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

Louis Agre, William Ewing, Floyd Montgomery, Joy Montgomery, and Rayman Solomon,	:	
Plaintiffs,	:	**Civil Action No. 2:17-cv-4392**
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.	:	

INTERVENOR DEFENDANTS MICHAEL C. TURZAI, SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, and JOSEPH B. SCARNATI, III, PENNSYLVANIA SENATE PRESIDENT PRO TEMPORE'S MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)

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, "Intervenor Defendants"), file the present Motion to Dismiss Plaintiffs' Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). In support of their Motion, Intervenor Defendants rely upon their

Memorandum of Law filed herewith.

Dated: October 24, 2017

Respectfully submitted,

BLANK ROME LLP

/s/ Brian S. Paszamant
BRIAN S. PASZAMANT
JASON A. SNYDERMAN
JOHN P. WIXTED
One Logan Square
130 N. 18th Street
Philadelphia, Pennsylvania 19103
Phone: 215-569-5791
Facsimile: 215-832-5791
Email: Paszamant@blankrome.com
Snyderman@blankrome.com
JWixted@blankrome.com

Attorneys for Intervenor Defendant Senator Joseph Scarnati, III

HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC

/s/ Jason Torchinsky
JASON TORCHINSKY (admitted *Pro Hac Vice*)
SHAWN SHEEHY (admitted *Pro Hac Vice*)
45 North Hill Drive, Suite 100
Warrenton, Virginia 20186
Phone: 540-341-8808
Facsimile: 540-341-8809
Email: JTorchinsky@hvjt.law
ssheehy@hvjt.law

Attorneys for Intervenor Defendants Senator Joseph Scarnati, III and Representative Michael Turzai

CIPRIANI & WERNER PC

/s/ Kathleen Gallagher
KATHLEEN GALLAGHER
CAROLYN BATZ MCGEE
650 Washington Road, Suite 700
Pittsburgh, Pennsylvania 15228
Phone: 412-563-4978
Email: KGallagher@c-wlaw.com
CMcgee@c-wlaw.com

Attorneys for Intervenor Defendant Representative Michael Turzai

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

Louis Agre, William Ewing, Floyd Montgomery, Joy Montgomery, and Rayman Solomon,	:	
Plaintiffs,	:	**Civil Action No. 2:17-cv-4392**
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.	:	

ORDER

AND NOW, this ____ day of _____, 2017, upon consideration of the Motion to Dismiss Plaintiffs' Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) filed by 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 (the "Motion"), and any responses thereto, it is hereby **ORDERED** that the Motion is **GRANTED** and Plaintiffs' Complaint is **DISMISSED**.

BY THE COURT:

_____

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

Louis Agre, William Ewing, Floyd Montgomery, Joy Montgomery, and Rayman Solomon,	:	
Plaintiffs,	:	**Civil Action No. 2:17-cv-4392**
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.	:	

INTERVENOR DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS

Intervenor Defendants, President Pro Tempore of the Pennsylvania Senate, Joseph B. Scarnati III and Speaker of the Pennsylvania House of Representatives, Michael C. Turzai (collectively, "Intervenor Defendants"), by and through their undersigned counsel, hereby submit this Memorandum of Law in support of their Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

I. PRELIMINARY STATEMENT

For more than 30 years, the United States Supreme Court has been unable to conclusively determine whether partisan gerrymandering claims, in any form, are justiciable. Indeed, following a series of plurality decisions from the U.S. Supreme Court, it remains doubtful whether such a claim could ever be viable, under any theory. Thus, for more than a generation, partisan gerrymandering claims have not succeeded.

This series of failures continued until late last year, when a three-judge District Court panel in *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016) (three-judge court), found that state

legislative maps in Wisconsin were unconstitutional under a "test" for partisan gerrymandering and ordered the creation of new legislative maps. Following the *Whitford* decision, several lawsuits—now including this one—were filed across the country, all seeking to have state legislative and congressional maps redrawn. These cases are driven much more by politics than they are by the law. In fact, there has been no discernable change in U.S. Supreme Court law and the viability of *any* partisan gerrymandering claims remains completely unsettled, particularly given the Supreme Court's current consideration of *Whitford*.[1]

Plaintiffs' Complaint seeks to invalidate the congressional redistricting plan enacted in 2011 by the Pennsylvania General Assembly (the "2011 Plan"). Notwithstanding that many Democrats voted in favor of the 2011 Plan, Plaintiffs allege that the Plan is the result of an unconstitutional partisan gerrymander. Plaintiffs' allegations are meritless, and the Complaint should be dismissed for multiple, independently sufficient reasons.

First, an individual advancing a partisan gerrymandering claim only has standing to challenge his/her own district in a congressional map. Consequently, a group of plaintiffs lacks standing to challenge a statewide congressional map unless they, at a minimum, live in all of the districts in the state. Here, Plaintiffs purport to challenge the 2011 Plan, which consists of 18 separate districts, on a statewide basis. But, because there are only five Plaintiffs (none of whom even identify their Congressional districts in the Complaint), they plainly lack standing to advance a statewide challenge to the 2011 Plan.

[1] As noted below, the U.S. Supreme Court stayed relief afforded in *Whitford* on June 19, 2017. *See Gill v. Whitford*, 137 S. Ct. 2289 (2017).

Second, even if certain Plaintiffs have standing, the Complaint must be dismissed for failure to state a claim. Partisan gerrymandering claims are premised upon the notion that a plaintiff has suffered a diminution of political power—e.g., because the allegedly unlawful congressional redistricting plan favors members of one political party over another. Because Plaintiffs have failed to identify their district, address, or political party affiliation, Plaintiffs have failed to allege sufficient facts to allow the Court to determine whether Plaintiffs have in fact suffered any diminution of their political power. As such, the Complaint must be dismissed.

