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**IN THE SUPREME COURT OF PENNSYLVANIA**

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LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, CARMEN  
FEBO SAN MIGUEL, JAMES SOLOMON, JOHN GREINER, JOHN  
CAPOWSKI, GRETCHEN BRANDT, THOMAS RENTSCHLER,  
MARY ELIZABETH LAWN, LISA ISAACS, DON LANCASTER,  
JORDI COMAS, ROBERT SMITH, WILLIAM MARX, RICHARD  
MANTELL, PRISCILLA MCNULTY, THOMAS ULRICH, ROBERT  
MCKINSTRY, MARK LICHTY, LORRAINE PETROSKY,

Petitioners,

v.  
Commonwealth of Pennsylvania,

THE PENNSYLVANIA GENERAL ASSEMBLY; THOMAS W. WOLF,  
IN HIS CAPACITY AS GOVERNOR OF PENNSYLVANIA; MICHAEL  
J. STACK III, IN HIS CAPACITY AS LIEUTENANT GOVERNOR OF  
PENNSYLVANIA AND PRESIDENT OF THE PENNSYLVANIA  
SENATE; MICHAEL C. TURZAI, IN HIS CAPACITY AS SPEAKER  
OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES; JOSEPH  
B. SCARNATI III, IN HIS CAPACITY AS PENNSYLVANIA SENATE  
PRESIDENT PRO TEMPORE; Robert Torres (Acting), In His Official  
CAPACITY AS SECRETARY OF THE COMMONWEALTH OF  
PENNSYLVANIA; JONATHAN M. MARKS, IN HIS CAPACITY AS  
COMMISSIONER OF THE BUREAU OF COMMISSIONS,  
ELECTIONS, AND LEGISLATION OF THE PENNSYLVANIA  
DEPARTMENT OF STATE,

Respondents.<sup>1</sup>

No. \_\_\_\_\_

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**APPLICATION FOR EXTRAORDINARY RELIEF UNDER  
42 PA.C.S. § 726 AND PA. R.A.P. 3309**

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<sup>1</sup> The Commonwealth of Pennsylvania was the lead Respondent below, but was dismissed from the case by the Commonwealth Court on October 4, 2017.

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
RELEVANT FACTUAL AND PROCEDURAL HISTORY .....	6
I.    The Petition .....	6
II.   The Commonwealth Court Has Delayed Proceedings and Will Not Resolve This Case for the 2018 Elections .....	12
ARGUMENT .....	13
I.    This Court Should Exercise Its Plenary Jurisdiction and Resolve this Case Before the 2018 Elections .....	13
A.  There is an Urgent Need for this Court to Exercise Jurisdiction .....	13
B.  There is Precedent for this Court to Exercise Extraordinary Jurisdiction and to Resolve this Case Before the Next Election .....	16
II.   There is No Reason to Delay this Case.....	18
CONCLUSION .....	21

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>In re 1991 Legis. Reapportionment Comm'n</i> , 609 A.2d 132 (Pa. 1992).....	18
<i>Agre v. Wolf</i> , No. 2:17-cv-04392-MMB (E.D. Pa.).....	3, 4, 17
<i>Bd. of Revision of Taxes v. City of Phila.</i> , 4 A.3d 610 (Pa. 2010).....	13, 14
<i>Colo. River Water Conservation Dist. v. United States</i> , 424 U.S. 800 (1976).....	19
<i>Erfer v. Commonwealth</i> , 794 A.2d 325 (2002).....	<i>passim</i>
<i>Gill v. Whitford</i> , No. 16-1161 (S. Ct.),.....	<i>passim</i>
<i>Pap's A.M. v. City of Erie</i> , 812 A.2d 591 (Pa. 2002).....	5, 15, 19, 20
<i>Perzel v. Cortes</i> , 870 A.2d 759 (Pa. 2005).....	16
<i>Shapiro v. McManus</i> , 203 F. Supp. 3d 579 (D. Md. 2016).....	10
<i>Sprague v. Casey</i> , 550 A.2d 184 (Pa. 1988).....	14
<b>Statutes</b>	
42 Pa.C.S. § 726.....	13

**Other Authorities**

Laura Royden & Michael Li, *Extreme Maps*, Brennan Center for Justice (2017) ..... 1

Maria Chikinaa, Alan Friezeb & Wesley Pegden, *Assessing significance in a Markov chain without mixing*, 114 Proc. of Nat’l Acad. of Sci. 2860 (2017) .....9

Pa. Const. Art. I § 1.....11

Pa. Const. Art. I § 5.....11

Pa. Const. Art. I § 7.....10, 14, 19

Pa. Const. Art. I § 20.....10, 14, 19

Pa. Const. Art. I § 26.....11

## INTRODUCTION

This suit presents an issue of extraordinary and immediate importance to the voters of this Commonwealth and the integrity of its democratic institutions.

Petitioners allege that the Commonwealth's current congressional districts are rigged. Following the 2010 census, the Republican-controlled General Assembly employed sophisticated technology to gerrymander the Commonwealth's congressional districts more egregiously and effectively than ever before, manipulating district boundaries to discriminate against Petitioners and other Democratic voters on the basis of their political views, their votes, and the party with which they choose to associate. The gerrymander of Pennsylvania congressional districts has been ranked as one of the most "extreme" in the nation, and by some measures, it is the "worst offender" in the country.<sup>2</sup>

The three elections that have now passed under the districting plan (the "2011 Plan") provide overwhelming evidence of the gerrymander's effects. The map gives Republicans 13 out of 18 seats irrespective of swings in the vote, and even when Democratic candidates win a majority of votes statewide. It is difficult to conceive of a starker violation of the free expression and equal protection provisions of the Pennsylvania Constitution. Petitioners ask this Court to exercise

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<sup>2</sup> Laura Royden & Michael Li, *Extreme Maps*, Brennan Center for Justice, at 1, 9 (2017), available at <https://www.brennancenter.org/publication/extreme-maps>.

its extraordinary jurisdiction to ensure that they and millions of other Pennsylvania voters obtain redress for the violation of their rights in time for the 2018 elections.

Petitioners sought to proceed in the Commonwealth Court in time for the 2018 congressional elections. Petitioners filed a Petition for Review in the Commonwealth Court on June 15, 2017—ten months before the 2018 primaries and nearly a year and half before the 2018 general elections. But the only thing that has happened in the Commonwealth Court is delay. Three respondents, the General Assembly and the Republican legislative leaders from both chambers (collectively “the General Assembly”), filed an application in late August to stay this case pending the U.S. Supreme Court’s review in *Gill v. Whitford*, No. 16-1161 (S. Ct.), a case challenging Wisconsin’s state legislative districts that involves solely federal constitutional claims. The Commonwealth Court set a hearing on the stay application for a month and half later—on October 4, 2017—and failed to act on Petitioners’ request to accelerate the hearing. At that October 4 hearing, the Commonwealth Court stated that it would not resolve this case in time for the 2018 election. Acknowledging that this lawsuit raises only *Pennsylvania* constitutional claims, the Commonwealth Court nonetheless decided to stay the case pending the U.S. Supreme Court’s decision in *Gill*, except that it will address certain privilege issues in the interim. Petitioners are left with no choice but to turn to this Court to vindicate their constitutional rights.

There is direct precedent for this Court to exercise plenary jurisdiction. This Court did so in the last congressional gerrymandering case filed under the Pennsylvania Constitution, *Erfer v. Commonwealth*, 794 A.2d 325 (2002), and with much less time than is available here. In *Erfer*, the petitioners filed suit in the Commonwealth Court in January 2002, seven months later in the election cycle than Petitioners filed suit here. When the Commonwealth Court indicated that it would not resolve *Erfer* in time for the next election, this Court exercised plenary jurisdiction, ordered an evidentiary hearing to be completed by February 8, 2002, and then heard and decided the case. This Court has more time here than in *Erfer* and indeed, at the October 4 hearing, the Commonwealth Court noted that an exercise of this Court's plenary jurisdiction, as in *Erfer*, would enable the case to proceed more quickly. And unlike in *Erfer*, here the Court has the results of three elections under the 2011 Plan, which provide critical record evidence that was lacking in *Erfer*.

There is no serious question whether this case can and should be resolved expeditiously and in time for the 2018 elections. It can and should, a fact that is highlighted by a separate, recently filed lawsuit challenging Pennsylvania's congressional districts in federal court. *Agre v. Wolf*, No. 2:17-cv-04392-MMB (E.D. Pa.). *Agre* was filed just nine days ago, on October 2, 2017, nearly four months after Petitioners filed suit here. Federal District Judge Michael Baylson

immediately convened a hearing on October 10, 2017. Judge Baylson referenced a letter he had received from the General Assembly's counsel stating that the Commonwealth Court intended to stay this case (attached as Exhibit D). But Judge Baylson advised the parties that a stay of the federal case pending *Gill* would be inappropriate. The court then entered a scheduling order setting a tentative trial date of December 5, 2017. *Agre v. Wolf*, ECF No. 20. Judge Baylson and two other federal judges (who will be designated by Chief Judge Smith of the Third Circuit) will preside over that trial. The federal court proceedings in a case filed much later than this one illustrate that it is entirely possible to resolve these claims in time for the 2018 elections. Surely if the federal court could hear the federal claims in two months, Petitioners should be permitted to have their claims under the Pennsylvania Constitution adjudicated in their first-filed case.

Indeed, the highest Court of this Commonwealth should take this case and render its independent judgment on Petitioners' claims. At issue is a state law passed by the state legislature that Petitioners allege violates their state constitutional rights. This Court has emphatically rejected the "radical," "highly inappropriate" notion that partisan gerrymandering claims should escape review under the Pennsylvania Constitution. *Erfer*, 794 A.2d at 331. Petitioners, who reside in each of Pennsylvania's eighteen congressional districts, meticulously



detailed the history and effects of the gerrymander in their Petition, carefully developed their state constitutional claims, and have retained multiple experts to testify at trial. *See* Pet. for Review (attached as Exhibit A). Some of these experts will detail how the 2011 Plan rips apart historical communities of interest in Pennsylvania. Others will present computer modeling techniques and statistical evidence that prove with certainty that the 2011 Plan cannot be explained by the use of traditional districting criteria—but can be explained only by partisan intent—and that the 2011 Plan has had its intended effects. Petitioners have developed overwhelming evidence of the 2011 Plan’s unconstitutionality, and the courts of this Commonwealth should hear this case without delay.

This Court has made clear that “Pennsylvania citizens should not have the contours of their fundamental rights under our charter rendered uncertain, unknowable, or changeable, while [federal courts] struggles to articulate a standard to govern a similar federal question.” *Pap’s A.M. v. City of Erie*, 812 A.2d 591, 611 (Pa. 2002). Petitioners respectfully request that this Court exercise its discretion to take this case and render its independent judgment on a matter of immediate public importance to the citizens of the Commonwealth.

## RELEVANT FACTUAL AND PROCEDURAL HISTORY

### I. The Petition

Petitioners filed their Petition for Review in the Commonwealth Court on June 15, 2017. Petitioners—who include the League of Women Voters of Pennsylvania and eighteen individual Pennsylvania voters ranging from a chaplain to retired school teachers to an Army Reservist—allege that the 2011 Plan violates their fundamental rights under the Pennsylvania Constitution. Pet. ¶¶ 14-31, 104-113, 115-120. As set forth in the Petition, the basic facts are as follows:

Leading up to the 2010 elections, national Republicans leaders targeted Pennsylvania as a key state for a national Republican State Leadership Committee plan known as “the REDistricting Majority Project,” or “REDMAP.” Pet. ¶ 42. REDMAP’s goal was to “control[] the redistricting process in . . . states [that] would have the greatest impact on determining how both state legislative and congressional district boundaries would be drawn.” *Id.* They were successful—Republicans took control of both chambers of the General Assembly and the Governorship. Pet. ¶ 45.

National and state Republicans quickly set to work to redraw Pennsylvania’s congressional map in a way that would entrench the Republican Party in power. Pet. ¶ 45. Republican mapmakers used sophisticated computer modeling to implement the gerrymander, through techniques known as “cracking” and

“packing.” The mapmakers “packed” Democratic voters into 5 districts that are overwhelmingly Democratic, and “cracked” the remaining Democratic voters by spreading them across the other 13 districts such that Republicans constitute a majority of voters in each of these 13 districts. *Id.* ¶¶ 6, 47.

The result of these efforts was a districting plan that is utterly unresponsive to the will of voters. In 2012, Republican congressional candidates won a *minority*—only 49%—of the total statewide vote, but still won a remarkable 13 of 18—72%—of congressional seats. *Pet.* ¶¶ 77-79. In 2014 and 2016, Republicans won 55% and 54% of the statewide vote and still won the exact same 13 seats. *See id.* ¶¶ 80-81. Thus, even though Democrats won an extra 6 percentage points of the statewide congressional vote in 2012 compared to 2014, they did not win any additional House seats. The 2011 Plan locks Democrats into the 5 districts in which they are packed, and Democrats do not lose—and cannot gain—seats with any normal swing in the statewide vote.

These lopsided results were the product of an intentional effort to discriminate against Democratic voters and cannot be explained by traditional districting criteria. The tortured shapes of various districts are inexplicable except as an exercise of raw partisanship. For instance, Pennsylvania’s 7th District has been dubbed “Goofy kicking Donald Duck” to reflect its absurd shape, and in some places is so narrow that the only thing holding the district together is a

steakhouse (in King of Prussia) or a medical endoscopy center (in Coatesville). Pet. ¶¶ 58. Other districts are just as bizarrely shaped. *Id.* ¶¶ 56-57. The 2011 Plan also rips apart local communities. Montgomery County, for example, is split across five districts, and not a single one of the five Congressman for those districts actually lives in Montgomery County. *Id.* ¶ 55. Other counties such as Berks and Chester are torn apart. *Id.*

The evidence of the impermissible intent and effects of the gerrymander is not limited to district shapes. Far from it. Political scientists and mathematicians have recently developed a number of statistical measures and computer modeling techniques to identify partisan gerrymanders, and these tests each independently demonstrate the Republican bias of the 2011 Plan.

One such methodology is the computer modeling of University of Michigan political scientist Jowei Chen. Pet. ¶ 85. Professor Chen's work uses computer simulations to generate alternative plans that adhere to traditional districting criteria (such geographic compactness, contiguity, and respect for communities of interest), and do not aim to advance partisan goals. *Id.* These alternative plans account for natural factors affecting the distribution of voters across the Commonwealth, such as any clustering of voters of a particular party into particular areas. *Id.* Applied to Pennsylvania's congressional districts, Professor Chen's methodology produces thousands of alternative plans that comport with

traditional districting criteria, and *not a single one* of those plans produce the 13-5 Republican advantage that exists under the 2011 Plan. *Id.* ¶ 86. This modeling demonstrates with statistical certainty that the Republican bias of the 2011 Plan is not the result of neutral factors and can only have resulted from of an intentional effort to discriminate against Democratic voters. *Id.*

Another modeling approach was developed by mathematicians at Carnegie Mellon University and the University of Pittsburgh. Pet. ¶ 87. This approach, which employs a methodology known as a “Markov chain analysis,” takes the enacted plan as a starting point and then makes a series of random adjustments to the district boundaries. *Id.* Simply making random changes greatly diminishes the Republican advantage under the 2011 Plan, which the professors show mathematically proves that the 2011 Plan’s Republican bias is not the result of neutral factors such as population patterns. *Id.*<sup>3</sup>

Two other measures of partisan gerrymandering show the extent of the gerrymander as well: the “mean-median gap” and the “efficiency gap.” The mean-median gap measures the extent to which one party’s voters are disproportionately packed into a few districts, and it shows how difficult it would be for that party to win a majority of statewide seats. Pet. ¶¶ 90-92. The efficiency gap measures the

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<sup>3</sup> See Maria Chikinaa, Alan Friezeb & Wesley Pegden, *Assessing significance in a Markov chain without mixing*, 114 Proc. of Nat’l Acad. of Sci. 2860 (2017), available with supplement at <https://www.math.cmu.edu/~af1p/Textfiles/outliers.pdf>.

extent to which the districting plan “wastes” one party’s votes relative to the other party’s through cracking and packing. *Id.* ¶¶ 88-89. Under the 2011 Plan, Pennsylvania’s mean-median gap and efficiency gap for congressional elections have been among the highest in the nation. *Id.* ¶¶ 88-92. Indeed, Pennsylvania’s efficiency gap was *the highest in the nation* for the 2012 election. *Id.* ¶ 89. Thus, at least four different statistical tests and modeling techniques each independently demonstrate that the 2011 Plan was intentionally drawn to entrench Republicans in power regardless of the will of the voters, and that it has had precisely that effect.

The Petition asserts two counts, both brought solely under the Pennsylvania Constitution. Count I alleges that the 2011 Plan violates Petitioners’ rights under Pennsylvania’s Free Expression and Association Clauses, Art. I, §§ 7, 20.

Petitioners allege that the 2011 Plan intentionally and unconstitutionally discriminates against Democratic voters by reason of their political viewpoints, their past votes, and the political party with which they associate. Pet. ¶¶ 100-07. In other words, the 2011 Plan constitutes content- and viewpoint-based legislation that burdens Petitioners on the basis of their speech, expressive conduct, and political associations, and the General Assembly cannot possibly demonstrate that the 2011 Plan satisfies strict scrutiny. Petitioners additionally allege that 2011 Plan violates the Free Expression and Association Clauses by *retaliating* against Petitioners for having engaged in prior protected speech and expressive conduct.

*Id.* ¶¶ 108-13; *see Shapiro v. McManus*, 203 F. Supp. 3d 579 (D. Md. 2016) (denying motion to dismiss partisan gerrymandering claims premised on a free speech retaliation theory). This Court’s prior decision on partisan gerrymandering in *Erfer* did not address the free expression and association claims asserted in Count I here. *See Erfer*, 794 A.2d at 328 n.2 (expressly noting that the Court did not consider these claims).

Count II of the Petition alleges that the 2011 Plan violates Pennsylvania’s Equal Protection guarantees, Art. I, §§ 1, 26 and the Free and Equal Clause, Art. I, § 5. Pet. ¶¶ 114-20. Petitioners allege that the 2011 Plan reflects intentional discrimination against an identifiable political group (*i.e.*, Petitioners and other Democratic voters) and accomplishes actual discriminatory effects. Petitioners allege that these effects go beyond election results given the extreme polarization of today’s Congress. *Id.* ¶¶ 93-98. Congress’ extreme partisanship magnifies the effects of partisan gerrymandering because representatives simply are not responsive to the views and interests of voters of the opposite party. When voters lose the ability to elect representatives of their party as a result of gerrymandering, those voters lose not only electoral power, but also the ability to influence legislative outcomes—because representatives pay no heed to the views and interests of voters of the opposite party once in office. Petitioners thereby are shut of the political process as a result of the 2011 Plan.

## **II. The Commonwealth Court Has Delayed Proceedings and Will Not Resolve This Case for the 2018 Elections**

The Petition was filed on June 15, 2017, nearly a year and half before the 2018 general elections and ten months before the primaries. However, there has been no movement in the Commonwealth Court to resolve the case in time for those elections; there has been only delay.

On August 9, 2017, the General Assembly filed an application to stay this case pending the U.S. Supreme Court's decision in *Gill v. Whitford*, No. 16-1161 (S. Ct).<sup>4</sup> On August 23, before Petitioners had even filed their opposition to the stay, the Commonwealth Court scheduled a hearing on the stay application for October 4—nearly a month and a half later. Petitioners moved on September 12 for an earlier hearing and for a conference to expedite the schedule for the case, with the goal of holding a trial in January 2018. The Commonwealth Court did not rule on the request.

At that October 4 hearing, Judge Pellegrini presided and made clear that he would not resolve the case in time for the 2018 elections. Tr. of Oct. 4, 2017 Hr'g at 27-29 (attached as Exhibit B). "I can tell you it isn't going to happen," the court said. *Id.* at 28. The court suggested however, that filing a "King's Bench" petition

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<sup>4</sup> Other Respondents including the Lieutenant Governor, the Secretary of the Commonwealth, and the Commissioner of Elections opposed the stay.



would be the one way the case could potentially be resolved in the time frame needed for the 2018 election. *See id.* at 29; *see also id.* at 24-25.

With respect to the stay application, the court stated its *disagreement* with the General Assembly’s primary ground for seeking a stay, which is that the U.S. Supreme Court’s in *Gill* could “moot” this case by holding that federal partisan gerrymandering claims are non-justiciable. *Id.* at 10-11. The court “agree[d]” with Petitioners that *Gill* cannot moot this case because the Pennsylvania Supreme Court has twice held that partisan gerrymandering under the Pennsylvania Constitution are justiciable, and *Gill* could not alter this binding state precedent. *Id.* at 26. Nonetheless, the court advised the parties that it would stay the case pending *Gill*, except for the resolution of privilege issues. None of the Preliminary Objections that have been pending since August will be resolved, nor will the General Assembly produce *any* discovery until the stay is lifted.

## **ARGUMENT**

### **I. This Court Should Exercise Its Plenary Jurisdiction and Resolve this Case Before the 2018 Elections**

#### **A. There is an Urgent Need for this Court to Exercise Jurisdiction**

This Court’s intervention is necessary to protect the constitutional rights of millions of Pennsylvania voters. Under 42 Pa.C.S. § 726, “[t]his Court may assume, at its discretion, plenary jurisdiction over a matter of immediate public importance that is pending before another court of this Commonwealth.” *Bd. of*

*Revision of Taxes v. City of Phila.*, 4 A.3d 610, 620 (Pa. 2010). If ever there were a case that is of “immediate public importance,” it is this one.

Petitioners allege that the General Assembly discriminated and retaliated against them on the basis of their political viewpoints, resulting in congressional elections that are unresponsive to their votes and rigged against them. The three congressional elections that have occurred under the 2011 Plan bear this out and provide overwhelming evidence of the intent and enduring effects of the gerrymander. Those elections show that Republican candidates are all but assured 13 of 18 seats in Pennsylvania’s congressional delegation, and millions of Pennsylvania voters are artificially deprived of any hope of electing a representative of their choice. Petitioners, and the voters of Pennsylvania at large, should not be made to suffer through another congressional election that deprives them of “fundamental” constitutional rights that “go[] to the very roots of our representative form of government.” *Sprague v. Casey*, 550 A.2d 184, 189 (Pa. 1988) (quoting *Wilson v. Phila. Sch. Dist.*, 195 A. 90, 99 (Pa. 1937)). “Swift resolution of this matter” is essential to “promote confidence in the authority and integrity of [this Commonwealth’s] institutions.” *Bd. of Revision*, 4 A.3d at 620.

Extraordinary jurisdiction is particularly warranted here because “the record clearly demonstrates” the violation of “[P]etitioners’ rights.” *Id.* With respect to Petitioners’ claims under Article I §§ 7 and 20, for instance, the 2011 Plan

constitutes content- and viewpoint-based legislation intended to burden particular speech, expressive conduct, and political associations; namely, the speech, expressive conduct, and political associations of voters who support Democratic candidates for Congress. The General Assembly cannot credibly deny that this was the intent of the statute. Indeed, the General Assembly will apparently offer *no* fact witnesses in defense of the 2011 Plan and their defenses set forth in its Preliminary Objections are almost entirely legal in nature, such as an argument that *Erfer* was wrongly decided and that partisan gerrymandering cases are nonjusticiable<sup>5</sup> Nor will the General Assembly be able to plausibly argue that the 2011 Plan serves a “compelling state interest,” and it certainly will not be able to plausibly argue that the 2011 Plan was “narrowly drawn” to accomplish any legitimate interest. *Pap’s*, 812 A.2d at 612. This Court applies strict scrutiny to *any* content- or viewpoint-based legislation, *see id.* at 611-13, and it is difficult to imagine what substantive defense, if any, the General Assembly will raise on the merits here.

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<sup>5</sup> The General Assembly has asserted privilege as to every single discovery request in the case, including those asking to identify the persons who participated in making the 2011 Plan. While Petitioners believe the privilege objections are not properly asserted, if these hold, then it will be impossible for the General Assembly to call any fact witness to defend the plan.

**B. There is Precedent for this Court to Exercise Extraordinary Jurisdiction and to Resolve this Case Before the Next Election**

*Erfer* is on-point precedent for this Court to exercise its plenary jurisdiction and to resolve this case in time of the 2018 elections. In *Erfer*, the petitioners brought a partisan gerrymandering challenge to the congressional districting plan that followed the 2000 census. As here, the petitioners originally filed their suit in the Commonwealth Court and sought expedited consideration so that the case could be resolved in time for the 2002 election. *Erfer*, 794 A.2d at 328. But as in the instant case, the Commonwealth Court made clear that it would not resolve the case in time for the election, as it scheduled a hearing for the day after the closing date for filing nomination petitions. *Id.* The petitioners then filed an application with this Court to exercise its plenary jurisdiction, the Court granted the application, and it directed that there be an evidentiary hearing by a date certain that would ensure this Court's review sufficiently in advance of the election deadlines. *Id.*; see also *Perzel v. Cortes*, 870 A.2d 759, 762 (Pa. 2005) (exercising extraordinary jurisdiction in another election matter).

The time frame in *Erfer* was far more compressed than it is here. The original Petition for Review in *Erfer* was not filed in the Commonwealth Court until January 10, 2002. *Id.* This Court exercised its plenary jurisdiction on January 29, 2002, and directed the Commonwealth Court to hold an evidentiary hearing and issue findings of fact and conclusions of law by February 8, 2002, just

ten days later. *Id.* Here, Petitioners filed their suit seven months earlier in the election cycle, on June 15, 2017. Despite the delays in the Commonwealth Court, there are still nearly five months before the due date for nomination petitions for the 2018 elections, which is March 6, 2018.<sup>6</sup>

This Court can resolve this case in that time frame. Petitioners propose that the parties conduct discovery and pretrial proceedings in time for a January trial under the plenary supervision of this Court. The trial should be straightforward and will provide a more than adequate record for this Court to rule on the merits. There is time to resolve this case before the 2018 elections, and this Court should make every effort to do so.

Even if this Court is unable to resolve this case in time for the 2018 election, however, it should still exercise extraordinary jurisdiction over this case. As the Secretary of the Commonwealth and the Commissioner of Elections noted in their opposition to the stay in the Commonwealth Court, allowing for protracted

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<sup>6</sup> That March 8 deadline will also be nearly 9 months from the date the Petition was filed, on June 15, 2017. Recent redistricting cases show that courts can resolve gerrymandering claims in that amount of time. For example, the district court in *Bethune-Hill v. Virginia State Board of Elections* held a trial on plaintiffs' gerrymandering claims less than seven months after plaintiffs filed their complaint. *See* Complaint, No. 3:14-cv-00852 (E.D. Va. filed Dec. 22, 2014), ECF No. 1; Minute Entry, No. 3:14-cv-00852 (E.D. Va. July 7, 2015) (noting bench trial held). The court in *League of Women Voters of North Carolina v. Rucho*, a partisan gerrymandering case, scheduled trial for just nine months after plaintiffs filed their complaint. *See* Complaint, No. 16-cv-011664 (M.D.N.C. filed Sept. 22, 2016), ECF No. 1; Notice of Trial, No. 16-cv-011664 (M.D.N.C. May 23, 2017) (setting trial date of June 26, 2017). And the recently filed federal lawsuit, *Agre*, was not filed until October 2, 2017, nearly four months after this case, and it has already been set for trial.

proceedings in the Commonwealth Court could jeopardize the ability to resolve this case in time for the 2020 elections, which will be the final election under the 2011 Plan before the next census. Answer of Sec. of Com. Pedro A. Cortés & Comm’r of Elec. Jonathan Marks in Opp’n to App. to Stay Case at 7 n.3 (filed Aug. 23, 2017). This risk is real given the stay that is now in place, which could last until the end of June 2018 if that is when the U.S. Supreme Court decides *Gill*, and given that the Commonwealth Court intends to have legal issues resolved piecemeal by the en banc court. *See* Ex. B at 30.

## **II. There is No Reason to Delay this Case**

The General Assembly argued below, and is likely to argue in their opposition to this application, that this case should be put on hold until the U.S. Supreme Court rules in *Gill*. That argument has no merit and pays short shrift to the Pennsylvania Constitution and courts of this Commonwealth.

The General Assembly’s central argument below was that *Gill* may “moot” this case if the U.S. Supreme Court decides that federal partisan gerrymandering claims are nonjusticiable. But as even the Commonwealth Court recognized, such a holding would not and could not moot Petitioners’ claims, because this Court twice has squarely held that partisan gerrymandering claims *are* justiciable under the Pennsylvania Constitution. *See Erfer*, 794 A.2d 325; *In re 1991 Legis. Reapportionment Comm’n*, 609 A.2d 132 (Pa. 1992).

