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IN THE SUPREME COURT OF PENNSYLVANIA

LEAGUE OF WOMEN VOTERS	:
OF PENNSYLVANIA, et al.	:
Petitioners	:
	:
v.	:
	: Docket No. 159 MM 2017
THE COMMONWEALTH OF	:
PENNSYLVANIA, et al.	:
Respondents	:

PROPOSED INTERVENORS' ANSWER TO PETITIONERS' APPLICATION FOR EXTRAORDINARY RELIEF UNDER 42 PA.C.S. § 726 AND PA. R.A.P. 3309

Proposed Intervenors Brian McCann, Daphne Goggins, Carl Edward Pfeifer, Jr., Michael Baker, Cynthia Ann Robbins, Ginny Steese Richardson, Carol Lynne Ryan, Joel Sears, Kurtes D. Smith, C. Arnold McClure, Karen C. Cahilly, Vicki Lightcap, Wayne Buckwalter, Ann Marshall Pilgreen, Ralph E. Wike, Martin C.D. Morgis, Richard J. Tems, James Taylor, Lisa V. Nancollas, Hugh H. Sides, Mark J. Harris, William P. Eggleston, Jacqueline D. Kulback, Timothy D. Cifelli, Ann M. Dugan, Patricia J. Felix, Scott Uehlinger, Brandon Robert Smith, Glen Beiler, Tegwyn Hughes, Thomas Whitehead, David Moylan, Kathleen Bowman, James R. Means, Jr., Barry O. Christenson, Bryan Leib file the following Answer to Petitioners' Application for Extraordinary Relief Under 42 Pa.C.S. § 726 and Pa. R.A.P. 3309:

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INTRODUCTION

Proposed Intervenors hereby submit this Answer to Petitioners' Application for Extraordinary Relief as "persons who may be affected thereby" adverse to the Application. Pa. R.A.P. 3309(a), (b). Proposed Intervenors have submitted and briefed an Application for Leave to Intervene pending in Commonwealth Court at the time of the Application for Extraordinary Relief. Intervenors are active Republicans including candidates for office, Republican County Committee Chairpersons, and County Committee members who have worked to elect their preferred candidates to Congress. As Pennsylvania voters, they have legally enforceable interests at stake in this challenge to Pennsylvania's Congressional Districts. *See Albert v. 2001 Legis. Reapportionment Comm'n*, 790 A.2d 989, 994–95 (Pa. 2002).

STATEMENT OF THE CASE

On June 15, 2017—little more than six months after a federal three-judge panel ruled in favor of the plaintiffs in *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), *cert. granted*, 137 S. Ct. 2289 (2017) —the League of Women Voters of Pennsylvania (LWVPA) and eighteen individuals filed a Petition for Review in the Commonwealth Court challenging the constitutionality of Pennsylvania's

Congressional Districts. Petitioners claim that Pennsylvania's Congressional Districts were designed to prevent voters who consistently vote for the Democratic Party from electing their candidates to Congress. They assert that the 2011 reapportionment plan providing for Pennsylvania's Congressional Districts violates the Pennsylvania Constitution, specifically the free expression and free association clauses, Pa. Const. art. I §§ 7, 20, the equal protection guarantee, *id.* §§ 1, 26, and the free and equal elections clause, *id.* § 5.

Like Petitioners, Intervenors are consistent Pennsylvania voters. In fact, they have worked as candidates for public office, Republican County Committee Chairpersons, and Republican County Committee members since the 2011 reapportionment plan came into effect, years before the Petitioners filed their action. Accordingly, they have exercised rights protected by the Pennsylvania Constitution—the same rights alleged by the Petitioners, to free speech, free association, equal protection, and free and equal elections—for the 2012, 2014, and 2016 elections under the existing Congressional Districts challenged by Petitioners. As soon as the 2016 elections were over, Intervenors started preparing for the 2018 elections for Congress in reliance on the existing, duly enacted Congressional Districts.

To defend the exercise of their rights protected by the Pennsylvania Constitution, they filed an Application for Leave to Intervene in this matter on

August 10, 2017. At the time, no party had yet filed pleadings in response to the Petition.

