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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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League of Women Voters of Pennsylvania, <i>et al.</i> ,))
))
<i>Petitioners,</i>))
))
)	No. 261 MD 2017
v.))
))
The Commonwealth of Pennsylvania, <i>et al.</i> ,))
))
))
<i>Respondents.</i>))
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**PETITIONERS' BRIEF IN OPPOSITION
TO APPLICATION TO STAY CASE PENDING THE U.S. SUPREME
COURT'S RULING IN GILL V. WHITFORD**

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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 Assembly¹ 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

¹ The stay application was filed by the General Assembly, Speaker of the Pennsylvania House of Representatives Michael C. Turzai, and Pennsylvania Senate President Pro Tempore Joseph B. Scarnati III. This brief refers to these Respondents collectively as the “General Assembly.”

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.

COUNTERSTATEMENT OF RELEVANT FACTUAL AND PROCEDURAL HISTORY

I. The Petition

The Petition challenges the 2011 Plan as an unconstitutional partisan gerrymander. The consequence of this gerrymander is that congressional elections in Pennsylvania are rigged; they are determined not by the voters, but by partisan actors sitting behind a computer.

The General Assembly’s 2011 congressional map is one of the most extreme gerrymanders in the nation. Using sophisticated computer modeling to draw bizarre and indefensible district lines, the General Assembly “packed” Democratic voters into 5 districts that are overwhelmingly Democratic, and “cracked” the

remaining Democratic voters by spreading them across the other 13 districts, such that Republicans constitute a majority of voters in each of these 13 districts. *See* Pet. ¶¶ 54-64. The result has been a 13-5 Republican advantage in congressional elections regardless of how Pennsylvania voters cast their ballots. *See id.* ¶¶ 77-82. In 2012, Republican congressional candidates won only 49% of the statewide vote but still won 13 of the Commonwealth's 18 congressional seats. *Id.* ¶ 79. In 2014 and 2016, Republicans won 55% and 54% of the statewide vote and still won the exact same 13 seats. *See id.* ¶¶ 80-81. In short, the results are utterly non-responsive to the will of the voters.

The evidence of impermissible partisan intent and effect here is overwhelming. In addition to the results of three straight elections showing that the outcome is impervious to the will of the voters, the tortured shapes of the districts are damning evidence of a partisan gerrymander. Some districts snake through half a dozen others and are in places only as wide as a single business establishment. Pet. ¶¶ 56-59. The shape of the 2011 Plan is inexplicable except as an exercise of partisan gerrymandering. Not surprisingly, six years after the Plan's creation, the General Assembly has failed to produce any alternative explanation for how the districts were created. Nor is the evidence of partisan gerrymandering confined to the shape of the districts. As described in further detail below, an array of computer modeling techniques and statistical measures all confirm that the 2011

Plan represents an unconstitutional gerrymander that has significant effects on electoral outcomes and the representational rights of Petitioners.

The individual Petitioners in this case are 18 registered Pennsylvania voters, ranging from a chaplain to retired school teachers to a military veteran, all of whom allege that the 2011 Plan violates their fundamental rights under the Pennsylvania Constitution. Pet. ¶¶ 14-31, 104-113, 115-120. Count I of the Petition alleges that the 2011 Plan violates Petitioners' rights under Pennsylvania's Free Expression and Association Clauses, Art. I, §§ 7, 20, which the Pennsylvania Supreme Court has held provide greater protection than the First Amendment of the U.S. Constitution. *Pap's A.M v. City of Erie*, 812 A.2d 591, 605 (Pa. 2002). Petitioners allege that the 2011 Plan has the purpose and effect of disfavoring Petitioners and other Democratic voters by reason of their political views, their past votes, and the political party with which they associate, in violation of Art. I, §§ 7, 20. Pet. ¶¶ 100-07. Petitioners additionally allege that 2011 Plan violates the Pennsylvania Constitution's prohibition against retaliating against individuals on the basis of their protected speech and political views. *Id.* ¶¶ 108-13.

