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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

PETITIONERS' ANSWER IN OPPOSITION TO THE APPLICATION FOR LEAVE TO INTERVENE

Petitioners, League of Woman Voters of Pennsylvania, *et al.*, submit this Answer in Opposition to the Application for Leave to Intervene. Petitioners request that the Court deny the Application because the Proposed Intervenors have no legally enforceable interest under Pa.R.C.P. 2327(4), the Proposed Intervenors' purported interests are adequately represented by multiple Respondents under Pa.R.C.P. 2329(2), and intervention will unduly delay the resolution of this lawsuit under Pa.R.C.P. 2329(3).

INTRODUCTION

In this lawsuit, Petitioners challenge the partisan gerrymandering of Pennsylvania's current congressional districts by the Republican majority in the Pennsylvania General Assembly on the grounds that the map violates the Pennsylvania Constitution. Respondents in this lawsuit include, among others, the Republican-controlled Pennsylvania General Assembly, Republican Speaker of the Pennsylvania House of Representatives Michael C. Turzai, and Republican Pennsylvania Senate President Pro Tempore Joseph B. Scarnati III. Two months into this lawsuit, these Republican Respondents, represented by three experienced law firms, have filed and briefed an Application for Stay along with filing Preliminary Objections on six different grounds. They have also served objections to Petitioners' discovery requests and served objections to Petitioners' notice of

intent to serve third party subpoenas. Yet thirty-four (34) active members of the Pennsylvania Republican Party ("Proposed Intervenors") now seek leave from the Court to intervene in this lawsuit claiming that as activist party members they have a unique interest in the litigation that is distinct from the Republican Respondents or voters at large, and moreover that their interests will not be adequately represented by the activist Republican Respondents. In addition, the Proposed Intervenors contend that their intervention somehow will not unduly delay the trial or adjudication of the parties' rights. These assertions are unfounded and the Proposed Intervenors' request to join this case should be rejected.

The Proposed Intervenors' interest in this ligation is apparently that any ongoing uncertainty as to congressional districts causes them harm because of their right – common to all voters – to recruit, fundraise, and campaign for candidates in the 2018 election. Application for Leave to Intervene ¶ 3. Thus, Proposed Intervenors seek "to protect their personal, individual, fundamental and legally enforceable interests and constitutional rights of voting, freedom of expression, and freedom of association." Application for Leave to Intervene, ¶ 64. Under the controlling cases of this Court and the Supreme Court these purported interests – because they are common to all – are not permissible grounds for intervention. Moreover, no voter has a right to perpetuate unconstitutional congressional

districts because a change will cause some inconvenience with respect to campaign activities. If that were the case, no relief from unconstitutional districts – even because of unequal population or racial discrimination – would ever be available.

Most importantly, Proposed Intervenors' interests are more than adequately represented by the Republican Respondents in this litigation, two of whom are Republican party legislators and leaders. The Application for Leave to Intervene does not even allege any conflict in their interests. Nor could Proposed Intervenors credibly do so, for the proposed Preliminary Objections that accompanied their Application raise the same objections and arguments raised by Respondents the Pennsylvania General Assembly, House Speaker Turzai, and Senate President Pro Tempore Scarnati in their recently filed Preliminary Objections, attached as Exhibit A.

Similarly, Proposed Intervenors argue that this lawsuit should be stayed pending the United States Supreme Court's decision in *Gill v. Whitford*, Application, ¶ 65(f), but Respondents the Pennsylvania General Assembly, House Speaker Turzai, and Senate President Pro Tempore Scarnati champion that same position in their Application for a Stay and accompanying brief, attached as Exhibit B.

Lastly, the addition of 34 new parties will complicate and delay the orderly resolution of this lawsuit. For each of these reasons, the Court should deny the Application for Leave to Intervene.

PROPOSED INTERVENORS

1. Denied. Petitioners are without knowledge or information sufficient to form a belief as to the truth of the averments set forth in this paragraph as to the Proposed Intervenors' status as voters or as enrolled members of the Republican Party, and therefore they are denied. The remaining averments in this paragraph are conclusions of law to which no responsive pleading is required.
2. Denied. Petitioners are without knowledge or information sufficient to form a belief as to the truth of the averments set forth in this paragraph concerning the activities of each Proposed Intervenor, and therefore they are denied. By way of further response, Proposed Intervenors' right to conduct such activities would not be denied by a judgment for the Petitioners that congressional districts must comply with the Pennsylvania Constitution.
3. Denied. Petitioners are without knowledge or information sufficient to form a belief as to the truth of the averments set forth in this paragraph concerning the activities of each Proposed Intervenor, and therefore they are denied. By way of further response, Proposed Intervenors' right to conduct such activities would

not be denied by a judgment for the Petitioners that congressional districts must comply with the Pennsylvania Constitution.

4. Denied. Petitioners are without knowledge or information sufficient to form a belief as to the truth of the averments set forth in this paragraph, and therefore they are denied.
5. Denied. Petitioners are without knowledge or information sufficient to form a belief as to the truth of the averments set forth in this paragraph, and therefore they are denied.
6. Denied. Petitioners are without knowledge or information sufficient to form a belief as to the truth of the averments set forth in this paragraph, and therefore they are denied. [1,2]
7. Denied. Petitioners are without knowledge or information sufficient to form a belief as to the truth of the averments set forth in this paragraph, and therefore they are denied.[3]

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[1] Denied. Petitioners are without knowledge or information sufficient to form a belief as to the truth of the averments set forth in this footnote, and therefore they are denied.
[2] The averments in this footnote purport to summarize the contents of a website; Petitioners refer to the website for its full and complete contents and deny anything inconsistent therewith.
[3] Denied. This footnote purports to summarize the contents of a website; Petitioners refer to the website for its full and complete contents and deny anything inconsistent therewith.

8. Denied. Petitioners are without knowledge or information sufficient to form a belief as to the truth of the averments set forth in this paragraph concerning fund raising by Congressional candidates, and therefore they are denied. By way of further response, this averment does not purport to pertain to activities of the Proposed Intervenors.[4]

9. Denied. Petitioners are without knowledge or information sufficient to form a belief as to the truth of the averments set forth in this paragraph that Proposed Intervenors have activities "well underway" concerning Congressional candidacies, and therefore they are denied. Petitioners further deny that Proposed Intervenors have a legal right to know geographic parameters of a congressional district "at least two (2) years in advance of the federal election." The 2011 Plan was adopted in December 2011, only four months in advance of the federal primary election in April 2012. Proposed Intervenors do not allege any unique harm or legal interest; any litigation involving voting and election laws causes uncertainty. Legal challenges to candidate qualifications, nomination petition disputes, recounts, challenges to ballot initiatives and

[4] This footnote purports to summarize the contents of several websites; Petitioners refer to the websites for their full and complete contents and deny anything inconsistent therewith.

referenda, and redistricting lawsuits, all introduce some uncertainty to the election cycle. Any purported "right to know" congressional district boundaries is a right held in common with all citizens desiring to support political candidates of their choice.

10. Admitted in part; denied in part. Petitioners admit that the 2018 Pennsylvania Primary is nine months away. Petitioners deny that any uncertainty as to the congressional district boundaries causes direct harm to each of the Proposed Intervenors to the extent it is not a conclusion of law to which no responsive pleading is required. By way of further response, Proposed Intervenors have not alleged that they have been prevented from participating in their campaign activities nor do they have a right to perpetuate unconstitutional congressional district boundaries because a change will cause some inconvenience with respect to campaign activities. In addition, Proposed Intervenors' allegations of harm do not identify any way that uncertainty as to the congressional district boundaries causes them harm different from any other citizen desiring to support candidates of their choice. Moreover, Proposed Intervenors' interests are adequately represented by the Republican-controlled Pennsylvania General Assembly, Republican House Speaker Turzai, and Republican Senate President

Pro Tempore Scarnati who have sought a stay and filed preliminary objections on the same grounds as Proposed Intervenors.

11. Denied. Petitioners are without knowledge or information sufficient to form a belief as to the truth of the averments set forth in this paragraph concerning Proposed Intervenors' participation "in the political process," and therefore they are denied. By way of further response, Proposed Intervenors have not alleged that they have been prevented from participating in their campaign activities nor do they have a right to perpetuate unconstitutional congressional district boundaries because a change will cause some inconvenience with respect to campaign activities. In addition, Proposed Intervenors' allegations of harm do not identify any way that uncertainty as to the congressional district boundaries causes them harm different from any other citizen desiring to support candidates of their choice. Moreover, Proposed Intervenors' interests are adequately represented by the Republican-controlled Pennsylvania General Assembly, Republican House Speaker Turzai, and Republican Senate President Pro Tempore Scarnati who have sought a stay and filed preliminary objections on the same grounds as Proposed Intervenors.