The General Assembly also argued below that a stay was proper because *Gill* may establish legal standards that could affect a decision on the merits of Petitioners' claims, but that argument was equally wrong. *Gill* is a case applying federal law to state legislative districts in Wisconsin. Petitioners bring claims exclusively under the Pennsylvania Constitution. The General Assembly has not offered a *single* prior instance in which Pennsylvania courts have stayed claims under the Pennsylvania Constitution because of the pendency of claims in a different case under the federal constitution. Moreover, Petitioners bring claims under the Free Expression and Association Clauses of Article I, §§ 7, 20, which this Court has repeatedly held "provide[] protection for freedom of expression that is broader than the federal constitutional guarantee." *Pap's*, 812 A.2d at 605 (internal quotation marks omitted). Given these "broader protections," any ruling in *Gill* denying the plaintiffs' federal First Amendment claims would not be controlling of Petitioners' Pennsylvania free speech claims here, as the procedural history of *Pap's* well-illustrates. *See id.* at 598-611. Finally, as detailed in Petitioners' opposition to the stay filed below (attached as Exhibit C), there are extensive factual and evidentiary differences between this case and *Gill*, including that Petitioners rely upon several statistical measures and modeling techniques that were not presented in *Gill*.

Nor does the recently filed federal lawsuit present any ground for delay. Quite the opposite—it is well-settled that state law claims asserted in state court should take primacy, or, at minimum, proceed in parallel, where there is similar federal litigation. *Cf. Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). Petitioners reside in all eighteen of Pennsylvania’s congressional districts, filed their lawsuit nearly four months before the federal lawsuit, and have carefully and meticulously built overwhelming evidence of violations of their rights under the Pennsylvania Constitution. That evidence will include testimony from several different experts, some of whom will detail how the current plan splits apart historical communities of interest in Pennsylvania, and others of whom will present conclusive statistical evidence proving the partisan intent and effects of the 2011 Plan. Petitioners’ case will be ready to proceed to trial in time for the 2018 elections, and as this Court said in *Pap’s*, “Pennsylvania citizens should not have the contours of their fundamental rights under our charter rendered uncertain, unknowable, or changeable, while [federal courts] struggles to articulate a standard to govern a similar federal question.” 812 A.2d at 611.

In short, there is no compelling reason to delay the proceedings and the vindication of Petitioners’ constitutional rights. This Court has made clear time and again that “the fundamental rights guaranteed by the Pennsylvania Declaration of Rights ‘cannot lawfully be infringed, even momentarily.’” *Id.* at 607 (quoting



*Spayd v. Ringing Rock Lodge*, 113 A. 70, 72 (Pa. 1921)). This Court's intervention is necessary to prevent precisely that from happening.

### **CONCLUSION**

For the reasons stated above, Petitioners respectfully request that this Court exercise its extraordinary jurisdiction over this matter and implement proceedings (including, if desirable, the appointment of a special master) to ensure timely resolution of this case before the 2018 congressional elections. In the alternative, even if this Court does not implement a schedule to resolve this case before the 2018 elections, Petitioners request that this Court still exercise its extraordinary jurisdiction to ensure a timely and efficient adjudication of this case without further delay.

Dated: October 11, 2017

Respectfully submitted,

/s/ Mary M. McKenzie

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Counsel for Petitioners\*

\* Attorneys from Arnold & Porter Kaye

Scholer LLP were admitted to represent

Petitioners *pro hac vice* at the

Commonwealth Court, and their applications

for *pro hac vice* admission in this Court are

forthcoming

# **EXHIBIT A**

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**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA,  
JAMES WRIGHT, CARMEN FEBO SAN MIGUEL,  
JAMES SOLOMON, JOHN GREINER, JOHN  
CAPOWSKI, GRETCHEN BRANDT, MARY  
ELIZABETH LAWN, LISA ISAACS, DON LANCASTER,  
JORDI COMAS, ROBERT SMITH, WILLIAM MARX,  
RICHARD MANTELL, PRISCILLA MCNULTY,  
THOMAS ULRICH, ROBERT MCKINSTRY, MARK  
LICHTY, LORRAINE PETROSKY,

Petitioners,

v.

THE COMMONWEALTH OF PENNSYLVANIA;  
PENNSYLVANIA GENERAL ASSEMBLY;  
THOMAS W. WOLF, IN HIS CAPACITY AS  
GOVERNOR OF PENNSYLVANIA; MICHAEL J.  
STACK III, IN HIS CAPACITY AS LIEUTENANT  
GOVERNOR OF PENNSYLVANIA AND PRESIDENT  
OF THE PENNSYLVANIA SENATE; MICHAEL C.  
TURZAI, IN HIS CAPACITY AS SPEAKER OF THE  
PENNSYLVANIA HOUSE OF REPRESENTATIVES;  
JOSEPH B. SCARNATI III, IN HIS CAPACITY AS  
PENNSYLVANIA SENATE PRESIDENT PRO  
TEMPORE; PEDRO A. CORTÉS, IN HIS CAPACITY AS  
SECRETARY OF THE COMMONWEALTH OF  
PENNSYLVANIA; JONATHAN M. MARKS, IN HIS  
CAPACITY AS COMMISSIONER OF THE BUREAU OF  
COMMISSIONS, ELECTIONS, AND LEGISLATION OF  
THE PENNSYLVANIA DEPARTMENT OF STATE,

Respondents.

Docket No.

## NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within thirty (30) days, or within the time set by order of the court, after this petition for review and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claims or relief requested by the plaintiff. You may lose money or property or other rights important to you.

*You should take this paper to your lawyer at once. If you do not have a lawyer or cannot afford one, go to or telephone the office set forth below to find out where you can get legal help.*

Dauphin County Bar Association  
Lawyer Referral Service  
213 North Front Street  
Harrisburg, PA 17101  
(717) 232-7536

## AVISO

Le han demandado a usted en la corte. Si usted quiere defenderse de estas demandas expuestas en las paginas siguientes, usted treinta (30) dias de plazo al partir de la fecha de la demanda y la notificacion. Hace falta asentar una comparencia escrita o en persona o con un abogado y entregar a la corte en forma escrita sus defensas o sus objections a las demandas en contra de su persona. Sea avisado que si usted no se defiende, la corte tomara medidas y puede continuar la demanda en contra suya sin previo aviso o notificacion. Ademias, la corte puede decidir a favor del demandante y require que usted cumpla con todas las provisiones de esta demanda. Usted puede perer dinero o sus propiedades u otros derechos importantes para usted.

*Lleva esta demanda a un abogado inmediatamente. Si no tiene abogado o si no tiene el dinero suficiente de pagar tal servicio. Vaya en persona o llame por telefono a la oficina cuya direccion se encuentra escrita abajo para averiguar donde se puede conseguir alstencia legal.*

Colegio de Abogados de Condado de  
Dauphin  
Abogado Servicio de Referencia  
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Counsel for Petitioners

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**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA,  
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JAMES SOLOMON, JOHN GREINER, JOHN  
CAPOWSKI, GRETCHEN BRANDT, MARY  
ELIZABETH LAWN, LISA ISAACS, DON LANCASTER,  
JORDI COMAS, ROBERT SMITH, WILLIAM MARX,  
RICHARD MANTELL, PRISCILLA MCNULTY,  
THOMAS ULRICH, ROBERT MCKINSTRY, MARK  
LICHTY, LORRAINE PETROSKY,

Petitioners,

v.

THE COMMONWEALTH OF PENNSYLVANIA;  
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THOMAS W. WOLF, IN HIS CAPACITY AS  
GOVERNOR OF PENNSYLVANIA; MICHAEL J.  
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GOVERNOR OF PENNSYLVANIA AND PRESIDENT  
OF THE PENNSYLVANIA SENATE; MICHAEL C.  
TURZAI, IN HIS CAPACITY AS SPEAKER OF THE  
PENNSYLVANIA HOUSE OF REPRESENTATIVES;  
JOSEPH B. SCARNATI III, IN HIS CAPACITY AS  
PENNSYLVANIA SENATE PRESIDENT PRO  
TEMPORE; PEDRO A. CORTÉS, IN HIS CAPACITY AS  
SECRETARY OF THE COMMONWEALTH OF  
PENNSYLVANIA; JONATHAN M. MARKS, IN HIS  
CAPACITY AS COMMISSIONER OF THE BUREAU OF  
COMMISSIONS, ELECTIONS, AND LEGISLATION OF  
THE PENNSYLVANIA DEPARTMENT OF STATE,

Respondents.

Docket No.

**TO:**

**Commonwealth of Pennsylvania**  
Pennsylvania Office of Attorney General  
16th Floor, Strawberry Square  
Harrisburg, PA 17120

**Pennsylvania General Assembly**  
c/o Senator Joseph B. Scarnati III  
Senate President Pro Tempore  
Senate Box 203025  
Harrisburg, PA 17120-3025  
Room: 292 Main Capitol Building  
c/o Representative Michael C. Turzai  
Speaker of the House  
139 Main Capitol Building  
PO Box 202028  
Harrisburg, PA 17120-2028

**Governor Thomas W. Wolf**  
Office of the Governor  
508 Main Capitol Building  
Harrisburg, PA 17120

**Lieutenant Governor Michael J. Stack III**  
President of the Senate  
200 Main Capitol Building  
Harrisburg, Pennsylvania 17120

**Representative Michael C. Turzai**  
Speaker of the House  
139 Main Capitol  
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Harrisburg, PA 17120-2028

**Senator Joseph B. Scarnati III**  
Senate President Pro Tempore  
Senate Box 203025  
Harrisburg, PA 17120-3025  
Room: 292 Main Capitol

**Secretary Pedro A. Cortés**  
Pennsylvania Department of State  
Office of the Secretary  
302 North Office Building  
Harrisburg, PA 17120

**Commissioner Jonathan M. Marks**  
Pennsylvania Department of State  
Bureau of Commissions, Elections and  
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210 North Office Building, 401 North Street  
Harrisburg, PA 17120

**NOTICE TO PLEAD**

You are hereby notified to file a written response to the enclosed Petition for Review within thirty (30) days from service hereof or a judgment may be entered against you.

BY: */s/ Mary M. McKenzie*

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**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA,  
CARMEN FEBO SAN MIGUEL, JAMES SOLOMON,  
JOHN GREINER, JOHN CAPOWSKI, GRETCHEN  
BRANDT, THOMAS RENTSCHLER, MARY  
ELIZABETH LAWN, LISA ISAACS, DON LANCASTER,  
JORDI COMAS, ROBERT SMITH, WILLIAM MARX,  
RICHARD MANTELL, PRISCILLA MCNULTY,  
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Petitioners,

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COMMISSIONS, ELECTIONS, AND LEGISLATION OF  
THE PENNSYLVANIA DEPARTMENT OF STATE,

Respondents.

Docket No.

**PETITION FOR REVIEW**  
**ADDRESSED TO THE COURT'S ORIGINAL JURISDICTION**

**INTRODUCTION**

1. This case is about one of the greatest threats to American democracy today: partisan gerrymandering. A partisan gerrymander occurs when the political party in control of redistricting redraws congressional or state legislative districts to entrench that party in power and prevent voters affiliated with the minority party from electing candidates of their choice. The result is that general election outcomes are rigged—they are predetermined by partisan actors sitting behind a computer, not by the candidates, and not by the voters.

2. This practice is illegal and has been condemned by the Supreme Courts of the United States and the Commonwealth of Pennsylvania. The U.S. Supreme Court has explained that “[p]artisan gerrymanders . . . are incompatible with democratic principles.” *Ariz. State Legis. v. Ariz. Indep. Redist. Comm’n*, 135 S. Ct. 2652, 2658 (2015) (alterations omitted). The Pennsylvania Supreme Court has written that a partisan gerrymander would violate the Pennsylvania Constitution when “there was intentional discrimination against an identifiable political group” that resulted in “an actual discriminatory effect on that group.” *Erfer v. Commonwealth*, 794 A.2d 325, 332 (Pa. 2002). A partisan gerrymander “burdens rights of fair and effective representation” by enabling one political party to entrench itself in power while diluting the votes of citizens who affiliate with the party out of power. *Vieth v. Jubelirer*, 541 U.S. 267, 312 (2004) (Kennedy, J., concurring in judgment).

3. While neither political party has a monopoly on the practice, this case challenges the partisan gerrymandering of the Commonwealth’s current congressional districts by the Republican majority in the Pennsylvania General Assembly. Following the 2010 Census, Republican legislators dismantled Pennsylvania’s existing congressional districts and stitched

them back together with the goal of maximizing the political advantage of Republican voters and minimizing the representational rights of Democratic voters. According to the Brennan Center for Justice, the districting plan that resulted (the “2011 Plan”), which was signed into law by the Republican then-Governor, is one of the three most “extreme” gerrymanders in the nation.<sup>1</sup> Indeed, by some measures, Pennsylvania’s gerrymander is the “worst offender” in the country.<sup>2</sup>

4. The 2011 Plan was the product of a national movement by the Republican Party to entrench its own representatives in power by utilizing the latest advances in mapmaking technologies and big data to gerrymander districts more effectively than ever before. Republican mapmakers used sophisticated computer modeling techniques, in Pennsylvania and elsewhere, to manipulate district boundaries with surgical precision to maximize the number of seats their party would win in future elections.

5. And their effort has been overwhelmingly successful. In 2012, Republican candidates won only 49% of the statewide congressional vote, but remarkably won 13 of 18—or 72%—of Pennsylvania’s congressional seats. In 2014 and 2016, Republican candidates retained the same 72% share of Pennsylvania’s seats, even while winning only 55% and 54% shares of the statewide vote.

6. The 2011 Plan achieved these lopsided results by “packing” Democratic voters into five districts that are overwhelmingly Democratic, and “cracking” the remaining Democratic voters by spreading them across the other 13 districts such that Republicans constitute a majority of voters in each of these 13 districts. The result is a districting plan that is utterly unresponsive

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<sup>1</sup> Laura Royden & Michael Li, *Extreme Maps*, Brennan Center for Justice, at 1 (2017), available at <https://www.brennancenter.org/publication/extreme-maps>.

<sup>2</sup> *Id.* at 9.

to—and often flouts—the will of voters. For example, even though Democratic candidates won 6 points more in the statewide vote in 2012 compared to 2014, the number of Democrats elected was no different across the two elections.

7. The composition of the enacted districts reflects how the Republicans responsible for redistricting achieved this partisan result. For example, the city of Reading—a Democratic stronghold—was carved out of the 6th Congressional District, where it would naturally reside, and placed into the 16th District, where Republicans made up the majority. Similarly, in the 17th District, the Democratic-leaning cities of Scranton (in Lackawanna County), Wilkes-Barre (in Luzerne County), and Easton (in Northampton County) were packed into a district that was already reliably Democratic, removing any risk that Wilkes-Barre voters (who would reside in the 11th District if county boundaries were respected) would tilt the 11th District to Democrats. And in the 7th District, portions of the city of Chester were carved out by packing these voters into the reliably Democratic 1st District.

8. As illustrated *infra* at Paragraphs 55-59, these decisions resulted in district lines that are absurd. Pennsylvania’s 7th Congressional District has been described as “Goofy Kicking Donald Duck.”<sup>3</sup> The 12th District could be mistaken for the boot of Italy. The 6th resembles the State of Florida, with perhaps a longer and more jagged Panhandle. These shapes lay bare the lengths that Republicans went to deny Petitioners and millions of other voters their constitutional rights and to lock in an artificial political advantage for Republicans.

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<sup>3</sup> Aaron Blake, *Name That District Contest Winner: ‘Goofy Kicking Donald Duck’*, Wash. Post, Dec. 29, 2011, [https://www.washingtonpost.com/blogs/the-fix/post/name-that-district-contest-winner-goofy-kicking-donald-duck/2011/12/29/gIQA2Fa2OP\\_blog.html?utm\\_term=.a7863a1c4f3a](https://www.washingtonpost.com/blogs/the-fix/post/name-that-district-contest-winner-goofy-kicking-donald-duck/2011/12/29/gIQA2Fa2OP_blog.html?utm_term=.a7863a1c4f3a).

9. While the districts are so bizarrely engineered that the only fair inference is that the Republican mapmakers made them so for partisan advantage, this partisan purpose is confirmed by an array of statistical techniques. Indeed, just as modern technology enabled Republicans to accomplish their gerrymander with more precision than ever before, it can be used to expose this discrimination for what it is. Computer modeling used by political scientists demonstrates that the Republican bias of the enacted plan could not have resulted from the use of traditional redistricting criteria such as contiguity and compactness, and cannot be explained by any natural clustering of voters in Pennsylvania. Rather, it is a statistical certainty that the Republican bias of the enacted plan could have resulted *only* from impermissible partisan intent.

10. Other statistical tests further confirm that the enacted plan reflects a deliberate and successful effort to disadvantage Democratic voters. The “efficiency gap,” which a three-judge panel recently applied in striking down Wisconsin’s state house districts, measures how many votes the enacted plan “wastes” for the disfavored party, relative to the favored party, through cracking and packing. *See generally Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), *jurisdictional statement filed* (U.S. Mar. 24, 2017) (No. 16-1161). In 2012, the efficiency gap of Pennsylvania’s congressional districts was *the largest* in the nation. Another test for identifying political gerrymandering is the “mean-median gap,” which measures the gap between the average Democratic vote share across the Commonwealth and Democratic vote share in the median district, *i.e.*, the district either party would need to win to earn a majority of districts. Again, Pennsylvania’s mean-median gap is one of the largest in the nation, reflecting the deliberate effort to maximize the number of seats Republicans win by packing Democrats into a few districts.

11. A variety of statistical modeling techniques and tests all lead to the same conclusion: the enacted plan could have resulted only from unconstitutional partisan intent, and the effect of that discrimination is significant and enduring.

12. Along with other forms of equitable relief, Petitioners seek a judicial declaration that the enacted plan, by discriminating against Democratic voters on the basis of their political expression and affiliation, violates the Pennsylvania Constitution.

## **PARTIES**

### **A. Petitioners**

13. The League of Women Voters of Pennsylvania (“LWVPA”), a nonpartisan political organization, encourages the informed and active participation of citizens in government, works to increase understanding of major public policy issues, and influences public policy through education and advocacy. The League supports full voting and representational rights for all eligible Commonwealth citizens and opposes efforts to disadvantage or burden voters based on their political affiliation.

14. Petitioner Carmen Febo San Miguel is an Executive Director of a non-profit cultural organization and a former physician who resides in the 1st Congressional District in Philadelphia. Febo San Miguel is a registered Democrat who has consistently voted for Democratic candidates for Congress. Democrats have won every congressional election in the 1st District under the 2011 Plan with over 80% of the vote, at times with the Democratic candidate running unopposed.

15. Petitioner James Solomon is a retired federal employee who resides in Philadelphia in the 2nd Congressional District. Solomon is a registered Democrat who has consistently voted for Democratic candidates for Congress. Democrats have won every congressional election in the 2nd District since 2002 with over 85% of the vote.

16. Petitioner John Greiner is a software engineer who resides in the 3rd Congressional District, in Erie, Erie County. Greiner is a registered Democrat and has consistently voted for Democratic candidates for Congress. Before the 2011 Plan, the 3rd District was a competitive district: Republicans won in 2002, 2004, 2006, and 2010, while Democrats won in 2008. But the Republican representative, Mike Kelly, has comfortably won reelection in every election since the 2011 Plan, running unopposed in 2016.

17. Petitioner John Capowski is a law professor emeritus residing in Camp Hill, Cumberland County, in the 4th Congressional District. Capowski is a registered Democrat who has consistently voted for Democratic candidates for Congress. Prior to the 2011 Plan, the 4th District was a competitive district: Republicans won in 2002 and 2004, and Democrats won in 2006, 2008, and 2010. But the Republican representative, Scott Perry, has easily won reelection in every election since the 2011 Plan.

18. Petitioner Gretchen Brandt is a mother of two and a school board director residing in the 5th Congressional District, in State College, Centre County. Brandt is a registered Democrat who has consistently voted for Democratic candidates for Congress. Republicans have won every congressional election in the 5th District since 2002.

19. Petitioner Thomas Rentschler is a former school teacher and attorney who resides in Exeter Township, Berks County, which falls in the 6th Congressional District. Rentschler is a registered Democrat who has consistently voted for Democratic candidates for Congress. The 6th District had been an extremely competitive district under the prior congressional plan, with 4 of the 5 congressional elections decided by less than 5 points. But the 6th district has been far less competitive under the 2011 Plan, with the Republican representative winning each election by more than 12 points.

20. Petitioner Mary Elizabeth Lawn is a chaplain at a retirement community who lives in Chester, Delaware County. Lawn is a registered Democrat who has consistently voted for Democratic candidates for Congress. Prior to the 2011 Plan, Lawn's home fell in the 1st Congressional District, which has consistently elected Democrats. But under the 2011 Plan, Lawn was moved to the 7th Congressional District, which has voted for Republicans by comfortable margins in every election since the redistricting.

21. Petitioner Lisa Isaacs is an attorney who resides in the 8th Congressional District in Morrisville, Bucks County. Isaacs is a registered Democrat who has consistently voted for Democratic candidates for Congress. Prior to the 2011 Plan, the 8th District was a competitive district: Republicans won in 2002, 2004, and 2010, while Democrats won in 2006 and 2008. Under the 2011 Plan, however, Republican candidates have won by 8 points or more in each election.

22. Petitioner Don Lancaster is a retired teacher who resides in Indiana County, in the 9th Congressional District. Lancaster is a registered Democrat who has consistently voted for Democratic candidates for Congress. Republicans have won every congressional election in the 9th District since 2002 with more than 60% of the vote.

23. Petitioner Jordi Comas is an academic and chef residing in Lewisburg, Union County. Comas is a registered Democrat in Pennsylvania's 10th Congressional District who has consistently voted for Democratic candidates for Congress. Prior to the 2011 Plan, the 10th District was often a competitive district: Republicans won in 2002, 2004, and 2010, and Democrats won in 2006 and 2008. But the Republican representative, Tom Marino, easily won election in 2012 with over 65% of the vote and has been comfortably reelected ever since.



24. Petitioner Robert Smith, a retired health executive, resides in Bear Creek Village Borough, Luzerne County, in the 11th Congressional District. Smith is a registered Democrat who has consistently voted for Democratic candidates for Congress. Prior to the 2011 Plan, the 11th District was often a competitive district: Democrats won in 2002, 2004, 2006 and 2008, but were unseated in 2010 when a Republican, Lou Barletta, defeated the Democratic incumbent. Since the 2011 Plan, Lou Barletta has comfortably won reelection with about 60% of the vote.

25. Petitioner William Marx is a high school civics teacher and Army Reservist residing in Delmont, Westmoreland County, which falls in the 12th Congressional District. Marx is a registered Democrat who has consistently voted for Democratic candidates for Congress. Prior to the 2011 Plan, Democrats won every congressional election in the 12th District since 2002, often winning over 60 percent of the vote. Since redistricting, Republicans have won every election, winning by more than 18 points in the last two elections.

26. Petitioner Richard Mantell is a retired school administrator residing in Jenkintown, Montgomery County, which sits in the 13th Congressional District. Mantell is a registered Democrat who has consistently voted for Democratic candidates for Congress. Prior to the 2011 Plan, elections in the 13th District were generally competitive, with Democrats winning each election but with less than 60% of the vote in three out of five elections. But after Democratic voters were packed into the district under the 2011 Plan, Democrats won easily in 2012 and 2014 and ran unopposed in the 2016 election.

27. Petitioner Priscilla McNulty is a manager at a non-profit who resides in the 14th Congressional District in Pittsburgh, Allegheny County. McNulty is a registered Democrat who has consistently voted for Democratic candidates for Congress. Democrats have easily won every congressional election in the 14th District since 2002.

28. Petitioner Thomas Ulrich is a retired school teacher who resides in Bethlehem, Lehigh County, falling in the 15th Congressional District. Ulrich is a registered Democrat who has consistently voted for Democratic candidates for Congress. Republicans have won every congressional election in the 15th District since 2002.

29. Petitioner Robert B. McKinstry, Jr. is an environmental attorney who resides in East Marlborough Township, Chester County, in the 16th Congressional District. McKinstry is a registered Democrat who has consistently voted for Democratic candidates for Congress. Republicans have won every congressional election in the 16th District since 2002.

30. Petitioner Mark Lichty is a retired attorney and manufacturer who resides in East Stroudsburg, Monroe County, in the 17th Congressional District. Lichty is a registered Democrat who has consistently voted for Democratic candidates for Congress. Democrats have won every congressional election in the 17th District since 2002.

31. Petitioner Lorraine Petrosky is a retired preschool teacher who resides in the 18th Congressional District in Latrobe, Westmoreland County. Petrosky is a registered Democrat who has consistently voted for Democratic candidates for Congress. Republicans have won every congressional election in the 18th District since 2002, almost always with more than 60% of the vote.

**B. Respondents**

32. Respondent the Commonwealth of Pennsylvania has its capital located in Harrisburg, Pennsylvania.

33. Respondent the Pennsylvania General Assembly is the state legislature for the Commonwealth of Pennsylvania and is comprised of the State House and State Senate. The General Assembly convenes in the State Capitol building in Harrisburg, Pennsylvania.

34. In Pennsylvania, the boundaries for congressional districts are redrawn every ten years after the national census by legislative action in a bill that proceeds through both chambers of the General Assembly and is signed into law by the Governor. In 2011, Republicans controlled every step of that process. Most of the Respondents named below were not involved in drafting Pennsylvania's current plan. They are named in their official capacities as parties who would be responsible for implementing the relief Petitioners seek.

35. Respondent Thomas W. Wolf is Governor of the Commonwealth and is sued in his official capacity only. As Governor, Respondent Wolf is responsible for signing bills into law as well as the faithful execution of the 2011 Plan.

36. Respondent Pedro A. Cortés is the Secretary of the Commonwealth and is sued in his official capacity only. In that capacity, he is charged with the general supervision and administration of Pennsylvania's elections and election laws.

37. Respondent Jonathan Marks is the Commissioner of the Bureau of Commissions, Elections, and Legislation of the Pennsylvania Department of State and is sued in his official capacity only. In that capacity, he is charged with the supervision and administration of the Commonwealth's elections and electoral process.

38. Respondent Michael J. Stack III, the Lieutenant Governor of the Commonwealth, serves as President of the Pennsylvania Senate and is sued in his official capacity only.

39. Respondent Michael C. Turzai is the Speaker of the Pennsylvania House of Representatives and is sued in his official capacity only.

40. Respondent Joseph B. Scarnati III is the Pennsylvania Senate President Pro Tempore and is sued in his official capacity only.

## JURISDICTION

41. The Court has original jurisdiction over this Verified Petition for Review pursuant to 42 Pa. Cons. Stat. § 761(a).

## FACTUAL ALLEGATIONS

### A. National Republican Party Officials Target Pennsylvania For Partisan Gerrymandering

42. In the years leading up to the 2010 census, national Republicans leaders undertook a concerted effort to gain control of state governments in critical swing states such as Pennsylvania. The Republican State Leadership Committee (RSLC) codenamed their plan “the REDistricting Majority Project,” or “REDMAP.” REDMAP’s goal was to “control[] the redistricting process in . . . states [that] would have the greatest impact on determining how both state legislative and congressional district boundaries would be drawn.”<sup>4</sup>

43. The RSLC intended that this project would “solidify conservative policymaking at the state level and maintain a Republican stronghold in the U.S. House of Representatives for the next decade.”<sup>5</sup> The REDMAP homepage explains that “Republicans [had] an opportunity to create 20-25 new Republican Congressional Districts through the redistricting process. . . , solidifying a Republican House majority.”<sup>6</sup>

44. Pennsylvania was a key REDMAP “target state.” As the second most populous swing state in the nation, Pennsylvania currently holds 18 seats in the U.S. House of Representatives. Pennsylvania is also one of only a handful of states that has consistently lost

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<sup>4</sup> 2012 REDMAP Summary Report, Redistricting Majority Project (Jan. 4, 2013), <http://www.redistrictingmajorityproject.com/?p=646>.

<sup>5</sup> *Id.*

<sup>6</sup> Redistricting Majority Project, <http://www.redistrictingmajorityproject.com/> (last visited June 9, 2017).

seats in the U.S. House of Representatives every ten years through reapportionment, having lost at least one House seat every ten years since 1920. These features of Pennsylvania's political landscape make it a prime target for partisan gerrymandering.

45. Heading into the November 2010 election, Democrats held the Pennsylvania House by a slim margin. The RSLC focused its resources on Pennsylvania in the 2010 election, targeting and winning three key house races that would swing control of the Pennsylvania House to Republicans. During that same election, Republicans also won the governorship, while retaining control of the Pennsylvania Senate. Thus, after the 2010 election, Republicans had exclusive control over congressional redistricting in Pennsylvania. The Republicans quickly set to work to redraw the congressional map in a way that would entrench the Republican Party's dominance in Pennsylvania's delegation to the U.S. House for the next decade.

46. On information and belief, Republicans, including key members of the Pennsylvania Senate and House Committees on State Government, communicated with Republican leaders in Washington, D.C. and elsewhere to create a plan that would maximize the number of Republicans elected to the U.S. House.

47. Mapmakers seeking to create a partisan gerrymander do so primarily through two means—"cracking" and "packing" voters of the opposing political party into congressional districts that will dilute their political power. "Cracking" is achieved by dividing a party's supporters among multiple districts so that they fall short of a majority in each district. "Packing" involves concentrating one party's backers in a few districts that they win by overwhelming margins to minimize the party's votes elsewhere. This 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).