Third, Plaintiffs allege that the 2011 Plan violates the Elections Clause of the U.S. Constitution—which expressly grants partisan State Legislatures the right to draw congressional maps—because the Elections Clause purportedly requires congressional maps be drawn in a neutral, nonpartisan manner.[2] But, Plaintiffs' Elections Clause claim is meritless; in fact, a plurality of Supreme Court Justices summarily rejected the very same theory in *Vieth v. Jubelirer*, 541 U.S. 267, 285-86 (2004) (plurality op.) (recognizing that because the Elections Clause vests a political branch with drawing congressional districts, substantial political considerations in districting are inevitable).[3] As the *Vieth* plurality made clear, invalidating a congressional map under the Elections Clause would depart from over 200 years of tradition and accepted jurisprudence, which has clearly established that State Legislatures may consider partisan objectives when drawing electoral maps. *Id.*; *see also id*. at 358, 360 (Breyer, J., dissenting)

---

[2] Plaintiffs' Elections Clause claim is framed as a claim pursuant to the Privileges and Immunities Clause of the U.S. Constitution. As discussed below, the Privileges and Immunities Clause does not, on its own, protect any of the rights that Plaintiffs seek to assert here.

[3] None of the other Justices in *Vieth* addressed the issue.

(acknowledging that, "political considerations will likely play an important, and proper, role in the drawing of district boundaries."). Plaintiffs' Elections Clause claim should therefore be dismissed.

Fourth, Plaintiffs' claims advanced under the Equal Protection Clause of the Fourteenth Amendment and under the First Amendment to the Constitution must be dismissed because numerous U.S. Supreme Court decisions have made clear that there are no judicially-manageable standards to govern such claims. As such, these claims are not justiciable and should be dismissed.

Fifth, Plaintiffs' claims should be dismissed by operation of laches because Plaintiffs inexcusably delayed the filing of their Complaint for nearly six years, and, as a result of that delay, Intervenor Defendants and the citizens of the Pennsylvania will all be harmed if Plaintiffs are granted the relief they seek.

For these reasons, and those more fully explained below, Intervenor Defendants respectfully submit that the Complaint should be dismissed in its entirety, with prejudice.

II. FACTUAL BACKGROUND

Plaintiffs are five individual citizens of Pennsylvania. (Complaint ¶¶ 9-16.) The Complaint does not identify any of Plaintiffs' addresses, political congressional districts, or political affiliations. (*Id.*) Yet, Plaintiffs claim that by continuing to implement the 2011 Plan, Defendants—who are officials holding office in Pennsylvania's executive branch—have deprived them of their Constitutional rights. *Id.* ¶ 3. Plaintiffs seek to enjoin any further implementation of the 2011 Plan in the upcoming 2018 Congressional elections, and request that the Court order the submission of proposed revisions to the 2011 Plan. *Id.* ¶ 52.

The Complaint asserts three causes of action. Count I of the Complaint alleges that by implementing the 2011 Plan, which Plaintiffs allege was based, in part, on partisan considerations, Defendants violated the Elections Clause of the U.S. Constitution. *Id.* ¶¶ 33-40. But Plaintiffs ignore that the Elections Clause does not prohibit state legislatures from considering partisan intent. *See id*. Count II alleges that by implementing the 2011 Plan, Defendants violated Plaintiffs' Fourteenth Amendment Equal Protection rights. *Id.* ¶¶ 41-48. Finally, Count III alleges that by implementing the 2011 Plan, Defendants have violated the First Amendment. *Id.* ¶¶ 49-52.

III. ARGUMENT

A. This Action Must Be Dismissed Because Plaintiffs Lack Standing Pursuant to Federal Rule of Civil Procedure 12(b)(1)

A party may move to dismiss based of lack of standing pursuant to Federal Rule of Civil Procedure 12(b)(1). *See In re Schering-Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 243 (3d Cir. 2012) ("A motion to dismiss for want of standing is . . . properly brought pursuant to Rule 12(b)(1), because standing is a jurisdictional matter.") (citations and quotations omitted).

Article III of the U.S. Constitution limits the jurisdiction of federal courts to actual cases or controversies. *See* U.S. CONST. ART. III, § 2; *Allen v. Wright*, 468 U.S. 737, 750 (1984). And the most important aspect of the case and controversy requirement is the doctrine of standing, which prevents litigants from "raising another person's legal rights," and prohibits the adjudication of generalized grievances "more appropriately addressed in the representative branches." *Id*. at 750-51. Therefore, to invoke the power of federal courts, a plaintiff bears the burden of demonstrating that s/he has suffered an injury to a legally protected interest that is both concrete

and particularized to the plaintiff, and is an injury that the court can redress. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 & n.1 (1992); *Ballentine v. U.S.*, 468 F.3d 806, 810 (3d Cir. 2007) ("On a motion to dismiss for lack of standing, the plaintiff bears the burden of establishing the elements of standing, and each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof.").

In the context of racial gerrymandering claims, the Supreme Court has held that a plaintiff has standing to bring a challenge only to the district where the plaintiff resides. *See United States v. Hays*, 515 U.S. 737, 744-45 (1995); *Shaw v. Hunt*, 517 U.S. 899, 904 (1996). In *Hays*, the U.S. Supreme Court based its decision in part on the fact that, "[w]hen a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Id*. (*quoting Shaw*, 509 U.S. at 648). The Court concluded that, "where a plaintiff does not live in such a district, he or she does not suffer those special harms, and any inference that the plaintiff has personally been subjected to a racial classification would not be justified absent specific evidence tending to support that inference." *Id*. at 745.

For this reason, an organization lacks standing to bring a statewide gerrymandering claim on behalf of its members unless it can show that it has members in every district of the state. *Id*; *see also Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265, 1268-70 (2015) (holding that an organization bringing a racial gerrymandering case on behalf of its constituents does not have standing). The district-specific rule makes sense because congressional elections are on a district wide basis, not on a statewide or proportional basis. *Davis v. Bandemer*, 478 U.S. 109,

159 (1986) (O'Connor, J., concurring). Indeed, someone who lives outside of the challenged district does not suffer a personal, individualized injury by the election of a congressperson who does not represent him. *See Ala. Legis. Black Caucus*, 135 S. Ct. at 1265; *Hays*, 515 U.S. at 745.