Count II of the Petition alleges that the 2011 Plan violates Pennsylvania's Equal Protection guarantees, Art. I, §§ 1, 26 and the Free and Equal Clause, Art. I, § 5. Pet. ¶¶ 114-20. Petitioners allege that the 2011 Plan reflects intentional discrimination against an identifiable political group (*i.e.*, Petitioners and other

Democratic voters) and accomplishes actual discriminatory effects. With respect to the discriminatory effects, Petitioners allege—unlike in *Gill* or in any other partisan gerrymandering case—that the extreme partisanship of today’s Congress magnifies the effects of gerrymandering because members of Congress overwhelmingly no longer represent the views and interests of voters of the opposite party. *Id.* ¶¶ 95-98. That is, when voters lose the ability to elect representatives of their party as a result of gerrymandering, those voters lose not only electoral power, but also the ability to influence legislative outcomes.

Petitioners ask the Court to declare the 2011 Plan unconstitutional and enjoin its use in future primary or general elections. Petitioners further urge that, if Respondents fail to enact a new plan that comports with the Pennsylvania Constitution in a timely manner, the Court should do so.

II. *Gill*

On November 21, 2016, a three-judge district court in the Western District of Wisconsin ruled that Wisconsin’s state general assembly districts constituted an unconstitutional partisan gerrymander. *See Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016). The plaintiffs in *Gill* brought exclusively federal constitutional claims under the First Amendment and Equal Protection Clause of the U.S. Constitution. The district court, in a 159-page opinion that extensively detailed and relied upon the unique history of Wisconsin’s state legislature districts, held

that the districting plan had the intent and effect of violating the plaintiffs' federal constitutional rights.

On June 19, 2017, the U.S. Supreme Court agreed to hear *Gill*. See 137 S. Ct. 2268 (2017) (postponing the question of jurisdiction to the hearing of the case on the merits). The case is scheduled to be argued on October 3, 2017, and the Court is expected to issue its decision by the end of June 2018. As explained in further detail below, the *Gill* defendants ask the U.S. Supreme Court to hold as a bright-line rule that the Wisconsin plan cannot constitute an unconstitutional gerrymander because the districts there are compact and not bizarrely shaped. The *Gill* defendants and their amici also focus much of their attention on the "efficiency gap," which they argue was the statistical measure relied upon by the *Gill* plaintiffs and the three-judge district court.

COUNTERSTATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Trial courts in Pennsylvania have authority to "stay proceedings in a case pending the outcome of another case, where the latter's result might resolve or render moot the stayed case." *Israelit*, 703 A.2d at 724 n.3. For the reasons explained below, there is no possibility that the U.S. Supreme Court's decision in *Gill* "might resolve or render moot" this matter.

REASONS FOR DENYING A STAY

I. No Basis Exists to Stay Petitioners' State Law Claims Pending a Federal Court's Decision on Exclusively Federal Claims

A. *Gill* Will Not Moot This Case

The General Assembly's central argument is that this case would be "mooted" if the U.S. Supreme Court decides in *Gill* that partisan gerrymandering claims are nonjusticiable. (Stay Br. at 11-13). This argument is wrong and ignores controlling Pennsylvania Supreme Court precedent.

The Pennsylvania Supreme Court has twice squarely held that partisan gerrymandering claims *are* justiciable under the Pennsylvania constitution. *See Erfer v. Com.*, 794 A.2d 325 (Pa. 2002); *In re 1991 Reapportionment*, 609 A.2d 132 (Pa. 1992). *Erfer* explained that, in *1991 Reapportionment*, the Pennsylvania Supreme Court "determined that the claim [for partisan gerrymandering] was justiciable." 794 A.2d at 331 . Put differently, "a litigant c[an] raise claims that a reapportionment plan effected a political gerrymander and thus violated the U.S. and Pennsylvania Constitutions." *Id.* These state law decisions on justiciability are controlling. A U.S. Supreme Court holding that federal partisan gerrymandering claims are nonjusticiable as a matter of federal law would not and could not control this case. Indeed, *Erfer* expressly rejected the notion that only the federal Constitution is relevant in a partisan gerrymandering lawsuit. "Without clear support for the radical conclusion that our Commonwealth's Constitution is

nullified in challenges to congressional reapportionment plans, it would be highly inappropriate for us to so circumscribe the operation of the organic legal document of our Commonwealth.” *Id.*