48. Republicans worked with highly skilled and partisan mapmakers to generate the most advantageous possible map for the Republican Party. Using sophisticated computer software and data such as voter registration information and election results, the Republicans' mapmakers created a plan that virtually guaranteed the Republican Party would win in the large majority of Pennsylvania's congressional districts. Their entire aim was to burden the representational rights of Democratic voters, making it nearly impossible for Democrats in cracked districts to elect representative of their choice, and wasting the votes of Democrats in packed districts.

49. Democrats were not involved in the drawing of the map. The Republican mapmakers created the 2011 Plan through a secret process to avoid scrutiny from Democrats and the general public.

### **C. Republicans Introduce Senate Bill 1249**

50. On September 14, 2011, Republicans introduced their redistricting bill, Senate Bill 1249. The bill's primary sponsors were all Republicans: Majority Floor Leader Dominic F. Pileggi, President Pro Tempore Joseph B. Scarnati III, and Senator Charles T. McIlhinney Jr. The Republican leadership went to extraordinary lengths to conceal their intent.

51. As introduced, Bill 1249 was simply an empty shell. It contained no map showing the proposed congressional districts. Each congressional district was described in the following fashion: "The [Number] District is composed of a portion of this Commonwealth." The same held true through the second reading of the bill. This was a deliberate effort on the part of the Republicans to prevent Democrats and the public from understanding the nature of the Republicans' redistricting plan.

52. Then, three months after they had introduced SB 1249, on the morning of December 14, 2011—the day of the vote on the bill—the Republicans suddenly amended the bill

to add for the first time the actual descriptions of the congressional districts. Once the details of the plan were released, it became clear why the Republicans had kept it a secret.

53. As explained below, SB 1249 represented, by any measure, one of the most extreme partisan gerrymanders in American history. One of Pennsylvania's leading political scientists, Franklin & Marshall political science professor Terry Madonna, described it as “[t]he most gerrymandered map [he had] seen in the modern history of our state.”<sup>7</sup> Even Sean Trende, who testified in defense of Wisconsin's gerrymandered map in *Whitford v. Gill*, suggests that Pennsylvania's map might be “the Gerrymander of the Decade.”<sup>8</sup>

54. To accomplish their gerrymander, Republicans “packed” Democrats into “a group of Rorschach-inkblot districts,”<sup>9</sup> and then “cracked” the rest into districts that would vote reliably Republican. Michael Barone and Chuck McCutcheon, writing for *The Almanac of American Politics*, described the plan as follows:

The plan ruthlessly sewed the state, particular the Philadelphia suburbs, into a crazy quilt. Montgomery County, about the population of one district, was split five ways to boost the suburban Republican trio of Jim Gerlach, Mike Fitzpatrick, and Pat Meehan, who were happy to feed their trickiest inner suburbs to Philadelphia's Democrats. Mapmakers even awkwardly appended a portion of Amish Country to Meehan's 7th District. In the northeast, Republicans stuffed Blue Dog [Tim] Holden's 17th District with the liberal labor bastions of Scranton, Wilkes-Barre, and Easton to relieve pressure on freshman Republican Lou Barletta in the 11th District and Charlie Dent in the Lehigh Valley's 15th.

In the west, Republicans split the city of Erie to shore up freshman Mike Kelly and carefully merged [Jason] Altmire and [Mark] Critz in such a way that neither

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<sup>7</sup> Charles Thompson, *Congressional Redistricting Puts Pa. Congressmen at a Distance*, Harrisburg Patriot-News, Dec. 18, 2011, [http://www.pennlive.com/midstate/index.ssf/2011/12/congressional\\_redistricting\\_pu.html](http://www.pennlive.com/midstate/index.ssf/2011/12/congressional_redistricting_pu.html).

<sup>8</sup> Sean Trende, *In Pennsylvania, the Gerrymander of the Decade?*, Real Clear Politics (Dec. 14, 2011), [http://www.realclearpolitics.com/articles/2011/12/14/in\\_pennsylvania\\_the\\_gerrymander\\_of\\_the\\_decade\\_112404.html](http://www.realclearpolitics.com/articles/2011/12/14/in_pennsylvania_the_gerrymander_of_the_decade_112404.html).

<sup>9</sup> *Id.*

Democrat could plausibly run elsewhere but either would still be vulnerable in a general election. Sure enough, Critz defeated Altmire in a bitter primary and Republican Keith Rothfus defeated Critz in November. Back east, Holden lost his primary to a more liberal Democrat, and in November, Republicans held onto their other 12 seats without much of a fight.

55. The “crazy quilt” that the Republicans devised ignores all traditional redistricting criteria and serves no legitimate purpose. It fractures local political subdivisions rather than keeping them intact. For example, enough voters live in Montgomery County for that county to have its own congressional district. But, as seen below, under SB 1249, Montgomery County is split among five districts.<sup>10</sup> Not a single one of those five Congressmen lives in Montgomery County. Other counties—such as Berks and Chester—are similarly divided.

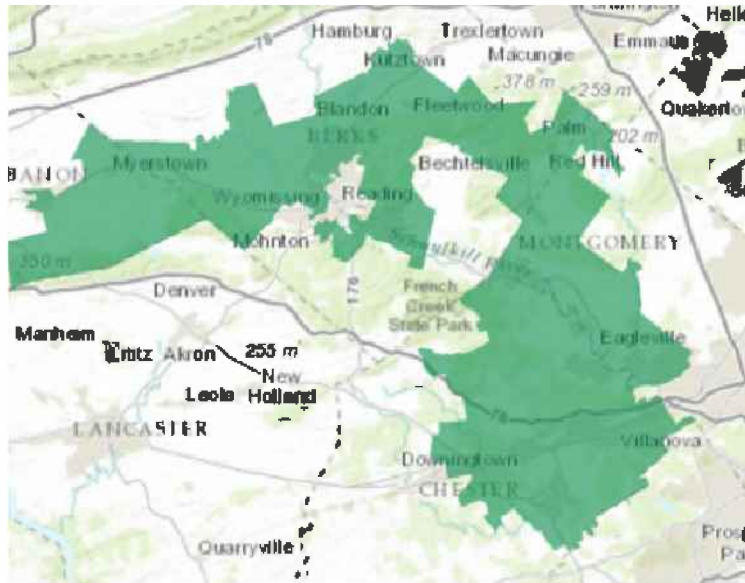


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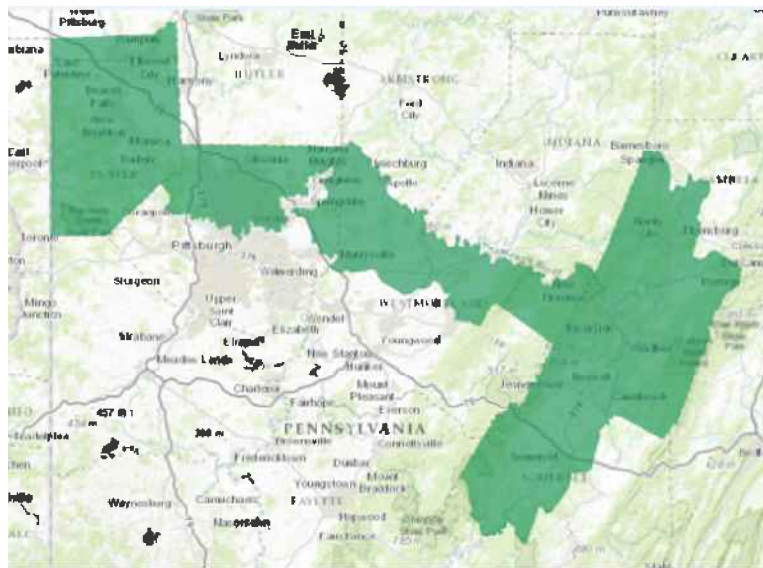
<sup>10</sup> Dan Sokil, *Fair Districts PA Urges Residents to Spread the Word of Redistricting Reform Effort*, Times Herald, May 3, 2017, <http://www.timesherald.com/article/JR/20170503/NEWS/170509919>.



56. SB 1249 also resulted in district shapes that make the gerrymander obvious. For example, Pennsylvania’s 6th District now looks like the State of Florida:

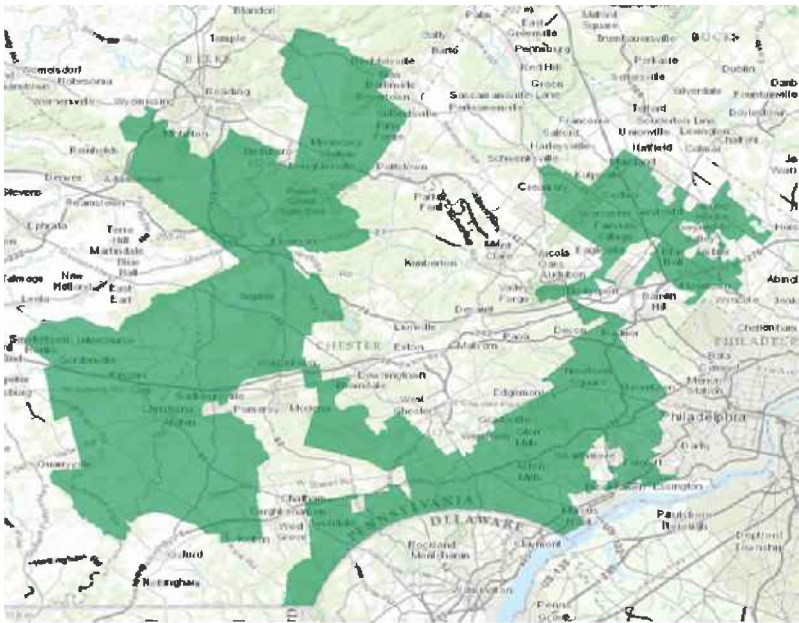


57. The 12th District looks like the boot of Italy:

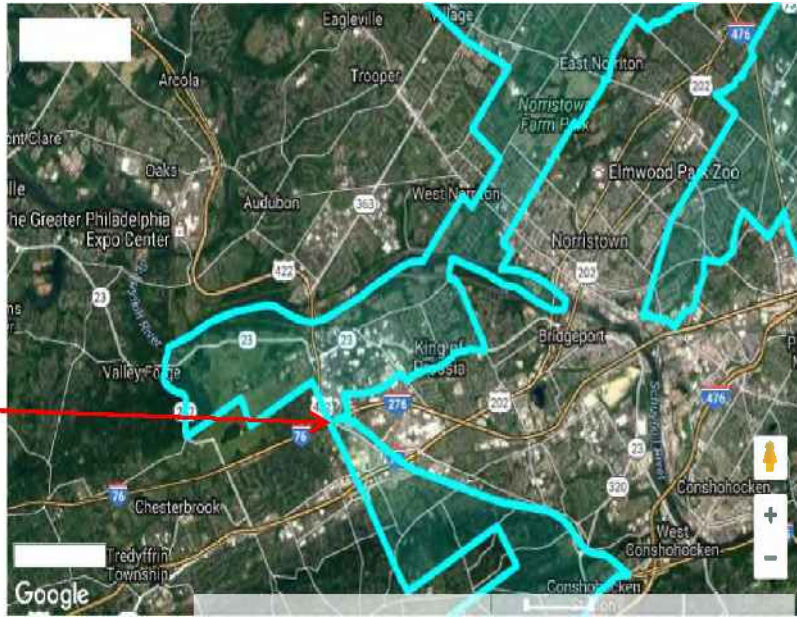


58. And Pennsylvania’s notorious 7th District—“Goofy kicking Donald Duck”—is spread out among five counties. At one point in King of Prussia, the district is so narrow that it

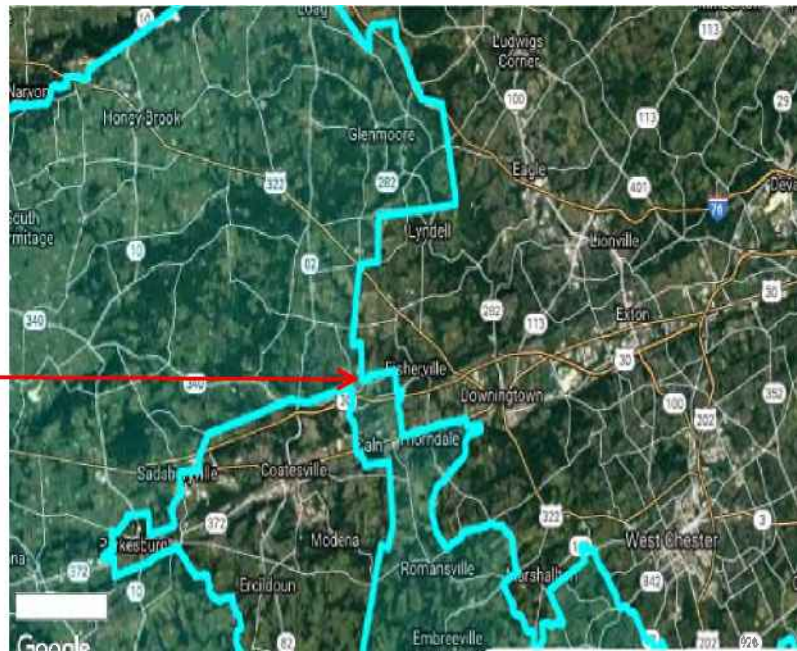
is held together only by a Creed's Seafood & Steaks. At another point in Coatesville, it is only a medical endoscopy center that connects one part of the district to another.



Creed's Seafood & Steaks

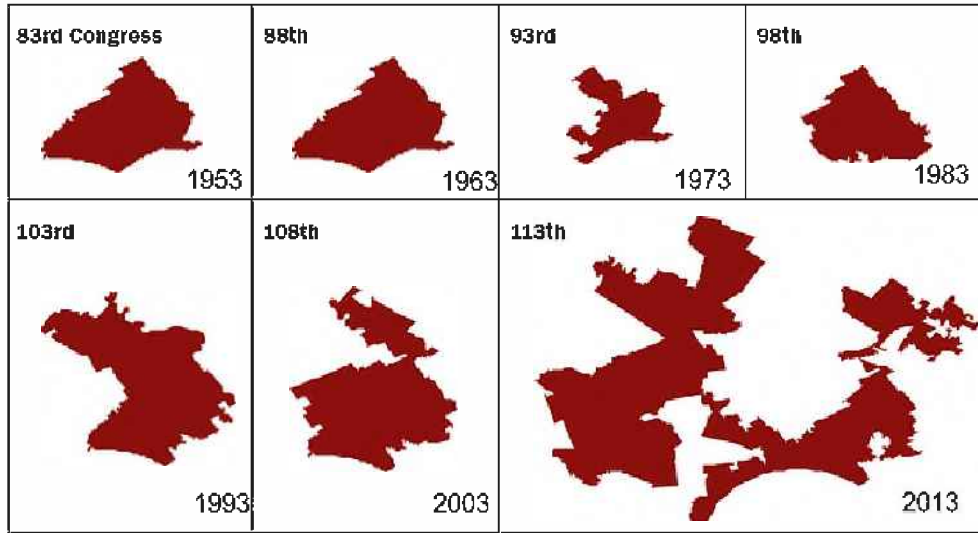


Brandywine GI Associates (endoscopy center)



59. There is no legitimate, constitutionally permissible reason for drawing districts in this manner. As depicted below, the evolution of the 7th District over time lays bare the lengths to which Republicans have gone to construct the district to their advantage.<sup>11</sup>

**THE EVOLUTION OF PENNSYLVANIA'S SEVENTH DISTRICT**



60. The 2011 Plan for the entire state is shown in the appendix attached hereto.

61. Because of the way Republicans redrew district boundaries, members of entire communities are denied a right to cast a vote that has any meaning. For example, when Republicans redrew the 6th District, they carefully carved out the city of Reading to make the 6th “safe” for Republicans. They then forced Reading into the solidly Republican 16th district, where the votes of Democratic voters are virtually certain never to matter. As a result, Reading

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<sup>11</sup> Christopher Ingraham, *What 60 Years of Political Gerrymandering Looks Like*, Wash. Post, May 21, 2014, [https://www.washingtonpost.com/news/wonk/wp/2014/05/21/what-60-years-of-political-gerrymandering-looks-like/?utm\\_term=.8fb7e83fcbba](https://www.washingtonpost.com/news/wonk/wp/2014/05/21/what-60-years-of-political-gerrymandering-looks-like/?utm_term=.8fb7e83fcbba).



residents “really . . . don’t have true representation[;] [their] voice is really muted because of the gerrymandering that’s taken place in Pennsylvania.”<sup>12</sup>

62. Republicans used a similar technique in the 17th District, where they packed the Democratic-leaning cities of Scranton, Wilkes-Barre, and Easton into a district that was already reliably Democratic, and removed any risk that Wilkes-Barre voters (which would reside in the 11th District if county boundaries were respected) would tilt the 11th District to the Democrats.

63. In the 7th District, Republicans carved out many Democratic voters in the city of Chester, packing them into the reliably Democratic 1st District.

64. Republicans packed minority voters into the 1st and 2nd Districts to waste their votes. The 1st District now has 66% minority voters, while the 2nd District now has 71% minority voters. Since the 2011 Plan, both districts have reliably produced super-majority votes for Democratic candidates of over 80% of the vote. In the 2nd District, the Democratic representative has won over 87% of the vote in every election since the 2011 Plan.

65. Republicans consistently redrew district lines to their advantage across the Commonwealth, taking one competitive district after another and transforming it into a safe Republican district. For example, under the 2003 plan, in the 11th District, 57.5% of voters voted for Barack Obama in the 2008 presidential election. After redistricting, however, only 47.7% of voters were 2008 Obama voters, a 9.8% swing.

66. On the day the 2011 Plan was both revealed and voted upon in the Senate, Democratic Senators protested that the plan was partisan, that it was proposed with “extremely

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<sup>12</sup> Lindsay Lazarski, *Dividing Lines: How Pennsylvania’s Elections Really Are Rigged*, *Keystone Crossroads*, <https://keystonecrossroads.atavist.com/dividing-lines-how-pennsylvanias-elections-really-are-rigged>.

short notice,” and that the process lacked any transparency. As Democratic Senator Anthony H. Williams explained, “[M]aybe if we had . . . transparency, openness, and most importantly, inclusion, we could have shared the responsibility of coming up with a[] . . . much more representative map. That is not what happened . . . . [W]e have a map that not one Democrat had anything to do with on this side of the aisle.”

67. Democratic Senator Jay Costa unsuccessfully introduced an amendment to the Republican plan that he believed would create 8 districts favorable to Republicans, 4 districts favorable to Democrats, and 6 swing districts.

68. The Republican majority in the Pennsylvania Senate set SB 1249 for a vote on the very same day that they first publicly disclosed the descriptions of the new districts. The bill passed in the Senate by a vote of 26-24. Not one Democratic Senator voted for the bill.

69. On December 15, 2011 and December 20, 2011, the Pennsylvania House of Representatives considered SB 1249. As in the Senate, Democratic representatives vociferously objected to the lack of transparency in adopting the plan and to its partisan nature.

70. Democratic representative Dan Frankel observed that the plan was clearly an effort to entrench Republicans in power: “[W]hat is taking place here today, in my view, is a very cynical attempt to institutionalize a Republican majority of congressional seats in Pennsylvania. . . . That is not good for our politics. . . . This is not the way we ought to be governing; to overreach, to go through contortions to create districts that are safe for a majority of Republican members of Congress is not good public policy. We ought to reject this. This is not good government; this is a very cynical way to do government.”

71. Democratic Representative Frank Dermody similarly objected: “[T]he way our system is supposed to work is that the voters are supposed to pick the politicians. With this map,

the politicians pick the voters. This map sets up districts that are gerrymandered beyond recognition.”

72. Democratic Representative Robert Freeman added: “SB 1249 contains the worst case of gerrymandering in Pennsylvania in living memory. . . . A look at the configuration of the congressional district map of 1249 reveals twisted and distorted districts that were drawn purely for political advantage, with no consideration for compactness of districts or communities of interest.”

73. Democratic Representative Steve Samuelson protested about the lack of transparency: “When this bill had first reading, the Senate had no plan [i.e., the bill had no substantive content]. When this bill had second reading, the Senate had no plan. The map was not revealed until December 13. The details . . . were not available until 9 a.m. on December 14. . . . [T]he public had about 14 hours to see the details. Now, since the Senate came out with their plan on Wednesday, the public has had a grand total of 5 days.”

74. Democratic Representative Babette Josephs similarly protested the extraordinary lack of transparency in what she called a “dreadful” plan, noting that she had never before “seen a hearing in this legislature on a blank bill.” “You could not tell, looking at the bill or looking for a map, what . . . the Republicans had in mind.”

75. Democratic Representative Michael Hanna offered an amendment to “create a fair redistricting map . . . [that] will minimize district splits in counties and municipalities and ensure equality of representation across the 18 congressional districts,” but, as with Senator Costa’s amendment, the House amendment failed.

76. Notwithstanding Democratic opposition, SB 1249 passed in the House on December 20, 2011 by a vote of 136-61. In the end, with passage of the bill *a fait accompli*

because of the Republican majority, 36 Democrats voted for the bill. Pennsylvania’s Republican Governor, Tom Corbett, signed the bill into law in time for the 2002 U.S. Congressional election. The 2011 Plan remains in effect today.

**D. Senate Bill 1249 Burdened the Representational Rights of Democratic Voters**

77. Senate Bill 1249 achieved exactly the effect REDMAP intended. In the 2012 election, each party’s share of the two-party vote in the districts the party won were as follows:

District	Democratic Vote Share	Republican Vote Share
1	84.9%	
2	90.5%	
13	69.1%	
14	76.9%	
17	60.3%	
3		57.2%
4		63.4%
5		62.9%
6		57.1%
7		59.4%
8		56.6%
9		61.7%
10		65.6%
11		58.5%
12		51.7%
15		56.8%
16		58.4%
18		64.0%
<b>Average in Districts Won</b>	<b>77.0%</b>	<b>59.3%</b>
<b>Statewide Vote Share</b>	<b>50.8%</b>	<b>49.2%</b>

78. The chart demonstrates how Republicans were able to rig the system so that Democrats could win only 5 of 18 districts even though Democrats won a *majority*—50.8%—of statewide congressional votes in the 2012 election. The average winning percentage in districts Democrats won was an astronomical 77.3%, reflecting the packing of Democrats into five districts. *Not a single winning Republican candidate* earned this large a share of the vote in his district. Victorious Republican candidates all won by much smaller margins, winning between



51.7% and 65.6% of the vote, for an average winning percentage of only 59.3%. In other words, the 2011 Plan guaranteed that Democrats would win a small number of House seats by very large margins, while Republicans would win the lion's share of seats by much smaller, although still comfortable, margins.

79. Republican officials pointed out that the 2011 Plan enabled Republicans to win the Commonwealth's delegation even in years when Democrats outperformed them, boasting that Republicans had achieved a large majority of the congressional seats even as Democrats won the important state-wide races: "The impact of this investment at the state level in 2010 is evident when examining the results of the 2012 election: Pennsylvanians reelected a Democratic U.S. Senator by nearly 9 points and reelected President Obama by more than 5 points, but at the same time they added to the Republican ranks in the State House and returned a 13-5 Republican majority to the U.S. House."<sup>13</sup>

80. In 2014, Republicans won 55.5% of the statewide congressional vote and remained at 13 of 18 seats. Although the percentage of seats Republicans won—72%—was still grossly disproportionate to their statewide vote share, it is nonetheless telling that Republicans won an extra 6 percentage points of the statewide congressional vote compared to 2012 but did not pick up any additional House seats. That is because the 2011 Plan is utterly unresponsive to the will of the voters. Democrats are locked into the 5 districts in which they are packed, and therefore do not lose—and cannot gain—seats with any normal swing in the statewide vote.

81. In 2016, the results were almost identical. Republicans won 53.9% of the statewide congressional vote and again won 13 of 18, or 72%, of the congressional seats.

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<sup>13</sup> 2012 REDMAP Summary Report, The Redistricting Majority Project, <http://www.redistrictingmajorityproject.com/?cat=1> (last visited June 7, 2017).

82. In both the 2014 and 2016 elections, the margin of victory in districts Democrats won was far higher than the margin of victory in districts Republicans won; in 2014, the average vote share for successful Democratic candidates was 73.6%, as compared to 63.4% for successful Republican candidates (excluding uncontested elections), and for 2016 the average vote share was 74.2% for successful Democratic candidates and 61.1% for successful Republican candidates (excluding uncontested elections).

83. That the 2011 Plan is the product of naked partisan gerrymandering is confirmed by any number of other measures. In recent years, political scientists and mathematicians have developed a number of sophisticated modeling techniques and tests to identify political gerrymanders. These tests each independently demonstrate the magnitude of the 2011 Plan's Republican bias, the fact that this bias could have resulted only from an intentional effort to benefit Republicans and to disadvantage Democrats.

84. One recognized way to test whether the 2011 Plan is the product of partisan bias is to ask whether observing traditional redistricting criteria such as contiguity, compactness, equal population, and minimizing county splits could reasonably be expected to produce a plan that yields the results generated by the actual 2011 Plan. The answer is a resounding "no."

85. Political scientists can answer this question by using computer modeling to generate alternative plans that adhere to traditional redistricting criteria but do not aim to advance partisan goals.<sup>14</sup> These alternative plans thus account for natural factors affecting the distribution of voters across the Commonwealth, such as any clustering of voters of a particular party into particular areas.

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<sup>14</sup> See, e.g., Jowei Chen, *The Impact of Political Geography on Wisconsin Redistricting*, 16 Election L.J. (forthcoming 2017), [http://www.umich.edu/~jowei/Political\\_Geography\\_Wisconsin\\_Redistricting.pdf](http://www.umich.edu/~jowei/Political_Geography_Wisconsin_Redistricting.pdf).

86. Performing this modeling for Pennsylvania congressional districts yields thousands of alternative plans that comply with traditional districting principles. But not one produces the partisan bias of the 2011 Plan. That is, using the *actual* voting results from past Pennsylvania statewide elections, and then interposing those voting results over the district boundaries in each alternative plan, not a single alternative plan produces a result in which Republicans would win a 13-5 advantage in Pennsylvania’s congressional delegation. This modeling demonstrates, with statistical certainty, that the 13-5 Republican advantage under the 2011 Plan is not the result of neutral factors such as population clustering. Rather, the bias of the 2011 Plan is necessarily the result of an intentional effort to favor Republicans.

87. Mathematicians at Carnegie Mellon University and the University of Pittsburgh have developed an alternative modeling approach that also demonstrates the partisan intent behind the 2011 Plan.<sup>15</sup> Using a modeling technique known as “Markov chain” analysis, these mathematicians take the enacted plan as a starting point and then make a series of random adjustments to the district boundaries by swapping precincts, while maintaining districts that are contiguous, of equal population, and as compact as the ones in the 2011 Plan. It can be proved mathematically using this approach that if the enacted plan were drawn without bias, these changes should not change the statistical properties of the plan. But the professors find that random changes to the 2011 Plan greatly diminish the Republican advantage. The professors conclude that the 2011 Plan has a Republican bias that cannot be the result of external factors such as the political geography of Pennsylvania.

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<sup>15</sup> Maria Chikinaa, Alan Friezeb & Wesley Pegden, *Assessing significance in a Markov chain without mixing*, 114 Proc. of Nat’l Acad. of Sci. 2860 (2017), available with supplement at <https://www.math.cmu.edu/~af1p/Textfiles/outliers.pdf>.

88. Yet another statistical approach that measures partisan gerrymanders is the efficiency gap. This measure, which the three-judge panel in *Whitford* applied in striking down Wisconsin's state house districts, measures how efficiently a party's voters are distributed across districts. For each party, the efficiency gap calculates that party's number of "wasted" votes, 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). The lower each of these numbers, the fewer wasted votes and the more likely a party is to win additional seats. The efficiency gap equals the difference in the total wasted votes between the two parties, divided by the total number of votes cast in the election.

89. The efficiency gap for Pennsylvania's congressional districts is enormous. For example, in the 2012 election, Democrats wasted 2,442,621 votes, compared to Republicans who wasted only 1,093,328 votes. The resulting efficiency gap of 24.5% was *the highest in the nation* among states that have more than two congressional districts. These figures demonstrate the massive number of Democrats in cracked districts who were deprived of the ability to elect officials of their choice, and the massive number of Democrats packed into districts where their votes were diluted.

90. Another measure of partisan gerrymandering is the "mean-median gap." The measure looks at the Democratic vote share in each of Pennsylvania's 18 congressional districts and then calculates: (i) the average, or mean, of those 18 Democratic vote shares, which will be roughly equivalent to the Democratic vote share statewide; and (ii) the Democratic vote share in the district that was the middle-best in terms of Democratic performance, which because Pennsylvania has an even number of districts, is the average of Democrats' vote shares in the districts where Democrats performed the ninth and tenth best out of the 18 districts.