12. Denied. Petitioners are without knowledge or information sufficient to form a belief as to the truth of the averments set forth in this paragraph concerning the

purported activities of each of the seven (7) Proposed Intervenors identified as County Chairpersons or the extent to which those activities are linked to the identity of the Congressional candidate as alleged, and therefore they are denied. By way of further response, Proposed Intervenors have not alleged that they have been prevented from participating in their campaign activities nor do they have a right to perpetuate unconstitutional congressional district boundaries because a change will cause some inconvenience with respect to campaign activities. In addition, Proposed Intervenors' allegations of harm do not identify any way that uncertainty as to the congressional district boundaries causes them harm different from any other citizen desiring to support candidates of their choice. Moreover, Proposed Intervenors' interests are adequately represented by the Republican-controlled Pennsylvania General Assembly, Republican House Speaker Turzai, and Republican Senate President Pro Tempore Scarnati who have sought a stay and filed preliminary objections on the same grounds as Proposed Intervenors.

13. Denied. Petitioners are without knowledge or information sufficient to form a belief as to the truth of the averments set forth in this paragraph concerning whether this single Proposed Intervenor, David Moylan—who has not publicly announced a congressional candidacy—is engaged in these activities because of

his interest in being a "potential" candidate, and therefore they are denied. Furthermore, whether such activities constitute "significant personal interest in this litigation" is a matter of law to which no responsive pleading is required. The level of interest of a potential but undeclared candidate is completely speculative and inchoate; any number of persons may be interested in being a potential candidate. By way of further response, Proposed Intervenor Moylan has not been prevented from engaging in these campaign activities, nor does he have a right to particular congressional district boundaries because a change will cause some inconvenience with respect to campaign activities. In *Fraenzl v. Secretary of the Commonwealth of Pennsylvania*, 478 A.2d 903 (Pa. Commw. Ct. 1984), in an action filed by a Socialist Worker candidate seeking to compel the Commonwealth to place her on the ballot, this Court denied intervention by a Republican candidate for office. While the Court recognized that its "decision will no doubt have an effect on the outcome of the election," the Court found that the Republican candidate could "assert no legally enforceable interest in potential votes which may be lost to an additional candidate." 478 A.2d at 904. Instead, she had "only an interest in having the election laws properly applied, an interest she shares in common with every other member of the electorate." *Id.* Likewise, here, Proposed Intervenor

Moylan has an interest only in having congressional district boundaries that comply with the constitution, an interest he shares with every other member of the electorate. Accordingly, the Application for Leave to Intervene should be denied. Finally, Proposed Intervenor Moylan's interests are adequately represented by the Republican-controlled Pennsylvania General Assembly, Republican House Speaker Turzai, and Republican Senate President Pro Tempore Scarnati who have sought a stay and filed preliminary objections on the same grounds as Proposed Intervenors.

14. Denied. Petitioners are without knowledge or information sufficient to form a belief as to the truth of the averments set forth in this paragraph as to whether each of the twelve (12) Proposed Intervenors identified as County Committee members engage in the activities averred, and therefore they are denied. Petitioners further deny the characterization that these Proposed Intervenors "often" vote for candidates for Congress to fill vacancies and the relevancy that this party function has to an interest in a particular congressional district boundary. By way of further response, Proposed Intervenors have not alleged that they have been prevented from participating in their campaign activities nor do they have a right to perpetuate unconstitutional congressional district boundaries because a change will cause some inconvenience with respect to

campaign activities. In addition, Proposed Intervenors' allegations of harm do not identify any way that uncertainty as to the congressional district boundaries causes them harm different from any other citizen desiring to support candidates of their choice. Moreover, Proposed Intervenors' interests are adequately represented by the Republican-controlled Pennsylvania General Assembly, Republican House Speaker Turzai, and Republican Senate President Pro Tempore Scarnati who have sought a stay and filed preliminary objections on the same grounds as Proposed Intervenors.

15. Denied. Petitioners are without knowledge or information sufficient to form a belief as to the truth of the averments set forth in this paragraph, and therefore they are denied. Moreover, to the extent that the averments can be construed to allege that the thirteen (13) Proposed Intervenors who are merely voters registered in the Republican Party and who do not hold any party office have any duty or responsibility to engage in the activities set forth in this paragraph, those averments are denied. By way of further response, Proposed Intervenors have not alleged that they have been prevented from participating in their campaign activities nor do they have a right to perpetuate unconstitutional congressional district boundaries because a change will cause some inconvenience with respect to campaign activities. In addition, Proposed

Intervenors' allegations of harm do not identify any way that uncertainty as to the congressional district boundaries causes them harm different from any other citizen desiring to support candidates of their choice. Moreover, Proposed Intervenors' interests are adequately represented by the Republican-controlled Pennsylvania General Assembly, Republican House Speaker Turzai, and Republican Senate President Pro Tempore Scarnati who have sought a stay and filed preliminary objections on the same grounds as Proposed Intervenors.

16.–49. Denied. Petitioners are without knowledge or information sufficient to form a belief as to the truth of the averments set forth in these paragraphs concerning each Proposed Intervenor, and therefore they are denied. By way of further response, Proposed Intervenors' right "to participate in the political process" will not be denied by a judgement in this case requiring congressional districts to comply with the Pennsylvania Constitution.

FACTUAL AND PROCEDURAL BACKGROUND

50. Admitted.

51. Admitted in part; denied in part. Petitioners admit that the League of Women Voters of Pennsylvania and eighteen (18) registered Democrat voters are the Petitioners and that the individuals consistently voted for Democratic

candidates for Congress. Petitioners deny the characterization of the League as an "allegedly non-partisan political organization."[5]

52. Admitted in part; denied in part. Petitioners admit that they have consistently voted for Democratic candidates for Congress. To the extent the remaining averments in this paragraph purport to summarize paragraphs 14 through 31 of the Petition, Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

53. Admitted.

54. Denied. By way of further answer, none of the articles referred to in this paragraph support that averment.[6]

55. Admitted in part; denied in part. Petitioners admit that Respondents include the Commonwealth of Pennsylvania and the General Assembly. The characterization of the other Respondents as various bipartisan public officials (some of whom are registered Democrats) is denied as incomplete and failing to note that they are included in their official capacities. By way of further

[5] Denied. The averments in this footnote mischaracterize the Petition; Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.
[6] Denied.

response, Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

56. Admitted in part; denied in part. Admitted to the extent the averments mean that most Commonwealth Respondents who are named in the lawsuit in their official capacities were not in the public office they are currently holding. The remaining averments in this paragraph are denied.

57. Admitted in part; denied in part. Petitioners admit that Josh Shapiro is currently the State Attorney General; that he voted against the 2011 Plan as a member of the Pennsylvania House of Representatives; and that the Attorney General's office is representing the Commonwealth in this litigation. The remaining averments in this paragraph are either denied or are conclusions of law to which no responsive pleading is required.

58. Admitted in part; denied in part. Petitioners admit that none of the Petitioners are registered Republican voters. The remaining averments of this paragraph are either conclusions of law to which no responsive pleading is required or are denied. By way of further response, Petitioners deny that Petitioners do not represent interests of Republican voters, Independents, or minor political parties as they all have an interest in elections which comply with the Pennsylvania Constitution.

59. Denied. The averments in his paragraph are denied to the extent that they are not conclusions of law to which no responsive pleading is required. By way of further response, Proposed Intervenors' interests are adequately represented by Respondents. Both Respondent Turzai and Respondent Scarnati are the same "qualified electors, register electors, and active and enrolled members of the Republican Party of Pennsylvania" as Proposed Intervenors set forth as their defining qualifications in Paragraph 1 of this Application. Moreover, Respondent the Republican-controlled Pennsylvania General Assembly, Republican House Speaker Turzai, and Republican Senate President Pro Tempore Scarnati have already filed Preliminary Objections to the Petition, raising six different objections including the three objections of the Proposed Intervenors – (1) that Petitioner the League of Women Voters "lacks standing to pursue its Petition in Court;" (2) that the Petition "fails to state a claim upon which relief may be granted"; and (3) that "the Petition fails to state the specific bases for how and why the LWVPA has standing in this matter." *Compare* Exhibit B, ¶¶ 19-66, *with* Proposed Intervenors' Preliminary Objections, ¶¶ 14-49.

60. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

BASES FOR PROPOSED INTEVENORS' APPLICATION

61. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

62. Admitted.

63. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. In addition, the averments in this paragraph are denied as incomplete. To the extent the paragraph purports to set forth the pertinent rules regarding Intervention, it fails to include Pennsylvania Rule of Civil Procedure 2329, which allows a court to refuse Intervention if "(2) the interest of the petitioner is already adequately represented; or (3) … the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties." Pa.R.C.P. 2329. By way of further response, absent a "legally enforceable interest," Proposed Intervenors have no standing to intervene, and their Application must be denied pursuant to Pennsylvania Rule of Civil Procedure 2327. It is well established that Proposed Intervenors must "allege and prove an interest in the outcome of the suit which surpasses 'the common interest of all citizens in procuring obedience to the law.'" *Biester v. Thornburgh,* 409 A.2d 848, 851 (Pa. 1979) (quoting *William Penn Parking Garage v. City of Pittsburgh,* 346 A.2d 269,

281 (Pa. 1975)). Applying this test, Pennsylvania courts have consistently denied intervention where the alleged interest is shared by the community or public in general. For example, in *Markham v. Wolf,* 136 A.3d 134, 140 (Pa. 2016) the Supreme Court denied Pennsylvania legislators the right to intervene in a challenge to an executive order finding their interests "are generalized interests common to the general citizenry." Similarly, in *Biester,* the proposed intervenor asserted an interest, as a taxpayer, in "the prevention of a waste of tax revenue as a result of expenditures [on illegal and unconstitutional activities]." 409 A.2d at 851. Because the proposed intervenor's interest was "merely the same interest all citizens have in having others comply with the law or the constitution," the Supreme Court held that "such an interest is not sufficient to confer standing" either to bring a petition for review or to intervene under Rule 2327. 409 A.2d at 850 n.2, 851-52. Like the legislators in *Markham,* the taxpayer in *Biester*, and the political candidate in *Fraenzl,* 478 A.2d at 904, here Proposed Intervenors' only legally enforceable interest is in having congressional district boundaries that comply with the constitution, an interest Proposed Intervenors share in common with every other member of the electorate. Accordingly, Proposed Intervenors have no legally enforceable interest under Pa.R.C.P.

2327(4) because any alleged interest is shared by the public in general. Thus, their Application for Leave to Intervene should be denied.

64. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. In addition, Petitioners deny that the interests identified by Proposed Intervenors are legally enforceable, that they are personal and individual rather than common to all voters, or that any right to engage in campaigning activities claimed by Proposed Intervenors will be "adversely affected by Petitioners' requested relief," which is to create congressional districts which do not violate the Pennsylvania Constitution. Nothing in the relief sought by Petitioners—to have congressional districts that conform to the Pennsylvania Constitution and are not based on partisan map-making—will interfere with the right of Republican party members and officials to campaign for candidates of their choice or to engage in any other activities asserted by Proposed Intervenors.

65. Denied. The "potential defenses" set forth in this paragraph are conclusions of law to which no responsive pleadings are required. By way of further response, each of the proposed defenses has been asserted by Respondents the Republican-controlled Pennsylvania General Assembly, Republican House Speaker Turzai, and Republican Senate President Pro Tempore Scarnati in their

Preliminary Objections and in their Application for a Stay and who are adequately representing the interests of Proposed Intervenors. Pennsylvania courts make clear that intervention should not be permitted under Pa.R.C.P. 2329(2) when a Respondent is already defending the "legally enforceable interest" of a Proposed Intervenor. For example, in *Pennsylvania Association of Rural and Small Schools v. Casey*, 613 A.2d 1198, 1200-01 (Pa. 1992), the Supreme Court found that the proposed intervenor school districts' interest in upholding the constitutionality of the school funding statute was adequately represented by the Commonwealth and affirmed the Commonwealth Court's holding that the proposed intervenors' "desire to pursue a preferred litigation strategy or defense theory was not an interest entitling [them] to intervene." *Id.* at 1201.

a. Denied. Petitioners are without information or knowledge sufficient to form a belief as to the truth of the averments in this subparagraph concerning Respondents' wishes and they are therefore deemed denied. By way of further response, Petitioners deny that the list of interests in this subparagraph is unique to Proposed Intervenors, is not already adequately represented by Respondents, or may be affected by the relief sought in this litigation.

b. Denied. Petitioners are without information or knowledge sufficient to form a belief as to the truth of the averments in this subparagraph concerning Respondents' wishes and they are therefore deemed denied. By way of further response, Petitioners deny that the list of interests in this subparagraph is unique to Proposed Intervenors, is not adequately represented by Respondents, or may be affected by the relief sought in this litigation.

c. Denied. By way of further response, Petitioners have not proposed **any** redistricting plan but are merely asking the Court to prevent the use of an unconstitutional plan and to order the creation of a plan that conforms to the Pennsylvania Constitution.

d. Denied. This subparagraph contains conclusions of law to which no responsive pleading is required. By way of further response, Respondents the Republican-controlled Pennsylvania General Assembly, Republican House Speaker Turzai, and Republican Senate President Pro Tempore Scarnati have already presented these same arguments in their Preliminary Objections. *See* Exhibit A, ¶¶ 9-14. To the extent this subparagraphs states that provisions of the Pennsylvania Constitution cannot exceed the requirements of the

United States Constitution and must be construed *in pari materia*, it is denied.

e. Denied. This subparagraph contains conclusions of law to which no responsive pleading is required. By way of further response, Respondents the Republican-controlled Pennsylvania General Assembly, Republican House Speaker Turzai, and Republican Senate President Pro Tempore Scarnati have already presented these same arguments in their Preliminary Objections. *See* Exhibit A, ¶¶ 9-14.

f. Admitted in part; denied in part. Petitioners admit that the U.S. Supreme Court is scheduled to hear argument in *Gill v. Whitford*, Doc. No. 16-1161. The remaining averments in this subparagraph are conclusions of law to which no responsive pleading is required. By way of further response, Respondents the Republican-controlled Pennsylvania General Assembly, Republican House Speaker Turzai, and Republican Senate President Pro Tempore Scarnati have already presented and briefed these same arguments in their Application for a Stay. *See* Exhibit B. Petitioners deny that the issues to be heard by the U.S. Supreme Court in *Gill v. Whitford*, are "identical" to those in this case. To the contrary, there is no legitimate reason to hold this case in

abeyance for potentially eleven months while the Supreme Court considers a case that involves different law, different theories, different facts, different evidence, and a different state's districting plan for state legislative districts. In addition, Petitioners refer to their Answer and Brief in Opposition to the Application to Stay Case, filed on August 28, 2017.

g. Denied. This subparagraph contains conclusions of law to which no responsive pleading is required. By way of further response, Respondents the Republican-controlled Pennsylvania General Assembly, Republican House Speaker Turzai, and Republican Senate President Pro Tempore Scarnati raise these arguments in their Preliminary Objections. *See* Exhibit A. Petitioners' claims have never challenged and do not depend on challenging any of the assertions in this subparagraph. For example, although "(3) there have been significant changes in voting patterns over the last several elections," the outcome pattern of 13 Republican and 5 Democratic Congressional seats has never varied, because of the partisan gerrymander in the 2011 Plan. Moreover, Proposed Intervenors mischaracterize Petitioners' claims, and Petitioners refer to the

Petition for its full and complete contents, and deny anything inconsistent therewith.

h. Denied. This subparagraph contains conclusions of law to which no responsive pleading is required. By way of further response, to the extent that this subparagraph is intended to state that the Pennsylvania Constitution does not apply to congressional redistricting, it is denied.

i. Admitted in part; denied in part. Petitioners admit that the legislature enacted the 2011 Plan by a Republican majority vote and the Bill was signed into law by the Governor. The remaining averments in this subparagraph are conclusions of law to which no responsive pleading is required.

j. Denied. This subparagraph contains conclusions of law to which no responsive pleading is required.

k. Denied. This subparagraph contains conclusions of law to which no responsive pleading is required.

l. Denied. This subparagraph contains conclusions of law to which no responsive pleading is required. By way of further response, there is no rational explanation for the extreme and enduring distortion between the congressional votes cast for the parties and the

congressional seats actually won by the parties except that the map was drawn to discriminate against Democratic voters.

m. Denied. This subparagraph contains conclusions of law to which no responsive pleading is required. By way of further response, Article I, Section 4 of the U. S. Constitution does not require or authorize violations of Pennsylvania's equal protection provisions or of its free expression and association clauses.

n. Denied. This subparagraph contains conclusions of law to which no responsive pleading is required.

o. Denied. This subparagraph contains conclusions of law to which no responsive pleading is required.

p. Admitted in part; denied in part. Petitioners admit that three Congressional elections have been held pursuant to the 2011 Plan and that only one more election in 2020 would be held after 2018 under the 2011 Plan. Petitioners are without knowledge or information sufficient to form a belief as to the truth of the averments concerning the status of congressional campaigns. Petitioners deny that these facts demonstrate that the relief requested in this Petition—to require that congressional districts comply with the Pennsylvania Constitution—

"will be detrimental to and cause harm to the Proposed Intervenors" or to "constituents."

q. Denied. This subparagraph contains conclusions of law to which no responsive pleading is required. By way of further response, Petitioners note that the durability of the gerrymander in the 2011 Plan has become increasingly evident through the completion of three elections in which differing voting patterns produce the same Congressional results—13 Republican seats and 5 Democratic seats.

r. Denied. This subparagraph contains conclusions of law to which no responsive pleading is required. By way of further response, the relief is appropriate to prevent the violations in the 2011 Plan from reoccurring.

