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IN THE SUPREME COURT OF PENNSYLVANIA

League of Women Voters of Pennsylvania, *et al.*, *Petitioners,* v. The Commonwealth of Pennsylvania, *et al.*, *Respondents.*	**No. 159 MM 2017**

PETTIONERS' APPLICATION FOR LEAVE TO SUPPLEMENT APPLICATION FOR EXTRAORDINARY RELIEF

Attached as Exhibit A is the "Motion for Review and Reconsideration of Scheduling Order By Three Judge Panel" filed on October 16, 2017 by two Respondents, Speaker Michael C. Turzai and President Pro Tempore Joseph B. Scarnati III, in *Agre v. Wolf*, Case No. 2:17-cv-4392 (E.D. Pa.). *Agre* is the federal challenge to Pennsylvania's congressional district map. Respondents Turzai and

Scarnati take the position that the federal court, which has tentatively scheduled a December trial, should instead "Defer Adjudication of this Action Because the Constitutionality of the 2011 Plan is already Being Addressed by Pennsylvania Appellate Courts." Motion at 7.

Dated: October 20, 2017

Respectfully submitted,

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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 pending

Exhibit A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LOUIS AGRE, WILLIAM EWING, FLOYD MONTGOMERY, JOY MONTGOMERY, and **RAYMAN SOLOMON,**

Plaintiffs,

v.

THOMAS W. WOLF, Governor of Pennsylvania, **PEDRO CORTES**, Secretary of State of Pennsylvania, and **JONATHAN MARKS**, Commissioner of the Bureau of Elections, in their official capacities,

Defendants.

CIVIL ACTION

Case No. 2-17-cv-04392

The Honorable Michael M. Baylson

Electronically Filed

MOTION FOR REVIEW AND RECONSIDERATION OF SCHEDULING ORDER BY THREE JUDGE PANEL BY MICHAEL C. TURZAI, SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, and JOSEPH B. SCARNATI III, PENNSYLVANIA SENATE PRESIDENT PRO TEMPORE

Proposed Intervenor-Defendants Michael C. Turzai, in his official capacity as Speaker of the Pennsylvania House of Representatives, and Joseph B. Scarnati, III, in his official capacity as Pennsylvania Senate President Pro Tempore (collectively, the "Proposed Intervenors"), by and through their undersigned counsel, respectfully submit this Motion for Review and Reconsideration of the Court's October 10, 2017 Scheduling Order (ECF No. 20) by the Three Judge Panel and, in support thereof, state the following:

I. INTRODUCTION & BACKGROUND

1. On October 2, 2017, Louis Agre, William Ewing, Floyd Montgomery, Joy Montgomery, and Rayman Solomon (collectively, the "Plaintiffs") filed a Complaint (ECF No.

1) seeking declaratory and injunctive relief, claiming that the Pennsylvania Congressional districting plan adopted in December, 2011 (the "2011 Plan") is unconstitutional under the Elections Clause of the United States Constitution, Article I, Section 4. Plaintiffs claim that by continuing to implement the 2011 Plan, Defendants Thomas Wolf, Pedro Cortes and Jonathan Marks (collectively, the "Defendants") have deprived Plaintiffs of their rights under the Privileges and Immunities Clause and the Equal Protection Clause of the Fourteenth Amendment, and of their rights under the First Amendment of the U.S. Constitution -- all in violation of 42 U.S.C. § 1983. Plaintiffs seek to enjoin the further implementation of the 2011 Plan in the upcoming Congressional elections scheduled for 2018, and additionally request that the Court order the submission of proposed revisions to the 2011 Plan.

2. Upon the filing of the Complaint, United States District Judge Michael B. Baylson was assigned to preside over this matter.

3. Before formal service on Defendants was effectuated by Plaintiffs and before the three (3) Judge panel was formally requested by Plaintiffs, on October 4, 2017, the Court entered an Order setting a "Prompt Pretrial Conference" for Tuesday, October 10, 2017 at 10:00 a.m. (ECF No. 2).