Gerrymandering does not impact the mean vote share, since that is a statewide figure. But it does affect the median vote share, since gerrymandering is designed to maximize the number of districts a party wins, and winning the median district means that party wins a majority of seats. If, as in 2012, the Democratic vote share in the median district is lower than the mean Democratic vote share statewide, that necessarily indicates there are a disproportionately large number of Democratic voters in a few, packed districts. And it indicates that it is more difficult for Democrats to win the median district and hence a majority of seats: the larger the mean-median gap, the greater the mean vote share across the state that Democrats need to bring their vote share in the median district above 50%.

91. As illustrated below, in the 2012 election, the mean Democratic vote share across all Pennsylvania districts was 50.46%, but the median Democratic vote share was just 42.81% (the average of the 6th and 3rd Districts, which were Democrats' ninth and tenth best districts). Accordingly, the mean-median gap was 7.65%, which was the fifth largest of all congressional states in the country for the 2012 election. This gap shows the disproportionate percentage of the statewide vote that Democrats would need to win a majority of congressional seats. Democrats would have needed to win the 3rd District to win a majority of seats, and Democrats would have needed to win an additional 7.2% of the vote there to win—even though Democrats already won over 50% of the vote statewide.

92. Indeed, it would be nearly as difficult for Democrats to win just *two additional seats*. In 2012, Democrats would have needed to flip the 8th District to win two additional seats (*i.e.*, to win their seventh best district), but Democrats received just 43.4% share of the vote in the 8th District. These figures show how Republicans skewed the districts to maximize the

numbers of seats they would win and render these seats immune from normal swings in the statewide vote.

District	Democratic Vote Share
10	34.4%
18	36.0%
4	36.6%
5	37.1%
9	38.3%
7	40.6%
11	41.5%
16	41.6%
3	42.8%
6	42.9%
15	43.2%
8	43.4%
12	48.3%
17	60.3%
13	69.1%
14	76.9%
1	84.9%
2	90.5%
<b>Mean</b>	<b>50.5%</b>
<b>Median</b>	<b>42.8%</b>

93. The mean-median gaps for the 2014 and 2016 held steady at roughly the same levels. The mean-median gap was 7.46% for the 2014 election and 7.61% for the 2016 election, again showing the degree to which Democratic votes are packed and cracked.<sup>16</sup>

94. In short, a host of manageable tests, including the computer modeling and statistical tests described above, demonstrate that the 2011 Plan was intentionally drawn to minimize the influence of Democratic voters, that it has had precisely that effect, and that it will continue to do so for the life of the plan.

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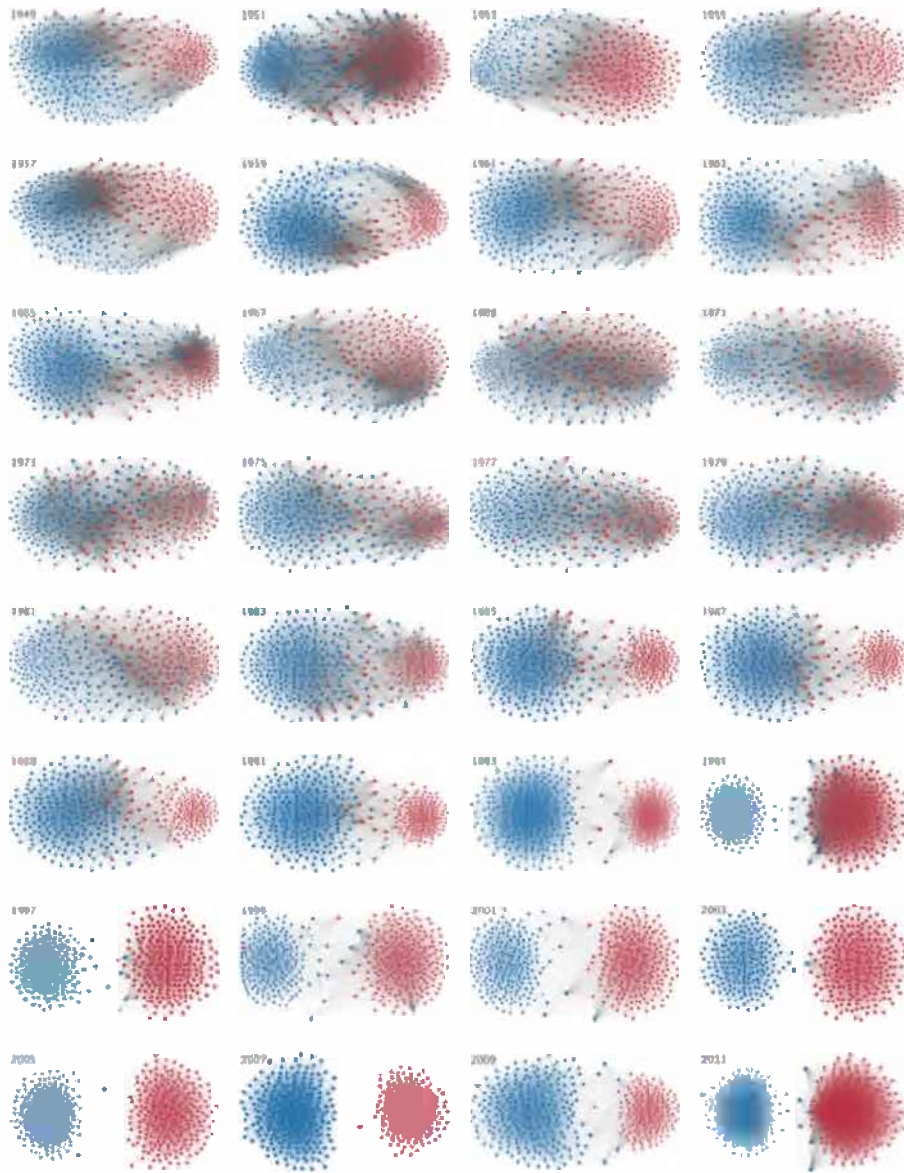
<sup>16</sup> These mean-median gaps were calculated by using actual vote totals from the 2014 and 2016 congressional elections, except in districts that were uncontested. Results in uncontested districts were imputed using a statistical regression model that predicts 2014 and 2016 election results based on each district's results in the 2012 congressional elections.

95. The effects of the gerrymander go beyond election results. In today’s Congress, representatives are simply not responsive to the views and interests of voters of the opposite party. Regardless of whether gerrymandering has *caused* this increased partisanship, such extreme partisanship magnifies the *effects* of partisan gerrymandering. When voters lose the ability to elect representatives of their party as a result of gerrymandering, those voters lose not only electoral power, but also the ability to influence legislative outcomes—because representatives pay no heed to the views and interests of voters of the opposite party once in office.

96. The increasing and extreme polarization of the U.S. House of Representatives is readily apparent. Numerous studies have documented this trend, including a 2015 article co-authored by Clio Andris from Pennsylvania State University.<sup>17</sup> Andris et al. gathered data for each Congress on the number of times each Member of Congress voted with every other Member. In the chart below, Andris et al. represent each Member with a red or blue dot and group the dots to show how often each pair of Members voted with one another; the closer two dots are to one another, or the thicker the line connecting them, the more often those two Members voted with each other. The trend over time is remarkable. It shows that, in recent years, Members have voted almost exclusively with Members of the same party and rarely, if ever, have joined with representatives from the opposing party to vote on a bipartisan basis.

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<sup>17</sup> See Clio Andris et al., *The Rise of Partisanship and Super-Cooperators in the U.S. House of Representatives*, PLOS One (2015).



97. The Members of Pennsylvania’s Congressional delegation are no exception to this trend. As the chart below demonstrates, in the two Congresses following the 2011 Plan, these Members almost always voted with a majority of other members of the same party and rarely crossed over to vote with members of the other party.<sup>18</sup>

<sup>18</sup> Data are from the Washington Post’s “U.S. Congress Votes Database,” <http://projects.washingtonpost.com/congress/114/house/members/> (last visited June 12, 2017).



District	Representative(s)	Party	Voting with Majority of Same Party	
			112th Congress	113th Congress
1	Bob Brady	D	94%	93%
2	Chaka Fattah	D	95%	96%
3	Mike Kelly	R	93%	96%
4	Jason Altmire	D	64%	N/A
4	Scott Perry	R	N/A	95%
5	Glenn Thompson	R	91%	93%
6	Jim Gerlach	R	86%	91%
7	Patrick Meehan	R	86%	92%
8	Mike Fitzpatrick	R	81%	85%
9	Bill Shuster	R	94%	96%
10	Tom Marino	R	95%	95%
11	Lou Barletta	R	92%	95%
12	Mark Critz	D	77%	N/A
12	Keith J. Rothfus	R	N/A	96%
13	Allyson Schwartz	D	94%	95%
14	Mike Doyle	D	93%	95%
15	Charles W. Dent	R	86%	91%
16	Joe Pitts	R	95%	95%
17	Tim Holden; Matt Cartwright	D	76%	96%
18	Tim Murphy	R	93%	96%

98. These figures illustrate that when voters artificially lose the ability to elect representatives of their party, they also lose any chance of having their views represented in Congress.

**COUNT I**  
**Violation of the Pennsylvania Constitution’s**  
**Free Expression and Association Clauses, Art. I, §§ 7, 20**

99. Petitioners hereby incorporate Paragraphs 1 through 98 above as if they were fully set forth herein.

100. Article I, Section 7 of the Pennsylvania Constitution provides in relevant part:  
“The free communication of thoughts and opinions is one of the invaluable rights of man, and

every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.”

101. Article I, Section 20 provides: “The citizens have a right in a peaceable manner to assemble together for their common good . . . .”

102. Pennsylvania’s constitution “provides protection for freedom of expression that is broader than the federal constitutional guarantee.” *Pap’s A.M. v. City of Erie*, 812 A.2d 591, 605 (Pa. 2002). This “broader protection[] of expression than the related First Amendment guarantee” applies “in a number of different contexts,” including “political” contexts. *DePaul v. Commonwealth*, 969 A.2d 536, 546 (Pa. 2009) (citing *Commonwealth v. Tate*, 432 A.2d 1382, 1391 (Pa. 1981)).

103. Pennsylvania’s Constitution protects the right of voters to participate in the political process, to express political views, to affiliate with or support a political party, and to cast a vote.

104. The 2011 Plan has the purpose and the effect of subjecting Petitioners and other Democratic voters to disfavored treatment by reason of their political views, their votes, and the party with which they choose to associate.

105. The Pennsylvania General Assembly expressly and deliberately considered the political views, voting histories, and party affiliations of Petitioners and other Democratic voters when it created the 2011 Plan.

106. The General Assembly drew the 2011 Plan with the intent to burden and disfavor those voters, including Petitioners, by reason of conduct protected by Article I, Sections 7 and 20, and with the intent to burden forms of expression that are protected by those provisions.

107. The Plan has had the effect of burdening and disfavoring Democratic voters in Pennsylvania, including Petitioners, by reason of their constitutionally-protected conduct. The Plan has prevented Democratic voters from electing the representatives of their choice and from influencing the legislative process, and the Plan has the effect of suppressing the political views and expression of Democratic voters. By contrast, the Plan favors Republican voters, by ensuring that they will be able to associate with fellow Republican voters to elect the representatives of their choice and to influence the electoral, and thus political, process.

108. The Plan also violates the Pennsylvania Constitution's prohibition against retaliation against individuals who exercise their rights under Article I, Section 7, and Article I, Section 20. Republicans "penalize[d] [Petitioners] for expressing certain preferences, while, at the same time, rewarding other voters for expressing the opposite preferences." *Shapiro v. McManus*, 203 F. Supp. 3d 579, 595 (D. Md. 2016).

109. For instance, Petitioner Mary Elizabeth Lawn has resided at the same home in Chester since 2004, but her congressional district was changed under the 2011 Plan. Lawn previously was in the 1st Congressional District, which has consistently elected Democrats, but under the 2011 Plan, Lawn was moved to the 7th Congressional District, which has voted for Republicans by comfortable margins in every election since the redistricting.

110. Petitioner John Greiner's District, the 3rd Congressional District, was subject to cracking under the 2011 Plan. The 3rd District previously was a competitive district: Republicans won in 2002, 2004, 2006, and 2010, while Democrats won in 2008. But since the 2011 Plan, the district is no longer competitive. The Republican representative, Mike Kelly, comfortably won reelection in 2014 and 2016, and the district is so skewed that Kelly was able to run unopposed in 2016.

111. Like Greiner, Petitioner Robert Smith was also subject to cracking. Smith resides in Pennsylvania's 11th Congressional District. Prior to the 2011 Plan, the 11th District was a competitive district: the Democratic candidate won by a mere 3% in 2008, and the Republican candidate won the seat in 2010. But since the 2011 Plan, the Republican Representative, Lou Barletta, has won every election by more than 17%.

112. With respect to each of these Petitioners and others, Republicans "expressly and deliberately considered [their] protected . . . conduct, including their voting histories and political party affiliations, when it redrew the lines of" their districts. *Shapiro*, 203 F. Supp. 3d at 595. And Republicans "did so with an intent to disfavor and punish [Petitioners] by reason of their constitutionally protected conduct." *Id.* This intentional retaliation had an "actual effect" that would not have occurred but-for the retaliation. *Id.* Petitioners such as Lawn, Greiner, and Smith are no longer able to elect representatives of their choice or to influence the political process.

113. The 2011 Plan cannot be explained or justified by reference to Pennsylvania's geography or other legitimate redistricting criteria.

**COUNT II**  
**Violation of the Pennsylvania Constitution's**  
**Equal Protection Guarantees, Art. I, §§ 1 and 26, and Free and Equal Clause, Art. I, § 5,**

114. Petitioners hereby incorporate Paragraphs 1 through 113 above as if they were fully set forth herein.

115. The General Assembly is not "free to construct political gerrymanders with impunity." *Erfer*, 794 A.2d at 334. On the contrary, a congressional redistricting plan violates the Pennsylvania Constitution's equal protection guarantees if (1) the plan reflects "intentional discrimination against an identifiable political group"; and (2) "there was an actual

discriminatory effect on that group.” *Id.* at 332; *see also Whitford*, 218 F. Supp. 3d 837 (finding equal protection violation in Wisconsin redistricting where there was both discriminatory purpose and effects).

116. Here, the enacted plan reflects intentional discrimination against an identifiable political group—that is, Petitioners and other Democratic voters. Pennsylvania’s congressional districts were drawn as part of a nationwide movement to use redistricting to maximize Republican seats in Congress and entrench these Republican members in power. Analyses such as the computer modeling of districts that would observe traditional districting criteria, the Markov Chain analysis, and the efficiency and mean-median gaps leave no room for doubt on this score. They conclusively demonstrate that the 2011 Plan could not have resulted “legitimate legislative objective[s],” *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in judgment), but could have resulted only from discriminatory partisan intent.

117. The enacted plan also works an actual discriminatory effect. A plan works such an effect when (1) “the identifiable group has been, or is projected to be, disadvantaged at the polls”; and (2) “by being disadvantaged at the polls, the identifiable group will lack political power and be denied fair representation.” *Erfer*, 794 A.2d at 332. Here, the enacted plan disadvantages Petitioners and other Democratic voters at the polls and severely burdens their representational rights.

118. Statewide, the computer modeling and statistical tests demonstrate that Democrats receive far fewer congressional seats than they would absent the gerrymander, and that Republicans’ advantage is nearly impossible to overcome. Indeed, one need look only at the results of the 2012 election to see the effects of the gerrymander: Democrats won only 28% of Pennsylvania’s seats despite winning a majority of the statewide congressional vote.

119. The effects are likewise significant for individual voters. For Petitioners such as James Greiner and Robert Smith who live in cracked districts, these voters are “essentially shut out of the political process.” *Erfer*, 794 A.2d at 333 (citation and quotation marks omitted). They are artificially denied any realistic opportunity to elect representatives of their choice, with the demographics of their districts skewed to ensure Republican victories. And given the extreme partisanship of their representatives, these voters have no meaningful opportunity to influence legislative outcomes. Their representatives simply do not weigh Democratic voters’ interests and policy preferences in deciding how to act.

120. For Petitioners such as Carmen Febo San Miguel and James Solomon who live in packed Democratic districts, the “weight” of their votes has been substantially diluted. *See Reynolds v. Sims*, 377 U.S. 533, 563 (1964). Their votes have no marginal impact on election outcomes, and representatives will be less responsive to their individual interests or policy preferences.

### **PRAYER FOR RELIEF**

**WHEREFORE**, Petitioners respectfully request that this Honorable Court enter judgment in their favor and against Respondents, and:

- a. Declare that the 2011 Plan is unconstitutional and invalid because it violates the rights of Petitioners and all Democratic voters in Pennsylvania under the Pennsylvania Constitution’s Free Expression and Association Clauses, Art. I, §§ 7, 20; Equal Protection Guarantees, Art. I, §§ 1 and 26, and Free and Equal Clause, Art. I, § 5.
- b. Enjoin Respondents, their agents, officers, and employees from administering, preparing for, or moving forward with any future primary or general elections of Pennsylvania’s U.S. house members using the 2011 Plan;

- c. Establish a new congressional districting plan that complies with the Pennsylvania Constitution, if Respondents fail to enact a new congressional districting plan comporting with the Pennsylvania Constitution in a timely manner;
- d. Enjoin the Pennsylvania General Assembly from creating any future congressional districts with the purpose or effect of burdening or penalizing an identifiable group, a political party, or individual voters based on their political beliefs, political party membership, registration, affiliations or political activities, or voting histories;
- e. Enjoin the Pennsylvania General Assembly from using data regarding a voter's political party membership, registration, affiliation, political activities, or voting history in any future redistricting process of congressional districts, where such use burdens or penalizes an identifiable group, a political party, or individual voters based on their political beliefs, political-party membership, registration, affiliations or political activities, or voting histories.

Dated: June 15, 2017

Respectfully submitted,

*/s/ Mary M. McKenzie*

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Counsel for Petitioners



# **Appendix**



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**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA,  
JAMES WRIGHT, CARMEN FEBO SAN MIGUEL,  
JAMES SOLOMON, JOHN GREINER, JOHN  
CAPOWSKI, GRETCHEN BRANDT, MARY  
ELIZABETH LAWN, LISA ISAACS, DON LANCASTER,  
JORDI COMAS, ROBERT SMITH, WILLIAM MARX,  
RICHARD MANTELL, PRISCILLA MCNULTY,  
THOMAS ULRICH, ROBERT MCKINSTRY, MARK  
LICHTY, LORRAINE PETROSKY,

Petitioners,

v.

THE COMMONWEALTH OF PENNSYLVANIA;  
PENNSYLVANIA GENERAL ASSEMBLY;  
THOMAS W. WOLF, IN HIS CAPACITY AS  
GOVERNOR OF PENNSYLVANIA; MICHAEL J.  
STACK III, IN HIS CAPACITY AS LIEUTENANT  
GOVERNOR OF PENNSYLVANIA AND PRESIDENT  
OF THE PENNSYLVANIA SENATE; MICHAEL C.  
TURZAI, IN HIS CAPACITY AS SPEAKER OF THE  
PENNSYLVANIA HOUSE OF REPRESENTATIVES;  
JOSEPH B. SCARNATI III, IN HIS CAPACITY AS  
PENNSYLVANIA SENATE PRESIDENT PRO  
TEMPORE; PEDRO A. CORTÉS, IN HIS CAPACITY AS  
SECRETARY OF THE COMMONWEALTH OF  
PENNSYLVANIA; JONATHAN M. MARKS, IN HIS  
CAPACITY AS COMMISSIONER OF THE BUREAU OF  
COMMISSIONS, ELECTIONS, AND LEGISLATION OF  
THE PENNSYLVANIA DEPARTMENT OF STATE,

Respondents.

Docket No.

**PROOF OF SERVICE**

I hereby certify that this 15th day of June, 2017, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfied the requirements of Pa.R.A.P. 121:

**Commonwealth of Pennsylvania**

Pennsylvania Office of Attorney General  
16th Floor, Strawberry Square  
Harrisburg, PA 17120  
Service Method: Certified mail

**Pennsylvania General Assembly**

c/o Senator Joseph B. Scarnati III  
Senate President Pro Tempore  
Senate Box 203025  
Harrisburg, PA 17120-3025  
Room: 292 Main Capitol Building  
c/o Representative Michael C. Turzai  
Speaker of the House  
139 Main Capitol Building  
PO Box 202028  
Harrisburg, PA 17120-2028  
Service Method: Certified mail

**Governor Thomas W. Wolf**

Office of the Governor  
508 Main Capitol Building  
Harrisburg, PA 17120  
Service Method: Certified mail

**Lieutenant Governor Michael J. Stack III**

President of the Senate  
200 Main Capitol Building  
Harrisburg, Pennsylvania 17120  
Service Method: Certified mail

**Representative Michael C. Turzai**

Speaker of the House  
139 Main Capitol  
PO Box 202028  
Harrisburg, PA 17120-2028  
Service Method: Certified mail

**Senator Joseph B. Scarnati III**

Senate President Pro Tempore  
Senate Box 203025  
Harrisburg, PA 17120-3025  
Room: 292 Main Capitol  
Service Method: Certified mail

**Secretary Pedro A. Cortés**

Pennsylvania Department of State  
Office of the Secretary  
302 North Office Building  
Harrisburg, PA 17120  
Service Method: Certified mail

**Commissioner Jonathan M. Marks**

Pennsylvania Department of State  
Bureau of Commissions, Elections and Legislation  
210 North Office Building, 401 North Street  
Harrisburg, PA 17120  
Service Method: Certified mail

BY: */s/ Mary M. McKenzie*

---

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*Counsel for Petitioners*

**VERIFICATION**

I, Suzanne Almeida, on behalf of the League of Women Voters of Pennsylvania, hereby state:

1. I am a petitioner in this action;
2. I verify that the statements made in the foregoing Petition for Review are true and correct to the best of my knowledge, information, and belief; and
3. I understand that the statements in said Petition for Review are subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Signed: 

Dated: June 14, 2017

# **EXHIBIT B**

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

League of Women Voters of  
Pennsylvania, Carmen Febo San Miguel,  
James Solomon, John Greiner,  
John Capowski, Gretchen Brandt,  
Thomas Rentschler,  
Mary Elizabeth Lawn, Lisa Isaacs,  
Don Lancaster, Jordi Comas,  
Robert Smith, William Marx,  
Richard Mantell, Priscilla McNulty,  
Thomas Ulrich, Robert McKinstry,  
Mark Lichty, Lorraine Petrosky,  
Petitioners

v.

No. 261 MD 2017

The Commonwealth of Pennsylvania;  
The Pennsylvania General Assembly;  
Thomas W. Wolf, In His Capacity As  
Governor of Pennsylvania;  
Michael J. Stack III, In His Capacity  
As Lieutenant Governor of Pennsylvania;  
And President of the Pennsylvania  
Senate; Michael C. Turzai, In His  
Capacity As Speaker of the  
Pennsylvania House of Representatives;  
Joseph B. Scarnati III, In His  
Capacity As Pennsylvania Senate  
President Pro Tempore; Pedro A.  
Cortes, In His Capacity As Secretary  
of the Commonwealth of Pennsylvania;  
Jonathan M. Marks, In His Capacity As  
Commissioner of the Bureau of  
Commissions, Elections, and  
Legislation of the Pennsylvania  
Department of State,  
Respondents

TRANSCRIPT OF PROCEEDINGS

Before: THE HONORABLE DAN PELLEGRINI, Senior Judge  
Date: October 4, 2017, 10:00 a.m.  
Place: Commonwealth Court of Pennsylvania  
Pennsylvania Judicial Center  
601 Commonwealth Avenue, Courtroom No. 3001  
Harrisburg, Pennsylvania



1 APPEARANCES:

2 David P. Gersch, Esquire  
3 Mary M. McKenzie, Esquire  
4 Elisabeth S. Theodore, Esquire  
5 For - Petitioners

6 Jonathan S. Goldman, Esquire  
7 For - The Commonwealth of Pennsylvania,  
8 Respondent

9 Thomas P. Howell, Esquire  
10 For - Thomas W. Wolf, In His Capacity As  
11 Governor of Pennsylvania, Respondent

12 Clifford B. Levine, Esquire  
13 For - Michael J. Stack III, In His Capacity As  
14 Lieutenant Governor of Pennsylvania and  
15 President of the Pennsylvania Senate,  
16 Respondent

17 Jason Torchinsky, Esquire  
18 Brian S. Paszamant, Esquire  
19 Kathleen A. Gallagher, Esquire  
20 For - The Pennsylvania General Assembly;  
21 Michael C. Turzai, In His Capacity As Speaker  
22 Of the Pennsylvania House of Representatives;  
23 and Joseph B. Scarnati III, In His Capacity As  
24 Pennsylvania Senate President Pro Tempore,  
25 Respondents

Kathleen M. Kotula, Esquire  
Timothy E. Gates, Esquire  
For - Pedro A. Cortes, In His Capacity As  
Secretary of the Commonwealth of Pennsylvania;  
Jonathan M. Marks, In His Capacity As  
Commissioner of the Bureau of Commissions,  
Elections, and Legislation of the Pennsylvania  
Department of State, Respondents

1 THE COURT CRIER: All rise. Commonwealth Court is  
2 now in session. The Honorable Dan Pellegrini presiding.

3 THE COURT: Good morning, counsel. Please be  
4 seated.

5 What this case proves is if you touch something, it  
6 comes back to you even if it's 15 years later. I was the --  
7 for lack of a better term, the master in the Erfer case. And  
8 I consider -- just to inform people, I consider myself -- my  
9 role in this case pretty similar to what occurred in Erfer.  
10 I am going to tee this case up as much as I can and send it  
11 over to a court en banc for decision rather -- and I've been  
12 promised that even if there's a hearing, I may not have to  
13 hear it. But there's fake promises too, so I don't -- but  
14 generally that's the -- the role that I'm having in this  
15 case.

16 Now there are two motions set for today. The first  
17 motion -- one motion dealt with the intervention of the  
18 Republican Party. I am not going to hear that today because  
19 looking at the preliminary objections, that's intertwined  
20 with the preliminary objection to the League of Women Voters  
21 on standing. It's pretty much a similar issue, so that will  
22 be determined together.

23 But I am going to allow the Republican Party if it  
24 so desires -- and this really doesn't matter for either party  
25 because there's individual plaintiffs and individual

1 intervenors who the Republican Party and the League of Women  
2 Voters are associated with. But if the Republican Party  
3 wants to participate today, I'm going to allow their  
4 participation.

5 And with that, we will get to the presiding  
6 officers' motion which I'm going to call the -- the  
7 legislators' motion for a stay of the proceedings pending the  
8 decision of the Supreme Court in Gill versus Whitford.

9 MR. TORCHINSKY: Thank you, Your Honor.

10 May it please the Court, Jason Torchinsky on behalf  
11 of Senator Scarnati, Speaker Turzai, and the General  
12 Assembly.

13 We're here today because the petitioners are in  
14 fact seeking proportional representation, something that the  
15 courts of this Commonwealth and the federal courts have  
16 squarely rejected. This map has been around since 2011, and  
17 Pennsylvania citizens have elected members of the House of  
18 Representatives under this map for three terms. It was not  
19 until -- this case was not filed until seven years after the  
20 map was adopted and eight months after the Whitford decision  
21 was decided by the lower court in Wisconsin. And now  
22 petitioners are here seeking to ask you to rush to their  
23 conclusion.

24 There is a real possibility that Gill will  
25 render -- render moot or resolve either all of this case or

1 major portions of this case. And petitioners don't deny that  
2 Gill is going to have a significant impact on at least half  
3 and maybe more than half of their case.

4 Their claim really boils down to two fundamental  
5 issues: an Equal Protection claim and a Free -- Free  
6 Expression and Association claim. And the Israelit decision  
7 both sides agree kind of sets forth the standard that this  
8 Court has before it today which is the stay should be issued  
9 if another pending case might resolve or render moot this  
10 matter.

11 THE COURT: Well, let me ask this question.

12 MR. TORCHINSKY: Sure.

13 THE COURT: If -- if the Supreme Court in Gill  
14 versus Whitford which was argued yesterday --

15 MR. TORCHINSKY: Yes.

16 THE COURT: -- and maybe we should just say what  
17 Justice Kennedy decides -- if they come down with affirmed,  
18 just affirmed, so we know the rationale, we know everything,  
19 what happens?

20 MR. TORCHINSKY: If --

21 THE COURT: They're probably not here. They're  
22 probably down in federal court, alleging their federal claim;  
23 but other than that, on the state claim.

24 MR. TORCHINSKY: If there -- if there is a summary  
25 affirmance in Whitford, then this Court will need to wrestle

1 with how a summary -- and let's assume for a moment it's a  
2 summary affirmance which is --

3 THE COURT: Well, essentially it's not a summary  
4 affirmance; let's say an affirmance adopting the three-judge  
5 panel decision in Whitford.