On October 4, 2017, the Commonwealth Court held a hearing on whether to stay the case pending the U.S. Supreme Court's disposition of *Gill v. Whitford*. After the hearing, the Court held a conference in which it indicated that it would grant the stay but allow certain privilege issues to move forward. The Court instructed counsel for Petitioners and for the Pennsylvania General Assembly, Speaker Turzai, and Senator Scarnati (Legislative Respondents) to submit a proposed order regarding a stay within ten days.

On October 11, 2017—before ten days elapsed—Petitioners filed this Application for Extraordinary Relief with this Honorable Court. On October 13, 2017, Petitioners and Legislative Respondents submitted separate proposed orders to the Commonwealth Court, indicating they could not agree upon a joint proposed order. On October 16, 2017, the Commonwealth Court issued an order granting a stay of the case pending the U.S. Supreme Court's disposition of *Gill v. Whitford*, while also providing a briefing schedule for the privilege issues.

SUMMARY OF ARGUMENT

This Honorable Court should, in its discretion, decline to assume plenary jurisdiction over this case at this time. Although the Commonwealth Court has

entered a stay, it is also proceeding to address objections to Petitioners' discovery requests. Petitioners object to the stay but cannot show immediate need for this Court to take jurisdiction, since Petitioners' discovery cannot be completed and maps redrawn in time for the 2018 primary and general elections.

There is no question a factual record must be developed and no reason to believe it will go faster in the Supreme Court than in Commonwealth Court. Thus, this Honorable Court should, in its discretion, decline to assume plenary jurisdiction at this time.

APPLICABLE STANDARD

Under its extraordinary jurisdiction power, the Pennsylvania Supreme Court may "assume plenary jurisdiction" of any matter pending in Pennsylvania courts "involving an issue of immediate public importance." 42 Pa. C.S. § 726. The extraordinary jurisdiction power is distinct from King's Bench powers, which allow this Honorable Court to assume jurisdiction "even when no matter is pending before a lower court." *Bd. of Revision of Taxes v. City of Phila.*, 4 A.3d 610, 620 (Pa. 2010) (citing *In re Dauphin Cty. Fourth Investigating Grand Jury*, 943 A.2d 929, 933 n.3 (Pa. 2007)). *Compare Commonwealth v. Williams*, 129 A.3d 1199, 1206 (Pa. 2015) (King's Bench). Because an action between the same parties regarding the same issues is pending in the Commonwealth Court, Petitioners'

Application for Extraordinary Relief is properly considered under the extraordinary jurisdiction power. *See In re Dauphin Cty. Grand Jury*, 943 A.2d at 933 n.3).

In determining whether to exercise its discretion to assume plenary jurisdiction, this Honorable Court "considers the immediacy and public importance of the issues raised." *Bd. of Revision of Taxes*, 4 A.3d at 620 (citing 42 Pa. Cons. Stat. § 726); *see also Commonwealth v. Harris*, 32 A.3d 243, 251 (Pa. 2011) (declining to assume plenary jurisdiction because "the requisite degree of public importance is lacking in most orders overruling privileges"). In addition, this Court considers whether there are any factual disputes. *Id.* at 621. This Court is less hesitant to assume plenary jurisdiction when it can decide the issues as matters of law. *Id.* Finally, this Court is also less hesitant to assume plenary jurisdiction when it has a factual record that "demonstrates that petitioners have a clear right to relief." *Id.*

"[E]ven a clear showing that a petitioner is aggrieved does not assure that this Court will exercise its discretion to grant the requested relief." *Id.* at 620 (quoting *Phila. Newspapers, Inc. v. Jerome*, 387 A.2d 425, 430 n.11 (Pa. 1978)). "This Court will not exercise extraordinary jurisdiction to consider any and every challenge . . . that [is] properly reviewable in the ordinary course, only once a final order issues." *In re Dauphin Cty. Grand Jury*, 943 A.2d at 936. "Plenary jurisdiction is invoked sparingly and only in circumstances where the record

clearly demonstrates the petitioners' rights." *Bd. of Revision of Taxes*, 4 A.3d at 620 (citing *Commonwealth v. Morris*, 771 A.2d 721, 731 (Pa. 2001); and *Phila. Newspapers*, 387 A.2d at 430 n.11).

ARGUMENT

Extraordinary relief is inappropriate at this time because the issues involved in Petitioners' application are not "immediate."