4. Subsequent thereto, on October 5, 2017, Plaintiffs filed their Request for Three Judges to be convened to hear to this matter under 28 U.S.C. § 2284(a). (ECF No. 3). There is no dispute that this case requires the appointment of a three-judge panel.

5. Also on October 6, 2017, counsel for Proposed Intervenors requested via letter to Judge Baylson, with a copy to counsel for Plaintiffs, that they be permitted to attend the October 10, 2017 scheduling conference. Counsel for Proposed Intervenors notified the Court in that letter of the pending state court litigation in *League of Women Voters, et al. v. Commonwealth of*

Pennsylvania, et al., No. 261 MD 2017 (Pa. Comm. Ct. June 15, 2017) (the "LWV Litigation"). Counsel for Proposed Intervenors was advised by Judge Baylson's chambers that same day that they would be permitted to attend the conference.

6. The Court held the scheduling conference on October 10, 2017 (*see* ECF Nos. 24 and 29), during the course of which Judge Baylson advised that he had written to Chief Judge D. Brooks Smith of the United States Court of Appeals for the Third Circuit to request appointment of the remaining two judges who, along with Judge Baylson, would comprise the three-judge panel of the District Court which will preside over this matter.

7. To date, the remaining two judges have not been appointed.

8. Following the October 10th conference, Judge Baylson issued a Pretrial Scheduling Order (ECF No. 20). Pursuant to that Order, the case is scheduled for a trial to commence on December 5, 2017, just 64 days after the Complaint was filed.

9. Pursuant to the Order (ECF No. 20), Proposed Intervenors are required to file their Motion for Leave to Intervene, and their initial responsive pleadings by October 24, 2017. (*See id.* at ¶¶ 1 – 3).

10. To this end, Proposed Intervenors intend to file a Motion to Dismiss, or in the alternative, Motion to Stay and/or Abstain at the same time they file their Motion to Intervene.

11. The Order also sets forth a schedule for the exchange of discovery requests by October 13, 2017, as well as other interim deadlines.

12. Proposed Intervenors acknowledge that Judge Baylson had the authority to enter the Scheduling Order and set the deadlines established therein. However, 28 U.S.C. § 2284(b)(3) vests the full court with the authority to review the Scheduling Order:

> A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as

> provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. *Any action of a single judge may be reviewed by the full court at any time before final judgment.*

28 U.S.C. § 2284(b)(3) (emphasis added); *see also Shapiro v. McManus*, 136 S.Ct. 450, 454-55 (2015) (discussing the purposes and rules for a three judge court in apportionment cases); and *Miss. State Conf. of the NAACP v. Barbour,* Civ. A. No. 11-159, 2011 U.S. Dist. LEXIS 52822, *14, 2011 WL 1870222 (S.D. Miss. May 16, 2011).

13. For the reasons articulated herein, Proposed Intervenors respectfully request that the full court review and reconsider the October 10, 2017 Scheduling Order.

II. MOTION FOR REVIEW and RECONSIDERATION BY THREE JUDGE PANEL

14. There are three (3) undisputed facts which are essential to the Court's consideration of this Motion:

i. Currently pending in the Supreme Court of the United States is the matter of *Gill v. Whitford*, No. 16-1161, 2017 U.S. LEXIS 4040 (U.S. June 19, 2017, argued October 3, 2017). At issue in *Gill* is whether judicially manageable standards even exist to evaluate partisan gerrymandering claims and, if so, the determination for the standards governing such claims under the Equal Protection Clause of the Fourteenth Amendment and the Free Speech and Association Clauses of the First Amendment to the U.S. Constitution. Oral argument was held on October 3, 2017 and a decision will issue before the expiration of the Supreme Court's current term in June 2018.