6 MR. TORCHINSKY: Right. I mean, if that -- if that  
7 happens, then this case is not mooted. And this case will go  
8 forward, and this Court will have to decide how the Whitford  
9 decision impacts what the Supreme Court --

10 THE COURT: So in other words we do the same  
11 efficiency calculations that the Whitford court did.

12 MR. TORCHINSKY: Well, I think there are some -- I  
13 think there are some differences. For example, in the  
14 Wisconsin case -- and, again, this gets more to merits than  
15 to our --

16 THE COURT: No, but what --

17 MR. TORCHINSKY: -- application for stay.

18 THE COURT: See, one of the reasons for the stay,  
19 the -- the petitioners are contending that you essentially  
20 conceded; if the Supreme Court came down and affirmed the  
21 three-judge panel in Whitford, that you pretty much conceded  
22 that the -- that they win.

23 MR. TORCHINSKY: No. We don't agree with that at  
24 all. And, you know, we have not briefed that issue, although  
25 we have submitted preliminary objections that do -- that do

1 get to merits. And if the Court wants to --

2 THE COURT: Let me ask you this question: how do  
3 you win if they adopt the three-judge panel decision?

4 MR. TORCHINSKY: A couple of things. First of all,  
5 the efficiency gap was -- was one measure, but as oral  
6 argument in the Supreme Court illustrated yesterday, the  
7 efficiency gap was not the fundamental -- it was not the  
8 fundamental piece of social science hodgepodge that the  
9 District Court relied on. So we have -- and petitioners in  
10 this case have made clear that they've got other social  
11 science hodgepodge that they intend -- that they intend to  
12 introduce in front of the Court, whether they call it --

13 THE COURT: Okay.

14 MR. TORCHINSKY: -- the efficiency gap or parts --  
15 and every --

16 THE COURT: In other words, we -- we'll have to  
17 look at the test, how that efficiency gap test relates to  
18 Pennsylvania.

19 MR. TORCHINSKY: Correct.

20 THE COURT: And if the numbers are roughly the  
21 same, what happens?

22 MR. TORCHINSKY: Well, so -- so you have to  
23 evaluate all of the different social science measures and  
24 listen to -- to their side's experts and our side's experts  
25 debate the various social science measures and how they apply

1 here in Pennsylvania and --

2 THE COURT: In other words, what you're saying is  
3 it's not going to be an easy test.

4 MR. TORCHINSKY: No, it's not going to be an easy  
5 test at all.

6 THE COURT: Okay. Another -- I -- the real answer  
7 I wanted to get was they're contending that essentially you  
8 conceded that if Whitford was decided against you, you lose;  
9 and you're not.

10 MR. TORCHINSKY: No, not at all, Your Honor.

11 THE COURT: Okay. Let me ask the second question.

12 MR. TORCHINSKY: Sure.

13 THE COURT: One of the allegations that they make  
14 is that the petitioner -- that the -- Wisconsin, the  
15 defenders of the present reapportionment system in Wisconsin  
16 argued that there -- the test should be compact, contiguous,  
17 and as few municipal boundaries as possible which in  
18 Pennsylvania means counties. If they adopt that test, what  
19 happens?

20 MR. TORCHINSKY: Well, I think that that -- I think  
21 if you read carefully what the state of Wisconsin was saying  
22 in their briefing in Gill, I think that their position was  
23 that the -- their adherence to traditional redistricting  
24 factors was -- was essentially a defense. Whether this map  
25 complies with traditional redistricting factors is some- --

1 is a factual question for the Court and something that should  
2 -- and we're not -- we're not conceding that traditional  
3 redistricting factors were not considered in this case.

4 THE COURT: You mean Goofy kicking somebody.

5 MR. TORCHINSKY: I mean, look, that's their  
6 description of the district but --

7 THE COURT: I know. At a certain point in time,  
8 there has to be -- you know, you have to look at a map.  
9 Okay.

10 MR. TORCHINSKY: I mean, look, the state is roughly  
11 shaped like a rectangle, but the various counties, the  
12 various municipalities don't share rectangular shapes.

13 THE COURT: What you're essentially arguing then is  
14 that in Gill, we have to know what the Supreme Court says.

15 MR. TORCHINSKY: Yes.

16 THE COURT: And the Supreme Court could come out  
17 with a decision that you win, and the Supreme Court could  
18 come out with a very clear standard that you lose.

19 MR. TORCHINSKY: You meaning who? Meaning the  
20 state of Wisconsin?

21 THE COURT: Meaning you.

22 MR. TORCHINSKY: I mean, look, the -- whatever the  
23 Supreme Court decides in Gill will have an impact on this  
24 case and will set forth the test that we need to -- that we  
25 need to work underneath if the Supreme Court in some way



1 affirms Whitford.

2 THE COURT: See, the problem I'm having with your  
3 position is you keep arguing in a sense that it doesn't  
4 matter what happens in Gill and -- because if -- and that's  
5 the reason for the stay. What you're saying is it is  
6 essential to the matter of your stay that Gill could be  
7 determinative, and what you're saying is -- that's -- that's  
8 the core of your argument.

9 MR. TORCHINSKY: No --

10 THE COURT: And the answer is Gill could be  
11 determinative.

12 MR. TORCHINSKY: Your Honor, I think that -- I  
13 think you're -- you're misunderstanding our argument. On the  
14 application for stay, the standard that this Court had set  
15 forth in Israelit is that the pending case might resolve or  
16 render moot the case. If -- if Gill determines that  
17 political gerrymandering cases are non-justiciable, then we  
18 have -- you know, then that significantly impacts this case.  
19 If --

20 THE COURT: Well, let's stop there. I agree the  
21 merits, but hasn't Pennsylvania decided that the issue is  
22 justiciable?

23 MR. TORCHINSKY: Well, Your Honor, if you go back  
24 -- and obviously this Court is very familiar with the Erfer  
25 case and with the '91 Legislative Reapportionment case.

1 Prior to the '91 Legislative Reapportionment case, the  
2 Pennsylvania Supreme Court had made clear that it found  
3 political gerrymandering claims to be non-justiciable.

4 THE COURT: We're an intermediate court.

5 MR. TORCHINSKY: Right. But the only reason that  
6 the Pennsylvania Supreme Court changed its mind is that it  
7 said that on Equal Protection matters, the Pennsylvania Equal  
8 Protection Clauses are coextensive with the federal Equal  
9 Protection Clauses. So the only reason that the Supreme --  
10 the Pennsylvania Supreme Court came out differently in '91  
11 was because of the U.S. Supreme Court's decision in Bandemer.  
12 If that decision is reversed, the keystone on which the  
13 Pennsylvania Supreme Court decision was built has been kicked  
14 out from underneath it. And that is certainly something this  
15 Court can consider.

16 THE COURT: Let me ask this question. This gets to  
17 -- we're here under a state constitutional claim.

18 MR. TORCHINSKY: That's correct.

19 THE COURT: And this will get to the -- kind of the  
20 ultimate resolution. Because the Supreme Court adopted the  
21 decision in -- in -- going way back and relied on federal  
22 law, is the state constitutional determination affected for  
23 us for the Supreme -- because the U.S. Supreme Court changes?

24 MR. TORCHINSKY: Well, so here's -- here's the  
25 potential problem that -- that the courts could -- could

1 face. If the Pennsylvania courts say the Bandemer -- you  
2 know, the Bandemer test is what we're going to apply and Gill  
3 versus Whitford puts forward some different test, at least  
4 with respect to compliance with the First Amendment and the  
5 Fourteenth Amendment, there's no doubt that the U.S. Supreme  
6 Court -- whatever the U.S. Supreme Court says, you know,  
7 under the Supremacy Clause would override anything that the  
8 Pennsylvania Supreme Court said depending on which one was  
9 more or less restrictive. And we don't know where that's  
10 going to be, so --

11 THE COURT: No. No. My point is the Supreme Court  
12 interprets the Pennsylvania Constitution.

13 MR. TORCHINSKY: Yes.

14 THE COURT: They don't have to make it coextensive  
15 with the federal law.

16 MR. TORCHINSKY: You're right; they don't have to.  
17 But there's at least 60 years of precedent that says it does.

18 THE COURT: And if they wanted to, they could still  
19 stick with the Bandemer test.

20 MR. TORCHINSKY: That is correct; they could. But  
21 that would be a reversal of 60 years plus of state supreme  
22 court precedent.

23 THE COURT: They usually go in lockstep, but  
24 sometimes they don't.

25 MR. TORCHINSKY: On Equal Protection, I don't think

1 that anybody has -- has pointed out any case where the  
2 Pennsylvania Supreme Court has not moved in lockstep with the  
3 federal courts on Equal Protection claims.

4 THE COURT: We -- we call it uniformity when we  
5 don't want to move in lockstep.

6 MR. TORCHINSKY: Right. But -- but, Your Honor,  
7 again, no party here has brought forward or found any case  
8 where at least on Equal Protection grounds --

9 THE COURT: I agree with you that the Supreme Court  
10 in -- our Supreme Court in election matters has generally  
11 adopted the federal standards.

12 MR. TORCHINSKY: Right. And -- and again, I'm not  
13 aware of any case and our research has not determined any  
14 case where the Pennsylvania Supreme Court has deviated there.

15 THE COURT: So I should follow the federal court,  
16 not the last pronouncement of the state supreme court?

17 MR. TORCHINSKY: Your Honor --

18 THE COURT: You should probably say no. You know  
19 why? Because then I've got to follow Bandemer.

20 MR. TORCHINSKY: Your Honor, I think all we're  
21 asking you to -- we're not asking you to make that decision  
22 right now. We're just asking you to take a breath and have  
23 this case heard when the Court has all of the legal  
24 pronouncements from the Supreme Court in -- from the U.S.  
25 Supreme Court in front of it so you can make that evaluation.

1 Without knowing what Gill is going to say, it puts this Court  
2 in a very difficult position. And what we're asking you to  
3 do is to get this case right and not rush it. And that's why  
4 we're asking you to stay.

5 We're not asking you for an indefinite stay. We're  
6 not asking you to -- to stay this case because of some other  
7 trial happening in some other state. We're asking you to  
8 stay this case while the U.S. Supreme Court decides the case  
9 that was --

10 THE COURT: I understand --

11 MR. TORCHINSKY: -- argued yesterday.

12 THE COURT: -- your position. I understand your  
13 position. But one of the issues for a stay is -- is that the  
14 stay will help us, but it is not determinative. And the  
15 question is whether or not we should allow the ancillary  
16 matters to continue while we await.

17 MR. TORCHINSKY: Well, I mean, the Israelit  
18 standard is that --

19 THE COURT: And I was hoping that you were going to  
20 say it's done; I mean, the -- if the efficiency standard  
21 comes in or the other standard, we agree that if they adopt  
22 the opinion in -- in -- the three-judge panel in Whitford,  
23 then the case is over.

24 MR. TORCHINSKY: Yeah. No, we don't -- we don't  
25 agree with that, Your Honor.

1 THE COURT: So in other words litigation is going  
2 to go on forever.

3 MR. TORCHINSKY: Oh, no. I mean, Your Honor -- I  
4 mean, your -- your -- your assumption there is that Whitford  
5 was going to affirm the three-judge court. I mean, that was  
6 the underlying premise to your question.

7 THE COURT: Well, if --

8 MR. TORCHINSKY: What we're saying is --

9 THE COURT: But if -- I'm going to ask --

10 MR. TORCHINSKY: -- that's an unknown.

11 THE COURT: See, that's not the question that I'm  
12 -- I'm going to ask them that question.

13 MR. TORCHINSKY: Right. I mean, Your Honor -- I  
14 mean, remember the standard in Israelit isn't that the case  
15 will definitively -- that we know for -- for sure, for a  
16 hundred percent certainty that Whitford will definitively  
17 decide this case. What we know is that there's a possibility  
18 that it might resolve or render moot --

19 THE COURT: It --

20 MR. TORCHINSKY: -- the case.

21 THE COURT: Well, how -- well --

22 MR. TORCHINSKY: It might.

23 THE COURT: -- it's only going to render it moot in  
24 your favor.

25 MR. TORCHINSKY: And that's quite possible which is

1 why --

2 THE COURT: Or it could render your position  
3 untenable.

4 MR. TORCHINSKY: It could -- it could cause a  
5 change in our position. Yes.

6 THE COURT: Yes.

7 MR. TORCHINSKY: But, you know, exactly what that  
8 might be, we don't know. And that's why we're just saying --

9 THE COURT: See, I finally got an answer out of you  
10 that augers in favor of a stay rather than we're going to  
11 have this constant litigation no matter what happened or  
12 continuing litigation that -- we're -- we're going to have --  
13 we don't need all the intermediate steps before we get to a  
14 hearing. And essentially what you're saying is you need  
15 Whitford to determine what you're going to do and what your  
16 strategy is going to be.

17 MR. TORCHINSKY: I mean, without Whitford, this  
18 Court is stabbing in the dark as to what the standards are.  
19 This Court -- I mean, they're basically saying we've -- we've  
20 amassed this social science hodgepodge -- and it's -- it's  
21 the same thing that happened in the oral argument yesterday.  
22 They've got this social science hodgepodge. And somehow  
23 between all these different social science metrics, they're  
24 asking the Court to devise some mathematical test here that  
25 the Court should declare is the constitutional standard.

1           You know, and it is quite possible that if Whitford  
2 says that, you know, some social science hodgepodge  
3 mathematical test is the answer under the federal  
4 constitution, that the Pennsylvania courts could determine  
5 something else.

6           THE COURT: They could come up with the  
7 Pennsylvania constitutional standard of compact, contiguous,  
8 and -- and doesn't violate as many governmental boundaries as  
9 close as or -- the word -- the word absolute is somewhere in  
10 there.

11           MR. TORCHINSKY: Right.

12           THE COURT: And that's a justiciable standard.

13           MR. TORCHINSKY: That -- that is. And in -- in the  
14 Wisconsin case, there are in fact standards in the state  
15 constitution -- in the Wisconsin State Constitution for their  
16 legislative districts.

17           THE COURT: That's -- that's what Wisconsin is  
18 arguing --

19           MR. TORCHINSKY: Right.

20           THE COURT: -- should be applied to the  
21 congressional districts.

22           MR. TORCHINSKY: Now that's not present -- no. No.  
23 The Wisconsin case was about their state assembly districts,  
24 not their congressional districts.

25           THE COURT: No, I'm talking about that's what the



1 state of Wisconsin is arguing in the U.S. Supreme Court  
2 should be the standard that should be applied to determine  
3 whether districts are gerrymandered impermissibly.

4 MR. TORCHINSKY: No. I think what Wisconsin was  
5 saying is the fact that their state assembly districts met  
6 with the -- the traditional districting criteria that are in  
7 fact in their state constitution for their state assembly  
8 districts should provide them -- should provide them a  
9 defense.

10 In this case here, there are -- for the state  
11 legislative districts, there are in fact criteria in the  
12 state constitution for what applies to the state legislature,  
13 but there's nothing in the state constitution that applies  
14 those criteria to congressional districts.

15 THE COURT: No, but my --

16 MR. TORCHINSKY: And --

17 THE COURT: My point is, is that there are  
18 justiciable standards.

19 MR. TORCHINSKY: Maybe.

20 THE COURT: In other words, the Pennsylvania  
21 Constitution doesn't provide a judicial standard even if you  
22 apply it to the congressional districts.

23 MR. TORCHINSKY: I mean, look -- I mean,  
24 compactness and contiguity are -- are standards that -- that  
25 are justiciable and -- and have been recognized by courts. I

1 mean, we're not -- we're not standing here telling you that  
2 compactness and contiguity are not justiciable, but unless  
3 there was a statute or a constitutional requirement that  
4 compactness and contiguity apply here in the way that the  
5 plaintiffs are seeking it --

6 THE COURT: No, that's --

7 MR. TORCHINSKY: -- that's a different case.

8 THE COURT: That's not my point. My point is -- is  
9 if the Supreme Court wanted to come up with a standard under  
10 federal law, they could apply that standard. They're not  
11 limited to what you call the statistical gobbledygook.

12 MR. TORCHINSKY: I think that was Justice  
13 Roberts -- Chief Justice -- the Chief Justice's words. But,  
14 no, you're right. I mean -- and that's why we're saying --

15 THE COURT: So there could be a standard for a  
16 judicial -- a justiciable standard for reapportionment -- for  
17 impermissible gerrymandering.

18 MR. TORCHINSKY: That's right. If compactness and  
19 contiguity --

20 THE COURT: Our Supreme Court applies it all the  
21 time.

22 MR. TORCHINSKY: I mean, if -- if compactness and  
23 contiguity and keeping municipalities and counties whole is  
24 the standard in Pennsylvania, that would be a change in the  
25 law from where we are now, but that's a standard that is

1 administrable.

2 THE COURT: I think you should look at the William  
3 Penn case that just came down on justiciability on the  
4 Education Clause. Supreme Court has made -- our Supreme  
5 Court last week made a major change in justiciability.

6 MR. TORCHINSKY: I will review that decision, Your  
7 Honor.

8 THE COURT: It's about a hundred pages, so I'll  
9 give you some time.

10 MR. TORCHINSKY: Thanks.

11 THE COURT: Okay. Do you have anything else you  
12 wanted to add?

13 MR. TORCHINSKY: No. I think that's it for now,  
14 Your Honor. May I have some rebuttal time?

15 THE COURT: Sure.

16 MR. TORCHINSKY: Thank you.

17 MR. GERSCH: Good morning. David Gersch for the  
18 petitioners from the firm of Arnold & Porter Kaye Scholer.

19 No stay should issue in this case. We filed a well  
20 pled petition. We've invoked the jurisdiction --

21 THE COURT: Well, you filed a -- it may have been  
22 well pled in federal court. It wasn't -- I don't know if it  
23 was well pled in state court. There's a preliminary  
24 objection outstanding that we're a fact pleading state, not a  
25 notice pleading state.

1 MR. GERSCH: We understand, Your Honor.

2 THE COURT: I'm a follower of Justice -- Judge  
3 Aldisert. So you -- you probably don't know, but he was the  
4 judicial guru about fact pleading is important and notice  
5 pleading is a story.

6 MR. GERSCH: Certainly. And we think we've pled  
7 the relevant facts. My point, Your Honor, is we --

8 THE COURT: I'm sorry to interrupt you on something  
9 that was a tangent.

10 MR. GERSCH: It's quite all right.

11 THE COURT: It was something that always bothers me  
12 about the way people plead in the court. Okay.

13 MR. GERSCH: Understood, Your Honor.

14 My real point is we've invoked the Court's  
15 jurisdiction on a theory that as Your Honor currently  
16 recognizes, the Pennsylvania Supreme Court says we're  
17 entitled to go forth on Article I, Section X of the U -- of  
18 the Pennsylvania Constitution says --

19 THE COURT: Well, what about their argument that's  
20 dependent upon the -- the United States Supreme Court's  
21 decision in the 1991 reapportionment case and if they find in  
22 Gill that it's not justiciable, they predict that our Supreme  
23 Court is going to find that it's not justiciable under  
24 federal law?

25 MR. GERSCH: That is their argument, and they're

1 wrong. This is not a question of what we predict the  
2 Pennsylvania Supreme Court is going to do. There's law; the  
3 Pennsylvania Supreme Court has ruled. They ruled in the 1991  
4 legislative apportionment case. They've ruled in Erfer.  
5 That's the law in Pennsylvania. The way you change the law  
6 is you go back up to the Supreme Court and you tell the  
7 Supreme Court, There have been new developments, Supreme  
8 Court; please change the law. That's how it works. This is  
9 Constitutional Law 101.

10           The reason that Gill can never, ever moot this case  
11 is that the U.S. Supreme Court has no power to rule on  
12 Pennsylvania law. It's that simple.

13           THE COURT: Well, that gets to --

14           MR. GERSCH: It's that simple.

15           THE COURT: Well, that gets to the point is --  
16 Bandemer. The Supreme Court applied the test in Bandemer  
17 which is -- which they described in Erfer as onerous. And  
18 we're an intermediate court. Your argument is essentially  
19 I've got to follow -- our court has to follow Bandemer.

20           MR. GERSCH: Our -- our position is that Erfer  
21 controls. There is language in Erfer which actually says at  
22 this juncture, counsel hasn't called to our attention a  
23 reason to read the Equal Protection Clause differently.  
24 That's in Erfer. But Erfer -- Erfer is the law. Erfer is  
25 the law.

1 THE COURT: Yeah. And -- and if it goes to our --  
2 our court en banc and what -- and before -- and let's say  
3 Whitford hasn't come down, what do they apply?

4 MR. GERSCH: Well, there are two answers. One, on  
5 the Equal Protection arguments, Erfer is the law unless I can  
6 make an argument under that language in Erfer that says, Show  
7 us something different. But that -- but Erfer -- Erfer is  
8 what's controlling on the Equal Protection claim.

9 But we also have in our first count -- that's our  
10 second count, the Equal Protection claim. Our first count is  
11 a Freedom of Expression, Freedom of Association claim. On  
12 that, the law in Pennsylvania is quite clearly different and  
13 more protected.

14 THE COURT: How is it different?

15 MR. GERSCH: Well, the key case is Pap's. Pap's is  
16 a case that went -- that was the topless dancing case. And  
17 I'm sure Your Honor will recall where the case went from the  
18 Pennsylvania Supreme Court to the U.S. Supreme Court. The  
19 U.S. Supreme Court said nude dancing isn't protected  
20 expression. It went back. It was remanded to -- the  
21 Pennsylvania Supreme Court said, yes, not under the U.S.  
22 Constitution, but our constitutional protections for Freedom  
23 of Expression are broader. And under our constitution, Pap's  
24 is protected; they're engaging in protected conduct.

25 So the one thing we know when we go to the Supreme

1 Court -- and let me just digress there and say I think Your  
2 Honor had right it on the ball. Our job is to tee this case  
3 up for the Pennsylvania Supreme Court. The Pennsylvania  
4 Supreme Court are the only people that are going to decide  
5 this in the long run, and --

6 THE COURT: So why didn't you file King's Bench?

7 MR. GERSCH: Well, that's an interesting question,  
8 Your Honor. I've been told by everyone that it's an arcane  
9 procedure and who knows what will happen.

10 THE COURT: That's what happened in Erfer.

11 MR. GERSCH: Well, first they -- no, first they  
12 filed here.

13 THE COURT: Yeah. And we scheduled the hearing a  
14 couple of weeks before the primary, like March 8th as I  
15 recall from the opinion, which petitions have to be filed for  
16 the districts in the middle of February. And so the Supreme  
17 Court said, That's not fast enough. They took King's Bench,  
18 and then I was appointed the master.

19 MR. GERSCH: Well, we'll -- we'll take that as your  
20 suggestion if --

21 THE COURT: Well --

22 MR. GERSCH: Maybe -- maybe that will happen. But  
23 we're not there.

24 THE COURT: It's not a suggestion. I'm saying it's  
25 going to the Supreme Court. That was the procedure that was

1 followed in Erfer. If you want to stay here, we'd be  
2 perfectly happy to hear you.

3 MR. GERSCH: Thank you, Your Honor.

4 No, my only point was that in Erfer, they -- they  
5 first went to the Commonwealth Court, and they tried to get a  
6 fast hearing in Commonwealth Court. And that's what we're  
7 trying to do here. And -- but -- but the bottom line is the  
8 same, the bottom line whether Your Honor were to sit as  
9 master or whether Your Honor or some other -- other judge  
10 would try the case for the -- for the Commonwealth Court en  
11 banc, however it's going to work. What we're doing, what the  
12 parties and the Court are doing are setting the stage for the  
13 Pennsylvania Supreme Court to make a decision. And right now  
14 Pennsylvania law is that this case can go ahead.

15 And in addition to the Equal Protection theory, we  
16 have the Freedom of Expression theory which Erfer said they  
17 weren't reaching. Erfer said they were not going to reach  
18 that claim. So that -- that issue has never been decided,  
19 and that issue is not going to turn on what the U.S. Supreme  
20 Court said.

21 I want to come back to why they can't moot. They  
22 can't moot this case because the U.S. Supreme Court does not  
23 have judicial power to speak to Pennsylvania law. And if  
24 they want to bring these theories of non-justiciability --  
25 and also they have a stand- -- it's not just justiciability.



1 They have a standing argument where they say that one -- one  
2 voter can't challenge the whole map. I don't know why they  
3 make that argument because we have voters in each  
4 jurisdiction. But they make that argument. Erfer rejected  
5 it. If they want that argument, they've got to go back to  
6 the Pennsylvania Supreme Court. This Court -- this Court  
7 isn't going to overrule Erfer. That's not the function of  
8 the Commonwealth Court.

9 THE COURT: That -- I think I can say that.

10 MR. GERSCH: Then we're -- then we're together on  
11 that, Your Honor.

12 THE COURT: And that's why I'm having the problem.  
13 I'm -- he's arguing that the Supreme Court -- I don't know --  
14 he's arguing -- respondents are arguing that the Supreme  
15 Court may decide the issue is not justiciable so then we  
16 should decide it's not justiciable.

17 And you're -- you're -- you're essentially saying  
18 -- and I -- and I agree; I don't think we can change that  
19 justiciability decision here. But I also find out that if --  
20 if our Supreme Court adopted Bandemer, I don't know how we --  
21 this Court changes their analysis in Bandemer. That's up to  
22 the -- our Supreme Court. And I think you just said you  
23 agree.

24 MR. GERSCH: I agree on the Equal Protection  
25 claim --

1 THE COURT: You don't --

2 MR. GERSCH: -- that was decided by Bandemer. The  
3 Freedom of Expression issue was never reached by Erfer. It  
4 was never reached in Erfer, so --

5 THE COURT: Now the other issue that you raised in  
6 your pleading is that we have to move fast because we -- the  
7 nineteen -- the 2018 elections are coming. Well, if we move  
8 -- if we moved as fast as we can, I don't think we can get  
9 this case decided by March 1.

10 Let's say we tee it up and you get a decision out  
11 of this Court the fastest with all of the brief -- it will  
12 take everybody with all the papers -- and we don't have any  
13 discovery filed in this case; this won't be heard by this  
14 Court -- earliest December, maybe not until February. Then  
15 let's say you win. Government parties appeal. They get an  
16 automatic supersedeas. We're up to the Supreme Court. We're  
17 past the filing date.

18 I don't see -- if we moved as fast as possible --  
19 the decision in Whitford came down by the three-judge panel a  
20 year ago, and that's an automatic appeal up to the Supremes.  
21 It took them a year to hear it. If we do this in six months,  
22 everything, all the Pennsylvania state proceedings, we  
23 don't -- we don't make it.

24 I mean, do we have to stop -- you know, one of the  
25 ways you look at things, do we have to stop and -- we're

1 saying we're not going to hear it until 2018 -- and I don't  
2 know if this Court can even do that; I'm sure the -- I don't  
3 even know if our Supreme Court can do it -- the 2018  
4 congressional elections. See, I don't -- I mean, the idea of  
5 speed is -- I don't know how we can affect the 2018  
6 elections. Tell me how.

7 MR. GERSCH: Well, Your Honor, let me answer I  
8 guess on several levels. I may be hearing an argument that  
9 maybe we should be filing King Bench -- King's Bench. But --  
10 but let's -- let's -- I guess on the -- I would answer first  
11 on the theoretical and then on a practical level.

12 On the theoretical level, I would say we should  
13 keep going and try and get this case done for 2018 until and  
14 unless it turns out we can't. But we shouldn't abandon the  
15 -- the hope at the beginning.

16 THE COURT: The present status of the case you can  
17 hope, but I can tell you it isn't going to happen. I mean,  
18 if we -- we move cases pretty fast, and the fastest we can do  
19 something like this is probably three months by the time you  
20 -- you do your briefs. And the biggest part is you do your  
21 briefs. And then we review the briefs. And then the opinion  
22 has to be circulated, and assuming there's no dissents,  
23 that's about three months. And then it goes up to the  
24 Supreme Court. And let's say they do it in three months. I  
25 don't see how we do it.

1 MR. GERSCH: Well, Erfer was done from beginning to  
2 end in two months, and they didn't have the advantage of a  
3 case that was filed in June the year before.

4 THE COURT: Why? Why was it done in two months?

5 MR. GERSCH: It was done in two. I don't know why.

6 THE COURT: Because they -- the Supreme Court  
7 accepted King's Bench --

8 MR. GERSCH: Okay. That was the -- that was behind  
9 my first answer.

10 THE COURT: Yeah.

11 MR. GERSCH: But I think on a theoretical level,  
12 what we ought to be doing is trying to get it done. On a  
13 practical level, we think that the -- we're willing to strip  
14 our case down a little bit. But what we need is a ruling on  
15 the privilege issues. We have a request for a 407 --  
16 4007.1(e) deposition of the General Assembly. They've raised  
17 privilege arguments. We'll be filing our brief next week.  
18 We think that that -- that ought to resolve the key issues in  
19 the case.

20 I don't -- I don't think there's a tremendous  
21 amount of discovery. I looked at the discovery schedule in  
22 the North Carolina case, the case the League of Women Voters  
23 brought there. Their entire discovery plan -- the Court  
24 clearly told them to come up with a plan together because  
25 they submitted a joint plan. And the plan was 40 depositions

1 per side, two and a half months, and we'll be ready to go to  
2 trial.

3 THE COURT: Let me -- let me --

4 MR. GERSCH: We don't need 40 depositions.

5 THE COURT: Let me tell you, I think one of the --  
6 I think the privilege of the General Assembly is an important  
7 issue.