Moreover, even as to the federal constitutional claims in *Gill*, the Generally Assembly’s position is baseless and misleading. The General Assembly’s assertion that the U.S. Supreme Court “may ... determine” that federal partisan gerrymandering claims are nonjusticiable (Stay Br. at 12) ignores the fact that the Court has rejected this exact argument in its last three decisions on partisan gerrymandering. The Court held that such claims *are* justiciable in *Davis v. Bandemer*, 478 U.S. 109, 125 (1986), a fact the General Assembly fails to disclose. The General Assembly states that a “four justice plurality” in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), concluded that partisan gerrymandering claims are nonjusticiable. (Stay Br. 11-12). But the General Assembly fails to advise this Court that the plurality did not speak for the court on the justiciability question and that, to the contrary, *five Justices* in *Vieth* confirmed that they would adhere to *Bandemer*’s conclusion that federal partisan gerrymandering claims are justiciable. Justice Kennedy described *Bandemer* as “the controlling precedent on the question of justiciability,” and stated that he “reject[ed] the plurality’s conclusions as to nonjusticiability.” *Vieth*, 541 U.S. at 310-11 (Kennedy, J., concurring); *accord id.* at 326 (Stevens, J., dissenting); *id.* at 346 (Souter and Ginsburg, JJ., dissenting); *id.*

at 355 (Breyer, J., dissenting). Justice Kennedy’s 2006 opinion for the Court in *LULAC v. Perry*, 548 U.S. 399 (2006), reaffirmed the point. Justice Kennedy explained that *Bandemer* “held that an equal protection challenge to a political gerrymander presents a justiciable case or controversy,” that a “majority” in *Vieth* declined to hold political gerrymanders nonjusticiable, and that the Court was not “revisit[ing] the justiciability holding.” *LULAC*, 548 U.S. at 413-14.

In short, the General Assembly is asking this Court to stay a case involving state law gerrymandering claims that Pennsylvania’s highest court has found to be justiciable, because a federal court “may” reverse itself and decide that federal gerrymandering claims are nonjusticiable—a hypothetical holding that would have no impact on the justiciability of the state constitutional claims presented here. The General Assembly identifies no case in which *any* court *anywhere* has granted a stay in such circumstances, and we are aware of none.

B. This Case and *Gill* Involve Different Claims and Governing Law

The General Assembly’s fallback argument, that this Court should issue a stay because *Gill* “will likely establish the standards governing [Petitioners’] claims,” is equally wrong. (Stay Br. at 2). Petitioners bring claims exclusively under the Pennsylvania Constitution, and those state constitutional claims are different from the federal constitutional claims in *Gill*.

Petitioner's first claim is under the Free Expression and Association Clauses of Article I, §§ 7, 20 of the Pennsylvania Constitution, which the Pennsylvania Supreme Court has repeatedly held "provide[] protection for freedom of expression that is broader than the federal constitutional guarantee." *Pap's*, 812 A.2d at 605 (internal quotation marks omitted). The Court has explained that these "broader protections" are "firmly rooted in Pennsylvania history and experience" and apply "in a number of different contexts," including "political" contexts. *DePaul v. Commonwealth*, 969 A.2d 536, 546 (Pa. 2009) (citing *Commonwealth v. Tate*, 432 A.2d 1382, 1391 (Pa. 1981)). Given these broader protections, any ruling in *Gill* denying the plaintiffs' federal First Amendment claims would not be controlling of Petitioners' Pennsylvania free speech claims here.

The procedural history of *Pap's* illustrates the point. There, the U.S. Supreme Court had reversed an earlier Pennsylvania Supreme Court decision and held that the ordinance in question did not violate the federal First Amendment. *Pap's*, 812 A.2d at 598-99. On remand, the Pennsylvania Supreme Court held that, notwithstanding the U.S. Supreme Court's judgment that the ordinance did not violate federal free speech rights, different and more speech-protective standards applied under Pennsylvania's free speech provisions, and the ordinance violated those provisions. *Id.* at 601-11. *Pap's* thus makes clear that any U.S. Supreme Court decision denying the federal First Amendment claims in *Gill* would

not “resolve or render moot” Petitioners’ free speech claims under the Pennsylvania Constitution. *Israelit*, 703 A.2d at 724 n.3

Moreover, *Pap*’s emphasized that it is particularly important for Pennsylvania courts to render their “independent judgment” on “distinct and enforceable” Pennsylvania constitutional rights where “the governing federal law, to which [Pennsylvania courts] ordinarily would look for insight and comparison, has been fluid and changing and still is not entirely clear.” *Id.* at 611. The Court stated, in language directly applicable here, that:

As a matter of policy, Pennsylvania citizens should not have the contours of their fundamental rights under our charter rendered uncertain, unknowable, or changeable, while the U.S. Supreme Court struggles to articulate a standard to govern a similar federal question.