The same logic applies to partisan gerrymandering claims. In fact, while the Supreme Court has not specifically addressed the issue of whether the district-specific rule applies to partisan gerrymandering cases, several Justices have indicated that it does. *See Vieth*, 541 U.S. at 327-28 (Stevens, J., dissenting) ("Because *Hays* has altered the standing rules for gerrymandering claims—and because, in my view, racial and political gerrymanders are species of the same constitutional concern—the *Hays* standing rule requires dismissal of the statewide claim."); *id*. at 347-48 (Souter, J., and Ginsburg, J., dissenting) (relying in *Hays* for the proposition that to succeed in a partisan gerrymandering claim, a plaintiff must show that the district of his residence disregarded traditional districting criteria); *Bandemer*, 478 U.S. at 159 (O'Connor, J., concurring) (stating that elections are on a district wide basis for specific candidates not for party); *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016) (dismissing appeal for lack of standing because intervenor congressional defendants—who alleged that the remedial map would flood their districts with Democrats making it more difficult to get reelected—did not live in or represent the challenged districts, Congressional Districts 3 and 4).

Recent federal court decisions have also reached exactly this conclusion. Earlier this month, the United States District Court for the Middle District of Alabama held that the Supreme Court's standing analysis in *Hays* is equally applicable to partisan gerrymandering cases. *Ala.*

Legis. Black Caucus v. Alabama, No. 2:12-CV-691, 2017 WL 4563868, at *5 (M.D. Ala. Oct. 12, 2017). The Court explained:

> We conclude that this analysis controls the question of standing in the context of political gerrymandering. In *Hays*, the Supreme Court reasoned that alleged victims of racial gerrymandering could establish individual harm either by living in an affected district or by proving that they had been personally classified on the basis of race. Assuming that partisan classifications are also constitutionally suspect, an alleged victim of partisan gerrymandering must make the same showing of residency or individual harm.

Id. In support of its conclusion, the court noted that, "[l]ike racial gerrymandering, partisan gerrymandering has the effect of muting the voices of certain voters within a given district." *Id*. Applying this analysis, the Court dismissed partisan gerrymandering claims involving districts in which none of the Plaintiffs resided.

Here, Plaintiffs purport to challenge the 2011 Plan on a statewide basis. But to advance such a claim, Plaintiffs are required to establish that they collectively live in all 18 Pennsylvania Congressional districts. *See Ala. Legis. Black Caucus*, 135 S. Ct. at 1265, 1268-70. Because there are only five Plaintiffs in this action, Plaintiffs necessarily lack standing to challenge the 2011 Plan on a statewide basis, and the Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1).

Additionally, because Plaintiffs fail to identify their congressional districts or allege how their particular districts cause them harm, any attempt to construe this Complaint as a district specific complaint must be denied, and the Complaint dismissed Pursuant to Federal Rule of Civil Procedure 12(b)(1).

B. The Complaint Should Be Dismissed For Failure To State A Claim Pursuant to Federal Rule of Civil Procedure 12(b)(6)

1. Applicable Legal Standard

When considering a motion to dismiss pursuant to Rule 12(b)(6), courts "consider only the complaint, exhibits attached to the complaint, [and] matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents." *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010) (*citing Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993)). In evaluating the legal sufficiency of a complaint, courts accept the factual allegations of the complaint as true and "construe the complaint in the light most favorable to the plaintiff." *DelRio-Mocci v. Connolly Props., Inc.*, 672 F.3d 241, 245 (3d Cir. 2012) (internal citations omitted). A plaintiff's pleading obligation is to set forth "'a short and plain statement of the claim,' " which gives the defendant "'fair notice of what the ... claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The complaint must contain "'sufficient factual matter to show that the claim is facially plausible,' thus enabling 'the court to draw the reasonable inference that the defendant is liable for [the] misconduct alleged.'" *Warren Gen. Hosp.*, 643 F.3d at 84 (*quoting Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009)).

2. The Complaint Should Be Dismissed Because Plaintiffs Fail to Plead Their Claims With Sufficient Specificity

Plaintiffs' Complaint renders it impossible to properly evaluate Plaintiffs' claims; thus, the Complaint fails to state a claim. To the extent they are constitutionally viable, partisan gerrymandering claims are based on the concept that a party should not suffer a diminution in

political power or be shut out of the political process. *Hays*, 515 U.S. at 744-45. When similarly viewed in the racial gerrymandering context, the U.S. Supreme Court has explained that a representative from a district that is engineered to diminish the voting power of a racial minority may believe that he does not need to represent members of the racial minority, thereby diminishing the political power of the racial minority. *Hays*, 515 U.S. 737, 744-45 ("When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole.").

Here, any damage based on partisan gerrymandering would necessarily be based on the theory that each Plaintiff has been shut out of the political process because s/he lives in a Congressional district that was gerrymandered to favor a political party to which such Plaintiff does not belong. While the Complaint alleges generally that all five Plaintiffs live in Pennsylvania, it does not identify any Plaintiff's address, congressional district, or political party. As discussed above, to fully evaluate whether Plaintiffs have suffered *any* type of harm that could conceivably sustain their gerrymandering claims, it is necessary to know and have alleged in the Complaint, at a bare minimum, the district and party affiliation of each Plaintiff. Because Plaintiffs have failed to plead this essential information, the Complaint must be dismissed for failure to state a claim.

3. Count I Should Be Dismissed Because Enforcement Of The 2011 Plan Does Not Violate The Privileges And Immunities Clause Or The Elections Clause

Count I of Plaintiffs' Complaint alleges that Defendants' continued enforcement of the 2011 Plan violates the Privileges and Immunities Clause of the Fourteenth Amendment because, in enacting the 2011 Plan, the General Assembly exceeded its authority under the Elections Clause. (Complaint ¶¶ 33 – 35.) This claim must be dismissed for the reasons set forth below.

a. Plaintiffs Cannot State a Cognizable Claim Under the Privileges And Immunities Clause

The Privileges and Immunities Clause guarantees the federal rights of citizenship. These rights are few: access to ports and navigable waterways, the ability to run for federal office, and to be protected while on the high seas. *See Slaughterhouse Cases*, 83 U.S. 36, 77-78 (1873). In its broadest interpretation, the Privileges and Immunities Clause mandates that the States not abridge those rights guaranteed in the Bill of Rights. *See McDonald v. City of Chicago*, 561 U.S. 742, 806, 837-38 (2010) (Thomas, J., concurring); *see also Garnes v. McCann*, 21 Ohio St. 198, 209-210 (Ohio 1871). Accordingly, the Privileges and Immunities Clause is not an independent source of rights. Rather, it simply mandates that the States guarantee to its citizens the rights guaranteed in the Bill of Rights. *McDonald*, 561 U.S. at 858 (Thomas, J., concurring).

