

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

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

Counsel for Petitioners;
additional counsel appear on the signature page

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

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

Petitioners submit this Answer to Respondents the Pennsylvania General Assembly's, Representative Michael C. Turzai's, and Senator Joseph B. Scarnati III's (collectively "General Assembly") Application to Stay All Proceedings ("Application" or "the Application"). Petitioners' grounds for opposing the stay are set forth in further detail in Petitioners' Brief in Opposition to the stay application, which will be filed contemporaneously with this Answer.

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 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 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.

Petitioners deny the averments in the seven unnumbered paragraphs in the Introduction to the Application. The averments in the seven unnumbered paragraphs on the Introduction to the Application are conclusions of law to which no responsive pleading is required.

For the reasons set forth below and in Petitioners’ separately filed Brief in

Opposition to the stay application, Petitioners deny that a stay is necessary and/or appropriate in the present action.

I. Relevant Factual and Procedural History

Petitioners respond to the averments in paragraphs 1-14 of the Application as follows:

1. Admitted in part; denied in part. Petitioners admit that the League of Women Voters of Pennsylvania and eighteen (18) registered Democrat voters are the Petitioners and that the individuals consistently voted for Democratic candidates for Congress. The remaining averments in this paragraph purport to summarize paragraphs 14-31 of Petitioners' Petition for Review filed in this Court on June 15, 2017 ("the Petition"); Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

2. Admitted in part; denied in part. Petitioners admit that they assert the 2011 plan was designed by Republicans to maximize the number of Republican congressional representatives. Petitioners deny that their claims are the same as the claims in *Gill*. Moreover, the remaining averments in this paragraph purport to summarize paragraphs 42-49 of the Petition; Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

3. Admitted. Petitioners admit the averments in this paragraph but further respond by directing the Court to the Petition.

4. Admitted in part; denied in part. Petitioners admit that they claim the 2011 Plan violates the Free Speech and Expression and Freedom of Association Clauses in the Pennsylvania Constitution. To the extent the remaining averments in this paragraph purport to summarize paragraphs 99-112 of the Petition, Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

5. Admitted in part; denied in part. Petitioners admit that they claim the 2011 Plan violates the equal protection provisions in the Pennsylvania Constitution. To the extent the remaining averments in this paragraph purport to summarize paragraphs 116-117 of the Petition, Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

6. Admitted in part; denied in part. Petitioners admit that they assert that the 2011 plan disadvantages Petitioners and other Democratic voters at the polls and severely burdens their representational rights. To the extent the remaining averments in paragraph 6 purport to summarize paragraph 117 of the Petition, Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

7. Admitted in part; denied in part. Petitioners admit that under the 2011 plan, certain Democratic voters are essentially shut out of the political process, denied any realistic opportunity to elect representatives of their choice, and have

no meaningful opportunity to influence legislative outcomes. Other Democratic voters under the 2011 plan have the weight of their votes substantially diluted, their votes have no marginal impact on election outcomes, and representatives are less responsive to their individual needs or policy preferences. The remaining averments in this paragraph purport to summarize paragraph 119-120 of the Petition; Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

8. The averments in this paragraph purport to summarize paragraph 115 of the Petition; Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

9. The averments in this paragraph purport to summarize paragraphs 61-66 and paragraphs 73-74 of the Petition; Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

10. The averments in this paragraph purport to summarize paragraph 88 of the Petition; Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith. Petitioners further deny that the efficiency gap analysis on which Petitioners rely is “identical” to the analysis relied on by the three-judge panel in *Gill*.

11. The averments in this paragraph, including footnotes, purport to summarize paragraph 88 of the Petition; Petitioners refer to the Petition for its full

and complete contents and deny anything inconsistent therewith.

12. Admitted in part; denied in part. Petitioners admit that Pennsylvania’s “efficiency gap” is the highest in the nation and that that fact is one of many that proves that voters were unconstitutionally “packed” and “cracked” in violation of the Pennsylvania Constitution. The remaining averments in this paragraph purport to summarize paragraphs 88-89 of the Petition; Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

13. Denied.

14. Admitted in part; denied in part. Petitioners admit that Petitioners have served requests and provided notice of intent to serve subpoenas; Petitioners refer to those requests and subpoenas for their full and complete contents, and deny anything inconsistent therewith.