66. Denied. This paragraph contains conclusions of law to which no responsive pleading is required.

67. Denied. This paragraph contains conclusions of law to which no responsive pleading is required. By way of further response, Proposed Intervenors' interests are and will be adequately represented by Respondents the Republican-controlled Pennsylvania General Assembly, Republican House Speaker Turzai, and Republican Senate President Pro Tempore Scarnati. All of

the claims asserted by the Proposed Intervenors in this Application, and in their Preliminary Objections attached to their Application, are asserted in the Preliminary Objections and Application for Stay filed by these three Respondents. *See* Exhibits A and B.

68. Admitted. By way of further response, Proposed Intervenors' Application should be denied because they have no legally enforceable interest that is in any way different from the legal interests of the public at large, their purported interests are adequately represented by three of the Respondents, and their intervention would delay and unnecessarily complicate the adjudication of this matter.

69. Denied. This paragraph contains conclusions of law to which no responsive pleading is required. By way of further response, the addition of 34 new parties will substantially delay resolution of the issues involved herein. Among other things, the addition of 34 more parties will increase the number and frequency of motions before the Court, increase the amount of discovery necessary, and extend the length of examination of witnesses.

CONCLUSION

70. Denied. This paragraph contains conclusions of law to which no responsive pleading is required. By way of further response, any purported interest of the

Proposed Intervenors is represented by three of the Respondents. As set forth above, Respondents the Republican-controlled Pennsylvania General Assembly, Republican House Speaker Turzai, and Republican Senate President Pro Tempore Scarnati have filed the same objections to this lawsuit as those proposed to be asserted by the Proposed Intervenors and similarly are seeking a stay of this litigation.

71. Denied. This paragraph contains conclusions of law to which no responsive pleading is required. By way of further response, the Proposed Intervenors have demonstrated no legal interest different from the legal interest of the general public.

72. Admitted.

73. Admitted in part; denied in part. Petitioners admit that Proposed Intervenors have requested a hearing. By way of further response, Proposed Intervenors have no legally enforceable interest that is in any way different from the legal interests of the public at large, their purported interests are adequately represented by three of the Respondents, and their intervention would delay and unnecessarily complicate the adjudication of this matter.

WHEREFORE, Petitioners request that the Court deny the Proposed Intervenors' Application for Leave to Intervene.

Dated: August 28, 2017

Respectfully submitted,

/s/ Mary M. McKenzie

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Exhibit A

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

ORDER

AND NOW, this day of , 2017, upon consideration of Respondents Pennsylvania General Assembly, Michael C. Turzai, and Joseph B. Scarnati III's Preliminary Objections to the Petition for Review, and any response thereto, it is hereby **ORDERED** that the Preliminary Objections are **SUSTAINED** and the Petition for Review is **DISMISSED**.

BY THE COURT:

_____

J.

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Petitioners are hereby notified to plead to the enclosed Preliminary Objections within 30 days from service hereof

/s/ Brian S. Paszamant

Attorney for Respondent
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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

League of Women Voters of Pennsylvania, *et al.*,

) Civ. No. 261 MD 2017

Petitioners,	)
	)
v.	)
	)
The Commonwealth of Pennsylvania,	)
	)
et al.,	)
Respondents.	)
	)

RESPONDENTS PENNSYLVANIA GENERAL ASSEMBLY, MICHAEL C. TURZAI, AND JOSEPH B. SCARNATI III'S PRELIMINARY OBJECTIONS

Respondents Pennsylvania General Assembly, Michael C. Turzai, and Joseph B. Scarnati III (collectively, "Objecting Respondents") file these Preliminary Objections to the Petition for Review filed by Petitioners League of Women Voters of Pennsylvania, *et al.* (collectively, "Petitioners").

PRELIMINARY STATEMENT

The ability of a party to advance a claim for partisan gerrymandering claim is tenuous, at best. Indeed, since the U.S. Supreme Court abandoned the plurality's standard in *Davis v. Bandemer*, 478 U.S. 109 (1986), the Supreme Court of Pennsylvania—which had previously adopted the analysis in *Bandemer*—has not addressed what standard (if any) should govern partisan gerrymandering claims.

Despite the tenuous and unknowable legal landscape, and after three election cycles under the plan that was designed in 2011 (the "2011 Plan"), Petitioners, 18 Democrat voters and the League of Women Voters of Pennsylvania, claim that each of Pennsylvania's 18 congressional districts constitutes an unconstitutional partisan gerrymander. Petitioners' claims include even those districts where the Democrat Petitioners were able to elect a Democratic Party member to Congress and those districts where Democrats have a voter registration advantage.

As set forth herein, Petitioners' partisan gerrymandering claims advanced under Art. I, §§ 7, 20 and Art. I, §§ 1 and 26, and Art. I, §5 of Pennsylvania's Constitution are fundamentally flawed, and this Court should sustain these Preliminary Objections for the following reasons:

First, partisan gerrymandering claims are non-justiciable political questions and therefore this Court should dismiss the Petition for Review for lack of jurisdiction.

Second, Petitioners cannot state a claim upon which relief can be granted because they do not plead facts that demonstrate they are shut out of the political process and that their elected congressional members entirely ignore their interests.

Third, Petitioners cannot sustain their free speech and association claims because those rights have not been violated. Petitioners are able to endorse candidates, campaign for candidates, and speak in favor of candidates. The map they are challenging does not violate any of the Petitioners' free speech or associational rights under the Pennsylvania Constitution.

Fourth, Petitioner League of Women Voters of Pennsylvania does not have standing. The right to vote is personal to each individual, not to an organization. Therefore, the League of Women Voters of Pennsylvania does not have a sufficient interest to remain a Petitioner in this lawsuit.

Fifth, even if certain Petitioners could advance a cause of action for partisan gerrymandering, those Petitioners who are Democratic Party supporters and live in districts that have a Democratic Party registration advantage cannot state a claim because they cannot establish that they have suffered any diminution of their political power, that they have been shut-out of the political process in any way, or that Republican representatives have "entirely ignored" Democratic constituents.

Sixth, Petitioners do not have standing to bring a challenge to the map on a statewide basis. Under the U.S. Supreme Court's racial gerrymandering jurisprudence, to have standing, plaintiffs must reside in the

district that the plaintiff claims is unconstitutional. The rule for partisan gerrymandering claims should be no less stringent.

I. FACTUAL BACKGROUND

A. The Pennsylvania General Assembly Passes Senate Bill 1249 and Creates New Boundaries for the Commonwealth's Eighteen Congressional Districts.

1. According to the facts alleged in the Petition, Republican Senators in the Pennsylvania Senate introduced Senate Bill 1249 on September 14, 2011. (Pet. ¶ 50).[1]

2. The purpose of Senate Bill 1249 was to establish new boundaries for the Commonwealth's eighteen congressional voting districts (the 2011 Plan). (*Id.* ¶¶ 51-52).

3. After Senate Bill 1249 was passed in the Senate on December 14, 2011, (*id.* ¶¶ 52, 68), the House of Representatives—including thirty-six Democrats—voted to pass the Bill on December 20, 2011. (*Id.* ¶¶ 76).

4. Senate Bill 1249 was thereafter signed into law by Governor Tom Corbett, and it went into effect prior to the 2012 elections. (*Id.* ¶¶ 76).

[1] Objecting Respondents accept the allegations of the Petition as true only for purposes of these Preliminary Objections.

B. Petitioners Commence the Present Action Claiming That The 2011 Plan Violates Their Constitutional Rights

5. Petitioners consist primarily of registered Democrats from each of the eighteen Congressional Districts in Pennsylvania. (Pet. ¶¶ 14-31).

6. They allege that the 2011 Plan was devised to maximize impermissibly the number of Republican congressional representatives. (Pet. ¶¶ 42-49).