For the Pennsylvania Supreme Court to assume plenary jurisdiction over this case, the issues involved must be "immediate." *See Bd. of Revision of Taxes*, 4 A.3d at 620 (citing 42 Pa. C.S. § 726). This Honorable Court should, in its discretion, decline to assume plenary jurisdiction pending development of a factual record in Commonwealth Court.

A. Unlike in *Erfer*, Petitioners' delay in seeking this Honorable Court's plenary jurisdiction reveals that the issues in this case are not immediate.

Erfer is not "direct precedent" for this Honorable Court to assume plenary jurisdiction over this case, as Petitioners claim. App. for Extraordinary Relief Under Pa.C.S. § 726 and Pa. R.A.P. 3309 ("App.") 3; *see* App. 16. Petitioners are correct that this Honorable Court assumed plenary jurisdiction over *Erfer*, the last partisan gerrymandering case to challenge Pennsylvania's congressional districts, after it had been brought in Commonwealth Court. *Erfer v. Commonwealth*, 794 A.2d 325, 328 (Pa. 2002).

But in *Erfer*, the petitioners filed their emergency application with this Court *three days* after the Commonwealth Court issued its scheduling order, and well over a month before the date of the hearing it set. *Id.* Here, the Commonwealth Court issued a scheduling order on August 11, 2017 setting a hearing for October 4, 2017. Petitioners knew when the hearing was scheduled, but they waited until October 11—one week *after* the hearing—to file their Application for Extraordinary Relief.

Delay can also be attributed to the way Petitioners chose to bring their action. Petitioners chose to file a Petition for Review in Commonwealth Court on June 15, 2017. If they had wanted to accelerate the case, they had other choices. They could have filed for King's Bench directly with this Honorable Court with no case pending in the lower courts. *See Williams*, 129 A.3d at 1206 (citing 42 Pa. C.S. § 502). They could have filed a motion for summary relief on their pending Petition for Review before the Commonwealth Court. *See* Pa. R.A.P. 1532(b). They did not.

Now, the Commonwealth Court has held its first hearing, and has set a briefing schedule for privilege issues raised by objections to Petitioners' discovery requests. The case is proceeding. When this Honorable Court granted plenary jurisdiction in *Erfer*, the Commonwealth Court had not yet held its first hearing. Petitioners' two-month delay in seeking the Supreme Court's jurisdiction

undermines their claim of immediacy.

B. Under Pennsylvania Supreme Court precedent, Petitioners are not entitled to relief in time for the 2018 elections, and therefore the issues in their application are not immediate.

Petitioners state that the reason they seek this Honorable Court's extraordinary jurisdiction is "to ensure that they and millions of other Pennsylvania voters obtain redress for the violation of their rights in time for the 2018 elections." App. 1–2. But, as this Honorable Court's case law shows, Petitioners have no right to relief in reapportionment cases in time for a particular election. Thus, the issues involved in Petitioners' application are not immediate and do not merit extraordinary jurisdiction. This case should proceed in regular order.

As in this case, *Butcher I* considered the remedy for a mid-decade reapportionment challenge. There, this Honorable Court faced the question whether Pennsylvania's legislative districts were "substantially equal" in population in light of the seminal U.S. Supreme Court case *Reynolds v. Sims* and its progeny. *Butcher v. Bloom*, 203 A.2d 556, 564 (Pa. 1964) ("*Butcher I*") (quoting *Reynolds v. Sims*, 377 U.S. 533, 568 (1964)). Finding the districts unconstitutional, this Honorable Court nonetheless considered "whether the imminence of the 1964 primary and general elections requires the utilization of the apportionment scheme" that had been deemed invalid. *Id.* at 568 (quoting *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 739 (1964)).

From the *Reynolds* cases, this Honorable Court identified two considerations. First, it noted that, because responsibility for reapportionment lay with the State Legislature, the Legislature must be given the first opportunity to correct the districts. *Id.* (quoting *Md. Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 676 (1964)). Second, this Honorable Court engaged in a balancing test. On one hand, it considered the "imminence" of the upcoming elections and the need to give the Legislature "an opportunity to fashion a constitutionally valid apportionment plan." *Id.* (quoting *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 655 (1964)). On the other hand, it weighed whether "appellants' right to cast adequately weighted votes for members of the State Legislature can practicably be effectuated in 1964." *Id.* (quoting *Lucas*, 377 U.S. at 739).