8 MR. GERSCH: Yes, it is.

9 THE COURT: I may ship that over to the court en  
10 banc. That's an important issue as is as to whether -- how  
11 far does that extend out. Now you allege in your pleadings  
12 that it was the Republican National Committee, the red states  
13 group that did it, red flag group, something red.

14 MR. GERSCH: RED- -- REDMAP.

15 THE COURT: REDMAP did it, that did it. And the --  
16 the issue is, how far out does this extend? Does it extend  
17 to, like, ALEC, you know, like, ALEC who came in and -- I  
18 mean, they essentially drafted some bills that went to the  
19 General Assembly. And the General Assembly admitted it, and  
20 so it wasn't -- it wasn't an issue in dispute. How far out  
21 does that privilege extend? And I think that's an important  
22 issue. And I --

23 MR. GERSCH: It is.

24 THE COURT: -- probably would send that to a court  
25 en banc and not treat it as a -- as a pure discovery issue

1 because the preliminary research I've done on it, it's  
2 generally you want to depose an individual legislator and we  
3 say no.

4 MR. GERSCH: Well, actually Your Honor is touching  
5 on another great issue --

6 THE COURT: Or how they vote.

7 MR. GERSCH: Your Honor is touching on a great  
8 issue which is -- and this is why we -- we served the  
9 deposition notice -- a lot of how that ruling might turn out  
10 might depend on who actually did the drawing of the map. I  
11 don't know that we need to speak to any legislator. I would  
12 suspect we don't.

13 The most important thing for us to find out is how  
14 did they draw the map. It's not -- we're not interested in  
15 the discussions in the smoke-filled rooms. We're not  
16 interested -- when I say not interested, I think if we had  
17 more time, I would seek all of that. And we could argue  
18 about it forever. As you -- as you said, the litigation  
19 could go on forever. If we want to get this case done by  
20 2018 or for the 2018 elections, I've got to strip it down to  
21 its essentials.

22 THE COURT: You're going to have to strip it down  
23 that you want no discovery and -- I mean, essentially if we  
24 had -- we have -- if we had a motion for summary relief -- do  
25 you know what -- you're looking at me.

1 MR. GERSCH: It's probably not what I filed.

2 THE COURT: A motion for summary relief is under  
3 1513 of the appellate rules, and it kind of gets rid of all  
4 the other little steps. And it can be filed anytime after  
5 the initial pleading. And what it does, it -- if there's  
6 purely legal issues, it allows us to review those immediately  
7 by either a panel or a court en banc. And generally most of  
8 our original jurisdiction cases that are important are  
9 decided that way. We don't have a trial, although we could  
10 have a trial, because the parties can stipulate enough facts  
11 that we can get to the important issues. So that would be  
12 some way to get that up there, up to the court en banc.

13 But I don't see -- I don't see how. I mean,  
14 everybody says we're going to do this for 2018. We've been  
15 here since 2012. We've been sitting here, and nobody said  
16 this -- you know, this case had to be decided for the -- I  
17 guess this was done in 2011 for the 2012.

18 MR. GERSCH: That's correct, 2011.

19 THE COURT: And nobody said -- came here and --  
20 there was nothing filed, nothing. There was one for the 2000  
21 but nothing filed challenging the 2010 reapportionment. And  
22 now it's -- we're almost ready for the 2020 reapportionment.

23 MR. GERSCH: Well, Your Honor, all I can say is we  
24 filed our case at a time that was I think well over a year  
25 before the 2018 elections. We filed it in -- I think there

1 were about seven months. That's about the same time as  
2 Bethune-Hill versus Virginia Board of Elections which the  
3 Supreme Court decided this past term, the U.S. Supreme Court.  
4 That case went to trial, all the way from complaint to trial,  
5 not -- not expedited, seven months.

6 THE COURT: Was that in the Rocket District?

7 MR. GERSCH: Yes, it was.

8 THE COURT: Okay. Fifty-five days to trial.

9 MR. GERSCH: But it -- but it can be done. It can  
10 be done with all due process.

11 THE COURT: It -- it can be done, but -- but from  
12 what you just said, we're stuck with Bandemer.

13 MR. GERSCH: Only on the Equal Protection claim,  
14 Your Honor.

15 THE COURT: Okay. In other words, you're going  
16 to --

17 MR. GERSCH: Only on the Equal Protection claim.

18 THE COURT: -- abandon the Bandemer claim, the --  
19 the Equal Protection claim.

20 MR. GERSCH: We're not abandoning it.

21 THE COURT: Okay.

22 MR. GERSCH: We have both. We have both, Your  
23 Honor.

24 So to conclude, there ought not be any stay.  
25 There's no way that Gill or any decision by the U.S. Supreme



1 Court can moot this case. We ought to be moving this case as  
2 swiftly as possible.

3 Your Honor, I might add, we have pending a motion  
4 for a scheduling conference. Whether Your Honor disagrees  
5 with us on expedition or not, we'd like to have that  
6 scheduling conference as promptly as possible. If possible,  
7 we'd have it -- we're prepared to have it today. But we'd  
8 like to have it as promptly as possible.

9 THE COURT: Okay. Do you have any rebuttal?

10 MR. TORCHINSKY: Yes, Your Honor.

11 I'll be brief. I think the Court highlighted well  
12 the significant legislative privilege issues that are going  
13 to be before this Court as a legal matter. I also want to  
14 point out and -- and as the Court noted, the -- the  
15 Pennsylvania Supreme Court in Erfer noted that the -- the  
16 standards here to prevail on -- under the Bandemer test --  
17 let's call it that for a moment -- are -- are particularly  
18 onerous. And there are case-dispositive preliminary  
19 objections pending as well.

20 And, again, how those are decided may well be  
21 impacted by -- by Gill versus Whitford. And that's why we  
22 think that this Court should get this case right and not rush  
23 which is basically what the Pennsylvania Supreme Court did in  
24 the Holt case in 2012. It actually allowed -- it actually  
25 allowed elections to go forward in malapportioned districts

1 because there hadn't been --

2 THE COURT: Legislative districts?

3 MR. TORCHINSKY: It was legislative districts. It  
4 allowed, you know, elections to go forward in -- in  
5 malapportioned legislative districts and essentially using  
6 the twenty -- you know, using the -- even though we had new  
7 census numbers, the districts were clearly malapportioned.  
8 The state let it go anyway because the Court said we just  
9 don't have enough time and we'd rather get this right than  
10 rush it.

11 And what I'm hearing from the petitioners is we  
12 need to rush it. And what I'm hearing from the Pennsylvania  
13 Supreme Court is in these election cases and particularly  
14 when these kinds of rights are at issue, we need to get it  
15 right. And that's why the Court should grant our application  
16 for a stay.

17 THE COURT: They didn't do that in Erfer.

18 MR. TORCHINSKY: They didn't, but they did ten  
19 years later in Holt.

20 THE COURT: What I'm saying is they were  
21 inconsistent.

22 MR. TORCHINSKY: Welcome to redistricting law.

23 THE COURT: Okay. You know the problem with  
24 redistricting law? Nobody really gets good at it because  
25 they only do it once every ten years.

1 MR. TORCHINSKY: All right. Thank you, Your Honor.  
2 Nothing further.

3 THE COURT: Thank you.

4 MR. LEVINE: Your Honor, there are other parties.

5 THE COURT: Oh. You're -- I didn't know that you  
6 were another party. Who do you represent?

7 MR. LEVINE: The Lieutenant Governor.

8 THE COURT: The Lieutenant Governor.

9 MR. LEVINE: Yes.

10 THE COURT: Okay. You want out. But I haven't  
11 scheduled that for today. Is that about right?

12 MR. LEVINE: Well, may it please the Court,  
13 Clifford Levine on behalf of the Lieutenant Governor. And,  
14 no, we do not want out. And we feel very strongly that the  
15 Court should consider what is an obviously grotesque  
16 reapportionment map and should consider the implications.

17 And -- and I'm not going to go through the previous  
18 arguments. You certainly heard those, and they were well  
19 made. But the couple of points that we would like to make is  
20 we need to tee this up. If the -- if the -- if the  
21 legislative leaders from the Republican side were coming here  
22 and saying, listen, we acknowledge that the map was done for  
23 gerrymandering purposes, that it has the effect of year after  
24 year creating a basically 13 to 5 sort of disparity despite  
25 the state being pretty much a purple state, then we would

1 have a clear factual purpose. But if they intend to come  
2 back and say no, that there are other justifications:  
3 compactness, population, then those are factual matters which  
4 is appropriate to look at and would appropriately --  
5 regardless of whether or not there would be a privilege, if  
6 they want to come in and assert as a defense that this is not  
7 done just for pure gerrymandering reasons, then they're  
8 putting that at issue and we would have the right to  
9 participate.

10 THE COURT: Maybe I should have asked the other  
11 party, but if -- if we have a standard of compact,  
12 contiguous, and violates as few lines as possible and we say  
13 there's a dot in the middle of Centre County and the computer  
14 is going to -- to draw the lines, you know, the program is --  
15 you can't -- as few county lines as possible, but it's as  
16 compact and contiguous as you can do -- and my understanding  
17 is with computers, you can make -- the compactness is the  
18 most important part -- but -- and it's untouched by human  
19 hands; in other words, the computer did it, no -- no intent  
20 to discriminate, and there's 18 Republican legislators and  
21 the efficiency standard goes way out of whack for  
22 Congressmen, what happens?

23 MR. LEVINE: Well, then it could have -- well, so  
24 if there was no intent, if it just sort of happened to fall  
25 from the heavens and you had a grossly distorted map and the

1 effect was --

2 THE COURT: No, it wasn't a gross- -- it was a  
3 perfect map.

4 MR. LEVINE: Oh, a perfect map. Well, if it's a  
5 perfect map, they could be justified; here was our process --

6 THE COURT: Untouched by -- untouched by  
7 Republicans or Democrats.

8 MR. LEVINE: Here was our process. But you  
9 ultimately still have to have -- even under Pennsylvania law,  
10 there's still -- you know, we have situations where we look  
11 at maps, and we try to make a determination of something that  
12 even can look irrational. We have that in -- in spot zoning  
13 context under the state constitution all the time.

14 THE COURT: No, that part I understand. But what  
15 I'm saying -- what I'm asking is, I am positing a map where  
16 there's -- everybody admits there's no discrimination. A  
17 computer draws it. And it just so happens that more  
18 Republicans -- the same percentage of Republicans win now and  
19 the efficiency standard -- the efficiency gap is worse than  
20 in Wisconsin. And the Supreme Court comes down and says if  
21 you have an efficiency gap worse than Wisconsin, you lose.  
22 Would a state be required then to gerrymander districts to  
23 comply with the efficiency gap?

24 MR. LEVINE: I don't know -- not necessarily, I  
25 mean, as to each case. And we deal with this in the state

1 legislative commission situation --

2 THE COURT: I'm just -- it's just --

3 MR. LEVINE: Well, you have -- for instance,  
4 Philadelphia is heavily Democratic. So if you create  
5 districts, that tends to be skewed Democratic. So as long as  
6 you're trying to keep intact municipal boundaries, et cetera.  
7 But if the purpose and sole purpose which --

8 THE COURT: I took that out.

9 MR. LEVINE: Yeah. But -- well -- so that -- but  
10 the issue is -- I think -- look --

11 THE COURT: No, the point is, does efficiency gap  
12 standard mean that you have to -- that no matter how you --  
13 if you draw the map with -- untouched by human hands, that  
14 you have to have a proportional -- you have -- the efficiency  
15 gap would -- would then mean that you have to draw the map to  
16 come into compliance with the outcome of the efficiency gap.

17 MR. LEVINE: Well, I mean, somebody is designing  
18 the program in the first place. So I think you would have  
19 the right -- all we're saying is you would have the right to  
20 explore what happened. And they're not coming in here and  
21 saying this is -- they're not resting their whole case on a  
22 non-justiciability argument. They are saying here's what it  
23 is.

24 Now if you talk about the teeing it up, if we're  
25 going to have en banc decisions and if we're going to go to

1 the full Court -- and we certainly respect the Court's  
2 prerogative to design that -- then we're -- now we really  
3 need to start pressing this now because if we wait until end  
4 of June for the Supreme Court to issue a ruling, then we --  
5 then we start the process and we go to other hearings.

6 THE COURT: See, everybody is concerned that the  
7 Supreme Court will wait till June. I think your -- every --  
8 my concern is the Supreme Court will file November 1st.

9 MR. LEVINE: Well, we don't know --

10 THE COURT: I mean --

11 MR. LEVINE: -- and basically --

12 THE COURT: I mean, because then there may be a way  
13 to get to the March standard because we have a clear standard  
14 -- and I'm -- well, first of all, I don't think we'll decide  
15 it. It will be down in federal court and they'll file there.

16 MR. LEVINE: Well, and based on precedent, I think  
17 it's fair to conclude we may end up with a 4 to 1 to 4  
18 decision. So there are a lot of -- a lot of things that can  
19 happen, but there are the state claims. And all we're asking  
20 is, let's start the process. There are issues. It's not  
21 that complicated. I was involved personally in the -- the  
22 redistricting. There's a computer program. They're looking  
23 at performance, what are the standards for performance. So  
24 these are easy, one day type of depositions that we could  
25 have a better understanding of what took place. And so we

1 can move that along and -- and proceed. And then once we  
2 have that, we can address the state claims.

3 THE COURT: It will take people to read the briefs  
4 more than a day.

5 MR. LEVINE: Well, I appreciate that, but --

6 THE COURT: I've never seen so much paper filed in  
7 a -- we had -- before I came in, there were two -- two more  
8 pleadings in the queue for me to look at which I haven't had  
9 a chance to get to.

10 Okay. Thank you.

11 MR. LEVINE: So thank you, Your Honor.

12 THE COURT: Okay. Can I see counsel in three  
13 minutes in the conference room?

14 THE COURT CRIER: Court is now in recess.

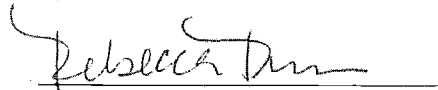
15 (Whereupon, a RECESS was taken at 10:46 a.m.)

16 (Whereupon, the proceedings concluded.)  
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6 DATED: October 10, 2017

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**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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

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**PETITIONERS' BRIEF IN OPPOSITION  
TO APPLICATION TO STAY CASE PENDING THE U.S. SUPREME  
COURT'S RULING IN *GILL V. WHITFORD***

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
INTRODUCTION .....	1
COUNTERSTATEMENT OF RELEVANT FACTUAL AND PROCEDURAL HISTORY .....	4
I. The Petition .....	4
II. <i>Gill</i> .....	7
COUNTERSTATEMENT OF THE SCOPE AND STANDARD OF REVIEW .....	8
REASONS FOR DENYING A STAY .....	9
I. No Basis Exists to Stay Petitioners’ State Law Claims Pending a Federal Court’s Decision on Exclusively Federal Claims .....	9
A. <i>Gill</i> Will Not Moot This Case .....	9
B. This Case and <i>Gill</i> Involve Different Claims and Governing Law .....	11
II. Petitioners Will Present Facts and Evidence That <i>Gill</i> Will Not Address .....	16
A. The 2011 Plan Flunks the Test Proposed by the <i>Gill</i> Defendants.....	16
B. Petitioners Rely on Statistical Measures Other Than the Efficiency Gap.....	18
C. Petitioners Will Establish Effects of Gerrymandering Not Presented in <i>Gill</i> Regarding Lack of Representation .....	21
III. The Balance of Equities Weighs Overwhelmingly Against a Stay .....	22
A. <i>Gill</i> Will Have No Effect on the Need for Discovery in This Case .....	22
B. A Stay Would Substantially Prejudice Petitioners .....	24
IV. Other Gerrymandering Cases Are Different From This Case .....	27
CONCLUSION .....	28

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>In re 1991 Reapportionment</i> , 609 A.2d 132 (Pa. 1992).....	9
<i>Commonwealth v. Smith</i> , 615 A.2d 321 (Pa. 1992).....	14
<i>Davis v. Bandemer</i> , 478 U.S. 109 (1986).....	10, 11
<i>Dellinger v. Mitchell</i> , 442 F.2d 782 (D.C. Cir. 1971).....	25
<i>DePaul v. Commonwealth</i> , 969 A.2d 536 (Pa. 2009).....	12
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976).....	24
<i>Erfer v. Com.</i> , 794 A.2d 325 (Pa. 2002).....	<i>passim</i>
<i>Gill v. Whitford</i> , No. 16-1161, 137 S. Ct. 2268 (2017) .....	<i>passim</i>
<i>Israelit v. Montgomery Cty.</i> , 703 A.2d 722 (Pa. Commw. Ct. 1997) .....	1, 3, 8, 13
<i>Latta v. Otter</i> , 771 F.3d 496 (9th Cir. 2014) .....	24
<i>League of Women Voters of N.C. v. North Carolina</i> , 769 F.3d 224 (4th Cir. 2014) .....	24
<i>LULAC v. Perry</i> , 548 U.S. 399 (2006).....	11

<i>Pap's A.M v. City of Erie,</i> 812 A.2d 591 (Pa. 2002).....	<i>passim</i>
<i>Vieth v. Jubelirer,</i> 541 U.S. 267 (2004).....	10, 11
<i>Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,</i> 429 U.S. 252 (1977).....	22
<i>Whitford v. Gill,</i> 218 F. Supp. 3d 837 (W.D. Wis. 2016).....	7
<b>Statutes</b>	
25 Pa. Stat. § 2753 .....	25
25 Pa. Stat. § 2868 .....	26
25 Pa. Stat. § 2873(d).....	26
<b>Other Authorities</b>	
Jowei Chen & Jonathan Rodden, <i>Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislature</i> , 8 Quarterly J. Pol. Sci. 239 (2013).....	27
Jowei Chen, <i>The Impact of Political Geography on Wisconsin Redistricting</i> , 16 Election L.J. (forthcoming 2017).....	19
Maria Chikinaa, Alan Friezeb & Wesley Pegden, <i>Assessing significance in a Markov chain without mixing</i> , 114 Proc. of Nat'l Acad. of Sci. 2860 (2017).....	20
Michael D. McDonald & Robin E. Best, <i>Unfair Partisan Gerrymanders in Politics and Law: A Diagnostic Applied to Six Cases</i> , 14 Elec. L.J. 312, 312 (2015).....	27
Nicholas O. Stephanopoulos & Eric M. McGhee, <i>Partisan Gerrymandering and the Efficiency Gap</i> , U. Chi. Law. Rev. 831 (2015).....	27

## INTRODUCTION

This suit alleges that the Republican legislature and then-Governor manipulated Pennsylvania’s congressional districts to rig elections and deprive Petitioners of their fundamental constitutional rights. Faced with these grave constitutional claims, the General Assembly<sup>1</sup> asks this court to do nothing except delay. The General Assembly’s stay application is meritless. It is nothing more than a brazen effort to deny Petitioners their day in court and insulate the challenged districting plan (the “2011 Plan”) from judicial review. The test for a stay is whether a different case “might resolve or render moot” the instant matter. *Israelit v. Montgomery Cty.*, 703 A.2d 722, 724 n.3 (Pa. Commw. Ct. 1997). Given the legal, factual, and evidentiary differences between this case and *Gill v. Whitford*, No. 16-1161 (S. Ct.), there is no possibility that *Gill* will “resolve or render moot” this case.

The General Assembly’s first argument—that this case will be “mooted” if the U.S. Supreme Court in *Gill* holds that partisan gerrymanders are non-justiciable (Stay Br. at 12-13)—fails as a matter of law. *Gill* involves a challenge to partisan gerrymandering under the United States Constitution, while this lawsuit asserts claims exclusively under the Pennsylvania Constitution. The Pennsylvania Supreme Court has twice ruled that state constitutional challenges to partisan

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<sup>1</sup> The stay application was filed by the General Assembly, Speaker of the Pennsylvania House of Representatives Michael C. Turzai, and Pennsylvania Senate President Pro Tempore Joseph B. Scarnati III. This brief refers to these Respondents collectively as the “General Assembly.”

gerrymanders are justiciable as a matter of Pennsylvania law. Because that holding binds this Court regardless of what *Gill* holds, resolution of the justiciability question in *Gill* cannot “resolve or render moot” this case.

The General Assembly’s fallback argument—that *Gill* supposedly is “nearly identical” to this case and therefore may offer relevant guidance on the merits (Stay Br. at 1)—is also wrong. For one, there is plenty of work to do in this case before reaching the merits, including discovery to be taken and privilege questions to be resolved. As to the merits, this case is not *Gill*. Petitioners offer *different* legal claims, *different* theories, and *different* evidentiary support. Petitioners assert claims under Pennsylvania’s free speech provisions, which the Pennsylvania Supreme Court has held provide broader protections than the federal First Amendment rights at issue in *Gill*. Petitioners also assert an additional free speech theory—for unconstitutional retaliation—that is not presented at all in *Gill*.

Moreover, while the *Gill* defendants argue that there can be no constitutional violations because the districts in Wisconsin’s legislative map are allegedly compact, Pennsylvania’s congressional districts are anything but compact and thus would fail even the test proposed by the *Gill* defendants. (For this reason, the General Assembly’s lengthy preliminary objections raise no such defense.) Petitioners’ claims are also supported by multiple statistical measures and modeling techniques not presented in *Gill*. Thus, even if the U.S. Supreme Court



says something of interest in *Gill*, the standard for a stay is not whether the pending case might merely “impact” this matter (Stay Br. at 13); it is whether the pending case “might resolve or render moot” the instant matter. *Israelit*, 703 A.2d at 724 n.3. *Gill* will not.

The General Assembly’s balance-of-equities analysis is even more strained. Because this case will go forward no matter what *Gill* holds, and because no party in *Gill* disputes that the legislature’s intent is relevant in assessing a partisan gerrymandering claim, all of the privilege and other discovery issues that the General Assembly raises will need to be litigated sooner or later. A stay will not relieve the General Assembly of the burdens of the discovery, to the extent those are legitimate “burdens” at all when asserted to thwart the constitutional rights of millions of Pennsylvania voters.

Petitioners, in contrast, will suffer substantial prejudice from a stay. A stay could last as long as eleven months, until the U.S. Supreme Court’s term ends in late June 2018. As the General Assembly well knows, and as the Secretary of the Commonwealth and Commissioner of Elections note in their opposition to a stay, such delay would eliminate any possibility of resolving this case in time for the 2018 elections, and could make it difficult to resolve this case in time for even the 2020 elections. The Pennsylvania Supreme Court has made clear that “the fundamental rights guaranteed by the Pennsylvania Declaration of Rights ‘cannot

lawfully be infringed, even momentarily.”” *Pap’s A.M v. City of Erie*, 812 A.2d 591, 607 (Pa. 2002) (quoting *Spayd v. Ringing Rock Lodge*, 270 Pa. 67, 113 A. 70, 72 (1921)). But a stay would do just that, causing further deprivation of Petitioners’ constitutional rights.

Petitioners, and the citizens of the Commonwealth at large, have an overwhelming interest in resolving this case as expeditiously as possible. No legitimate reason exists to hold this case in abeyance for potentially eleven months while the U.S. Supreme Court considers a case that involves different law, different theories, different facts, different evidence, and a different state’s districting plan.

## **COUNTERSTATEMENT OF RELEVANT FACTUAL AND PROCEDURAL HISTORY**

### **I. The Petition**

The Petition challenges the 2011 Plan as an unconstitutional partisan gerrymander. The consequence of this gerrymander is that congressional elections in Pennsylvania are rigged; they are determined not by the voters, but by partisan actors sitting behind a computer.

The General Assembly’s 2011 congressional map is one of the most extreme gerrymanders in the nation. Using sophisticated computer modeling to draw bizarre and indefensible district lines, the General Assembly “packed” Democratic voters into 5 districts that are overwhelmingly Democratic, and “cracked” the

remaining Democratic voters by spreading them across the other 13 districts, such that Republicans constitute a majority of voters in each of these 13 districts. *See* Pet. ¶¶ 54-64. The result has been a 13-5 Republican advantage in congressional elections regardless of how Pennsylvania voters cast their ballots. *See id.* ¶¶ 77-82. In 2012, Republican congressional candidates won only 49% of the statewide vote but still won 13 of the Commonwealth's 18 congressional seats. *Id.* ¶ 79. In 2014 and 2016, Republicans won 55% and 54% of the statewide vote and still won the exact same 13 seats. *See id.* ¶¶ 80-81. In short, the results are utterly non-responsive to the will of the voters.

The evidence of impermissible partisan intent and effect here is overwhelming. In addition to the results of three straight elections showing that the outcome is impervious to the will of the voters, the tortured shapes of the districts are damning evidence of a partisan gerrymander. Some districts snake through half a dozen others and are in places only as wide as a single business establishment. Pet. ¶¶ 56-59. The shape of the 2011 Plan is inexplicable except as an exercise of partisan gerrymandering. Not surprisingly, six years after the Plan's creation, the General Assembly has failed to produce any alternative explanation for how the districts were created. Nor is the evidence of partisan gerrymandering confined to the shape of the districts. As described in further detail below, an array of computer modeling techniques and statistical measures all confirm that the 2011

Plan represents an unconstitutional gerrymander that has significant effects on electoral outcomes and the representational rights of Petitioners.

The individual Petitioners in this case are 18 registered Pennsylvania voters, ranging from a chaplain to retired school teachers to a military veteran, all of whom allege that the 2011 Plan violates their fundamental rights under the Pennsylvania Constitution. Pet. ¶¶ 14-31, 104-113, 115-120. Count I of the Petition alleges that the 2011 Plan violates Petitioners' rights under Pennsylvania's Free Expression and Association Clauses, Art. I, §§ 7, 20, which the Pennsylvania Supreme Court has held provide greater protection than the First Amendment of the U.S. Constitution. *Pap's A.M v. City of Erie*, 812 A.2d 591, 605 (Pa. 2002). Petitioners allege that the 2011 Plan has the purpose and effect of disfavoring Petitioners and other Democratic voters by reason of their political views, their past votes, and the political party with which they associate, in violation of Art. I, §§ 7, 20. Pet. ¶¶ 100-07. Petitioners additionally allege that 2011 Plan violates the Pennsylvania Constitution's prohibition against retaliating against individuals on the basis of their protected speech and political views. *Id.* ¶¶ 108-13.

Count II of the Petition alleges that the 2011 Plan violates Pennsylvania's Equal Protection guarantees, Art. I, §§ 1, 26 and the Free and Equal Clause, Art. I, § 5. Pet. ¶¶ 114-20. Petitioners allege that the 2011 Plan reflects intentional discrimination against an identifiable political group (*i.e.*, Petitioners and other

Democratic voters) and accomplishes actual discriminatory effects. With respect to the discriminatory effects, Petitioners allege—unlike in *Gill* or in any other partisan gerrymandering case—that the extreme partisanship of today’s Congress magnifies the effects of gerrymandering because members of Congress overwhelmingly no longer represent the views and interests of voters of the opposite party. *Id.* ¶¶ 95-98. That is, when voters lose the ability to elect representatives of their party as a result of gerrymandering, those voters lose not only electoral power, but also the ability to influence legislative outcomes.

Petitioners ask the Court to declare the 2011 Plan unconstitutional and enjoin its use in future primary or general elections. Petitioners further urge that, if Respondents fail to enact a new plan that comports with the Pennsylvania Constitution in a timely manner, the Court should do so.

## **II. *Gill***

On November 21, 2016, a three-judge district court in the Western District of Wisconsin ruled that Wisconsin’s state general assembly districts constituted an unconstitutional partisan gerrymander. *See Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016). The plaintiffs in *Gill* brought exclusively federal constitutional claims under the First Amendment and Equal Protection Clause of the U.S. Constitution. The district court, in a 159-page opinion that extensively detailed and relied upon the unique history of Wisconsin’s state legislature districts, held

that the districting plan had the intent and effect of violating the plaintiffs' federal constitutional rights.

On June 19, 2017, the U.S. Supreme Court agreed to hear *Gill*. See 137 S. Ct. 2268 (2017) (postponing the question of jurisdiction to the hearing of the case on the merits). The case is scheduled to be argued on October 3, 2017, and the Court is expected to issue its decision by the end of June 2018. As explained in further detail below, the *Gill* defendants ask the U.S. Supreme Court to hold as a bright-line rule that the Wisconsin plan cannot constitute an unconstitutional gerrymander because the districts there are compact and not bizarrely shaped. The *Gill* defendants and their amici also focus much of their attention on the "efficiency gap," which they argue was the statistical measure relied upon by the *Gill* plaintiffs and the three-judge district court.

### **COUNTERSTATEMENT OF THE SCOPE AND STANDARD OF REVIEW**

Trial courts in Pennsylvania have authority 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." *Israelit*, 703 A.2d at 724 n.3. For the reasons explained below, there is no possibility that the U.S. Supreme Court's decision in *Gill* "might resolve or render moot" this matter.

## REASONS FOR DENYING A STAY

### I. No Basis Exists to Stay Petitioners' State Law Claims Pending a Federal Court's Decision on Exclusively Federal Claims

#### A. *Gill* Will Not Moot This Case

The General Assembly's central argument is that this case would be "mooted" if the U.S. Supreme Court decides in *Gill* that partisan gerrymandering claims are nonjusticiable. (Stay Br. at 11-13). This argument is wrong and ignores controlling Pennsylvania Supreme Court precedent.