7. Petitioners allege that the Senate sponsors of the 2011 Plan accomplished this goal by "packing" Democrat leaning jurisdictions and "cracking" Democrat leaning jurisdictions into multiple Republican leaning jurisdictions. (Pet. ¶¶ 61-66, 73-74).

8. According to Petitioners, "cracking" is accomplished "by dividing a party's supporters among multiple districts so that they fall short of a majority in each district," while "packing" consists of "concentrating one party's backers in a few districts that they win by overwhelming margins to minimize the party's votes elsewhere." (Pet. ¶ 47).

9. Petitioners allege that "[t]his cracking and packing results in 'wasted' votes: votes cast either for a losing candidate (in the case of cracking) or for a winning candidate but in excess of what he or she needs to prevail (in the case of packing)." (*Id.*).

C. Petitioners Advance Two Claims for Relief

10. Petitioners have advanced two claims for relief.

11. First, Petitioners contend that the 2011 Plan violates Pennsylvania's Free Speech and Expression Clause and the Freedom of Association Clause codified at Art. I, §§ 7, 20 of the Constitution of the Commonwealth of Pennsylvania.

12. According to Petitioners, the 2011 Plan violates these provisions because, among other things, 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).

13. Second, Petitioners contend that the 2011 Plan violates the equal protection provisions in Pennsylvania Constitution, codified at Art. I, §§ 1 and 26, and Art. I, §5 (the "Pennsylvania Equal Protection Clause"), because the 2011 Plan was enacted with discriminatory intent and has had a discriminatory effect. (Pet. ¶¶ 116-17).

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

15. Due to Democrats' statewide voting numbers, Petitioners assert, Democrats should have more congressional seats, but the alleged

gerrymander has allotted Petitioners far fewer seats than Democrats should win. (Pet. ¶ 118).

16. 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).

II. PRELIMINARY OBJECTIONS

17. Pursuant to Pennsylvania Rule of Civil Procedure 1028(a), "[p]reliminary objections may be filed by any party to any pleading" based upon grounds including the "lack of jurisdiction over the subject matter of the action or the person" and "insufficient specificity in a pleading." Pa. R.C.P. 1028(a)(2)-(3).

18. The Rules also provide that the preliminary objections "shall state specifically the grounds relied upon and may be inconsistent. Two or more preliminary objections may be raised in one pleading." Pa. R.C.P. 1028(b).

A. First Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(1): Petitioners' Claims Are Non-Justiciable Political Questions

1. Relevant Law Governing Justiciability

19. Questions concerning justiciability, including the political question doctrine, are "threshold" questions "generally resolved before addressing the merits of the parties' dispute." *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 917 (Pa. 2013) (citing *Council 13, Am. Fed. of State, Cnty. & Mun. Emps., AFL-CIO v. Commonwealth*, 986 A.2d 63, 74 n.10 (Pa. 2009)).

20. Justiciability questions are properly raised in preliminary objections "to a petition for review filed in the original jurisdiction of the Commonwealth Court . . . ." *Id*.

21. The political question doctrine secures the separation of powers doctrine, *id*. at 926-27, and is implicated when there is a "textually demonstrable constitutional commitment" to a political branch and where there is "a lack of judicially discoverable and manageable standards for resolving the disputed issue." *Id*. at 928 (citing and relying on *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

22. Judicial action, however, is governed by standards and rules. *See Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality op.).

23. Here, as discussed below, no judicially manageable standards exist to guide this Court in determining whether a constitutional violation has occurred.

2. Because No Judicially Manageable Standard Exists for Assessing Partisan Gerrymandering Actions, Petitioners' Claims Must Be Dismissed as Non-Justiciable Political Questions

a. The U.S. Supreme Court Decision Upon Which the Pennsylvania Supreme Court Relied in Assessing Partisan Gerrymandering Claims Has Been Abandoned

24. In assessing partisan gerrymandering claims, the Supreme Court of Pennsylvania previously adopted the plurality's test set forth by the U.S. Supreme Court in *Davis v. Bandemer*, 478 U.S. 109, 127-37 (1986). *See 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.").

25. That test mandates that for a plaintiff to plead and prove a partisan gerrymandering claim, the plaintiff must "prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Bandemer*, 478 U.S. at 127.

26. But the Supreme Court subsequently expressly abandoned the *Bandemer* test. *See Vieth*, 541 U.S. at 283-84 (plurality opinion); *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).

27. The *Vieth* plurality noted that the *Bandemer* plurality's test provided nothing more than "one long record of puzzlement and consternation," *id*. at 282, and that "eighteen years of essentially pointless litigation have persuaded us that *Bandemer* is incapable of principled application." *Id*. at 306.

28. As such, because the Pennsylvania Supreme Court relied upon *Bandemer* in crafting its standard for assessing partisan gerrymandering claims—and because *Bandemer* has been abandoned by the U.S. Supreme Court—the present standard (if any) governing such claims in Pennsylvania is unknown.

b. The U.S. Supreme Court Has Not Established Any Standard for Assessing Partisan Gerrymandering Claims

29. In *Vieth*, the U.S. Supreme Court produced four splintered opinions that articulated several different standards to determine an equal protection violation due to partisan gerrymandering. *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).

30. More standards were again submitted to the Court and ultimately rejected in *League of United Latin Am. Citizens v. Perry,* 548 U.S. 399, 514 (2006) (hereinafter "LULAC"); *see also id*. at 417-19 (rejecting plaintiffs' proposed test to prove partisan gerrymandering); *see also id*. at 471-72 (Stevens, J., and Breyer, J., concurring in part and dissenting in part) (stating that plaintiffs proved a partisan gerrymander under proposed test); *see also 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); *see 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.").

31. From the four opinions in *Bandemer,* to the five opinions in *Vieth*, to the six opinions in *LULAC*, the U.S. Supreme Court has produced fifteen opinions, none of which produced a judicially manageable rule or standard to determine if an unconstitutional partisan gerrymander occurred.

32. Thus, confusion persists, placing courts in an untenable position "of evaluating political gerrymandering claims without any definitive standards." *Radogno v. Ill. State Bd. of Elections*, No. 11-4884, 2011 U.S. Dist. LEXIS 122053, *14 (N.D. Ill. Oct. 21, 2011) (three-judge court).

33. Further complicating this analysis is the fact that both the U.S. Supreme Court and the Supreme Court of Pennsylvania have recognized that politics and political considerations are inevitable in redistricting, so much so that redistricting is "intended to have substantial political consequences." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973); *Erfer v. Commonwealth*, 794 A.2d 325, 332 (Pa. 2002).

34. Additionally, it is difficult to adjudicate partisan gerrymandering claims because political party affiliation is an inherently mutable characteristic as voters often vote for different parties in both different elections *and* in the same election. *See Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring); *Vieth*, 541 U.S. at 287 ("***Political affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line***.") (emphasis added).

35. In sum, because the Pennsylvania Supreme Court in *Erfer* relied upon *Bandemer* to assess partisan gerrymandering claims—and

because *Bandemer* has been abandoned by the U.S. Supreme Court—the holding in *Erfer* is no longer tenable, and no judicially manageable standard exists to govern Petitioners' claims in this action.

36. This Court should therefore sustain Objecting Respondents' Preliminary Objections and dismiss Petitioners' claims as non-justiciable political questions.

B. Second Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(4): Petitioners' Claims Are Legally Insufficient Because They Have Failed to Adequately Plead That Democrats' Electoral Power Is Unconstitutionally Diminished

1. The *Bandemer* Test Relied Upon By The Pennsylvania Supreme Court Requires Parties in Partisan Gerrymandering Actions to Demonstrate That They Have Been Shut Out of the Political Process

37. Even if the *Bandemer* test still applies in Pennsylvania, Petitioners must plead and prove that the Democratic Party and its members have "essentially been shut out of the political process." *Erfer*, 794 A.2d at 333 (quoting *Bandemer*, 478 U.S. at 139).

38. The test is intentionally "onerous" because the *Bandemer* Court was wary about creating a test that would permit courts to routinely interfere with a State's sovereign function of drawing district boundaries. *Erfer*, 794 A.2d. at 333-34; *see also O'Lear v. Miller*, 222 F. Supp. 2d 850, 855 (E.D. Mich. 2002) ("[A] redistricting plan may be drawn with the specific

intention of disadvantaging one political party's election prospects, and may cause election results that are unfair because they are disproportional to the percentage of the population voting for that party on a state-wide basis, and yet not violate the Constitution.") (citing and quoting *Bandemer*, 478 U.S. at 132, 139)).