Intervenor Defendants have been able to identify only one three-judge panel that has reviewed the application of the Privileges and Immunities Clause in a redistricting challenge. *See Pope v. Blue*, 809 F. Supp. 392, 399 (W.D. N.C. 1992). In *Pope*, the plaintiffs alleged that the configuration of the districts was so egregious that it placed the plaintiffs at an electoral disadvantage relative to other voters in other states. 809 F. Supp. 292, 399. The three-judge court

unanimously rejected this challenge, holding that the Privileges and Immunities Clause does not guarantee the right to live in a regularly shaped district. *See id.* at 399 *aff'd. sub nom Pope v. Blue*, 506 U.S. 801 (1992). Likewise, here, the Privileges and Immunities Clause does not establish any independent cause of action. Accordingly, to be able to maintain a claim under Count I of their Complaint, Plaintiffs are required to also allege that they are entitled to substantive relief under the Elections Clause, which they cannot do.

b. The 2011 Plan Does Not Violate The Elections Clause

Plaintiffs' Elections Clause claim is predicated on Plaintiffs' assertion that the states' authority to create electoral maps under the Elections Clause must be performed "neutrally," in a non-partisan manner. (Complaint ¶¶ 33-40.) The very same claim was raised in *Vieth*, albeit "fleetingly," and summarily rejected by a plurality of the Justices. *See Vieth*, 541 U.S. at 306 (plur.) (expressly rejecting the plaintiffs' attempt to invoke the Elections Clause as a basis to prohibit partisan gerrymandering). Plaintiffs' claim must be rejected, too, because it: (a) is inconsistent with the plain language and structure of the Elections Clause, and (b) ignores the Clause's purpose and history.

The Elections Clause provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of Chusing Senators.

U.S. Const. art. I, sec. 4. Thus, on its face, the Elections clause says nothing about "neutrality" in the drawing of district lines. To the contrary, the Elections Clause quite clearly delegates broad

authority to state legislatures (where the Founding Fathers were aware that members would be members of various political parties) with the only limitation being Congress's ability to create a statute limiting that authority.

As Justice Scalia explained in his plurality opinion in *Vieth*, "[p]olitical gerrymanders are not new to the American scene." *Vieth*, 541 U.S. at 274. The plurality in *Vieth* traced gerrymandering all the way back to 1732, when the Governor of North Carolina, "divide[d] old Precincts established by Law…to get a Majority of his creatures in the Lower House or to disrupt the assembly's proceedings." *Id*. *citing* 3 Colonial Records of North Carolina 380–381 (W. Saunders ed. 1886). The Framers knew that by delegating authority to oversee elections to state legislatures, the redistricting process would be inherently political, and they recognized the need to limit that authority. *Id*. However, the Framers never intended that state legislatures would perform their duties under the Elections Clause in a "neutral" manner. *Id*. Rather, the Framers included a check on the state legislatures by specifically allowing Congress to prescribe laws to limit a state legislature's authority. *Id.* ("It is significant that the Framers provided a remedy for such practices in the [Elections Clause], while leaving in state legislatures the initial power to draw districts for federal elections, permitted Congress to 'make or alter' those districts if it wished.").[4]

[4] In fact, not only does Congress have the power to enact legislation to limit the State Legislatures' power under the Elections Clause, it has done so previously. *See, e.g.*, 2 U.S.C. § 2c (mandating all Members of the House of Representatives be elected from single-member districts); *see also id*. § 7 (mandating that the first Tuesday after the first Monday in November as Election Day for congressional elections); *see also Vieth*, 541 U.S. at 276-77 (plurality op.) (citing other bills and statutes where Congress has exercised its authority to limit State's power in setting the Time, Place, and Manner of elections, including bills to limit gerrymandering in congressional districts).

The Framers therefore specifically endowed inherently partisan state legislatures with substantial, but not unlimited, power to gerrymander.

Acting under the broad authority of the Elections Clause, state legislatures have *always* engaged in political gerrymandering. As the plurality opinion in *Vieth* explained:

> The political gerrymander remained alive and well (though not yet known by that name) at the time of the framing. There were allegations that Patrick Henry attempted (unsuccessfully) to gerrymander James Madison out of the First Congress… And in 1812, there occurred the notoriously outrageous political districting in Massachusetts that gave the gerrymander its name—an amalgam of the names of Massachusetts Governor Elbridge Gerry and the creature ("salamander") which the outline of an election district he was credited with forming was thought to resemble. *By 1840 the gerrymander was a recognized force in party politics and was generally attempted in all legislation enacted for the formation of election districts. It was generally conceded that each party would attempt to gain power which was not proportionate to its numerical strength*.

Id. at 274-75 (internal citations omitted; emphasis added). Since the founding of this Nation, therefore, partisan gerrymandering under the Elections Clause has been expected, accepted, and legally permissible. *See, e.g.*, *Gaffney*, 412 U.S. at 753; *Vieth*, 541 U.S. at 285 (plurality op.); *see id*. at 358, 360 (Breyer, J., dissenting) (noting that the "legislature's use of political boundary-drawing considerations ordinarily does *not* violate the Constitution's Equal Protection Clause," and acknowledging that "political considerations will likely play an important, and proper, role in the drawing of district boundaries.").

Nonetheless, Plaintiffs argue that the Elections Clause requires State Legislatures to act neutrally, in a non-partisan matter. Plaintiffs' position appears to be based solely on an out-of-

context quote from Justice Kennedy's concurrence in *Cook v. Gralike*, 531 U.S. 510, 527 (2010). (*See* Complaint ¶ 3.) The narrow issue in *Gralike* was whether the State of Missouri could legally require congressional candidates to either support term limits or appear on the ballot with an asterisk indicating that the candidate opposes term limits. 531 U.S. at 527. In arguing that the statute should be struck, Justice Kennedy stated:

> Whether a State's concern is with the proposed enactment of a constitutional amendment or an ordinary federal statute it simply lacks the power to impose any conditions on the election of Senators and Representatives, save neutral provisions as to the time, place, and manner of elections pursuant to Article I, §4.