Ultimately, this Honorable Court concluded that it could not remedy Pennsylvania's legislative districts in time for the 1964 elections, notwithstanding constitutional violations. It recognized that "[s]erious disruption of orderly state election processes and basic governmental functions would result from immediate action by any judicial tribunal restraining or interfering with the normal operation of the election machinery at this date." *Id.* at 568–69. Thus, it held that the 1964 elections must continue under the unconstitutional districts. But it added that "[u]nder no circumstances . . . may the 1966 election of members of the Pennsylvania Legislature be conducted pursuant to a constitutionally invalid plan."

Id. at 569. The September 1, 1965 deadline for the Legislature to enact new districts passed without action. *Butcher v. Bloom*, 216 A.2d 457, 458–59 (Pa. 1966) ("*Butcher II*"). Only then did this Honorable Court take affirmative action to remedy the constitutional violations by ordering new districts for the 1966 elections. *Id.* at 459.

Under *Butcher I* and *Butcher II*, therefore, if the Pennsylvania courts determine that Pennsylvania's Congressional Districts do not comply with the Pennsylvania Constitution before the 2018 elections, then a remedy must be enacted in time for the 2020 elections, but not necessarily in time for the 2018 elections.

A more recent case supports this rule. In *Holt I*, this Honorable Court held that the 2011 reapportionment plan for state legislative districts was contrary to law, under provisions of the Pennsylvania Constitution enacted after *Butcher II* pertaining to state legislative reapportionment. *Holt v. 2011 Legis. Reapportionment Comm'n*, 38 A.3d 711, 756 (Pa. 2012) ("*Holt I*"); *see also* Pa. Const. art. II § 17. As a remedy, this Honorable Court ordered that the previous 2001 reapportionment plan remain in place until a new 2011 plan was approved. *Holt I*, 38 A.3d at 721 (citing *Albert*, 790 A.2d at 991); *see also Pileggi v. Aichele*, 843 F. Supp. 2d 584, 592–95 (E.D. Pa. 2012) (denying injunction against use of the 2001 plan for the 2012 elections). This Honorable Court ultimately approved a

new plan on May 8, 2013, "which shall hereby have the force of law, beginning with the 2014 election cycle." *Holt v. 2011 Legis. Reapportionment Comm'n*, 67 A.3d 1211, 1243 (Pa. 2013) ("*Holt II*"). Again, although legislative districts were held contrary to law before the 2012 elections, a remedy was not put in place until the 2014 elections.

In addition, the *Agre v. Wolf* case in federal district court offers no persuasive value to support an expedited timeline. Petitioners make much of the fact that "Judge Baylson advised the parties that a stay of the federal case pending *Gill* would be inappropriate." App. 4. But Petitioners fail to inform this Honorable Court that the Complaint in *Agre* was crafted specifically not to implicate *Gill*. According to the Complaint, *Agre* "raises a different type of legal claim not at issue in *Whitford*. . . . [*Whitford*] does not consider the effect of the Elections Clause on elections to the United States Congress. None of the three counts set out below duplicates the particular issue pending before the Court in *Whitford*." Compl. ¶ 5, *Agre v. Wolf*, Civ. No. 17-4392 (E.D. Pa. filed Oct. 2, 2017). By contrast, the issues in this case directly implicate *Gill*, including the efficiency gap as evidence of partisan gerrymandering claims under equal protection clauses. Thus, it makes sense that a stay is appropriate in this case, but not in *Agre*.

In sum, Petitioners have no right to relief in time for a particular election.

Accordingly, the issues involved in their application are not immediate, as shown by Petitioners' own actions and the stay granted by the Commonwealth Court. Thus, this Honorable Court should not assume plenary jurisdiction at this time, but give the Commonwealth Court an opportunity for orderly disposition of this case.

C. The Supreme Court can wait to assume plenary jurisdiction because discovery cannot realistically be completed in time to resolve this case for the 2018 elections.