ii. Currently pending in the Commonwealth Court of Pennsylvania is the LWV Litigation, which challenges the constitutionality of the 2011 Plan pursuant to the Commonwealth's Constitution and also requests, *inter alia*, that a new Congressional redistricting map be drawn. Proposed Intervenors are named Respondents in the LWV Litigation (as are the other Defendants in this matter). Following oral argument on October 4, 2017 on Legislative Respondents' (Proposed Intervenors' here) Application for Stay pending the U.S. Supreme Court's decision in *Gill*, the Commonwealth Court entered an order on October 16, 2017 in which it stayed the LWV Litigation pending the U.S. Supreme Court's adjudication of *Gill*, but directed the parties to brief various privilege assertions related to discovery already served and objected to in that litigation. Separately, on October 11, 2017, Petitioners in the LWV Litigation filed an Application for Extraordinary Relief in the Pennsylvania Supreme Court requesting that that Court exercise immediate, King's Bench jurisdiction over the matter. The Pennsylvania Supreme Court has set a deadline of October 23, 2017 for Respondents in that matter to file any response to that Application.

iii. Plaintiffs in this matter waited six (6) years and three (3) Congressional election cycles before filing this challenge to the 2011 Plan, and then only months before the 2018 election cycle is scheduled to begin.

A. Expedited Adjudication is Unnecessary Because Plaintiffs' Claims Are Substantively Identical to Claims Pending Before the U.S. Supreme Court and Pennsylvania Appellate Courts

15. As characterized by counsel for Plaintiffs during the course of the October 10th conference, the instant case results from an alleged "intentional illegal gerrymander." (*See* ECF No. 29, the Audio File of the October 10, 2017 conference).

16. Plaintiffs assert that their case is novel and therefore different from *Gill*. Although it is undisputed that Plaintiffs' Elections Clause claim is indeed novel—and arguably not even cognizable—Plaintiffs' remaining claims of novelty arise solely from the fact that they have packaged their other claims as civil rights violations under 42 U.S.C. § 1983. But a plain reading of those claims makes clear that the alleged underlying constitutional violations that form the foundation for the purported civil rights claims are identical to the constitutional claims asserted in *Gill*; specifically, alleged violations of the Equal Protection Clause of the Fourteenth Amendment and the First Amendment of the U.S. Constitution.

17. These claims are also nearly identical to those asserted in the LWV Litigation. Though the claims in the LWV Litigation are couched as violations of the Pennsylvania Constitution only, long-settled Pennsylvania law establishes that any analysis of Equal Protection claims asserted under the Pennsylvania Constitution is co-extensive with the analysis that would be required under the Equal Protection Clause of the U.S. Constitution. Similarly, the analysis of claims advanced pursuant to Pennsylvania's First Amendment tracks closely the federal court's analysis of claims advanced under the First Amendment to the U.S. Constitution. The LWV Litigation's Petition for Review (a copy of which is attached hereto as **Exhibit A**), set side-by-side with the claims advanced in this case, evidences that they are effectively the same.

18. Thus, though styled as claims advanced solely under Pennsylvania Constitution, the LWV Litigation actually necessitates the exact same analysis as that currently being considered by the U.S. Supreme Court in *Gill*.

19. Indeed, in both this matter and the LWV Litigation, the end result sought by the claimants is identical – the redrawing of Pennsylvania's Congressional Districts.

20. Put simply, the underlying claims asserted in this case are already being considered both by two Pennsylvania appellate courts (the Commonwealth Court and the Pennsylvania Supreme Court) as well as the U.S. Supreme Court.

B. The Court Should Defer Adjudication of this Action Because the Constitutionality of the 2011 Plan is Already Being Addressed by Pennsylvania Appellate Courts

21. It has been well-established for more than fifty years that the U.S. Supreme Court requires District Courts to defer the adjudication of litigation involving redistricting matters where the state whose plan is at issue is currently addressing the matter through its own legislative and/or judicial branch. *See, e.g., Growe v. Emison*, 507 U.S. 25, 34 (1993) (*citing Scott v. Germano*, 381 U.S. 407 (1965)).