See id.

In context, Justice Kennedy's statement cannot possibly be read to question decades of accepted Elections Clause practice. Rather, Justice Kennedy was simply acknowledging that Missouri did not have the power to coerce its congressional delegation into supporting term limits. *See id*. at 528 ("Freedom is therefore 'most secure if the people themselves, not the States as intermediaries, hold their federal legislators to account for the conduct of their office.'"). Indeed, Justice Kennedy has regularly recognized that partisan gerrymanders have existed since the founding, remain permissible, are inevitable, and in the face of a racial gerrymandering claim, can serve as a viable defense. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1488 (2017) (Alito, J., dissenting joined by Roberts, C.J., and Kennedy, J) (citing *Gaffney*, 412 U.S. at 753; *Bandemer*, 478 U.S. at 129; *Vieth*, 541 U.S. at 274-76; *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999).

In short, the plain language, legislative history of redistricting in this Country, and a long line of judicial precedents make abundantly clear that the Elections Clause cannot be invoked to

prevent partisan gerrymandering. *See Vieth*, 541 U.S. at 306 (plur.) (expressly rejecting plaintiffs' "fleeting" attempt to invoke the Elections Clause as a basis to prohibit partisan gerrymandering). The 2011 Plan was passed by the General Assembly and signed by the Governor in the very manner that hundreds of legally sound redistricting plans have been passed throughout the country's history.[5]

Accordingly, Count I of the Complaint must be dismissed for failure to state a claim.

4. Counts II and III Must Be Dismissed Because They Are Not Justiciable

Plaintiffs' remaining claims are non-justiciable and must be dismissed. Although *Marbury v. Madison* makes clear that it is "emphatically within the province of the judicial branch to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), it is equally clear that sometimes "the law is that the judicial department has no business entertaining the claim of unlawfulness-because the question … involves no judicially enforceable rights." *Vieth*, 541 U.S. at 277 (plurality op). "One of the most obvious limitations imposed by [Article III] is that judicial action must be governed *by standard, by rule*… [The] law pronounced by the courts must be principled, rational, and based upon reasoned distinctions." *Id.* (emphasis added). Thus, where no judicially manageable standard exists to adjudicate a claim or where the question presented is one confined to the political branches, the claim must be dismissed as non-judiciable. *See Baker v. Carr*, 369 U.S. 186, 217 (1962); *Vieth*, 541 U.S. 722; *Rodriquez v. 32nd Legislature of the V.I*, 859 F.3d 199, 202 (3d Cir. 2017). The history of partisan gerrymandering cases in the Supreme

[5] Plaintiffs also claim that the 2011 Plan violates the Supremacy Clause of the Constitution, which provides that state laws that conflict with federal law are invalid. (Complaint ¶ 33; *citing* U.S. CONST. ART. 6, cl. 2.) Because the 2011 Plan is entirely consistent with the Elections Clause, the Supremacy Clause is inapplicable.

Court makes abundantly clear that there is, at present, no manageable standard to evaluate such claims. As a result, Counts II and III are not justiciable, and should be dismissed.

a. A Brief History of Partisan Gerrymandering Claims

In 1986, in *Davis v. Bandemer*, the Supreme Court considered, for the first time, whether a partisan gerrymandering claim under the Fourteenth Amendment's Equal Protection Clause was justiciable. 478 U.S. 109 (1986).[6] Six Justices of the *Bandemer* Court indicated that while they could not agree upon a single standard for adjudicating such claims, they were "not persuaded that there are no judicially discernible and manageable standards by which political gerrymander cases are to be decided." *Id*. The splintered Court issued four separate opinions, and the majority of the Court did not agree with the plurality opinion regarding the standard for adjudicating partisan gerrymandering. Over the course of the next 18 years, lower courts attempted with futility to apply some standard adopted by the plurality in *Bandemer*.

In 2004, the Supreme Court rejected the *Bandemer* test. *See Vieth*, 541 U.S. at 283-84. Although the Justices in *Vieth* issued five separate opinions, they once again failed to identify any workable standard to evaluate partisan gerrymandering claims. The four Justice plurality explained that the *Bandemer* test provided nothing more than "one long record of puzzlement and consternation." *Id*. The plurality noted that any attempt to apply the plurality opinion in *Bandemer*, "has almost invariably produced the same result (except for the incurring of attorneys'

[6] Claims of partisan gerrymandering were presented to the Court prior to *Bandemer*, but none were decided on that issue. *See, e.g.*, *Smiley v. Holm*, 285 U.S. 186 (1932) (finding the statute to be invalid based on the then-existing federal congressional apportionment statute); *Wood v. Broom*, 287 U.S. 1 (1932) (in which the Court sidestepped the gerrymandering allegation and decided the case on other grounds).

fees) as would have obtained if the question were non-justiciable: Judicial intervention has been refused." *Id*. After engaging in extensive analysis, the plurality concluded that "eighteen years of essentially pointless litigation have persuaded us that *Bandemer* is incapable of principled application. We would therefore overrule that case, and decline to adjudicate these political gerrymandering claims." *Id*. at 282, 306. Justice Kennedy concurred in the judgment in *Vieth*, and acknowledged that he could not identify any judicially discernable standards to guide courts in evaluating partisan gerrymandering claims. *Id.* at 308. He concluded that that although the arguments in favor of holding partisan gerrymandering claims non-justiciable are "weighty" and in fact "may prevail in the long run…some limited and precise rationale" might be discovered in the future. *Id*. at 306.

Two years after *Vieth*, the Supreme Court again revisited the justiciability of partisan gerrymandering claims advanced under the Equal Protection Clause. *See League of United Latin Am. Citizens v. Perry,* 548 U.S. 399 (2006) ("*LULAC*"). The *LULAC* decision produced six opinions, but once again failed to produce a discernable standard upon which to evaluate partisan gerrymandering claims. 548 U.S. at 461 (Kennedy, J. concurring) (acknowledging that disagreement still persists in articulating the standard to evaluate partisan gerrymandering claims but declining to address the justiciability issue).