If this Honorable Court assumes plenary jurisdiction, it must develop the record in his case. This Honorable Court has hesitated to assume plenary jurisdiction before a factual record has been developed. In assuming plenary jurisdiction, this Honorable Court has noted approvingly when "there is no factual dispute; the issue is one of law, resolvable on the pleadings." *Bd. of Revision of Taxes*, 4 A.3d at 621. "Plenary jurisdiction is invoked sparingly and only in circumstances where the record clearly demonstrates the petitioners' rights." *Id.* at 620 (citing *Morris*, 771 A.2d at 731; and *Phila. Newspapers*, 387 A.2d at 430 n.11). When this Honorable Court granted plenary jurisdiction without a record in *Erfer*, it immediately remanded the case with a directive to the Commonwealth Court to file findings of fact and conclusions of law by a set deadline. *Erfer*, 794 A.2d at 328.

Discovery must be taken for Petitioners to meet their burden under *Erfer*. *Erfer* recognized that this Honorable Court's prevailing standard for partisan

gerrymandering claims is "unquestionably an onerous standard, difficult for a plaintiff to meet." *Id.* at 333. The *Erfer* petitioners failed to establish their claims because they had not shown that they have "effectively been shut out of the political process." *Id.* at 334. As the record stands, neither have Petitioners. Uncontroverted evidence submitted by Petitioners thus far—election results—have already been rejected as evidence by this Honorable Court. *Id.* ("Petitioners seem to believe that evidence of disproportionate results necessarily leads to the conclusion that there will also be a lack of political power and denial of fair representation, and that separate proof showing that the Democrats will be shut out of the political process is not necessary. In essence, Petitioners want us to collapse the two prongs of the effects test into one. This is precisely what the *Bandemer* plurality forbad, and we perceive no sound reason to ease Petitioners' burden in this respect.").

Partisan gerrymandering claims present fact-intensive questions. Petitioners have made allegations, but they have not proven facts. For example, discriminatory intent is one necessary factor for Petitioners to establish their claims. *Id.* at 332. Consider the allegations made about the "'REDistricting Majority Project,' or 'REDMAP.'" App. 6. Petitioners claim that REDMAP's "goal" was to "control[] the redistricting process." *Id.* But Petitioners have not proven REDMAP's role in Pennsylvania's reapportionment. To do so, they need

to take discovery from REDMAP—out-of-state, third-party witnesses beyond this Honorable Court's subpoena power. Their discovery cannot be taken overnight.

Indeed, the discovery necessary for each party to prove its case cannot realistically be completed quickly enough not to interfere with the 2018 primary and general elections. First, this case raises unique discovery issues. Recognizing the speech and debate privilege issues presented in this case, the Commonwealth Court has issued a scheduling order to brief the privilege issues. Second, in Intervenors' case, Intervenors will need to take and give discovery if their Application for Leave to Intervene is granted.

This case cannot be resolved in time for the 2018 elections. Even if this Honorable Court (1) assumed plenary jurisdiction now; (2) appointed a special master; and (3) concluded that Petitioners are entitled to relief before February 13, 2018—the date that candidates can begin circulating nomination petitions—it would also need to approve a new reapportionment plan before February 13, 2018. Such a short timeframe cannot realistically encompass the discovery necessary for this particular case. If this Honorable Court cannot remedy this case by the 2018 elections, the immediacy factor is not present to justify extraordinary relief now. This case should proceed in regular order. This Honorable Court should deny Petitioners' Application for Extraordinary Relief.

D. Petitioners are effectively forum-shopping in the middle of ongoing proceedings because they are unhappy with the Commonwealth Court's stay showing that the issues in this case are not immediate.

Petitioners waited to file their application until after the Commonwealth Court indicated that it would grant the Legislative Respondents' Application to Stay the case pending the U.S. Supreme Court's decision in *Gill v. Whitford*, against Petitioners' wishes. By asking this Honorable Court to assume plenary jurisdiction after the issuance of a non-appealable stay order, Petitioners are not only seeking a second bite at the stay application, but seeking to transfer the entire case to the Supreme Court.

The Commonwealth Court did not issue its stay arbitrarily. The relationship of Pennsylvania partisan gerrymandering law to federal law counsels in favor of a stay in light of the U.S. Supreme Court's consideration of *Gill v. Whitford*. The appropriate course is to wait for U.S. Supreme Court guidance in *Gill v. Whitford*. Arguably, the issues involved in this case are not immediate until *Gill* is decided.