Id. Thus, while the General Assembly argues that the standards for federal partisan gerrymandering claims are “unknown” given recent U.S. Supreme Court jurisprudence, such uncertainty weighs *in favor* of this Court moving forward on Petitioners’ state constitutional claims. Petitioners’ “fundamental rights” under the Pennsylvania Constitution should not remain “uncertain” while the U.S. Supreme Court “struggles to articulate a standard to govern a similar federal question.” *Id.*

The General Assembly also ignores the fact that Petitioners raise an additional free speech theory not presented in *Gill*—that Republican officials unlawfully retaliated against Petitioners for exercising their protected rights under Article I, §§ 7, 20. Pet. ¶ 108. The *Gill* plaintiffs do not pursue a free speech

retaliation claim, and accordingly the U.S. Supreme Court will not provide any substantive guidance on the standards governing such a claim. Petitioners' distinct retaliation claim alone provides reason to deny the request for a stay.

There is also no need to wait for the U.S. Supreme Court's ruling as relevant to Petitioners' equal protection claim. Again, *Pap's* is instructive. The Pennsylvania Supreme Court noted that in a prior decision, *Commonwealth v. Smith*, 615 A.2d 321 (Pa. 1992), the Court had "theretofore held the double jeopardy clause of the Pennsylvania Constitution to be coextensive with the federal double jeopardy clause." *Pap's*, 812 A.2d at 607 (citing *Smith*, 615 A.2d at 325). Even though the Pennsylvania Supreme Court had previously held the federal and state standards coextensive, and even though it was "not clear" how the case would be decided "under the then-prevailing federal standard," that "did not deter [the Pennsylvania Supreme Court] from effectuating [its] separate judgment under the Pennsylvania Constitution" and holding that double jeopardy applied. *Id.* (citing *Smith*, 615 A.2d at 325). There is the same pressing need here for the Pennsylvania courts to render their independent judgment on Petitioners' equal protection rights under the Pennsylvania Constitution.

In any event, the General Assembly fails to explain how a decision by the U.S. Supreme Court providing guidance on the standards for an equal protection claim would actually alter, as a practical matter, the proceedings that would go

forward *right now* absent a stay. No party in *Gill* suggests that partisan intent and effects—the primary focus of discovery in this case—should be irrelevant in assessing an equal protection partisan gerrymandering claim. *See infra* at 23-25; *see also Erfer*, 794 A.2d at 332 (assessing partisan intent and effect in evaluating partisan gerrymandering claim). As explained below, the intent and effects inquiries turn on facts and statistical measures that differ between this case and *Gill*, and that are subjects of Petitioners’ discovery requests..

Finally, the General Assembly’s argument that the “Supremacy Clause” provides justification for a stay because *Gill* might affirm the lower federal court’s holding is just silly. (Stay Br. at 17). The General Assembly suggests that Petitioners “may seek to amend their Petition to add nearly identical federal claims, or perhaps withdraw this case and file a new claim in federal court.” *Id.*; *see id.* at 3-4. In other words, the General Assembly asks for a stay pending *Gill* because *Gill* might impact hypothetical federal claims that Petitioners do not bring, or a hypothetical federal lawsuit that Petitioners have not filed. This Court should resolve the stay motion based on the actual case that Petitioners filed, not the non-existent one the General Assembly conjures up.²

² The General Assembly elsewhere inconsistently asserts that the U.S. Supreme Court’s decision to grant a stay in *Gill* somehow “suggests that the *Whitford* decision is likely to be reversed.” (Stay Br. at 11). The General Assembly cites zero support for this statement. Rather the General Assembly infers this broad principle from the fact that there was one redistricting case recently in which the U.S. Supreme Court *denied* a stay. (Stay Br. at 11) (citing *McCrorry v. Harris*, 136 S. Ct. 1001 (2016)). The premise does not support the conclusion.