39. The Supreme Court of Pennsylvania has previously rejected partisan gerrymandering claims where petitioners failed to plead and prove that Republican lawmakers "will entirely ignore the interests of those citizens within his district who voted for the Democratic candidate." *See Erfer*, 794 A.2d at 334 (internal quotation marks omitted).

40. Finally, alleged disproportionate election results do not lead to a lack of political power or denial of fair representation. *Id.*

2. Petitioners Have Failed to Allege That They Have Been Shut Out of the Political Process

41. Here, the Petition for Review is completely devoid of any allegations that would satisfy the high standard adopted by the Pennsylvania Supreme Court in *Erfer*.

42. For example, Petitioners James Greiner and Robert Smith allege in a conclusory fashion that they have no "meaningful opportunity to influence legislative outcomes" because they live in gerrymandered districts. (Pet. ¶ 119).

43. Similarly, Petitioners Carmen Febo San Miguel and James Solomon allege that because they live in purportedly "packed" districts that elect Democratic Party members to Congress, their elected officials are less responsive to their individual interests or policy preferences. (Pet. ¶ 120).

44. The Petition similarly contains the conclusory allegation that Petitioners are not able to "influence the legislative process," or elect representative of their choice. (Pet. ¶ 107).

45. But the constitution does not guarantee electoral success. *See Badham v. Eu*, 694 F. Supp. 664, 675 (N.D. Cal. 1988) *sum. aff'd.* 488 U.S. 1024 (1989).[2]

46. Moreover, since the 2011 Plan was implemented, several districts have failed even to nominate a Democratic candidate.[3]

47. Petitioners from these districts therefore cannot claim that they were somehow prejudiced by a partisan gerrymander.

48. In sum, because the Petition for Review fails to allege any

[2] Further undermining Petitioners' allegation that they have been shut out of the political process is the fact that one of Pennsylvania's Senators is a Democrat, and that Pennsylvania's Governor, Attorney General, and Secretary of State are all Democrats.

[3] http://www.electionreturns.pa.gov/General/OfficeResults?OfficeID=11&ElectionID=41&ElectionType=G&IsActive=0 and http://www.electionreturns.pa.gov/General/OfficeResults?OfficeID=11&ElectionID=54&ElectionType=G&IsActive=0 (demonstrating that the Fifteenth Congressional District and the Third Congressional District failed to nominate a candidate in 2014 and 2016, respectively, and that Democrats in the Eighteenth Congressional District failed to nominate a candidate in 2014 and 2016); (*see also* Pet. ¶ 16).

instance in which legislators "entirely ignored" Petitioners' requests, calls, letters, or emails, Objecting Respondents' Preliminary Objections should be sustained, and the Petition should be dismissed.

C. Third Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(4): Petitioners' Count I Fails to State a Claim Upon Which Relief Can Be Granted

1. Relevant Law Governing Alleged Free Speech and Association Violations in the Context of Partisan Gerrymandering Claims

49. Courts have recognized that there is no violation of First Amendment free speech or association rights without an equal protection violation. *See Whitford v. Gill*, 218 F. Supp. 3d 837, 884 (W.D. Wis. 2016) (stating that elements to prove an unconstitutional partisan gerrymander under the First Amendment or the Equal Protection Clause are the same); *see also Republican Party v. Martin*, 980 F.2d 943, 959 n.28 (4th Cir. 1992) ("This court has held that in voting rights cases no viable First Amendment claim exists in the absence of a Fourteenth Amendment claim.").[4]

50. Another district court rejected a First Amendment challenge to a redistricting plan because plaintiffs failed to show that the plan prevented plaintiffs from speaking, "endorsing and campaigning for a candidate,

[4] While the U.S. Supreme Court has opined that a First Amendment challenge to a redistricting plan is at least plausible, *see Shapiro v. McManus*, 136 S. Ct. 450 (2015), neither it, nor any other court, has ever found such a violation.

contributing to a candidate, or voting for a candidate." *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 575 (N.D. Ill. 2011).

51. Even the allegation that the redistricting plan makes it more difficult for a political party to succeed is insufficient to show a First Amendment violation because the First Amendment "does not ensure that all points of view are equally likely to prevail." *See id*. (quoting *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1101 (10th Cir. 2006)); *see also League of Women Voters v. Quinn*, No. 1:11-cv-5569, 2011 U.S. Dist. LEXIS 125531 *12-13 (N.D. Ill. Oct. 27, 2011) (three-judge court) (stating that the redistricting plan did not impede plaintiffs' ability to speak freely, endorse candidates, or campaign for candidates); *Washington v. Finlay*, 664 F.2d 913, 927-28 (4th Cir. 1981) ("The first amendment's protection of the freedom of association and of the rights to run for office, have one's name on the ballot, and present one's views to the electorate do not also include entitlement to success in those endeavors.").

2. Petitioners' Claim Under Article I, §§ 7, 20 of the Pennsylvania Constitution Must be Dismissed Because Petitioners Have Failed to Allege Any Infringement Upon Their Right to Speak or Associate

52. Here, Petitioners allege that the 2011 Plan violates Pennsylvania's Free Speech and Expression Clause and the Freedom of Association Clause codified at Art. I, §§ 7, 20 of the Constitution of the Commonwealth of Pennsylvania.

53. According to Petitioners, the 2011 Plan violates these provisions because, among other things, 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).[5]

54. Notably absent from the Petition, however, is any allegation that Petitioners were actually silenced and prevented from speaking, endorsing a candidate, or campaigning for a candidate because of the 2011 Plan. *See, e.g.*, *League of Women Voters*, No. 1:11-cv-5569, 2011 U.S. Dist. LEXIS 125531 at *12-13; *Badham*, 694 F. Supp. at 675 ("Plaintiffs here are

[5] It does not appear that any Pennsylvania court has addressed a partisan gerrymandering claim brought pursuant to Article I, §§ 7, 20 of the Pennsylvania Constitution. That said, the Pennsylvania Supreme Court has relied upon U.S. Supreme Court First Amendment precedent to interpret its own 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[.]"). As such, law interpreting the First Amendment to the U.S. Constitution is instructive in this analysis.

not prevented from fielding candidates or from voting for the candidate of their choice. The First Amendment guarantees the right to participate in the political process; it does not guarantee political success.").[6]

55. Rather, Petitioners have merely alleged that "representatives pay no heed to the views and interests of voters of the opposite party once in office." (Pet. ¶ 95).

56. This allegation, however, is insufficient to establish a violation of Petitioners' right to free speech and expression. *See Badham*, 694 F. Supp. 675 (finding that Democrats "need [not] attend to the views of fragmented and submerged Republican minorities in their districts" and rejecting the partisan gerrymandering claim).

57. Furthermore, *Bandemer* held that elected officials adequately represent the interests of those who did not vote for the official and that these voters have as much "opportunity to influence that candidate as other voters in the district." *Bandemer*, 478 U.S. at 132.

58. Finally, even under Petitioners' own "retaliation test" for assessing a free speech and expression violation,[7] Petitioners fail to state a

[6] In fact, as discussed above, five Pennsylvania districts are represented by Democrats, one of Pennsylvania's Senators is a Democrat, and Pennsylvania's Governor, Attorney General, and Secretary of State are all Democrats. This undermines the notion that Democrats have somehow been silenced in Pennsylvania.

claim because they do not allege sufficient facts demonstrating that Respondents targeted Democrats with the intent to punish them for their political views.

D. Fourth Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(1): Petitioner League of Women Voters of Pennsylvania Does Not Have Standing

59. To establish standing, the plaintiff must "have a direct interest in the subject-matter of the particular litigation." *See Albert v. 2001 Legislative Reapportionment Comm'n*, 790 A.2d 989, 994-95 (Pa. 2002).

60. The subject-matter in redistricting cases is an "individual's right to vote and to have that vote counted." *See id.* at 994-95.

61. This is so because the right to vote "[i]s personal and the rights sought to be vindicated in a suit challenging an apportionment scheme are personal and individual." *Id*. at 995 (quoting *Reynolds v. Sims*, 377 U.S. 533, 554-55 (1964) (internal quotation marks omitted)).

62. Any organization, therefore, that does not have the right to vote lacks standing. *Id.*; *see id*. at n.6 (dismissing a local chapter of League of Women Voters).

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[7] Petitioners' proposed test to prevail on their free speech and expression claim requires that Petitioners demonstrate that when drawing districts, Respondents intentionally considered a district's partisan composition, including political party affiliation, with an intent to disfavor or punish Petitioners for their political affiliation, and the resulting districts had the actual effect of negatively impacting Petitioners. (Pet. ¶ 112).