When considered collectively, *Bandemer*, *Vieth*, and *LULAC* make clear that the Supreme Court has been unable to establish a standard to evaluate partisan gerrymandering claims. *Shapiro v. McManus*, 203 F. Supp. 3d 579, 594 (D. Md. 2016) (three-judge court) ("Taken together, the combined effect of *Bandemer*, *Vieth*, and *LULAC* is that, while political gerrymandering claims

premised on the Equal Protection Clause remain justiciable in theory, it is presently unclear whether an adequate standard to assess such claims will emerge."); *Pearson v. Koster*, 359 S.W.3d 35, 42 (Mo. 2012) (rejecting partisan gerrymandering claim in part because of the "Supreme Court's inability to state a clear standard"); *Radogno v. Ill. State Bd. of Elections*, No. 11-4884, 2011 U.S. Dist. LEXIS 122053, *14 and 18 (N.D. Ill. Oct. 21, 2011) (three-judge court) (recognizing that because the U.S. Supreme Court has not adopted a test, trying to find one may be an "exercise in futility"); and *Ala. Legislative Black Caucus v. Alabama,* 988 F. Supp. 2d 1285, 1296, (M.D. Ala. 2013) ("The Black Caucus plaintiffs conceded at the hearing on the pending motions that the standard of adjudication for their claim of partisan gerrymandering is 'unknowable.'") (three-judge court).

Without a standard to apply, at least two federal courts have found that the *Vieth* plurality plus Justice Kennedy's concurrence constituted a majority for the proposition that partisan gerrymandering claims are presently non-justiciable. *Lulac of Texas v. Texas Democratic Party*, 651 F. Supp. 2d 700, 712 (W.D. Tex. 2009) (three-judge court) (*Vieth* held that partisan gerrymandering claims are non-justiciable); *Meza v. Galvin*, 322 F. Supp. 2d 52, 58 (D. Mass. 2004) (three-judge court) (noting that *Vieth* held "that political gerrymandering cases are nonjusticiable").

On October 3, 2017, the Supreme Court heard oral arguments in *Whitford*, a case on appeal from the Western District of Wisconsin. In *Whitford*, the Court is considering, once again, whether partisan gerrymandering claims are justiciable, including whether a workable standard exists to

evaluate gerrymandering claims based on the First Amendment or the Equal Protection Clause.[7] *Gill v. Whitford*, No. 16-1161, *jurisdictional statement* at 40 (U.S. March 24, 2017); *Gill v. Whitford*, 137 S. Ct. 2268 (2017).[8]

b. Count II Should Be Dismissed Because It Is Not Justiciable

Notwithstanding the pendency of *Whitford*, it is abundantly clear that, after thirty years of consideration, the U.S. Supreme Court has failed to establish any workable standard for adjudicating gerrymandering claims under the Equal Protection Clause. Thus, absent the emergence of a test that can be broadly applied, current Supreme Court precedent dictates that partisan gerrymandering claims under the Equal Protection Clause are simply not justiciable. *See Lulac of Texas*, 651 F. Supp. 2d at 712; *Meza v. Galvin*, 322 F. Supp. 2d at 58. Importantly, Plaintiffs do not even propose or identify any such tests. Instead, they base their Equal Protection claim on the allegation that the 2011 Plan was drawn using partisan classifications and, based upon those classifications, voters were placed into districts through a process of cracking and packing to make it easier for Republicans to get elected. (Compl. ¶¶ 27, 30.) But, it is well-established that

[7] Notably, Plaintiffs have described their case as a challenge to the 2011 Plan on the basis that it was created with a partisan intent and had a partisan effect. *See* **Exhibit A**, Excerpts from Transcript of October 10, 2017 Hearing at 21:22-22:7 ("Our case is pretty simple, which is just the state acted with intent, it intended to gerrymander, it achieved some gerrymandering effect that was significant by any common sense standard . . . ."). The partisan intent/partisan effect argument is precisely the same reasoning relied upon by the plaintiffs in *Whitford* to prove an equal protection violation. 218 F. Supp. 3d at 837. While these comments from Plaintiffs' counsel are not before the Court on this Motion, they nevertheless demonstrate the futility of Plaintiffs' claims should this case proceed, as Plaintiffs' claims arise from the same equal protection theory that has repeatedly failed in multiple cases before the U.S. Supreme Court.

[8] In light of the pending decision in *Whitford*, Intervenor Defendants have contemporaneously filed a motion asking to the Court to stay this matter until the Supreme Court has rendered its opinion. If the U.S. Supreme Court concludes that partisan gerrymandering claims are non-justiciable, it simply does not matter which constitutional provision Plaintiffs rely upon to support their claims. This entire action will be moot.

a congressional map is not unconstitutional merely because it makes it more difficult for a party to win elections or because it was created with partisan considerations. *See Vieth*, 541 U.S. at 288 (plurality op.); *id*. at 308 (Kennedy, J., concurring); *id*. at 338 (Stevens, J., dissenting). Count II should therefore be dismissed for failure to state a claim.[9]

c. Count III Of The Complaint Should Be Dismissed Because It Is Not Justiciable

In his concurrence in *Vieth*, Justice Kennedy suggested that plaintiffs could perhaps challenge redistricting maps under the First Amendment to the U.S. Constitution. *See Vieth*, 541 U.S. at 314 (Kennedy, J., concurring). Plaintiffs have seized on Justice Kennedy's suggestion and claim, without providing any supporting factual allegations as they are required to do under *Twombly, supra*, that the enforcement of the 2011 Plan violates their First Amendment Rights. In reality, Plaintiffs have failed to state a partisan gerrymandering claim under the First Amendment for two reasons.