II. Petitioners Will Present Facts and Evidence That *Gill* Will Not Address

Petitioners also paper over the extensive factual and evidentiary differences between this case and *Gill*. These differences crystallize why the General Assembly’s stay argument makes no sense. The *Gill* defendants ask the U.S. Supreme Court to rule that there can be no constitutional violation because Wisconsin’s districts are allegedly compact, but Respondents have no argument here that Pennsylvania’s congressional districts are compact—because they are not. And while the briefing in *Gill* focuses largely on the “efficiency gap” as a measure of partisan gerrymandering, Petitioners here rely upon at least three other statistical modeling techniques and measures that the U.S. Supreme Court will not address. All of these factual and evidentiary differences mean that, even if the Supreme Court were to rule in favor of the defendants in *Gill*, that would not resolve this case.

A. The 2011 Plan Flunks the Test Proposed by the *Gill* Defendants

The *Gill* defendants propose a bright-line rule for assessing partisan gerrymanders. If that test were adopted by the U.S. Supreme Court, Pennsylvania’s 2011 Plan would fail it. The *Gill* defendants advocate a “rule” that there can no constitutional violation for a partisan gerrymander if the relevant districts “comply with traditional redistricting principles”—meaning if they are compact (*i.e.*, not bizarrely shaped), contiguous, equal in population, and minimize

municipality splits. *Gill v. Whitford*, No. 16-1161, Brief For Appellants at 60-61 (July 2017) (hereinafter “Gill Merits Br.”). The *Gill* defendants assert that the Wisconsin districts at issue in *Gill* comport with these requirements. *See id.*

Whatever the merits of that assertion in *Gill*, the 2011 Plan indisputably does not “comply with the traditional districting principles.” *Id.* Pennsylvania’s congressional districts are anything but compact: districts such as the Third, Sixth, Seventh, Ninth, Tenth, Eleventh, Twelfth, Sixteenth, and Seventeenth twist and turn and sprawl out over vast stretches of land. *See* Pet. ¶¶ 56-58; app’x. The Sixth District snakes through six other districts. *Id.* ¶ 56. The Twelfth District runs through five others. *Id.* ¶ 57. The Seventh is as self-evidently gerrymandered as any district in the United States, so narrow in parts that it is only as wide as a single restaurant. *Id.* ¶ 58. The 2011 Plan also splits apart municipalities and communities of interest, such as the cities of Chester and Reading. *Id.* ¶ 7. These districts are so bizarrely shaped as to make a mockery of any claim by the General Assembly that they were produced by any even-handed process. Indeed, as explained below, Petitioners allege that computer modeling techniques confirm that the 2011 Plan could not be the result of adherence to any traditional districting criteria. Not surprisingly, the General Assembly does not even raise the *Gill* defendants’ “compactness” defense. Thus, even if the Supreme Court were to

adopt the rule that the *Gill* defendants propose, that would in no way help Respondents here.

B. Petitioners Rely on Statistical Measures Other Than the Efficiency Gap

The General Assembly points to the fact that *Gill* involves the efficiency gap, which the Petition also cites. But the General Assembly ignores the three other statistical measures and modeling techniques that Petitioners allege will demonstrate the impermissible partisan intent and effects of the gerrymander here, and that are not presented in *Gill*.

In their Supreme Court briefs, the *Gill* defendants and their *amici* focus much of their attention on the efficiency gap and their critiques of it. *Gill* Merits Br. at 48-53.³ They argue, for example, that the efficiency gap “fails to account for . . . political geography” and purported clustering of “Democratic voters . . . in big cities,” and that it rests on an assumption of proportional representation. *Id.* at 20, 50; see *Gill*, Brief for *Amici Curiae* Wisc. State Senate and Wisc. State Assembly in Supp. or Appellants at 22 (Apr. 24, 2017) (capitalization omitted) (hereinafter “Wisconsin Legislature Br.”). Petitioners do not agree with these critiques, but regardless, the Petition invokes a number of other statistical measures and

³ Indeed, counsel for the General Assembly in the instant case filed an *amicus* brief on behalf of the Republican National Committee in *Gill* that argues the efficiency gap is the keystone of the case. *Gill*, Br. of *Amici Curiae* Republican Nat’l Comm. & Nat’l Republican Cong. Comm. In Supp. Of Appellants at 2 (Apr. 24, 2017).

modeling techniques that are independent of the efficiency gap and that address the very critiques of the efficiency gap raised in *Gill*.