22. In *Growe*, the Supreme Court found that when challenges were pending to Minnesota's redistricting plan in both the State and Federal Courts, the District Court "erred in not deferring to the state court's timely consideration of congressional reapportionment." *Growe*, 507 U.S. at 37. In *Growe*, the United States Supreme Court reversed a three-judge court decision that invalidated maps enacted by the state government, and imposed its own map after the proceedings before the District Court were fully adjudicated.

23. In reversing the District Court's adjudication, the Supreme Court held, "[t]oday we renew our adherence to the principles expressed in *Germano*, which derive from the recognition that the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts ... [w]e say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Id.* at 34 (citing U.S. CONST., Art. I, § 2; and *Chapman v. Meier*, 420 U.S. 1, 27 (1975)).

24. As will be set forth at length in Proposed Intervenors' forthcoming Motion to Stay and/or Abstain, given the pendency of the LWV Litigation, this Court, pursuant to the Supreme Court's dictates in *Germano* and *Growe*, is required to defer consideration of this matter pending the outcome of the LWV Litigation. Numerous other courts in similar situations have so held since *Growe* was decided. *See, e.g.*, *Miss. State Conf. of the NAACP v. Barbour,* Civ. A. No. 11-159, 2011 U.S. Dist. LEXIS 52822, *14, 2011 WL 1870222 (S.D. Miss. May 16, 2011) (three judge court), *aff'd sub nom Miss. State Conf. of the NAACP v. Barbour*, 132 S. Ct. 542 (2011); *Rice v. Smith*, 988 F. Supp. 1437 (M.D. Ala. 1997) (three-judge court).

25. Given that there are substantial questions as to whether or not partisan gerrymandering claims (of any sort) are justiciable at all, whether Plaintiffs' novel Election Clause claim is even cognizable, and whether this Court should entertain any of these issues given the pendency of both *Gill* and the LWV Litigation already working its way through the Pennsylvania appellate courts, there are substantial questions that this Court must resolve before proceeding with written discovery, experts and trial.

26. Moreover, a prompt review of the Scheduling Order by the full court is required in order to assure compliance with the Supreme Court's decisions in *Growe* and *Germano*. *See also* 28 U.S.C. § 2284(b)(3) ("Any action of a single judge may be reviewed by the full court at any time before final judgment."); and *Shapiro*, 136 S.Ct. at 454-55 (discussing the same).

27. The current Scheduling Order respectfully enables this federal litigation to improperly and expeditiously proceed towards a final adjudication regarding the validity of the 2011 Plan at the same time as the LWV Litigation is pending and challenging the very same Plan.

28. For these reasons, requiring Proposed Intervenors to engage in formal discovery with Plaintiffs before they are afforded the opportunity to file their Motion to Dismiss and Motion to Stay and/or Abstain, and before the Court has had the opportunity to review those Motions is respectfully inefficient and improper in light of *Growe* and *Germano*.

C. Plaintiffs Waited Six Years to Commence This Action, And Their Requested Relief Cannot Be Implemented in Time to Affect the 2018 Elections

29. The fact that Plaintiffs sat on their hands for six (6) years is neither a proper nor valid reason for abandoning more than 50 years of U.S. Supreme Court precedent regarding the deferral of such cases when a state court, such as the Commonwealth Court of Pennsylvania in the LWV Litigation, is already addressing the constitutionality of the 2011 Plan.

30. As disclosed during the October 10, 2017 scheduling conference, the Court's reasoning for its extremely expedited Scheduling Order is the fact that Plaintiffs assert that this Court must take action prior to the 2018 primary elections.

31. However, even if Plaintiffs were entitled to the relief they seek (which Proposed Intervenors clearly deny) there is no possible way the relief sought could ever be implemented in time to impact the 2018 primary elections. There are many reasons why this is so.