First, courts reviewing First Amendment claims in partisan gerrymandering cases have made clear that there is no independent First Amendment violation without a violation of the Equal Protection Clause. *See Whitford,* 218 F. Supp. 3d at 884 (recognizing that elements to prove an unconstitutional partisan gerrymander under the First Amendment or the Equal Protection Clause are the same); *Legislative Redistricting Cases*, 629 A.2d 646, 660 (Md. 1993) ("There is no case holding that the First Amendment visits greater scrutiny upon a districting plan than the

[9] Plaintiffs advance each of their claims under 42 U.S.C. § 1983. But, "[s]ection 1983 provides remedies for deprivations of rights established in the Constitution or federal laws. It does not, by its own terms, create substantive rights." *Kaucher v. Cty. of Bucks*, 455 F.3d 418, 423 (3d Cir. 2006) (footnote and citation omitted). As a result, Plaintiffs' Section 1983 claims should be dismissed because Plaintiffs' substantive claims lack merit.

Fourteenth. Rather, the cases uniformly counsel the opposite.") (citing *Anne Arundel County Republican Cent. Comm. v. State Advisory Bd. of Election Laws*, 781 F. Supp. 394, 401 (D. Md. 1991), *sum. aff'd,* 504 U.S. 938 (1992); *Badham*, 694 F. Supp. at 675, *sum. aff'd*, 488 U.S. 1024, (1989); *see also Republican Party v. Martin*, 980 F.2d 943, 959 n.28 (4th Cir. 1992) ("This court has held that in voting rights cases no viable First Amendment claim exists in the absence of a Fourteenth Amendment claim."). Since Plaintiffs' Equal Protection claim must be dismissed because it is not justiciable, Plaintiffs' First Amendment Claim should be dismissed for the same reason.

Second, Justice Kennedy made clear in his *Vieth* concurrence that the mere allegation of a First Amendment violation is insufficient to plead and prove that political classifications were used; rather, a plaintiff must plead that political classifications were used *and the plaintiff's voting rights were burdened*. *See Vieth*, 541 U.S. at 315 (Kennedy, J., concurring). Subsequent to Justice Kennedy's opinion in *Vieth*, one three-judge panel has found that plaintiffs raising a First Amendment partisan gerrymandering claim must demonstrate that a legislature "purposefully" diluted "the weight of certain citizens' votes to make it more difficult for them to achieve electoral success because of the political views they have expressed through their voting histories and party affiliations." *Shapiro*, 203 F. Supp. 3d at 595.

Plaintiffs' allegations do not meet this heightened standard. In support of their First Amendment claim, Plaintiffs allege that the partisan classification of voters and the subsequent placing of voters into districts based upon those partisan classifications constitute a content-based speech regulation. (*See* Compl. ¶¶ 49-52.) Plaintiffs further allege that the 2011 Plan's "packing"

and "cracking" of Democrat voters makes it easier for Republicans to win. (*See* Compl. ¶¶ 27, 30 49-52.). These allegations, however, merely suggest that the General Assembly considered partisan objectives when drafting the 2011 Plan. *See Vieth*, 541 U.S. at 294; *Gaffney*, 418 U.S. at 753; *see Cromartie*, 526 U.S. at 551. Because this conduct is contemplated by the Elections Clause, it could not have violated Plaintiffs' First Amendment Rights. *See Shapiro*, 203 F. Supp. 3d at 595; *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 575 (N.D. Ill. 2011) (three-judge court) (rejecting First Amendment partisan gerrymandering claim because redistricting map did not prevent plaintiffs from speaking, endorsing political candidates of their choice, contributing for a candidate, or voting for the candidate and because the First Amendment "does not ensure that all points of view are equally likely to prevail."). Count III should therefore be dismissed.

5. Plaintiffs' Claims Are Barred By Laches

Finally, Plaintiffs claims should be dismissed under the doctrine of laches. Laches is an affirmative defense that allows for dismissal of claims where the movant can show that the plaintiff unreasonably delayed filing an action and the delay caused injury to other parties. *See, e.g., Gruca v. United States Steel Corp*., 495 F.2d 1252, 1258-59 (3d. Cir. 1974). Courts regularly dismiss redistricting challenges based on laches. *Cohen v. Osser*, 56 Pa. D. & C.2d 672, 679-80 (Ct. Comm. Pleas 1971) (declining to postpone or judicially interfere with election procedures underway because to do so would wreak "havoc" and confusion for the candidates where defendants enacted new districts in February 1971, nominating petitions began circulating in the same month for primary elections in May 1971 and plaintiffs brought their suit shortly after

enactment). For example, in *White v. Daniel*, the Fourth Circuit dismissed a claim that a county board of supervisors' method of elections violated the Voting Rights Act where plaintiffs waited seventeen years after plan was first initiated to file their claim, and the challenge was brought only two years prior to the new census. 909 F.2d 99 (4th Cir. 1990).

Here, Plaintiffs waited nearly six years to challenge the 2011 Plan, but the Complaint does not allege any newly-discovered information or new theory that would, or even could, justify the delay. On the contrary, all of the "facts" underlying Plaintiffs' allegations as well as Plaintiffs' legal theories were known, or could have been known, in 2011. Plaintiffs' delay in commencing this suit prejudices the Pennsylvania General Assembly and the people of Pennsylvania for several reasons. First, if this Court orders the 2011 Plan to be redrawn (and it should not), the General Assembly will be required to rely upon data that is nearly eight years old.[10] That data would not provide a "fair and accurate representation for the citizens" of Pennsylvania's Congressional Districts. *See White*, 909 F.2d at 104. Pennsylvania's citizens would also be prejudiced because a ruling in favor of Plaintiffs would require multiple reapportionments within a few years, one in 2018 and another in 2020, after then next Census. *See id.* (holding that requiring a reapportionment in 1988 due to court order and again in 1990 after a new census is released "would greatly prejudice

[10] Census day was April 1, 2010. The Census Bureau estimates that Pennsylvania's population has increased by approximately 80,000 people since 2010. https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk (Last visited October 20, 2017). However, based on the population growth in other states, apportionment projection based on these numbers indicates that Pennsylvania will likely lose an additional Congressional seat following the 2020 Census. See e.g. https://www.electiondataservices.com/wp-content/uploads/2016/12/20161220-NR_Appor-16wTablesAndMaps.pdf (Last visited October 20, 2017).

the County and its citizens by creating instability and dislocation in the electoral system and by imposing great financial and logistical burdens.").