For instance, the Petition cites the computer modeling of University of Michigan political scientist Jowei Chen. *See, e.g.,* Jowei Chen, *The Impact of Political Geography on Wisconsin Redistricting*, 16 Election L.J. (forthcoming 2017). Professor Chen's work uses a computer algorithm producing simulated districting plans to show that no alternative plan adhering to traditional districting criteria (including geographic compactness, contiguity, and respect for communities of interest, such as county boundaries) would ever produce a 13-5 Republican advantage in Pennsylvania's congressional delegation. Pet. ¶¶ 85-86. This approach accounts for Pennsylvania's unique political geography and natural population patterns and does not rely upon any assumption of proportional representation. The substance of the Chen approach is not addressed in the district court's opinion in *Gill* or in the *Gill* defendants' Supreme Court briefs.

The Petition also cites a computer modeling technique known as a "Markov chain" that is entirely different from anything presented in *Gill*. Pet. ¶¶ 87. The Markov chain analysis takes the enacted plan as a starting point and then makes a series of random adjustments to the district boundaries. Mathematicians at Carnegie Mellon University and the University of Pittsburgh find that, using this approach, making random changes does greatly diminish the Republican advantage

under the 2011 Plan. The professors assert that this mathematically proves that the 2011 Plan has a Republican bias that cannot be the result of neutral factors such as population clustering. *See* Maria Chikinaa, Alan Friezeb & Wesley Pegden, *Assessing significance in a Markov chain without mixing*, 114 Proc. of Nat'l Acad. of Sci. 2860 (2017), *available with* supplement at <https://www.math.cmu.edu/~af1p/Texfiles/outliers.pdf>.

Yet another measure of partisan gerrymandering that the Petition cites is the “mean-median gap.” Pet. ¶¶ 90-93. That measure looks at the Democratic vote share in each of Pennsylvania’s 18 congressional districts and then calculates: (i) the average, or mean, of those 18 Democratic vote shares, which will be roughly equivalent to the Democratic vote share statewide; and (ii) the Democratic vote share in the district that was the middle-best in terms of Democratic performance. Gerrymandering does not impact the mean vote share, since that is a statewide figure, but it does affect the median vote share, since gerrymandering is designed to maximize the number of districts a party wins, and winning the median district means that party wins a majority of seats. This measure shows that there are a disproportionately large number of Democratic voters packed into a small number of districts. And it demonstrates that it is more difficult for Democrats to win the median district and hence a majority of seats. Under the 2011 Plan, Pennsylvania consistently has had one of the largest mean-median gaps in the nation for

congressional elections. The *Gill* defendants and their *amici* do not discuss the mean-median gap in any detail in their Supreme Court briefs.

In short, the Petition does not rely solely or even primarily on the efficiency gap that is the focus of briefing in *Gill*. Thus, even if the U.S. Supreme Court were to reject the efficiency gap, a holding that would not be binding on the Pennsylvania courts in any event, that holding would in no way foreclose the other statistical measures presented in this case.

C. Petitioners Will Establish Effects of Gerrymandering Not Presented in *Gill* Regarding Lack of Representation

Petitioners allege that the effects of the gerrymander under the 2011 Plan are magnified by the extreme partisanship of today's Congress. Petitioners allege that Pennsylvania's representatives no longer represent the views and interests of voters of the opposite party, and that therefore, when voters lose the ability to elect representatives of their party as a result of gerrymandering, those voters lose the ability to influence legislative outcomes. *See* Pet. ¶¶ 95, 98, 107, 112.

These allegations, which will be supported by empirical and other evidence, will provide an independent basis for concluding that 2011 Plan produces unconstitutional effects, *see Erfer*, 794 A.2d at 333, and will also address one of the primary arguments raised by the Wisconsin Legislature in defense of the districts at issue in *Gill*. The Wisconsin Legislature argues that “voters who support losing candidates are not deprived of representation or access to the

political process.” Wisconsin Legislature Br. at 23 (capitalization omitted). The Legislature asserts that in “Wisconsin and across the country, legislators represent all of their constituents—not just the ones who voted for them,” and therefore “voters are represented even if they voted for the losing candidate. *Id.* at 23-24 (emphasis omitted). These arguments do not appear to have been tested at trial in *Gill*, but they will be here—another difference between the two cases.

