pennsylvania Constitution can only afford more protection than its federal counterpart, not less, and if the 2011 Plan is deemed to

violate the U.S. Constitution, it would be of little consequence if it also violates the Pennsylvania Constitution.

42. And, there is little doubt that if the Supreme Court holds that partisan gerrymandering claims do violate the U.S. Constitution, Petitioners in this case may seek to amend their Petition to add nearly identical federal claims or perhaps withdraw this case and file a new claim in federal court.

43. Accordingly, given that a denial *or* an affirmance in the *Whitford* action would significantly affect this matter, this Court should enter a stay of all proceedings pending the decision in that action.

D. <u>The Balance Of The Equities Decidedly Favors Issuing A Stay</u>

44. If this Court grants the request for a stay, there would be little, if any, harm to Petitioners. Six years lapsed before Petitioners brought their claims against the 2011 enacted plan that, Petitioners assert, is the "worst offender" in the country as an unconstitutional partisan gerrymander. (Pet. ¶ 3). Indeed, despite that inordinate passage of time, Petitioners did not file this action until the *Whitford* decision was before the Supreme Court.

45. Oral argument in *Whitford* will occur on October 3, 2017 with a decision no later than June 30, 2018.[4] Waiting *at most* eleven months for the Supreme Court to determine whether standards even exist for partisan

[4] *See* https://www.supremecourt.gov/search.aspx?filename=/docketfiles/16-1161.htm (last visited July 24, 2017).

gerrymandering claims and, if so, to delineate those standards is not unduly prejudicial to Petitioners who waited six years to file their claims. Petitioners' delay in bringing this suit militates against any potentially claimed need to immediately proceed with discovery.

46. By contrast, denying Applicants' request for a stay *will necessarily* cause harm to the parties.

47. Denying the stay will require the General Assembly and the Senate to expend taxpayer dollars conducting extensive and overbroad discovery, including identifying, accumulating, and conducting privilege reviews of documents and materials sought by Petitioners.

48. This will be substantial and expensive. Indeed, as discussed above, Petitioners have already served requests on Applicants for all documents related to the 2011 Plan, and notified Respondents of their intent to serve *seventeen* separate document subpoenas on individuals who worked on the 2011 Plan.

49. Many of the materials sought by Petitioners are protected by the Pennsylvania Speech or Debate Clause, which poses a likely discovery dispute over the application of that constitutional privilege along with other privileges such as attorney-client privilege, First Amendment privilege, and the traditional disputes over relevance and burden. The amount of time, effort, and resources the parties and this Court will have to expend will be substantial.

50. Furthermore, proceeding with discovery to ascertain facts that are probative under an undefined legal landscape would be unwieldy and unfocused. If the Supreme Court rules that partisan gerrymandering claims are non-justiciable, then taxpayer and judicial resources will have been completely wasted.

51. Additionally, if the Supreme Court issues new standards for determining partisan gerrymanders, then discovery will be needed under those new standards. *See Kirksey v. Jackson,* 625 F.2d 21, 21-22 (5th Cir. 1980); v *Burlington v. News Corp*., No. 09-1908, 2011 U.S. Dist. LEXIS 1988, at *5 (E.D. Pa. 2011).

IV. CONCLUSION

52. To conserve both taxpayer and judicial resources, this Court should grant Applicants' request for a stay of all proceedings until the U.S. Supreme Court decides whether Petitioners' claims are even justiciable at all and, if so, what standards would apply to such claims to determine whether a partisan gerrymandering violation has occurred.

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Respectfully Submitted,

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