The Pennsylvania Supreme Court has twice squarely held that partisan gerrymandering claims *are* justiciable under the Pennsylvania constitution. *See Erfer v. Com.*, 794 A.2d 325 (Pa. 2002); *In re 1991 Reapportionment*, 609 A.2d 132 (Pa. 1992). *Erfer* explained that, in *1991 Reapportionment*, the Pennsylvania Supreme Court "determined that the claim [for partisan gerrymandering] was justiciable." 794 A.2d at 331 . Put differently, "a litigant c[an] raise claims that a reapportionment plan effected a political gerrymander and thus violated the U.S. and Pennsylvania Constitutions." *Id.* These state law decisions on justiciability are controlling. A U.S. Supreme Court holding that federal partisan gerrymandering claims are nonjusticiable as a matter of federal law would not and could not control this case. Indeed, *Erfer* expressly rejected the notion that only the federal Constitution is relevant in a partisan gerrymandering lawsuit. "Without clear support for the radical conclusion that our Commonwealth's Constitution is

nullified in challenges to congressional reapportionment plans, it would be highly inappropriate for us to so circumscribe the operation of the organic legal document of our Commonwealth.” *Id.*

Moreover, even as to the federal constitutional claims in *Gill*, the Generally Assembly’s position is baseless and misleading. The General Assembly’s assertion that the U.S. Supreme Court “may ... determine” that federal partisan gerrymandering claims are nonjusticiable (Stay Br. at 12) ignores the fact that the Court has rejected this exact argument in its last three decisions on partisan gerrymandering. The Court held that such claims *are* justiciable in *Davis v. Bandemer*, 478 U.S. 109, 125 (1986), a fact the General Assembly fails to disclose. The General Assembly states that a “four justice plurality” in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), concluded that partisan gerrymandering claims are nonjusticiable. (Stay Br. 11-12). But the General Assembly fails to advise this Court that the plurality did not speak for the court on the justiciability question and that, to the contrary, *five Justices* in *Vieth* confirmed that they would adhere to *Bandemer*’s conclusion that federal partisan gerrymandering claims are justiciable. Justice Kennedy described *Bandemer* as “the controlling precedent on the question of justiciability,” and stated that he “reject[ed] the plurality’s conclusions as to nonjusticiability.” *Vieth*, 541 U.S. at 310-11 (Kennedy, J., concurring); *accord id.* at 326 (Stevens, J., dissenting); *id.* at 346 (Souter and Ginsburg, JJ., dissenting); *id.*



at 355 (Breyer, J., dissenting). Justice Kennedy’s 2006 opinion for the Court in *LULAC v. Perry*, 548 U.S. 399 (2006), reaffirmed the point. Justice Kennedy explained that *Bandemer* “held that an equal protection challenge to a political gerrymander presents a justiciable case or controversy,” that a “majority” in *Vieth* declined to hold political gerrymanders nonjusticiable, and that the Court was not “revisit[ing] the justiciability holding.” *LULAC*, 548 U.S. at 413-14.

In short, the General Assembly is asking this Court to stay a case involving state law gerrymandering claims that Pennsylvania’s highest court has found to be justiciable, because a federal court “may” reverse itself and decide that federal gerrymandering claims are nonjusticiable—a hypothetical holding that would have no impact on the justiciability of the state constitutional claims presented here. The General Assembly identifies no case in which *any* court *anywhere* has granted a stay in such circumstances, and we are aware of none.

**B. This Case and *Gill* Involve Different Claims and Governing Law**

The General Assembly’s fallback argument, that this Court should issue a stay because *Gill* “will likely establish the standards governing [Petitioners’] claims,” is equally wrong. (Stay Br. at 2). Petitioners bring claims exclusively under the Pennsylvania Constitution, and those state constitutional claims are different from the federal constitutional claims in *Gill*.

Petitioner's first claim is under the Free Expression and Association Clauses of Article I, §§ 7, 20 of the Pennsylvania Constitution, which the Pennsylvania Supreme Court has repeatedly held "provide[] protection for freedom of expression that is broader than the federal constitutional guarantee." *Pap's*, 812 A.2d at 605 (internal quotation marks omitted). The Court has explained that these "broader protections" are "firmly rooted in Pennsylvania history and experience" and apply "in a number of different contexts," including "political" contexts. *DePaul v. Commonwealth*, 969 A.2d 536, 546 (Pa. 2009) (citing *Commonwealth v. Tate*, 432 A.2d 1382, 1391 (Pa. 1981)). Given these broader protections, any ruling in *Gill* denying the plaintiffs' federal First Amendment claims would not be controlling of Petitioners' Pennsylvania free speech claims here.

The procedural history of *Pap's* illustrates the point. There, the U.S. Supreme Court had reversed an earlier Pennsylvania Supreme Court decision and held that the ordinance in question did not violate the federal First Amendment. *Pap's*, 812 A.2d at 598-99. On remand, the Pennsylvania Supreme Court held that, notwithstanding the U.S. Supreme Court's judgment that the ordinance did not violate federal free speech rights, different and more speech-protective standards applied under Pennsylvania's free speech provisions, and the ordinance violated those provisions. *Id.* at 601-11. *Pap's* thus makes clear that any U.S. Supreme Court decision denying the federal First Amendment claims in *Gill* would

not “resolve or render moot” Petitioners’ free speech claims under the Pennsylvania Constitution. *Israelit*, 703 A.2d at 724 n.3

Moreover, *Pap*’s emphasized that it is particularly important for Pennsylvania courts to render their “independent judgment” on “distinct and enforceable” Pennsylvania constitutional rights where “the governing federal law, to which [Pennsylvania courts] ordinarily would look for insight and comparison, has been fluid and changing and still is not entirely clear.” *Id.* at 611. The Court stated, in language directly applicable here, that:

As a matter of policy, Pennsylvania citizens should not have the contours of their fundamental rights under our charter rendered uncertain, unknowable, or changeable, while the U.S. Supreme Court struggles to articulate a standard to govern a similar federal question.

*Id.* Thus, while the General Assembly argues that the standards for federal partisan gerrymandering claims are “unknown” given recent U.S. Supreme Court jurisprudence, such uncertainty weighs *in favor* of this Court moving forward on Petitioners’ state constitutional claims. Petitioners’ “fundamental rights” under the Pennsylvania Constitution should not remain “uncertain” while the U.S. Supreme Court “struggles to articulate a standard to govern a similar federal question.” *Id.*

The General Assembly also ignores the fact that Petitioners raise an additional free speech theory not presented in *Gill*—that Republican officials unlawfully retaliated against Petitioners for exercising their protected rights under Article I, §§ 7, 20. Pet. ¶ 108. The *Gill* plaintiffs do not pursue a free speech

retaliation claim, and accordingly the U.S. Supreme Court will not provide any substantive guidance on the standards governing such a claim. Petitioners' distinct retaliation claim alone provides reason to deny the request for a stay.

There is also no need to wait for the U.S. Supreme Court's ruling as relevant to Petitioners' equal protection claim. Again, *Pap's* is instructive. The Pennsylvania Supreme Court noted that in a prior decision, *Commonwealth v. Smith*, 615 A.2d 321 (Pa. 1992), the Court had "theretofore held the double jeopardy clause of the Pennsylvania Constitution to be coextensive with the federal double jeopardy clause." *Pap's*, 812 A.2d at 607 (citing *Smith*, 615 A.2d at 325). Even though the Pennsylvania Supreme Court had previously held the federal and state standards coextensive, and even though it was "not clear" how the case would be decided "under the then-prevailing federal standard," that "did not deter [the Pennsylvania Supreme Court] from effectuating [its] separate judgment under the Pennsylvania Constitution" and holding that double jeopardy applied. *Id.* (citing *Smith*, 615 A.2d at 325). There is the same pressing need here for the Pennsylvania courts to render their independent judgment on Petitioners' equal protection rights under the Pennsylvania Constitution.

In any event, the General Assembly fails to explain how a decision by the U.S. Supreme Court providing guidance on the standards for an equal protection claim would actually alter, as a practical matter, the proceedings that would go

forward *right now* absent a stay. No party in *Gill* suggests that partisan intent and effects—the primary focus of discovery in this case—should be irrelevant in assessing an equal protection partisan gerrymandering claim. *See infra* at 23-25; *see also Erfer*, 794 A.2d at 332 (assessing partisan intent and effect in evaluating partisan gerrymandering claim). As explained below, the intent and effects inquiries turn on facts and statistical measures that differ between this case and *Gill*, and that are subjects of Petitioners’ discovery requests..

Finally, the General Assembly’s argument that the “Supremacy Clause” provides justification for a stay because *Gill* might affirm the lower federal court’s holding is just silly. (Stay Br. at 17). The General Assembly suggests that Petitioners “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.” *Id.*; *see id.* at 3-4. In other words, the General Assembly asks for a stay pending *Gill* because *Gill* might impact hypothetical federal claims that Petitioners do not bring, or a hypothetical federal lawsuit that Petitioners have not filed. This Court should resolve the stay motion based on the actual case that Petitioners filed, not the non-existent one the General Assembly conjures up.<sup>2</sup>

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<sup>2</sup> The General Assembly elsewhere inconsistently asserts that the U.S. Supreme Court’s decision to grant a stay in *Gill* somehow “suggests that the *Whitford* decision is likely to be reversed.” (Stay Br. at 11). The General Assembly cites zero support for this statement. Rather the General Assembly infers this broad principle from the fact that there was one redistricting case recently in which the U.S. Supreme Court *denied* a stay. (Stay Br. at 11) (citing *McCrorry v. Harris*, 136 S. Ct. 1001 (2016)). The premise does not support the conclusion.

## **II. Petitioners Will Present Facts and Evidence That *Gill* Will Not Address**

Petitioners also paper over the extensive factual and evidentiary differences between this case and *Gill*. These differences crystallize why the General Assembly’s stay argument makes no sense. The *Gill* defendants ask the U.S. Supreme Court to rule that there can be no constitutional violation because Wisconsin’s districts are allegedly compact, but Respondents have no argument here that Pennsylvania’s congressional districts are compact—because they are not. And while the briefing in *Gill* focuses largely on the “efficiency gap” as a measure of partisan gerrymandering, Petitioners here rely upon at least three other statistical modeling techniques and measures that the U.S. Supreme Court will not address. All of these factual and evidentiary differences mean that, even if the Supreme Court were to rule in favor of the defendants in *Gill*, that would not resolve this case.

### **A. The 2011 Plan Flunks the Test Proposed by the *Gill* Defendants**

The *Gill* defendants propose a bright-line rule for assessing partisan gerrymanders. If that test were adopted by the U.S. Supreme Court, Pennsylvania’s 2011 Plan would fail it. The *Gill* defendants advocate a “rule” that there can no constitutional violation for a partisan gerrymander if the relevant districts “comply with traditional redistricting principles”—meaning if they are compact (*i.e.*, not bizarrely shaped), contiguous, equal in population, and minimize

municipality splits. *Gill v. Whitford*, No. 16-1161, Brief For Appellants at 60-61 (July 2017) (hereinafter “Gill Merits Br.”). The *Gill* defendants assert that the Wisconsin districts at issue in *Gill* comport with these requirements. *See id.*

Whatever the merits of that assertion in *Gill*, the 2011 Plan indisputably does not “comply with the traditional districting principles.” *Id.* Pennsylvania’s congressional districts are anything but compact: districts such as the Third, Sixth, Seventh, Ninth, Tenth, Eleventh, Twelfth, Sixteenth, and Seventeenth twist and turn and sprawl out over vast stretches of land. *See* Pet. ¶¶ 56-58; app’x. The Sixth District snakes through six other districts. *Id.* ¶ 56. The Twelfth District runs through five others. *Id.* ¶ 57. The Seventh is as self-evidently gerrymandered as any district in the United States, so narrow in parts that it is only as wide as a single restaurant. *Id.* ¶ 58. The 2011 Plan also splits apart municipalities and communities of interest, such as the cities of Chester and Reading. *Id.* ¶ 7. These districts are so bizarrely shaped as to make a mockery of any claim by the General Assembly that they were produced by any even-handed process. Indeed, as explained below, Petitioners allege that computer modeling techniques confirm that the 2011 Plan could not be the result of adherence to any traditional districting criteria. Not surprisingly, the General Assembly does not even raise the *Gill* defendants’ “compactness” defense. Thus, even if the Supreme Court were to

adopt the rule that the *Gill* defendants propose, that would in no way help Respondents here.

**B. Petitioners Rely on Statistical Measures Other Than the Efficiency Gap**

The General Assembly points to the fact that *Gill* involves the efficiency gap, which the Petition also cites. But the General Assembly ignores the three other statistical measures and modeling techniques that Petitioners allege will demonstrate the impermissible partisan intent and effects of the gerrymander here, and that are not presented in *Gill*.

In their Supreme Court briefs, the *Gill* defendants and their *amici* focus much of their attention on the efficiency gap and their critiques of it. *Gill* Merits Br. at 48-53.<sup>3</sup> They argue, for example, that the efficiency gap “fails to account for . . . political geography” and purported clustering of “Democratic voters . . . in big cities,” and that it rests on an assumption of proportional representation. *Id.* at 20, 50; *see Gill*, Brief for *Amici Curiae* Wisc. State Senate and Wisc. State Assembly in Supp. or Appellants at 22 (Apr. 24, 2017) (capitalization omitted) (hereinafter “Wisconsin Legislature Br.”). Petitioners do not agree with these critiques, but regardless, the Petition invokes a number of other statistical measures and

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<sup>3</sup> Indeed, counsel for the General Assembly in the instant case filed an *amicus* brief on behalf of the Republican National Committee in *Gill* that argues the efficiency gap is the keystone of the case. *Gill*, Br. of *Amici Curiae* Republican Nat’l Comm. & Nat’l Republican Cong. Comm. In Supp. Of Appellants at 2 (Apr. 24, 2017).



modeling techniques that are independent of the efficiency gap and that address the very critiques of the efficiency gap raised in *Gill*.

For instance, the Petition cites the computer modeling of University of Michigan political scientist Jowei Chen. *See, e.g.,* Jowei Chen, *The Impact of Political Geography on Wisconsin Redistricting*, 16 Election L.J. (forthcoming 2017). Professor Chen's work uses a computer algorithm producing simulated districting plans to show that no alternative plan adhering to traditional districting criteria (including geographic compactness, contiguity, and respect for communities of interest, such as county boundaries) would ever produce a 13-5 Republican advantage in Pennsylvania's congressional delegation. Pet. ¶¶ 85-86. This approach accounts for Pennsylvania's unique political geography and natural population patterns and does not rely upon any assumption of proportional representation. The substance of the Chen approach is not addressed in the district court's opinion in *Gill* or in the *Gill* defendants' Supreme Court briefs.

The Petition also cites a computer modeling technique known as a "Markov chain" that is entirely different from anything presented in *Gill*. Pet. ¶¶ 87. The Markov chain analysis takes the enacted plan as a starting point and then makes a series of random adjustments to the district boundaries. Mathematicians at Carnegie Mellon University and the University of Pittsburgh find that, using this approach, making random changes does greatly diminish the Republican advantage

under the 2011 Plan. The professors assert that this mathematically proves that the 2011 Plan has a Republican bias that cannot be the result of neutral factors such as population clustering. See Maria Chikinaa, Alan Friezeb & Wesley Pegden, *Assessing significance in a Markov chain without mixing*, 114 Proc. of Nat'l Acad. of Sci. 2860 (2017), available with supplement at <https://www.math.cmu.edu/~af1p/Textfiles/outliers.pdf>.

Yet another measure of partisan gerrymandering that the Petition cites is the “mean-median gap.” Pet. ¶¶ 90-93. That measure looks at the Democratic vote share in each of Pennsylvania’s 18 congressional districts and then calculates: (i) the average, or mean, of those 18 Democratic vote shares, which will be roughly equivalent to the Democratic vote share statewide; and (ii) the Democratic vote share in the district that was the middle-best in terms of Democratic performance. Gerrymandering does not impact the mean vote share, since that is a statewide figure, but it does affect the median vote share, since gerrymandering is designed to maximize the number of districts a party wins, and winning the median district means that party wins a majority of seats. This measure shows that there are a disproportionately large number of Democratic voters packed into a small number of districts. And it demonstrates that it is more difficult for Democrats to win the median district and hence a majority of seats. Under the 2011 Plan, Pennsylvania consistently has had one of the largest mean-median gaps in the nation for

congressional elections. The *Gill* defendants and their *amici* do not discuss the mean-median gap in any detail in their Supreme Court briefs.

In short, the Petition does not rely solely or even primarily on the efficiency gap that is the focus of briefing in *Gill*. Thus, even if the U.S. Supreme Court were to reject the efficiency gap, a holding that would not be binding on the Pennsylvania courts in any event, that holding would in no way foreclose the other statistical measures presented in this case.

**C. Petitioners Will Establish Effects of Gerrymandering Not Presented in *Gill* Regarding Lack of Representation**

Petitioners allege that the effects of the gerrymander under the 2011 Plan are magnified by the extreme partisanship of today’s Congress. Petitioners allege that Pennsylvania’s representatives no longer represent the views and interests of voters of the opposite party, and that therefore, when voters lose the ability to elect representatives of their party as a result of gerrymandering, those voters lose the ability to influence legislative outcomes. *See* Pet. ¶¶ 95, 98, 107, 112.

These allegations, which will be supported by empirical and other evidence, will provide an independent basis for concluding that 2011 Plan produces unconstitutional effects, *see Erfer*, 794 A.2d at 333, and will also address one of the primary arguments raised by the Wisconsin Legislature in defense of the districts at issue in *Gill*. The Wisconsin Legislature argues that “voters who support losing candidates are not deprived of representation or access to the

political process.” Wisconsin Legislature Br. at 23 (capitalization omitted). The Legislature asserts that in “Wisconsin and across the country, legislators represent all of their constituents—not just the ones who voted for them,” and therefore “voters are represented even if they voted for the losing candidate. *Id.* at 23-24 (emphasis omitted). These arguments do not appear to have been tested at trial in *Gill*, but they will be here—another difference between the two cases.

### **III. The Balance of Equities Weighs Overwhelmingly Against a Stay**

#### **A. *Gill* Will Have No Effect on the Need for Discovery in This Case**

The General Assembly asserts that it will “necessarily [suffer] harm” if this Court does not grant a stay because the General Assembly would need to “conduct[] extensive . . . discovery, including identifying, accumulating, and conducting privilege reviews of documents and materials sought by Petitioners.” (Stay Br. at 18). But *Gill* will have no impact on the need for such discovery. As explained, there is no possibility that *Gill* will moot this “entire case.” *Supra* 10-12. Nor is there any possibility that *Gill* will hold that discriminatory intent—the element to which discovery is most pertinent—is not an element of a constitutional claim regarding partisan gerrymandering. Intent is a standard element of equal protection claims. *E.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). No party in *Gill* asks the Supreme Court to hold otherwise.

Accordingly, this case will go forward no matter what the U.S. Supreme Court holds in *Gill*. All of the privilege and other discovery issues that the General Assembly identifies will need to be litigated here, and nothing in the *Gill* decision is likely to be pertinent to their resolution. There is no legitimate reason to delay resolving these discovery issues, or conducting discovery as to the legislative history of the 2011 Plan more generally, pending a decision in *Gill* regarding a different districting plan with a different legislative history and different evidence of partisan intent and governed by separate constitutional provisions. The General Assembly merely invokes these discovery considerations as cover for their true objective—delay for the purposes of delay.

Indeed, the General Assembly’s claim of a “burden” in responding to the discovery requests is one of their own making. Petitioners seek straightforward, factual information regarding who drew the 2011 Plan, the criteria used, and other information relevant to the Plan’s creation and its intended effects. The General Assembly and other Respondents know the answers to these questions, and any discovery disputes will occur only because they are choosing to conceal this information from the public. The desire of government officials to oppose transparency regarding their own actions is not a cognizable burden, and certainly not one that justifies delaying adjudication of the constitutional rights of Petitioners and millions of other Pennsylvania citizens who pay the very taxes about which the

General Assembly purports to be so concerned. Finally, the General Assembly has raised objections to virtually all discovery in this case on grounds of privilege, *see* Ex. A, Respondent’s Objections to Petitioners’ Notice of Intent to Serve Subpoenas at 2 (objecting to *all* information requested in subpoenas on ground that disclosure “is prohibited pursuant to the Speech and Debate Clause of the Pennsylvania Constitution”), and fails to disclose to this Court that if they get their way, there may be not very much discovery at all.<sup>4</sup> The General Assembly cannot have it both ways.

**B. A Stay Would Substantially Prejudice Petitioners**

In contrast to the General Assembly, Petitioners would suffer real prejudice from a stay. The Pennsylvania Supreme Court has made clear that “the fundamental rights guaranteed by the Pennsylvania Declaration of Rights ‘cannot lawfully be infringed, even momentarily.’” *Pap ’s*, 812 A.2d at 607 (quoting *Spayd*, 113 A. at 72); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding that a deprivation of constitutional rights, “for even minimal periods of time, unquestionably constitutes irreparable injury”); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (“Courts routinely deem restrictions on fundamental voting rights irreparable injury.”); *Latta v. Otter*, 771

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<sup>4</sup> Respondents Turzai and Scarnati have also invoked legislative privilege to object to all discovery sought in this case. *See* Ex. B, Respondent Turzai’s Objections to Petitioners’ First Set of Requests for Production at 2; Ex. C, Respondent Turzai’s Objections to Petitioners’ First Set of Interrogatories at 2; Ex. D, Respondent Scarnati’s Objections to Petitioners’ First Set of Interrogatories at 2.

F.3d 496, 500 (9th Cir. 2014) (dissolving stay in light of “the public’s interest in equality of treatment of persons deprived of important constitutional rights”); *Dellinger v. Mitchell*, 442 F.2d 782, 787 (D.C. Cir. 1971) (holding that consideration of “the injury to the parties being stayed” was “of particular importance where the claim being stayed involves a not insubstantial claim of present and continuing infringement of constitutional rights”).

A stay here would do just that. The Generally Assembly acknowledges that a stay would likely mean that this case would languish for “eleven months”: the U.S. Supreme Court’s next term will conclude at the end of June 2018, and the Supreme Court often issues opinions in its most important or controversial cases at the end of the term. *See* (Stay Br. at 18). At the earliest, the Supreme Court will not decide *Gill* until the new year, given that the argument is not until October.

Thus, as the Secretary of the Commonwealth and the Commissioner of Elections explain in their opposition to the stay, a stay would render it extremely difficult to resolve this case and implement a new plan in time for the 2018 election. Cortés & Marks Opp. at 5-7. A stay may even jeopardize the ability to resolve this case in time for the 2020 elections, which will be the final election under the 2011 Plan before the next census. The 2020 primaries will be held on April 28, 2020. *See* 25 Pa. Stat. § 2753. Candidates will be able to start circulating nomination petitions on January 28, 2020, and those petitions will be

due on February 18, 2020. *See id.* §§ 2868; 2873(d). Given the uncertainties inherent in any litigation, it is not unlikely that granting a stay would prevent Petitioners from obtaining relief even for 2020—effectively mooting this case.

This Court should reject the General Assembly’s effort to run out the clock. Every new election under the 2011 Plan violates Petitioners’ constitutional rights anew. As Congress votes on extraordinarily important matters from healthcare to taxes to education, any delay in providing a Petitioners a fair opportunity to elect representatives of their choice will cause real and concrete prejudice. The notion that Petitioners should suffer further deprivations of their voting and representational rights, because the Assembly prefers to avoid the commonplace sort of discovery attendant to any serious lawsuit, is untenable.

Nor is there any merit to the General Assembly’s suggestion that a stay would not be “unduly prejudicial” because Petitioners purportedly “delay[ed] . . . bringing this suit.” (Stay Br. at 18). In *Erfer*, the Pennsylvania Supreme Court dismissed a lawsuit brought in 2002 challenging the districting plan created after the 2000 census. 794 A.2d at 328. The Court concluded that the petitioners lacked evidence establishing that that plan had an impermissible partisan effect. *Id.* at 334. The reason that Petitioners now know the 2011 Plan is perhaps the “worst offender” in the nation is precisely because of the data that exists from the elections since the 2011 Plan went into place, data that was unavailable in *Erfer*.



And Petitioners will use the data from the 2012, 2014, and 2016 elections not only to show the magnitude of the gerrymander, but also its durability and thus how it has entrenched Republicans in power. For instance, it is from comparing the 2012 to the 2014 and 2016 elections that it is clear that Republicans' hold on 13 of 18 seats does not change even with large swings in the vote. *See* Pet. ¶ 5. The timing of Petitioners' suit is also partly attributable to the aforementioned statistical modeling techniques and measures that Petitioners will present in this case. These techniques and measures were all developed in the last few years and will be a critical part of Petitioners' case.<sup>5</sup>

#### **IV. Other Gerrymandering Cases Are Different From This Case**

The General Assembly points to gerrymandering cases in federal court in Maryland and North Carolina where stays have been requested or granted. The Maryland Court has granted a stay but the North Carolina court is considering a request for a stay pending *Gill*; it has not granted one. In both of those cases, discovery has been completed. *See* Status Report, *Benisek v. Lamone*, No. 13-cv-03233 (D. Md. June 2, 2017), Dkt. 180 (“Discovery is complete, with the exception of the deposition of Plaintiffs’ expert, . . . [which] will be completed Monday, June 5, 2017.”); Order, *League of Women Voters of North Carolina v.*

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<sup>5</sup> *See, e.g.*, Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. Law. Rev. 831 (2015); Michael D. McDonald & Robin E. Best, *Unfair Partisan Gerrymanders in Politics and Law: A Diagnostic Applied to Six Cases*, 14 Elec. L.J. 312, 312 (2015); Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Quarterly J. Pol. Sci. 239 (2013).

*Rucho*, No. 16-cv-01164 (M.D.N.C. Mar. 1, 2017), Dkt. Entry 47 (setting discovery deadline of April 28, 2017). Those courts have done all the work, except trying the case. That is very different from this suit, where the General Assembly seeks a stay at the outset of the case, before any discovery has been taken. Finally, both the Maryland and North Carolina cases involve federal constitutional claims, like *Gill*, and therefore *Gill* could have a dispositive or significant impact on those suits. That is not the case here for the many reasons outlined above.

### **CONCLUSION**

For the reasons stated above, the Court should deny the request for a stay.

Dated: August 28, 2017

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# Exhibit A

IN THE COMMONWEALTH COURT, PENNSYLVANIA

CIVIL DIVISION

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA , CARMEN FEBO SAN MIGUEL, JAMES SOLOMON, JOHN GREINER, JOHN CAPOWSKI, GRETCHEN BRANDT, THOMAS RENTSCHLER, MARY ELIZABETH LAWN, LISA ISAACS, DON LANCASTER, JORDI COMAS, ROBERT SMITH, WILLIAM MARX, RICHARD MANTELL, PRISCILLA MCNULTY, THOMAS ULRICH, ROBERT MCKINSTRY, MARK LICHTY, LORRAINE PETROSKY,

Petitioners,

v.

THE COMMONWEALTH OF PENNSYLVANIA; THE PENNSYLVANIA GENERAL ASSEMBLY; THOMAS W. WOLF, IN HIS CAPACITY AS GOVERNOR OF PENNSYLVANIA; MICHAEL J. STACK III, IN HIS CAPACITY AS LIEUTENANT GOVERNOR OF PENNSYLVANIA AND PRESIDENT OF THE PENNSYLVANIA SENATE; MICHAEL C. TURZAI, IN HIS CAPACITY AS SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES; JOSEPH B. SCARNATI III, IN HIS CAPACITY AS PENNSYLVANIA SENATE PRESIDENT PRO TEMPORE; PEDRO A. CORTÉS, IN HIS CAPACITY AS SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA; JONATHAN M. MARKS, IN HIS CAPACITY AS COMMISSIONER OF THE BUREAU OF COMMISSIONS, ELECTIONS, AND LEGISLATION OF THE PENNSYLVANIA DEPARTMENT OF STATE,

Respondents.

CASE NUMBER: 261 MD 2017

**RESPONDENTS' OBJECTIONS TO PETITIONERS' NOTICE OF INTENT TO SERVE SUBPOENAS PURSUANT TO RULE 4009.21**

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FILED ON BEHALF OF:

MICHAEL C. TURZAI, IN HIS CAPACITY AS SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES AND THE PENNSYLVANIA GENERAL ASSEMBLY, Respondents.

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FILED ON BEHALF OF:

SENATOR JOSEPH B. SCARNATI III, IN HIS CAPACITY AS SENATE PRESIDENT PRO TEMPORE, Respondent.