Moreover, many parties have already expended time, money, and other resources in connection with the 2018 elections. Upon information and belief, at least 25 people to date have announced their candidacies to run against incumbents for Congressional seats, and as of March 2017, Pennsylvania candidates for the House of Representatives have raised over $3.5 million in an effort to win the 2018 elections. Other non-quantifiable efforts related to the election are ongoing. Both Democrats and Republicans are actively recruiting candidates. The media has covered campaigns and campaign events. As such, it is clear that non-parties who have already spent time and resources related to the 2018 congressional campaigns have also been harmed by Plaintiffs' delay.

In sum, Plaintiffs unreasonably delayed in filing their Complaint, and that avoidable delay prejudices both the citizens of Pennsylvania and Pennsylvania's legislators, including Intervenor Defendants. Accordingly, this Court should dismiss Plaintiffs' Complaint under the doctrine of laches.

IV. CONCLUSION

For the reasons and authorities set forth herein, Intervenor Defendants respectfully request that the Court dismiss the Complaint in its entirety, with prejudice, pursuant to Federal Rules of Civil Procedure 12(b)(1) and (b)(6).

Dated: October 24, 2017

Respectfully submitted,

BLANK ROME LLP

/s/ Brian S. Paszamant
BRIAN S. PASZAMANT
JASON A. SNYDERMAN
JOHN P. WIXTED
One Logan Square
130 N. 18th Street
Philadelphia, Pennsylvania 19103
Phone: 215-569-5791
Facsimile: 215-832-5791
Email: Paszamant@blankrome.com
Snyderman@blankrome.com
JWixted@blankrome.com

Attorneys for Intervenor Defendant Senator Joseph Scarnati, III

HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC

/s/ Jason Torchinsky
JASON TORCHINSKY (admitted *Pro Hac Vice*)
SHAWN SHEEHY (admitted *Pro Hac Vice*)
45 North Hill Drive, Suite 100
Warrenton, Virginia 20186
Phone: 540-341-8808
Facsimile: 540-341-8809
Email: JTorchinsky@hvjt.law

CIPRIANI & WERNER PC

/s/ Kathleen Gallagher
KATHLEEN GALLAGHER
CAROLYN BATZ MCGEE
650 Washington Road, Suite 700
Pittsburgh, Pennsylvania 15228
Phone: 412-563-4978
Email: KGallagher@c-wlaw.com
CMcgee@c-wlaw.com

Attorneys for Intervenor Defendant Representative Michael Turzai

ssheehy@hvjt.law

Attorneys for Intervenor Defendants Senator Joseph Scarnati, III and Representative Michael Turzai

EXHIBIT "A"

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

- - -

LOUIS AGRE, et al., Plaintiff : CIVIL NO. 17-4392

v.

THOMAS W. WOLF, et al., Defendant : Philadelphia, Pennsylvania
October 10th, 2017
10:04 a.m.

- - -

TRANSCRIPT OF PRETRIAL HEARING
BEFORE THE HONORABLE MICHAEL M. BAYLSON
UNITED STATES DISTRICT JUDGE

- - -

APPEARANCES:

For the Plaintiffs:
Louis Agre,
William Ewing,
Floyd Montgomery
Joy Montgomery
Rayman Solomon

ALICE W. BALLARD, ESQUIRE
Law Office of Alice W. Ballard, P.C.
123 S Broad Street
Suite 2135
Philadelphia, PA 19109

THOMAS H. GEOGHEGAN, ESQUIRE
Despres, Schwartz & Geoghegan LTD
77 W Washington St
Suite 711
Chicago, IL 60602

APPEARANCES: (Continued)

For the Defendants: Thomas W. Wolf, Pedro Cortes, Jonathan Marks

MICHELE D. HANGLEY, ESQUIRE
MARK A. ARONCHICK, ESQUIRE
CLAUDIA DE PALMA, ESQUIRE
Hangley, Aronchick, Segal, Pudlin & Schiller
1 Logan Square
27th Floor
Philadelphia, PA 19103

GREGORY G. SCHWAB, ESQUIRE
Governor's Office of General Counsel
333 Market Street
17th Floor
Harrisburg, PA 17101

- - -

Audio Operator: Janice Lutz

Transcribed By: Michael T. Keating

- - -

Proceedings recorded by electronic sound recording; transcript produced by computer-aided transcription service.

- - -

early to mid-February.

THE COURT: All right. Well, let me just ask -- and I'll let you speak up, but let me just ask you a question. Let's assume that the schedule I have in mind, it will work, at least from the Court's point of view, and we start a trial on December 4th and 5th. How long -- do you have any idea how long -- how much time you would need to present your case, plaintiffs' case?

MR. GEOGHEGAN: We haven't given that a lot of thought, but I would think two to three days --

THE COURT: All right.

MR. GEOGHEGAN: -- because our case is primarily that the State of Pennsylvania engaged in an intentional act of gerrymandering and that is a per se violation of the elections clause. We're less focused than cases like Gill in showing that it's absolutely impossible for any democratic voter to elect a candidate or that they're shut out from the political process in the terms that are now being presented to the Court in the Gill case.

Our case is pretty simple, which is just the state acted with intent, it intended to gerrymander, it achieved some gerrymandering effect that was significant by any common sense standard,

and that the legal act itself, the intent to try to have a certain number of republican seats and a certain number of democratic seats went way beyond the state's authority under Article 1 Section 4, should be enjoined, and a map that doesn't have that abusive effect should be put into place. That's our case.

THE COURT: Okay.

MR. GEOGHEGAN: And I think two to three days to put that on.

THE COURT: All right. Well, if that's -- if you end up being correct about that, or even if you take a couple of days longer, and the defendants or the interveners or however they decide to proceed were to request a similar time, then it's quite possible that this three-judge court could come to a decision before Christmas. And then whether there would be -- and I don't know what the result would be, but if it was negative to the plaintiffs, well, then you could appeal to the Supreme Court and how you dealt with the election laws would be -- I'm not sure that would be -- I mean I imagine you may move for a stay. I don't know what you would do, and I'm not suggesting that you have to tell me today what you would do in that event.

CERTIFICATION

I, Michael Keating, do hereby certify that the foregoing is a true and correct transcript from the electronic sound recordings of the proceedings in the above-captioned matter.

10/15/17

Date

Michael Keating