To date, Pennsylvania's partisan gerrymandering jurisprudence for congressional districts has been heavily influenced by the U.S. Supreme Court. In *In re 1991 Pennsylvania Legislative Reapportionment Commission*, this Honorable Court adopted the rationale of the plurality in *Davis v. Bandemer* for the *prima facie* case of partisan gerrymandering. *In re 1991 Pa. Legis. Reapportionment Comm'n*, 609 A.2d 132, 142 (Pa. 1992) (citing *Davis v. Bandemer*, 478 U.S. 109,

139 (1986) (plurality op.)). In *Erfer*, this Court reaffirmed the *Bandemer* plurality's standard for partisan gerrymandering claims. *Erfer*, 794 A.2d at 331–32.

However, *Erfer* was the last partisan gerrymandering case challenging Pennsylvania's congressional districts to come before this Honorable Court. *Erfer*, decided in 2002, predates the U.S. Supreme Court's disposition of *Vieth v. Jubelirer*, 541 U.S. 267 (2004). In *Vieth*, a plurality of the U.S. Supreme Court concluded that *Bandemer* should be overruled and that partisan gerrymandering claims are nonjusticiable under federal law. *Vieth*, 541 U.S. at 306 (plurality op.). No case has presented itself for this Honorable Court to address the impact of the *Vieth* plurality's criticism of *Bandemer* on Pennsylvania's partisan gerrymandering jurisprudence. *See id.* at 282–84 (detailing criticism of *Bandemer*). Not only could the U.S. Supreme Court's pending pronouncement in *Gill v. Whitford* impact Pennsylvania's partisan gerrymandering jurisprudence, this Court has never addressed the impact of *Vieth*.

The interplay between state and federal constitutional requirements resulting from the *Gill* decision could impact how Pennsylvania courts decide this case in two ways. First, *Gill* could impose requirements as a matter of federal law that necessarily cabin what Pennsylvania partisan gerrymandering law can or cannot do. Second, because the *Bandemer* plurality offered persuasive value to this

Honorable Court for the standard for a *prima facie* partisan gerrymandering claim, so too could this Honorable Court be persuaded by the rationales in *Vieth* and in *Gill*. If *Gill* holds that partisan gerrymandering claims are nonjusticiable under federal law, then this Honorable Court's reliance on *Bandemer* would be undermined. This Honorable Court would need to locate independent grounds in the Pennsylvania Constitution to provide relief for a partisan gerrymandering claim—a task made more difficult by the presence of standards for state legislative districts, which specifically do not cover congressional districts. *See* Pa. Const. art. II § 16. Thus, even if this Honorable Court ultimately maintains the *Bandemer* standard under independent Pennsylvania law, it must nevertheless address *Vieth* and *Gill*.

If Pennsylvania courts rush to decide this case and grant Petitioners' requested relief before *Gill*, they face the possibility of ordering Pennsylvania's Congressional Districts be redistricted not once but *twice*—first in light of Pennsylvania's existing law, and second to comply with new U.S. Supreme Court pronouncements in *Gill* which impact state law.

The possibility of multiple redistricting before the 2020 census is especially concerning to Intervenors, who need certainty in district boundaries to effectively carry out their political activities by directing those activities to the correct eligible voters. It could result in the unbelievable and extremely burdensome need to

prepare for the 2018 elections under a third iteration of maps.

In sum, this Honorable Court should not assume plenary jurisdiction from the Commonwealth Court merely because Petitioners are unhappy that the Commonwealth Court issued a stay. The Commonwealth Court is carefully and deliberately proceeding in this case, and will decide other issues, such as privileges, while the stay is pending. There is no rush for this Honorable Court to assume plenary jurisdiction as long as *Gill v. Whitford* is pending because the U.S. Supreme Court's decision could impact state law. Therefore, in light of *Gill v. Whitford*, the issues involved in this case are not immediate.

CONCLUSION AND RELIEF REQUESTED

WHEREFORE, Proposed Intervenors respectfully request this Honorable Court to decline to assume plenary jurisdiction at this time and deny Petitioners' Application for Extraordinary Relief.

Respectfully submitted,

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