III. The Balance of Equities Weighs Overwhelmingly Against a Stay

A. *Gill* Will Have No Effect on the Need for Discovery in This Case

The General Assembly asserts that it will “necessarily [suffer] harm” if this Court does not grant a stay because the General Assembly would need to “conduct[] extensive . . . discovery, including identifying, accumulating, and conducting privilege reviews of documents and materials sought by Petitioners.” (Stay Br. at 18). But *Gill* will have no impact on the need for such discovery. As explained, there is no possibility that *Gill* will moot this “entire case.” *Supra* 10-12. Nor is there any possibility that *Gill* will hold that discriminatory intent—the element to which discovery is most pertinent—is not an element of a constitutional claim regarding partisan gerrymandering. Intent is a standard element of equal protection claims. *E.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). No party in *Gill* asks the Supreme Court to hold otherwise.

Accordingly, this case will go forward no matter what the U.S. Supreme Court holds in *Gill*. All of the privilege and other discovery issues that the General Assembly identifies will need to be litigated here, and nothing in the *Gill* decision is likely to be pertinent to their resolution. There is no legitimate reason to delay resolving these discovery issues, or conducting discovery as to the legislative history of the 2011 Plan more generally, pending a decision in *Gill* regarding a different districting plan with a different legislative history and different evidence of partisan intent and governed by separate constitutional provisions. The General Assembly merely invokes these discovery considerations as cover for their true objective—delay for the purposes of delay.

Indeed, the General Assembly's claim of a "burden" in responding to the discovery requests is one of their own making. Petitioners seek straightforward, factual information regarding who drew the 2011 Plan, the criteria used, and other information relevant to the Plan's creation and its intended effects. The General Assembly and other Respondents know the answers to these questions, and any discovery disputes will occur only because they are choosing to conceal this information from the public. The desire of government officials to oppose transparency regarding their own actions is not a cognizable burden, and certainly not one that justifies delaying adjudication of the constitutional rights of Petitioners and millions of other Pennsylvania citizens who pay the very taxes about which the

General Assembly purports to be so concerned. Finally, the General Assembly has raised objections to virtually all discovery in this case on grounds of privilege, *see* Ex. A, Respondent’s Objections to Petitioners’ Notice of Intent to Serve Subpoenas at 2 (objecting to *all* information requested in subpoenas on ground that disclosure “is prohibited pursuant to the Speech and Debate Clause of the Pennsylvania Constitution”), and fails to disclose to this Court that if they get their way, there may be not very much discovery at all.⁴ The General Assembly cannot have it both ways.

B. A Stay Would Substantially Prejudice Petitioners

In contrast to the General Assembly, Petitioners would suffer real prejudice from a stay. 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*, 812 A.2d at 607 (quoting *Spayd*, 113 A. at 72); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding that a deprivation of constitutional rights, “for even minimal periods of time, unquestionably constitutes irreparable injury”); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (“Courts routinely deem restrictions on fundamental voting rights irreparable injury.”); *Latta v. Otter*, 771

⁴ Respondents Turzai and Scarnati have also invoked legislative privilege to object to all discovery sought in this case. *See* Ex. B, Respondent Turzai’s Objections to Petitioners’ First Set of Requests for Production at 2; Ex. C, Respondent Turzai’s Objections to Petitioners’ First Set of Interrogatories at 2; Ex. D, Respondent Scarnati’s Objections to Petitioners’ First Set of Interrogatories at 2.

F.3d 496, 500 (9th Cir. 2014) (dissolving stay in light of “the public’s interest in equality of treatment of persons deprived of important constitutional rights”); *Dellinger v. Mitchell*, 442 F.2d 782, 787 (D.C. Cir. 1971) (holding that consideration of “the injury to the parties being stayed” was “of particular importance where the claim being stayed involves a not insubstantial claim of present and continuing infringement of constitutional rights”).

A stay here would do just that. The Generally Assembly acknowledges that a stay would likely mean that this case would languish for “eleven months”: the U.S. Supreme Court’s next term will conclude at the end of June 2018, and the Supreme Court often issues opinions in its most important or controversial cases at the end of the term. *See* (Stay Br. at 18). At the earliest, the Supreme Court will not decide *Gill* until the new year, given that the argument is not until October.