32. First, many individuals have already announced their candidacy for Congressional seats in the 2018 primaries, and have hired staffs, begun fund-raising and started campaigning in Congressional districts as they currently exist. These efforts were all initiated in reliance on the Congressional map passed into law more than six years ago in 2011, and which has never before been challenged.

33. Second, the Elections Clause itself leaves the passage of any Congressional maps to the State Legislature, and even if this Court ordered a new map be drawn in early December, it would have to be created and then passed through both chambers of Pennsylvania's General

Assembly and signed by the Governor. This legislative process will take a considerable amount of time, especially given the number of legislative session days available in December and, even at its fastest possible pace, would likely not be concluded in time to impact the 2018 primaries.

34. Third, as counsel for the Commissioner of Elections made clear during the October 10, 2017 conference, he must prepare, finalize and circulate paperwork relating to the 2018 primaries weeks in advance of the first filing deadline on February 13, 2018.

35. Accordingly, even if Plaintiffs prevail in this case, it is simply far too late for any new Congressional map to be enacted in time to impact the 2018 primaries. As such, there is simply no reason to unnecessarily rush this matter with an extraordinarily expedited schedule given the importance and magnitude of the matters at issue and the substantial legal questions that must be addressed before any trial could be scheduled.

36. Critically, the 2011 Plan has existed for more than six (6) years and Plaintiffs have done *nothing* to challenge this map until now, just a few months before the 2018 election cycle begins. Surely there is no reason why Plaintiffs could not have asserted these same claims many years ago. Plaintiffs should not be rewarded with an extraordinarily expedited schedule (64 days from Complaint to trial) when this is an alleged crises of their own creation. This is especially so when this case would put an extraordinary – and potentially wholly unnecessary – burden on this Court, Defendants, Proposed Intervenors, and the entire Pennsylvania General Assembly. *See, e.g.*, *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990) (dismissing a redistricting case filed in 1988 on the ground of laches); *Maryland Citizens for Representative General Assembly v. Governor of Maryland*, 429 F.2d 606 (4th Cir. 1970) (dismissing a statewide redistricting challenge filed 90 days prior to the filing deadline for state legislative offices). *Ariz. Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Commission*, 366

F. Supp 2d 887, 908-909 (D. Ariz. 2005) (dismissing redistricting claim challenging a 2002 map filed in 2004 while the "2004 election deadlines were on the horizon").[1]

III. CONCLUSION

WHEREFORE, Proposed Intervenors respectfully request that the Court GRANT their Motion for Review and Reconsideration of the October 10, 2017 Scheduling Order (ECF No. 20) by the Three Judge Panel, strike the current deadlines as set forth in that Order with regard to the deadlines for discovery, including any discovery challenges and/or motions, the deadline for the production of expert reports, and trial, and defer issuing a new scheduling order until the full court decides Proposed Intervenors' Motion to Dismiss and Motion to Stay and/or Abstain.

Dated: October 16, 2017

Respectfully submitted,

HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC

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[1] Both *Arizona Minority Coalition* and *Maryland Citizens for Representative General Assembly* included requests for a three judge-court by the Plaintiffs. Both of those cases were decided before *Shapiro*, and the initial District Judge in both of those cases denied the three-judge panel motion. The Arizona case appears not to have been appealed, and the appeal of the District Court opinion in the Maryland case was taken to the United States Court of Appeals for the Fourth Circuit.

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CERTIFICATE OF SERVICE

I, Kathleen A. Gallagher, hereby, certify that on this 16th day of October, 2017, I caused a true and correct copy of the foregoing *MOTION FOR REVIEW AND RECONSIDERATION OF SCHEDULING ORDER* to be served on all counsel of record, via the Court's ECF Filing System.

Respectfully submitted,

CIPRIANI & WERNER, P.C.

BY: */s/ Kathleen A. Gallagher*

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