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

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**RESPONDENTS' OBJECTIONS TO PETITIONERS' NOTICE OF INTENT TO  
SERVE SUBPOENAS PURSUANT TO RULE 4009.21**

Respondents Michael C. Turzai and Joseph B. Scarnati III, by and through their undersigned counsel, pursuant to Pa. R. Civ. P. 4009.21(c) set forth the following Objections to the Petitioners' Notice of Intent to Serve Subpoenas to Produce Documents and Things pursuant to Pa. R. Civ. P. 4009.21 and state in support thereof:

1. On July 17, 2017, Petitioners served Respondents with 17 documents entitled, *Notice of Intent to Serve a Subpoena to Produce Documents and Things for Discovery Pursuant to Rule 4009.21* (collectively, "the Notices"). A copy of each of the Notices is attached hereto as composite Exhibit "A".

2. Attached to each of the 17 Notices is a Subpoena directed to various third-party individuals and entities which Subpoena seeks the production of certain documents (the "Subpoenas"). The documents requested by each Subpoena are nearly identical and

all of the Subpoenas seek the production of information pertaining to the 2011 Congressional Redistricting.

3. Of the 17 Subpoenas, 11 are addressed to current and/or former employees of Respondents, including but not limited to former Chiefs of Staff, and Legislative Assistants. One is addressed to a former Republican Member of the Pennsylvania House of Representatives (collectively referred to as the “Legislative Subpoenas”).

4. The remaining six Subpoenas are directed to the Republican National Committee (“RNC”), the National Republican Congressional Committee, the Republican State Leadership Committee and the State Government Leadership Foundation as well as two individuals who, upon information and belief, have been associated with the RNC or NRCC (collectively referred to as the “Entity Subpoenas”).

5. Respondents object to the Subpoenas in that the Subpoenas are improper and subject to protective orders and/or quashing in that:

a. Production of the information sought via the Legislative Subpoenas is prohibited pursuant to the Speech and Debate Clause of the Pennsylvania Constitution out of which the Legislative Privilege arises, PA. Const. Art 2, Sec. 15. *See Consumers Educ. & Prot. Ass’n v. Nolan*, 368 A.2d 675, 680 (Pa. 1977) and *Firetree, Ltd. v. Fairchild*, 920 A.2d 913, 918-919 (Pa. Cmwlth. 2007); and

b. Both the Legislative Subpoena and the Organization Subpoena request documents protected by First Amendment Privilege, *Pennsylvanians for Union Reform v. Pa. Office of Admin.*, 129 A.3d 1246 (Pa. Cmwlth. 2014), *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir.



2010); *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003), *Federal Election Commission v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981); and

c. The Subpoenas seek the production of documents protected by the attorney-client privilege and the attorney work product doctrine, 42 Pa.C.S. § 5928; Pa. R.C.P. No. 4003.3; *see Levy v. Senate of Pennsylvania*, 65 A. 3d 361 (Pa. 2013), *Gillard v. AIG Ins. Co.*, 15 A.3d 44 (Pa. 2011); and

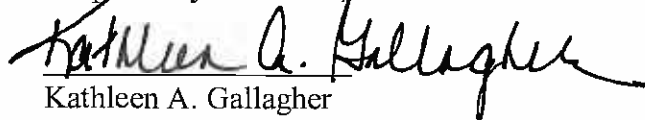
d. The Subpoena requests are overly broad, *see* Pa. R.C.P. No 4003.1(a); Pa. R.C.P. No. 4011; *see also In re Twenty-Fourth Statewide Investigating Grand Jury*, 589 Pa. 89 (Pa. 2006); *Hamilton v. Hennessey*, 783 A.2d 852 (Pa. Cmwlth. 2001); and

e. The Subpoenas seek the production of information that is not relevant to the Petitioners' claims. *See* Pa. R.C.P. No 4003.1(a); Pa. R.C.P. No. 4011; *see also Hamilton v. Hennessey*, 783 A.2d 852 (Pa. Cmwlth. 2001); *Croyle v. Smith*, 78 Pa. D. & C.4<sup>th</sup>196; *see generally* Pa.R.E. 401.

WHEREFORE, for all of the foregoing reasons, Respondents respectfully submit the within Objections to the Subpoenas and request that the Court issue an Order prohibiting Petitioners from effectuating service of the Subpoenas.

Dated: August 9, 2017

Respectfully submitted,



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PA Attorney # 208815  
John E. Hall  
PA Attorney #11095  
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Turzai, In His Capacity as Speaker of the  
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and the Pennsylvania General Assembly*

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*Counsel for Joseph B. Scarnati III, In His  
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Pro Tempore*

s/ Jason Torchinsky  
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Email: ssheehy@hvjt.law  
*Counsel for Representative Michael C.  
Turzai, In His Capacity as Speaker of the  
Pennsylvania House of Representatives  
Admission to be filed for Joseph B. Scarnati  
III, In His Capacity as Pennsylvania Senate  
President Pro Tempore and the  
Pennsylvania General Assembly*

## CERTIFICATE OF SERVICE

That counsel for the Respondent, REPRESENTATIVE MICHAEL C. TURZAI, IN HIS CAPACITY AS SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES AND THE PENNSYLVANIA GENERAL ASSEMBLY, hereby certifies that a true and correct copy of the ***RESPONDENTS' OBJECTIONS TO PETITIONERS' NOTICE OF INTENT TO SERVE SUBPOENAS PURSUANT TO RULE 4009.21*** has been served on the 9<sup>th</sup> day of August, 2017 to the following entities, by first class mail, postage pre-paid:

**Commonwealth of Pennsylvania**  
Pennsylvania Office of Attorney General  
16<sup>th</sup> Floor, Strawberry Square  
Harrisburg, PA 17120

Lazar M. Palnick  
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Pittsburgh, PA 15206  
*Counsel for Michael J. Stack III*

That the same document was served to counsel identified below by electronic mail by agreement of the parties:

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Sean M. Concannon  
Thomas P. Howell  
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*Counsel for Respondent Tom Wolf*

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Kathleen M. Kotula  
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Commissioner Jonathan M. Marks*

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*Counsel for Representative Michael C.  
Turzai, In His Capacity as Speaker of the  
Pennsylvania House of Representatives  
and Admission to be filed for Senator Joseph  
B. Scarnati III, In His Capacity as  
Pennsylvania Senate President Pro Tempore  
and The Pennsylvania General Assembly*

Respectfully submitted,

BY: 

KATHLEEN A. GALLAGHER  
CAROLYN BATZ MCGEE  
JOHN E. HALL

Counsel for the Respondents, THE PENNSYLVANIA  
GENERAL ASSEMBLY AND REPRESENTATIVE  
MICHAEL C. TURZAI, IN HIS CAPACITY AS  
SPEAKER OF THE PENNSYLVANIA HOUSE OF  
REPRESENTATIVES

# Exhibit B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

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**RESPONDENT MICHAEL C. TURZAI'S OBJECTIONS TO  
PETITIONERS' FIRST SET OF REQUESTS  
FOR PRODUCTION TO ALL RESPONDENTS**

Respondent, Michael C. Turzai, in His Capacity as Speaker of the Pennsylvania House of Representatives, (hereinafter "the Speaker"), by and through his undersigned counsel, and pursuant to the Pennsylvania Rules of Civil Procedure 4006(a)(1)(2) and 4009.12(a)(1) and Rules 311 and 313 of the Original Jurisdiction Rules of the Commonwealth Court, hereby serves his Objections to Petitioners' First Set of Requests for Production to all Respondents.

## **PRELIMINARY STATEMENT AND GENERAL OBJECTIONS**

1. The Speaker objects to the overly broad and burdensome nature of these Requests for Production of Documents. They are overly broad and unduly burdensome insofar as they request information and documents from the Speaker that are neither material nor relevant to this litigation.

2. The Speaker objects to these discovery requests to the extent that they seek information and/or documents that are protected under the attorney-client privilege, the attorney work product doctrine, and all other common law or statutory privileges, including but not limited to the protections where they are afforded, to include, without limitation, the Pennsylvania Speech or Debate Clause privilege, the First Amendment privilege, the attorney-client privilege, the attorney work product privilege and the common interest privilege. The Speaker hereby reserves all claims of privilege or other immunities from disclosure. Any inadvertent disclosure of any information or document in response to Petitioners' discovery requests shall not constitute a waiver of any privilege or other immunity from disclosure. The Speaker reserves the right to demand the return of any such information or documents, together with all copies thereof, and the right to object to the use of any such information or documents that may have been inadvertently disclosed.

3. The Speaker objects to Petitioners' discovery requests to the extent that they purport to require him to provide information that is not presently in his possession, custody or control.

4. The Speaker objects to the extent that Petitioners' discovery requests seek information that is confidential and/or proprietary. To the extent The Speaker has any such information that is responsive to any of Petitioners' Requests, such confidential or proprietary information will only be produced subject to a Protective Order entered in this case.

5. The Speaker objects to these Requests for Production of Documents to the extent that the instructions or definitions contained in Petitioners' discovery requests impose burdens beyond those established by the Pennsylvania Rules of Civil Procedure, or the local rules and practices of this Court.

6. The Speaker incorporates by reference his Application for Stay filed in this matter as though fully set forth herein.

7. In responding to these discovery requests, the Speaker does not concede that any of the information which may be provided is relevant or material to the subject matter of this litigation. Furthermore, the Speaker does not concede that any information which may be provided or documents produced are admissible in evidence or reasonably calculated to lead to the



discovery of admissible evidence. The Speaker hereby reserves the right to object to the use, at trial or otherwise, of any document produced herewith or information provided in response to any Request.

8. The Speaker reserves the right to modify, supplement and/or amend any or all of his responses to Petitioners' discovery requests, as necessary or appropriate.

9. Respondent's Preliminary Statement and his General Objections apply to all of the discovery requests and responses herein.

### **DOCUMENTS REQUESTED**

1. All documents referring or relating to the 2011 Plan, including, but not limited to:

a. All proposals, analyses, memoranda, notes, and calendar entries in whatever medium (e.g., paper, computerized format, e-mail, photograph, audiotape) they are maintained referring or relating to the 2011 Plan.

**RESPONSE:** The Speaker incorporates his Preliminary Statement and General Objections. Further, the Speaker specifically objects to Request Number 1, including all subparts thereto, on the grounds that it seeks the discovery of information which is categorically prohibited from production on the basis of the Pennsylvania Speech or Debate Clause, the First Amendment Privilege, the Attorney-Client Privilege, the Attorney Work Product Privilege and the Common Interest Privilege.

**The Speaker further specifically objects to Request Number 1 and all subparts thereof on the grounds that it violates Pennsylvania Rule of Civil Procedure 4011 in that it is unduly burdensome, overly broad and intended to cause unreasonable annoyance, embarrassment, oppression and undue expense to The Speaker.**

**By way of further Answer, The Speaker has filed an Application for Stay of this litigation with the Court. It is unreasonable and overly burdensome to expend the governmental resources and taxpayer dollars necessary to respond to the Request until such time as the Court has decided whether or not this litigation will move forward.**

b. All documents referring or relating to all considerations or criteria that were used to develop the 2011 Plan, such as compactness, contiguity, keeping political units or communities together, equal population, race or ethnicity, incumbent protection, a voter or area's likelihood of supporting Republican or Democratic candidates, and any others.

**RESPONSE: See response to 1(a) above which is incorporated herein by reference as though fully set forth.**

c. All documents referring or relating to how each consideration or criterion was measured, including the specific data and specific formulas used in assessing compactness and partisanship.

**RESPONSE: See response to 1(a) above which is incorporated herein by reference as though fully set forth.**

d. All documents referring or relating to how each consideration or criterion affected the 2011 Plan, including any rule or

principle guiding the use of each consideration or criteria in developing the 2011 Plan.

**RESPONSE: See response to 1(a) above which is incorporated herein by reference as though fully set forth.**

e. All communications since January 1, 2009 with any affiliate of the Republican Party, including, but not limited to, the Republican National Committee (RNC), the National Republican Congressional Committee (NRCC), the Republican State Leadership Committee (RSLC), the REDistricting Majority Project (REDMAP), or the State Government Leadership Foundation (SGLF) that refer or relate to the 2011 Plan.

**RESPONSE: See response to 1(a) above which is incorporated herein by reference as though fully set forth.**

f. All communications with any consultants, advisors, attorneys, or political scientists referring or relating to the 2011 Plan.

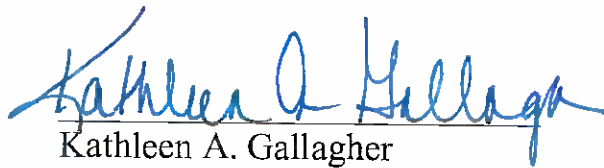
**RESPONSE: See response to 1(a) above which is incorporated herein by reference as though fully set forth.**

g. All communications with any committees, legislators, or legislative staffers referring or relating to the 2011 Plan.

**RESPONSE: See response to 1(a) above which is incorporated herein by reference as though fully set forth.**

Dated: August 14, 2017

Respectfully submitted,



Kathleen A. Gallagher

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Carolyn Batz McGee

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General Assembly*

s/ Jason Torchinsky

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Representatives*

*Admission to be filed for Joseph B.  
Scarnati III, In His Capacity as  
Pennsylvania Senate President Pro  
Tempore and Admission Pending for  
the Pennsylvania General Assembly*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of ***RESPONDENT MICHAEL C. TURZAI'S OBJECTIONS TO PETITIONERS' FIRST SET OF REQUESTS FOR PRODUCTION TO ALL RESPONDENTS*** was served upon the following counsel of record by electronic mail by agreement of the parties, this 14th day of August, 2017:

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Ian B. Everhart  
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President Pro Tempore*

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*Counsel for Possible Intervenors*

Respectfully submitted,

BY: 

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CAROLYN BATZ MCGEE

JOHN E. HALL

Counsel for the Respondents,

REPRESENTATIVE MICHAEL C.

TURZAI, IN HIS CAPACITY AS

SPEAKER OF THE PENNSYLVANIA

HOUSE OF REPRESENTATIVES AND

THE PENNSYLVANIA GENERAL

ASSEMBLY

# Exhibit C



they request information from The Speaker that is neither material nor relevant to this litigation.

2. The Speaker objects to these Interrogatories to the extent that they seek information that is protected under the attorney-client privilege, the attorney work product doctrine, and all other common law or statutory privileges, including but not limited to the protections where they are afforded, to include, without limitation, the Pennsylvania Speech or Debate Clause privilege, the First Amendment privilege, the attorney-client privilege, the attorney work product privilege, and the common interest privilege. The Speaker hereby reserves all claims of privilege or other immunities from disclosure. Any inadvertent disclosure of any information in response to Petitioners' discovery requests shall not constitute a waiver of any privilege or other immunity from disclosure. The Speaker reserves the right to demand the return of any such information or documents, together with all copies thereof, and the right to object to the use of any such information or documents that may have been inadvertently disclosed.

3. The Speaker objects to Petitioners' discovery requests to the extent that they purport to require the Speaker to provide information that is not presently in his possession, custody or control.

4. The Speaker objects to the extent that Petitioners' discovery requests seek information that is confidential and/or proprietary. To the extent the Speaker

has any such information that is responsive to any of Petitioners' Requests, such confidential or proprietary information will only be produced subject to a Protective Order entered in this case.

5. The Speaker objects to these Interrogatories to the extent that the instructions or definitions contained in Petitioners' discovery requests impose burdens beyond those established by the Pennsylvania Rules of Civil Procedure, or the local rules and practices of this Court.

6. The Speaker incorporates by reference his Application for Stay filed in this matter as though fully set forth herein.

7. In responding to these discovery requests, The Speaker does not concede that any of the information which may be provided is relevant or material to the subject matter of this litigation. Furthermore, The Speaker does not concede that any information which may be provided is admissible in evidence or reasonably calculated to lead to the discovery of admissible evidence. The Speaker hereby reserves the right to object to the use, at trial or otherwise, of any information provided in response to any Interrogatory.

8. The Speaker reserves the right to modify, supplement and/or amend any or all of his responses to Petitioners' discovery requests, as necessary or appropriate.

9. The Speaker's Preliminary Statement and his General Objections apply to all of the discovery requests and responses herein.

**ANSWERS TO INTERROGATORIES**

1. Identify each person who had any involvement in the development of the 2011 Plan. Provide the name of any entity with which each such person was affiliated at the time of their involvement with the 2011 Plan.

**ANSWER: The Speaker incorporates his Preliminary Statement and General Objections. Further, the Speaker specifically objects to this Interrogatory on the grounds that it seeks the discovery of information which is categorically prohibited from production on the basis of the Pennsylvania Speech or Debate Clause, the First Amendment Privilege, the Attorney-Client Privilege and the Attorney Work Product Privilege, and/or the Common Interest Privilege.**

**The Speaker further specifically objects to this Interrogatory on the grounds that it violates Pennsylvania Rule of Civil Procedure 4011 in that it is unduly burdensome, overly broad, and intended to cause unreasonable annoyance, and expense to The Speaker.**

**By way of further Answer, The Speaker has filed an Application for Stay of this litigation with the Court. It is unreasonable and overly burdensome to expend the governmental resources and taxpayer dollars necessary to respond to the Interrogatory until such time as the Court has decided whether or not this litigation will move forward.**

2. For each person identified in response to Interrogatory 1, describe that person's role with respect to the development of the 2011 Plan.

**ANSWER: See response to Interrogatory Number 1 above which is incorporated herein by reference as though fully set forth.**

3. Identify each person who before December 14, 2011 you communicated, caused to be communicated, or are aware had received a copy of the 2011 plan, or any part that was being considered for inclusion in the 2011 Plan.

**ANSWER: See response to Interrogatory Number 1 above which is incorporated herein by reference as though fully set forth.**

4. Identify and describe all criteria that were considered or used in developing the 2011 Plan, such as compactness, contiguity, keeping political units or communities together, equal population, race or ethnicity, incumbent protection, a voter or area's likelihood of supporting Republican or Democratic candidates, and any others.

**ANSWER: See response to Interrogatory Number 1 above which is incorporated herein by reference as though fully set forth.**

5. For each criterion identified in Your Response to Interrogatory 4, explain how each consideration or criterion was measured, including the specific data and specific formulas used in assessing the criterion.

**ANSWER: See response to Interrogatory Number 4 above which is incorporated herein by reference as though fully set forth.**

6. For each criterion identified in Your Response to Interrogatory 4, identify and describe how each consideration or criterion affected the 2011 Plan, including any rule or principle guiding the use of each consideration or criterion in developing the 2011 Plan.

**ANSWER: See response to Interrogatory Number 4 above which is incorporated herein by reference as though fully set forth.**

7. For each criterion identified in Your Response to Interrogatory 4, identify who selected the criterion and describe how the criterion was communicated to the persons involved with the development of the 2011 Plan. Identify any documents referring or relating these communications.

**ANSWER: See response to Interrogatory Number 4 above which is incorporated herein by reference as though fully set forth.**

8. Identify, including by name and manufacturer, any computer programs or software used to develop the 2011 Plan. If any computer programs or software used to develop the 2011 Plan were modified for that purpose, state what modifications were made.

**ANSWER: See response to Interrogatory Number 4 above which is incorporated herein by reference as though fully set forth.**

Dated: August 14, 2017

Respectfully submitted,



Kathleen A. Gallagher  
PA Attorney # 37950  
Carolyn Batz McGee  
PA Attorney # 208815  
John E. Hall  
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*s/ Jason Torchinsky*

Jason Torchinsky

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*Counsel for Representative Michael C. Turzai, In His Capacity as Speaker of the Pennsylvania House of Representatives, Admission to be filed for Joseph B. Scarnati III, In His Capacity as Pennsylvania Senate President Pro Tempore and Admission Pending for the Pennsylvania General Assembly*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of ***RESPONDENT MICHAEL C. TURZAI'S OBJECTIONS TO PETITIONERS' FIRST SET OF INTERROGATORIES TO ALL RESPONDENTS*** was served upon the following counsel of record by electronic mail by agreement of the parties, this 14th day of August, 2017:

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TURZAI, IN HIS CAPACITY AS

SPEAKER OF THE PENNSYLVANIA

HOUSE OF REPRESENTATIVES AND

THE PENNSYLVANIA GENERAL

ASSEMBLY

# Exhibit D

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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

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**RESPONDENT JOSEPH B. SCARNATI III'S OBJECTIONS TO  
PETITIONERS' FIRST SET OF INTERROGATORIES  
TO ALL RESPONDENTS**

Respondent Joseph B. Scarnati III (“Respondent”) hereby serves his Objections to Petitioners’ First Set of Interrogatories to All Respondents pursuant to Pennsylvania Rule of Civil Procedure 4006.

**PRELIMINARY STATEMENT AND GENERAL OBJECTIONS**

1. Respondent objects to the overly broad and burdensome nature of these Interrogatories. They are overly broad and unduly burdensome insofar as they request information from Respondent that is neither material nor relevant to this litigation.

2. Respondent objects to these Interrogatories to the extent that they seek information that is protected under the attorney-client privilege, the attorney work product doctrine, and all other common law or statutory privileges, including but not limited to the protections where they are afforded, to include, without limitation, the Pennsylvania Speech or Debate Clause privilege, the First Amendment privilege, the attorney-client privilege, the attorney work product privilege, and the common interest privilege. Respondent hereby reserves all claims of privilege or other immunities from disclosure. Any inadvertent disclosure of any information in response to Petitioners' discovery requests shall not constitute a waiver of any privilege or other immunity from disclosure. Respondent reserves the right to demand the return of any such information or documents, together with all copies thereof, and the right to object to the use of any such information or documents that may have been inadvertently disclosed.

3. Respondent objects to Petitioners' discovery requests to the extent that they purport to require him to provide information that is not presently in his possession, custody or control.

4. Respondent objects to the extent that Petitioners' discovery requests seek information that is confidential and/or proprietary. To the extent Respondent has any such information that is responsive to any of



Petitioners' Requests, such confidential or proprietary information will only be produced subject to a Protective Order entered in this case.

5. Respondent objects to these Interrogatories to the extent that the instructions or definitions contained in Petitioners' discovery requests impose burdens beyond those established by the Pennsylvania Rules of Civil Procedure, or the local rules and practices of this Court.

6. Respondent incorporates by reference his Application for Stay filed in this matter as though fully set forth herein.

7. In responding to these discovery requests, Respondent does not concede that any of the information which may be provided is relevant or material to the subject matter of this litigation. Furthermore, Respondent does not concede that any information which may be provided is admissible in evidence or reasonably calculated to lead to the discovery of admissible evidence. Respondent hereby reserves the right to object to the use, at trial or otherwise, of any information provided in response to any Interrogatory.

8. Respondent reserves the right to modify, supplement and/or amend any or all of his responses to Petitioners' discovery requests, as necessary or appropriate.

9. Respondent's Preliminary Statement and his General Objections apply to all of the discovery requests and responses herein.

## OBJECTIONS TO INTERROGATORIES

1. Identify each person who had any involvement in the development of the 2011 Plan. Provide the name of any entity with which each such person was affiliated at the time of their involvement with the 2011 Plan.

**ANSWER:** Respondent incorporates his Preliminary Statement and General Objections. Further, Respondent specifically objects to this Interrogatory on the grounds that it seeks the discovery of information which is categorically prohibited from production on the basis of the Pennsylvania Speech or Debate Clause, the First Amendment Privilege, the Attorney-Client Privilege and the Attorney Work Product Privilege, and/or the Common Interest Privilege.

**Respondent further specifically objects to this Interrogatory on the grounds that it violates Pennsylvania Rule of Civil Procedure 4011 in that it is unduly burdensome, overly broad, and intended to cause unreasonable annoyance, and expense to Respondent.**

**By way of further Answer, Respondent has filed an Application for Stay of this litigation with the Court. It is unreasonable and overly burdensome to expend the governmental resources and taxpayer dollars necessary to respond to the Interrogatory until such time as the Court has decided whether or not this litigation will move forward.**

2. For each person identified in response to Interrogatory 1, describe that person's role with respect to the development of the 2011 Plan.

**ANSWER:** See response to Interrogatory Number 1 above which is incorporated herein by reference as though fully set forth.

3. Identify each person who before December 14, 2011 you communicated, caused to be communicated, or are aware had received a copy of the 2011 plan, or any part that was being considered for inclusion in the 2011 Plan.

**ANSWER: See response to Interrogatory Number 1 above which is incorporated herein by reference as though fully set forth.**

4. Identify and describe all criteria that were considered or used in developing the 2011 Plan, such as compactness, contiguity, keeping political units or communities together, equal population, race or ethnicity, incumbent protection, a voter or area's likelihood of supporting Republican or Democratic candidates, and any others.

**ANSWER: See response to Interrogatory Number 1 above which is incorporated herein by reference as though fully set forth.**

5. For each criterion identified in Your Response to Interrogatory 4, explain how each consideration or criterion was measured, including the specific data and specific formulas used in assessing the criterion.

**ANSWER: See response to Interrogatory Number 4 above which is incorporated herein by reference as though fully set forth.**

6. For each criterion identified in Your Response to Interrogatory 4, identify and describe how each consideration or criterion affected the

2011 Plan, including any rule or principle guiding the use of each consideration or criterion in developing the 2011 Plan.

**ANSWER:** See response to Interrogatory Number 4 above which is incorporated herein by reference as though fully set forth.

7. For each criterion identified in Your Response to Interrogatory 4, identify who selected the criterion and describe how the criterion was communicated to the persons involved with the development of the 2011 Plan. Identify any documents referring or relating these communications.

**ANSWER:** See response to Interrogatory Number 4 above which is incorporated herein by reference as though fully set forth.

8. Identify, including by name and manufacturer, any computer programs or software used to develop the 2011 Plan. If any computer programs or software used to develop the 2011 Plan were modified for that purpose, state what modifications were made.

**ANSWER:** See response to Interrogatory Number 4 above which is incorporated herein by reference as though fully set forth.

Dated: August 14, 2017

Respectfully Submitted,

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Michael C. Turzai; Admission to be  
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Assembly and Joseph B. Scarnati III*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of Respondent Joseph B. Scarnati, III's Objections to Petitioners' First Set of Interrogatories to All Respondents was served upon the following counsel of record by electronic mail by agreement of the parties, this 14<sup>th</sup> day of August, 2017:

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# **EXHIBIT D**

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October 6, 2017

**VIA FACSIMILE (267) 299-5078**

Honorable Michael M. Baylson  
U.S. District Court Judge  
United States District Court  
Eastern District of Pennsylvania  
James A. Byrne U.S. Courthouse  
601 Market Street  
Philadelphia, Pennsylvania 19106

**Re: Agre et al. v. Wolf et al., No. 17-4392 (MMB)**  
**Pretrial Conference For October 10, 2017 (ECF 2)**

Dear Judge Baylson:

This Firm represents Senator Joseph Scarnati, the President Pro Tempore of the Pennsylvania Senate. Kathleen Gallagher of Cipriani & Werner, P.C. represents Representative Michael Turzai, the Speaker of the Pennsylvania House of Representatives. Jason Torchinsky of Holtzman Vogel Josefiak Torchinsky PLLC represents the President Pro Tempore and the Speaker.

We understand that Your Honor has scheduled a pretrial conference for Tuesday, October 10, 2017 in the above-referenced action. Given the unusual nature of the case, including the necessary appointment of a three-judge panel, we assume that the conference on Tuesday will likely address matters relating to scheduling. For that reason, we respectfully request the Court's permission, on the President Pro Tempore and the Speaker's behalf, to participate in Tuesday's pretrial conference for the reasons set for below.

As the Court may be aware, a Petition for Review concerning the constitutionality of Pennsylvania's 2011 Congressional map is currently pending before the Pennsylvania Commonwealth Court. *See League of Women Voters of Pennsylvania, et al., v. Commonwealth, et al.*, No. 261 M.D. 2017 (Comm. Ct. June 15, 2017). We represent the President Pro Tempore and the Speaker, who have been named as respondents in that action, which involves claims substantially similar to the claims advanced in this action. After an October 4, 2017 argument before the Commonwealth Court, that Court advised that it soon will be entering an order that,

Hon. Michael M. Baylson  
October 6, 2017  
Page 2



*inter alia*, stays that action pending the outcome of the Supreme Court of the United States' resolution of *Gill v. Whitford*, No. 16-1161 (Oral argument held Oct. 3, 2017).

Although we just recently learned of the pendency of this action, the President Pro Tempore and the Speaker intend to file a motion to intervene in the near future. Courts typically grant a legislator's motion to intervene in redistricting actions because the requested relief generally requires the legislature to redraw districts. *See, e.g., Bethune-Hill v. Va. State Bd. Of Elections*, No. 14-0852 (E.D. Va. Feb. 23, 2015) (three-judge court); *Perry v. Perez*, 565 U.S. 388, 392 (2012) (noting that redistricting is primarily the duty of the State and even where a legislative drawn map fails preclearance, it remains the legislature's duty to draw new compliant districts). And, a review of the Complaint filed in this action discloses Plaintiffs' desire to have the Pennsylvania legislature craft legislation to redraft Pennsylvania's Congressional districts. Accordingly, the President Pro Tempore and the Speaker, in their official capacities, will necessarily be directly impacted by this litigation. As a result, we respectfully request permission to participate in Tuesday's pretrial conference.

Thank you in advance for your time and attention to this matter.

Respectfully yours,

BRIAN S. PASZAMANT

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