II. Standard of Review

Petitioners respond to the averments in paragraphs 15-17 of the Application as follows:

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

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

17. The averments in this paragraph purport to characterize orders in other

proceedings in other states that do not concern violations of the Pennsylvania Constitution; Petitioners refer to those orders for their full and complete contents and deny anything inconsistent therewith.

III. Argument

Petitioners respond to the averments in paragraphs 18-51 of the Application as follows:

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

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

20. The averments in this paragraph purport to characterize a United States Supreme Court order involving a case that does not concern violations of the Pennsylvania Constitution; Petitioners refer to that order for its full and complete contents and deny anything inconsistent therewith.

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

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

23. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. By way of further response, the

Pennsylvania Supreme Court held that partisan gerrymandering cases are justiciable in *In re 1991 Pennsylvania. Legislative Reapportionment Commission*, 609 A.2d 132 (Pa. 1992), and *Erfer v. Commonwealth of Pennsylvania*. 794 A.2d 325 (Pa. 2002), and that the United States Supreme Court has consistently held that districting cases are justiciable since *Baker v. Carr*, 369 U.S. 186 (1962) and specifically held that partisan gerrymandering cases are justiciable in *Davis v. Bandemer*, 478 U.S. 109 (1986).

24. The averments in this paragraph purport to characterize a brief in a United States Supreme Court case that does not concern violations of the Pennsylvania Constitution; Petitioners refer to that brief for its full and complete contents and deny anything inconsistent therewith.

25. The averments in this paragraph purport to characterize an amicus brief in a United States Supreme Court case that does not concern violations of the Pennsylvania Constitution; Petitioners refer to that brief for its full and complete contents and deny anything inconsistent therewith.

26. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. By way of further response, *Gill* does not involve claims that concern violations of the Pennsylvania Constitution.

27. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. By way of further response, *Gill* does

not involve claims that concern violations of the Pennsylvania Constitution.

Petitioners further deny that a stay is necessary and/or appropriate in the present action.

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

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

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

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

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

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

34. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. By way of further response, the Pennsylvania Supreme Court has never refuted the “partisan intent/effect” test standard adopted in *In re 1991 Pennsylvania. Legislative Reapportionment*

Commission, 609 A.2d 132 (Pa. 1992), or *Erfer v. Commonwealth of Pennsylvania*, 794 A.2d 325 (Pa. 2002).

35. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. By way of further response, Petitioners deny that a stay is appropriate and/or necessary in the present action.

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

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

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

39. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. By way of further response, Petitioners deny that a stay is necessary and/or appropriate in the present action.

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

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

42. Denied. Petitioners are without knowledge or information sufficient to form a belief as to the truth of the averments set forth in this paragraph and therefore they are denied.

43. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. By way of further response, Petitioners deny that a stay is necessary and/or appropriate in the present action.

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

45. Petitioners admit the averments in the first sentence of paragraph 45. Petitioners deny the averments in the remaining sentences of paragraph 45; the averments in these remaining sentences are conclusions of law to which no responsive pleading is required.

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

47. Denied. Petitioners are without knowledge or information sufficient to form a belief as to the truth of the averments set forth in this paragraph and therefore they are denied.

48. Admitted in part; denied in part. Petitioners admit that Petitioners have served requests and provided notice of intent to serve subpoenas; Petitioners refer to those requests and that notice for their full and complete contents and deny

anything inconsistent therewith. Petitioners are without knowledge or information sufficient to form a belief as to the truth of the remaining averments set forth in this paragraph and therefore they are denied.

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

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

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

CONCLUSION

52. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. By way of further response, Petitioners deny that a stay is necessary/appropriate in the present action.

Dated: August 28, 2017

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

Respectfully submitted,

/s/ David P. Gersch

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

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

Counsel for Petitioners