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IN THE SUPREME COURT OF PENNSYLVANIA

League of Women Voters of Pennsylvania, *et al.*,)
)
)
 Petitioners,)
)
) **No. 159 MM 2017**
)
 v.)
)
 Pennsylvania General Assembly, *et al.*,)
)
)
)
 Respondents.)
)

**PETITIONERS’ APPLICATION FOR LEAVE TO FILE A REPLY IN
SUPPORT OF PETITIONERS’ APPLICATION FOR EXTRAORDINARY
RELIEF UNDER 42 Pa.C.S. § 726 AND Pa.R.A.P. 3309**

Petitioners request leave of the Court to file a Reply in response to
Respondents Pennsylvania General Assembly, Michael C. Turzai, and Joseph B.

Scarnati III's Answer to Petitioners' Application for Extraordinary Relief.

Petitioners' proposed Reply is attached as Exhibit A. Petitioners submit this 4-page Reply to concisely address assertions in Respondents' Answer.

Dated: October 23, 2017

Respectfully submitted,

/s/ Mary M. McKenzie

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* 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.

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)	
)	
	<i>Respondents.</i>)	
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[PROPOSED] ORDER

AND NOW, this _____ day of _____, 2017, upon consideration of Petitioners’ Application for Leave to File a Reply in Support of Petitioners’ Application for Extraordinary Relief under 42 Pa.C.S. § 726 and Pa. R.A.P. 3309, it is hereby ORDERED that the Application for Leave to File a Reply is GRANTED. The Prothonotary is directed to accept for filing the Reply that was submitted as Exhibit A to Petitioners’ Application.

BY THE COURT:

J.

Exhibit A

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)	
)	
<i>Respondents.</i>)	

**PETITIONERS' REPLY IN SUPPORT OF
APPLICATION FOR EXTRAORDINARY RELIEF UNDER
42 Pa.C.S. § 726 AND Pa.R.A.P. 3309**

Petitioners submit this brief reply in support of their application for extraordinary relief under 42 Pa.C.S. § 726 and Pa.R.A.P. 3309. Petitioners

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

request that the Court exercise extraordinary jurisdiction and resolve this matter so that a new, constitutional districting plan can be in place for the 2018 elections.

1. Of central importance is that this case is brought entirely under the Pennsylvania Constitution, which provides broader protections for speech, expressive conduct, and political association than the federal First Amendment. Thus, this case will not be mooted or otherwise resolved by any decision by the U.S. Supreme Court in *Gill v. Whitford*, No. 16-1161 (S. Ct.).

2. Indeed, while Legislative Respondents assert here that the Pennsylvania Courts should do nothing pending the U.S. Supreme Court's decision on federal claims in *Gill*, they told a federal district court something different just days ago: that, because the states "have primary responsibility" for apportioning their congressional districts, the federal court is "required to defer consideration of this matter pending the outcome of" this state court litigation. *Agre v. Wolf*, No. 2:17-cv-04392-MMB, ECF No. 31, at 7-8 (E.D Pa. Oct. 16, 2017). In other words, Legislative Respondents' position is that the state courts must wait for federal courts to decide a federal challenge (in *Gill*), but the federal courts must wait for the state courts to decide a state challenge. It is obvious that Legislative Respondents are simply engaging in delay tactics in an effort to insulate the map from judicial review. But Legislative Respondents are entirely correct that the state courts have primacy in this matter. This case should proceed without delay.

3. Legislative Respondents devote much of their Answer to misplaced complaints about Petitioners' purported delay in filing this case. Petitioners filed suit in June 2017, providing ample time to resolve this case for the 2018 elections. The previous challenge to Pennsylvania's congressional districts, in *Erfer v. Commonwealth*, 94 A.2d 325 (Pa. 2002), was brought much later in the election cycle, in January, and the Court held an evidentiary hearing and resolved the case in two months. And the recent federal challenge to Pennsylvania's congressional district was filed four months after this case, and the federal court is able to try it in December (although, as mentioned, Legislative Respondents recently asked the federal court to abstain until the conclusion of this case). Application at 3-4.

4. Had Petitioners filed sooner, Legislative Respondents would have argued that Petitioners had insufficient evidence of the gerrymander's effects. That is exactly what respondents argued in *Erfer*. There, the respondents argued that the petitioners' claim that the gerrymander's effects "will be sustained over the next ten years" was "speculative" and nothing more than a "haphazard guess." Br. of Resp. Lieutenant Governor Jubelirer & Speaker Ryan, *Erfer v. Commonwealth*, 2002 WL 32166326, at *43-44 (Pa. 2002). There is no need for speculation here: the three elections cycles that have occurred under the current plan provide conclusive evidence of the gerrymander's enduring effects.

5. This Court repeatedly has rejected the notion that, in the face of a constitutional challenge to a statute, any delay in filing suit provides a basis to deny swift resolution of the challenge. In words strikingly applicable to the case at hand, this Court in *Sprague v. Casey*, 550 A.2d 184 (1988) reiterated that:

We have not been able to discover any case which holds that laches will bar an attack upon the constitutionality of a statute as to its future operation, especially where the legislation involves a fundamental question going to the very roots of our representative form of government and concerning one of its highest prerogatives. To so hold would establish a dangerous precedent

Id. at 189 (quoting *Wilson v. Phila. Sch. Dist.*, 195 A. 90, 99 (Pa. 1937)).

6. Nor is there merit in the General Assembly’s assertion that it is “too late” to resolve this case in time for the 2018 elections. Again, this Court resolved *Erfer* in two months, with a trial in February before the Spring congressional primaries. While the Legislative Respondents claim that it “will take a considerable amount of time” to develop a new map, that simply is not accurate. With modern computing technology, creating a new map—or a range of possible maps—that adhere to traditional districting criteria can be done overnight. Similarly, Legislative Respondents’ purported about regarding how quickly the General Assembly could vote on a new plan given the “limited session days in December and January” are belied by recent history. Answer at 17. The Pennsylvania Senate voted on the current districting plan the same day it was

introduced, Dec. 14, 2011, and the Pennsylvania House of Representatives approved the plan just six days later, on December 20, 2011. Pet ¶¶ 52, 68, 76.

7. Legislative Respondents criticize Petitioners for asking this Court to exercise extraordinary jurisdiction only “after having lost on the stay issue before the Commonwealth Court.” Answer at 9. But there was nothing untoward about first filing an elections case in the Commonwealth Court and then waiting for it to rule before seeking extraordinary relief in this Court. It is not “forum shop[ping]” (Answer at 2) to ask Pennsylvania’s highest court to step in when, instead of expediting the matter as Petitioners requested, the Commonwealth Court issued a stay that will not only prevent this case from being resolved in 2018, but could threaten any ability to resolve it for 2020. This is precisely what happened in *Erfer*, where the petitioners first sought relief from the Commonwealth Court, and invoked this Court’s extraordinary jurisdiction only after the Commonwealth Court declined to act expeditiously.

* * *

Petitioners are due a timely resolution of their constitutional claims of exceptional public importance, and the highest Court of this Commonwealth should hear those claims without delay.

CONCLUSION

For the reasons stated above and in the Application, Petitioners respectfully request that this Court exercise its extraordinary jurisdiction over this matter.

Dated: October 23, 2017

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