63. The Pennsylvania Supreme Court has similarly ruled that the Democratic Committee does not have standing to bring partisan gerrymandering claims. *See Erfer*, 794 A.2d at 330.

64. This is true because the Democratic Party, or any political committee for that matter, does not have the right to vote. *Id.*

65. The League of Women Voters of Pennsylvania is an organization, and the Petition does not allege that the League of Women Voters of Pennsylvania is authorized to vote or that it is suing on behalf of its members.

66. Objecting Respondents therefore respectfully request that the Court sustain their Preliminary Objections, and dismiss the League of Women Voters from this action.

E. Fifth Preliminary Objection Pursuant To Pa. R. Civ. P. 1028(a)(4): Petitioners Who Live in Districts With Democratic Registration Advantages Fail to State a Claim That They Are Shut Out of the Political Process

67. As set forth above, the Petition for Review fails to state a claim upon which relief can be granted, and must be dismissed in its entirety.

68. That said, even if certain Petitioners could advance a cause of action for partisan gerrymandering, many Petitioners reside in districts where Democrats enjoy a registration advantage over Republicans, and would therefore still be unable to state a claim.

69. Specifically, in 2014, the Democratic Party held a registration advantage in the following 10 of Pennsylvania's 18 Congressional Districts:[8]

a. 336,887 to 73,941 registration advantage in the First Congressional District where a Democrat has won every election under the 2011 Plan. (Pet. ¶ 14);

b. 434,143 to 45,356 registration advantage in the Second Congressional District where a Democrat has won every election under the 2011 Plan. (Pet. ¶ 15);

c. 200,351 to 188,552 advantage in the Third Congressional District where the *Republican* candidate has "*comfortably*" won every election under the 2011 Plan and ran unopposed in 2016. (Pet. ¶ 16);

d. 204,191 to 199,827 registration advantage in the Eighth Congressional District where the *Republican* candidate has won every election by 8 points or more under the 2011 Plan. (Pet. ¶ 21);

e. 231,759 to 180,428 registration advantage in the Twelfth Congressional District where the *Republican* candidate has won every election by 18 points or more under the 2011 Plan. (Pet. ¶ 25);

f. 265,683 to 122,478 registration advantage in the Thirteenth Congressional District where a Democrat has won every election under the 2011 Plan, and ran unopposed in 2016. (Pet. ¶ 26);

g. 350,775 to 89,055 registration advantage in the Fourteenth Congressional District where a Democrat has won every election under the 2011 Plan. (Pet. ¶ 27);

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[8] *Saunders v. Commonwealth Dep't of Corr.*, 2016 Pa. Commw. Unpub. LEXIS 457, *1, 2016 WL 3570172 (Pa. Commw. Ct. June 30, 2016) ("[A] court may take judicial notice of public documents in ruling on a preliminary objection in the nature of a demurrer."). Registration statistics available at http://www.dos.pa.gov/VotingElections/OtherServicesEvents/VotingElectionStatistics/Documents/2016%20Election%20VR%20Stats.pdf (last visited Aug. 4, 2017).

h. 199,195 to 173,669 registration advantage in the Fifteenth Congressional District yet a *Republican* has won every election under the 2011 Plan. (Pet. ¶ 28);

i. 238,760 to 136,747 registration advantage in the Seventeenth Congressional District where a Democrat has won every election under the 2011 Plan. (Pet. ¶ 30);

j. 240,552 to 184,912 registration advantage in the Eighteenth Congressional District where the *Republican* candidate has won every election under the 2011 Plan "almost always with more than 60% of the vote." (Pet. ¶ 31).

k. In 2012, Democrats held a registration advantage in eleven congressional districts.[9]

70. Assuming that Pennsylvania even recognizes partisan gerrymandering claims now that *Bandemer* has been abandoned, Petitioners cannot prevail upon their claims unless they demonstrate that their elected representatives "entirely ignored" the interests of Democratic voters. *Erfer*, 794 A.2d at 334.

71. Plainly, Petitioners who reside in districts in which registered Democrats outnumber registered Republicans cannot claim that their elected officials entirely ignored their interests, when they themselves have the numerical advantage in electing those officials.

72. For all of the foregoing reasons, Objecting Respondents' Preliminary Objections should be sustained, and the claims advanced by

[9] All statistics cited in this paragraph can be found at www.electionreturns.pa.gov.

Petitioners from the First, Second, Third, Eighth, Twelfth, Thirteenth, Fourteenth, Fifteenth, Seventeenth, and Eighteenth Districts should be dismissed.

F. Sixth Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(1): Petitioners Do Not Have Standing to Challenge The 2011 Plan on a Statewide Basis.

73. For a party to have standing in Pennsylvania, the party must establish: "a substantial interest in the subject matter of the litigation; 2) the party's interest must be direct; and, 3) the interest must be immediate and not a remote consequence of the action." *See Erfer*, 794 A.2d at 329 (citations and quotations omitted).

74. Because standing requires a direct interest in the subject-matter of the lawsuit, a single Petitioner does not have standing to file a challenge to the map statewide; rather, a Petitioner may bring a challenge only to the Petitioners' specific district.

75. Regarding racial gerrymandering claims brought under the Fourteenth Amendment's Equal Protection Clause, the Supreme Court has ruled that these claims "[a]ppl[y] to the boundaries of individual districts. It applies district-by-district. It does not apply to a State considered as an undifferentiated 'whole.'" *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015).

76. The required injury is personal to the voter who lives in the racially gerrymandered district because that voter is personally subjected "to [a] racial classification." *Id*.

77. As such, that voter is forced to live in a district with an elected representative "who believes his primary obligation is to represent only the members of a particular racial group." *Id*. (internal quotation marks omitted).

78. Objecting Respondents acknowledge that the Supreme Court of Pennsylvania rejected the argument that a redistricting plaintiff is limited to bringing a challenge to the district where plaintiff resides. *See Erfer*, 794 A.2d at 329-30.

79. Based on the reasoning of the U.S. Supreme Court set forth above, however, Respondents respectfully request that the decision in *Erfer* be revisited or overruled, and that the Court sustain their Preliminary Objections on the basis that Petitioners lack standing to challenge the 2011 Plan on a statewide basis.

WHEREFORE, Respondents Pennsylvania General Assembly, Michael C. Turzai, and Joseph B. Scarnati III respectfully request that this Court sustain the Preliminary Objections to the Petition for Review, and dismiss the Petition for Review with prejudice as to Respondents

Pennsylvania General Assembly, Michael C. Turzai, and Joseph B. Scarnati III.

Dated: August 14, 2017

Respectfully Submitted,

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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.

Dated: August 9, 2017

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RESPONDENTS PENNSYLVANIA GENERAL ASSEMBLY, MICHAEL C. TURZAI, AND JOSEPH B. SCARNATI III'S BRIEF IN SUPPORT OF THEIR APPLICATION TO STAY ALL PROCEEDINGS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

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I. PRELIMINARY STATEMENT

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. And, although the Petition advances claims only under the Pennsylvania Constitution, it is plain that Petitioners are following the *Whitford* roadmap very closely, asserting nearly identical legal claims, theories, and evidentiary support.

Given the undeniable overlap of legal theories and purported evidence asserted in both *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. Indeed, a plurality of the Supreme Court has previously ruled that partisan

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

Second, if the U.S. Supreme Court concludes that partisan gerrymandering claims are justiciable, the *Whitford* decision will likely 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. In the past thirty years, the Supreme Court has considered multiple cases involving partisan gerrymandering claims, but has yet to agree upon a single standard for assessing such claims, with a plurality holding that no such standard exists (including several Justices who have held that no such standard could ever be established). Because the current legal foundation underlying Petitioners' claims is tenuous, this Court should allow the U.S. Supreme Court to determine which standards, if any, should govern partisan gerrymandering claims.

Third, Petitioners cannot escape *Whitford's* effect simply because their claims are advanced only under the Pennsylvania Constitution, whereas *Whitford* involves claims advanced under the U.S. Constitution. Here, Petitioners allege that: (1) the 2011 redistricting plan (the "2011 Plan") runs afoul of the Free Speech and Expression Clause and Freedom of Association Clause of the Pennsylvania Constitution; and (2) that the 2011 Plan also violates the equal protection provisions

of Pennsylvania's Constitution. But this does not change the fact that the Supreme Court's decision in *Whitford* will necessarily—and materially—impact this case. The Pennsylvania Supreme Court has long held that the equal protection provisions of Pennsylvania's Constitution are co-extensive with the Fourteenth Amendment's Equal Protection Clause. Thus, it is axiomatic that the U.S. Supreme Court's standards will apply to Petitioners' equal protection-based partisan gerrymandering claim.