Thus, as the Secretary of the Commonwealth and the Commissioner of Elections explain in their opposition to the stay, a stay would render it extremely difficult to resolve this case and implement a new plan in time for the 2018 election. Cortés & Marks Opp. at 5-7. A stay may even jeopardize the ability to resolve this case in time for the 2020 elections, which will be the final election under the 2011 Plan before the next census. The 2020 primaries will be held on April 28, 2020. *See* 25 Pa. Stat. § 2753. Candidates will be able to start circulating nomination petitions on January 28, 2020, and those petitions will be

due on February 18, 2020. *See id.* §§ 2868; 2873(d). Given the uncertainties inherent in any litigation, it is not unlikely that granting a stay would prevent Petitioners from obtaining relief even for 2020—effectively mooting this case.

This Court should reject the General Assembly’s effort to run out the clock. Every new election under the 2011 Plan violates Petitioners’ constitutional rights anew. As Congress votes on extraordinarily important matters from healthcare to taxes to education, any delay in providing a Petitioners a fair opportunity to elect representatives of their choice will cause real and concrete prejudice. The notion that Petitioners should suffer further deprivations of their voting and representational rights, because the Assembly prefers to avoid the commonplace sort of discovery attendant to any serious lawsuit, is untenable.

Nor is there any merit to the General Assembly’s suggestion that a stay would not be “unduly prejudicial” because Petitioners purportedly “delay[ed] . . . bringing this suit.” (Stay Br. at 18). In *Erfer*, the Pennsylvania Supreme Court dismissed a lawsuit brought in 2002 challenging the districting plan created after the 2000 census. 794 A.2d at 328. The Court concluded that the petitioners lacked evidence establishing that that plan had an impermissible partisan effect. *Id.* at 334. The reason that Petitioners now know the 2011 Plan is perhaps the “worst offender” in the nation is precisely because of the data that exists from the elections since the 2011 Plan went into place, data that was unavailable in *Erfer*.

And Petitioners will use the data from the 2012, 2014, and 2016 elections not only to show the magnitude of the gerrymander, but also its durability and thus how it has entrenched Republicans in power. For instance, it is from comparing the 2012 to the 2014 and 2016 elections that it is clear that Republicans' hold on 13 of 18 seats does not change even with large swings in the vote. *See* Pet. ¶ 5. The timing of Petitioners' suit is also partly attributable to the aforementioned statistical modeling techniques and measures that Petitioners will present in this case. These techniques and measures were all developed in the last few years and will be a critical part of Petitioners' case.⁵

IV. Other Gerrymandering Cases Are Different From This Case

The General Assembly points to gerrymandering cases in federal court in Maryland and North Carolina where stays have been requested or granted. The Maryland Court has granted a stay but the North Carolina court is considering a request for a stay pending *Gill*; it has not granted one. In both of those cases, discovery has been completed. *See* Status Report, *Benisek v. Lamone*, No. 13-cv-03233 (D. Md. June 2, 2017), Dkt. 180 (“Discovery is complete, with the exception of the deposition of Plaintiffs’ expert, . . . [which] will be completed Monday, June 5, 2017.”); Order, *League of Women Voters of North Carolina v.*

⁵ *See, e.g.*, Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. Law. Rev. 831 (2015); Michael D. McDonald & Robin E. Best, *Unfair Partisan Gerrymanders in Politics and Law: A Diagnostic Applied to Six Cases*, 14 Elec. L.J. 312, 312 (2015); Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Quarterly J. Pol. Sci. 239 (2013).

Rucho, No. 16-cv-01164 (M.D.N.C. Mar. 1, 2017), Dkt. Entry 47 (setting discovery deadline of April 28, 2017). Those courts have done all the work, except trying the case. That is very different from this suit, where the General Assembly seeks a stay at the outset of the case, before any discovery has been taken. Finally, both the Maryland and North Carolina cases involve federal constitutional claims, like *Gill*, and therefore *Gill* could have a dispositive or significant impact on those suits. That is not the case here for the many reasons outlined above.

CONCLUSION

For the reasons stated above, the Court should deny the request for a stay.

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Respectfully submitted,

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