Similarly, with regard to Petitioners' Free Speech and Association claim, 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. Accordingly, the Supreme Court's decision in *Whitford* will likely establish binding precedent with regard to Petitioners' equal protection claims and, at a minimum, compelling authority with regard to Petitioners' remaining free speech and expression claim.

Moreover, a Supreme Court affirmance in *Whitford* would materially impact these proceedings, and may even render an analysis of Petitioners' claims under the Pennsylvania Constitution completely unnecessary, because the Pennsylvania Constitution can only afford broader protection than its federal counterpart. Thus, 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 dismiss this case and file a new action in federal court.

Fourth, consideration of traditional factors relating to the stay of proceedings weighs in favor of issuing a stay. Petitioners have been fully aware of the 2011 Plan for more than five years—during which three major elections were held in 2012, 2014, and 2016—but failed to take any action until now. It was not until *Whitford* was decided and before the U.S. Supreme Court that this Petition was filed. Having sought to utilize the benefit of the *Whitford* holding, Petitioners therefore surely cannot claim any prejudice associated with a minor delay of these proceedings to allow the Supreme Court to decide the actual nature of the benefit under *Whitford* which they seek. Moreover, given the identity of the Respondents named in the Petition—and the broad scope of discovery Petitioners have already sought—the amount of time, effort, and resources that both the parties and this Court will be forced to expend on this matter (should it be permitted to proceed) will be significant. This will necessarily place an excessive burden both on the Respondents and Pennsylvania's taxpayers, especially considering that the *Whitford* decision could moot this entire action and will be decided, at the latest, by June 30, 2018.

For these reasons, and for all the reasons advanced herein, Applicants respectfully request that this Court stay this entire action pending a decision by the

Supreme Court.

II. RELEVANT FACTUAL AND PROCEDURAL HISTORY

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] 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 Whitford v. Gill*, 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).

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

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

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

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 *and Whitford*, 218 F. Supp. 3d at 837). 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); *compare Whitford*, 218 F. Supp. 3d at 846-853 (describing the drafting process as involving only Republican hired consultants and stating that Republicans both "cracked" and "packed" Democratic voters).

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). 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] Petitioners allege that Pennsylvania's efficiency gap is the highest in the nation, (Pet. ¶ 89), and that this proves that Democrats were "packed" and "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.[3]

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. 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

[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.*).

[3] Petitioners also rely on other tests cited by the plaintiffs/appellees in *Whitford*, such as the "mean-medium test" and the "partisan bias test." (Pet. ¶¶ 10, 84, 87 90-91); *compare Gill v. Whitford*, No. 16-1161, Mot. to Affirm at 10-15 and n.4 (*filed* May 8, 2017).

Legislators, Chiefs of Staff, Legislative Assistants, and current and/or former employees of Respondents.

III. SUMMARY OF APPLICANTS' ARGUMENT

This action should be stayed in its entirety pending the U.S. Supreme Court's decision in *Whitford* for the following reasons:

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

b. If the U.S. Supreme Court concludes that partisan gerrymandering claims are justiciable, the *Whitford* decision will likely 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.

c. *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, so the Supreme Court's analysis under the U.S. Constitution will be controlling. 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.

d. 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 new standards 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.

IV. SCOPE AND STANDARD OF REVIEW

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). 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."); *see also Commonwealth v. Batts*, 66 A.3d 286 (Pa. 2013) (in which the Pennsylvania Supreme Court *twice* stayed proceedings pending the outcome of U.S. Supreme Court cases); *Kirksey v. Jackson,* 625 F.2d 21, 21-22 (5th Cir. 1980) (vacating trial court ruling based upon Supreme Court decision rendered post-trial, and finding that "[f]act findings that were made under the spell of legal principles . . . since then declared to be improper, really can't be credited one way or the other."); *Burlington*

v. News Corp., No. 09-1908, 2011 U.S. Dist. LEXIS 1988, at *4-5 (E.D. Pa. 2011) (granting stay because the Supreme Court's decision would "almost certainly affect how we try this case.").

The logic and efficiency of staying proceedings pending the outcome in *Whitford* has been recognized by other courts presently adjudicating partisan gerrymandering claims. *See, e.g.*, *Common Cause, et al. v. Rucho, et al*., No. 16-1026 (M.D.N.C. June 19, 2017) (three-judge court) (minute entry postponing the imminent trial indefinitely); *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*).

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

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.[4] 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.

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. 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, and that the legal landscape governing partisan gerrymandering claims will be significantly reshaped once again.

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

The law governing the justiciability of partisan gerrymandering claims is, at best, tenuous. Indeed, a four justice plurality of the Supreme Court has previously

[4] 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.

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).

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). 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).

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). 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, 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

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. 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).

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). 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). 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).

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; *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.").[5]

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

[5] This lack of a coherent standard has confounded district and appellate courts that have recently addressed claims of partisan gerrymandering. *See, e.g., Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections,* 827 F.3d 333, 348 (4th Cir. 2016) ("We recognize that the Supreme Court has

Supreme Court has not had the opportunity to address political gerrymandering claims subsequent to *Vieth* or *LULAC*, and because the standards governing such claims are presently at issue 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

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. Thus, there can be no dispute that any standards set forth by the U.S. Supreme Court

not yet clarified when exactly partisan considerations cross the line from legitimate to unlawful."); *Shapiro v. McManus*, 203 F. Supp. 3d 579, 594 (D. Md. 2016) (three-judge court) ("[T]he combined effect of *Bandemer*, *Vieth*, and *LULAC* is that, while political gerrymandering claims premised on the Equal Protection Clause remain justiciable in theory, it is presently unclear whether an adequate standard to assess such claims will emerge.").

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

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). Pennsylvania's reliance upon Supreme Court authority in matters of free expression therefore 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*

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). As such, the Pennsylvania Constitution can only afford more protection than its federal counterpart, not less. Thus 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. 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. Accordingly, given that a denial *or* an affirmance in the *Whitford* action would significantly affect this matter, this Court should stay all proceedings pending the decision in that action.

D. The Balance Of The Equities Decidedly Favors Issuing A Stay

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). Oral argument in *Whitford* will occur on October 3, 2017 with a decision no later than June 30, 2018.[6] Waiting *at most* eleven months for the Supreme Court to determine whether standards even exist for partisan 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.

By contrast, denying Applicants' request for a stay *will necessarily* cause harm to the parties. Denying the stay will require the General Assembly to expend taxpayer dollars conducting extensive and overbroad discovery, including identifying, accumulating, and conducting privilege reviews of documents and materials sought by Petitioners. This will be substantial and expensive.[7] 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

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

[7] Prior cases have made clear that both the parties and the courts expend vast resources in litigating partisan gerrymandering claims. *See Vieth*, 541 U.S. at 287 n.8 (detailing that in *Republican Party of N.C. v. Hunt*, there were 311 stipulations, 132 witness statements, 300 exhibits, and two days of oral argument); *Whitford v. Gill*, No. 15-421 (W.D. Wis. Nov. 21, 2016) (Dkt. No.166) (116 page slip opinion); *Ala. Legislative Black Caucus*, No. 12-691 (M.D. Ala. Jan. 20, 2017) (Dkt. No. X) (457 page slip opinion).

seventeen separate document subpoenas on individuals who worked on the 2011 Plan. 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. 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.

Additionally, if the Supreme Court issues new standards for determining partisan gerrymanders—not a distant possibility given that *Vieth* several different proposed standards—then discovery will be needed under those new standards. *See Kirksey v. Jackson,* 625 F.2d 21, 21-22 (5th Cir. 1980); *Burlington v. News Corp*., No. 09-1908, 2011 U.S. Dist. LEXIS 1988, at *5 (E.D. Pa. 2011).

VI. CONCLUSION

Petitioners have filed this Petition seeking to proceed under *Whitford*. Indeed, but for *Whitford*, it is highly unlikely that this Petition would have been filed. As Petitioners seek to ride *Whitford's* coat tails, justice suggests that, in light of the

pending U.S. Supreme Court's review of *Whitford,* this litigation should not proceed until such time as the Supreme Court has completed its review.

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.

Dated: August 9, 2017

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Pennsylvania Rule of Appellate Procedure 2135(d), counsel for Respondents The Pennsylvania General Assembly, Michael C. Turzai, in his capacity as Speaker of the Pennsylvania House of Representatives and Joseph B. Scarnati III, in his capacity as Pennsylvania Senate President Pro Tempore hereby certify that the foregoing Brief in support of the Application to Stay does not exceed 14,000 words.

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