

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

TRACEY E. GEORGE, *et al.*, Petitioners,

v.

WILLIAM EDWARD “BILL” HASLAM, *et al.*,

On Application to Justice Elena Kagan to Extend Time to File
Petition for Writ of Certiorari to Review Judgement of
the United States Court of Appeals for the Sixth Circuit

APPLICATION OF PETITIONERS-APPLICANTS TRACEY E. GEORGE, *ET AL.*,
TO EXTEND TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

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Supreme Court No. 292924

C. Dewey Branstetter Jr.

Supreme Court No. 292919

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To Justice Elena Kagan as Circuit Justice for the United States Court of Appeals for the Sixth Circuit:

Applicant-Plaintiffs, Tracey E. George, Ellen Wright Clayton, Deborah Webster Clair, Kenneth T. Whalum, Jr., Meryl Rice, Jan Liff, Teresa M. Halloran, and Mary Howard Hayes (“Applicants”) respectfully ask the Court to extend the time for Applicants to file a petition for writ of certiorari. The current deadline for Applicants to file their petition is Tuesday, May 29, 2018, which is 90 days from Wednesday, February 28, 2018—the date when the Sixth Circuit denied Applicants’ timely petition for rehearing *en banc*. In light of this Court’s expected decision in *Gill v. Whitford* (No. 16-1161) by the end of June, Applicants request that their deadline be extended by 45 day so that the new deadline would be Friday, July 13, 2018. This will allow Applicants to address and incorporate guidance from the Court’s expected decision in *Gill* into their petition.

BACKGROUND

Applicants are eight private citizens of Tennessee who filed a 42 U.S.C. § 1983 civil rights action in federal district court against certain officials of the State of Tennessee who determined the manner in which votes on a proposed amendment to the Tennessee Constitution in the November 4, 2014 state and federal general election would be tabulated and who certified the results of whether the proposed constitutional amendment had passed based on their determination¹ (collectively “State Actors”).

¹ Defendant-Respondents are Governor of Tennessee William Edward “Bill” Haslam, Secretary of State Tre Hargett, Coordinator of Elections Mark Goins, Attorney General Herbert H. Slatery III, and

Applicants asserted the method by which State Actors determined the threshold for passage of the proposed state constitutional amendment violated their Fourteenth Amendment federal constitutional rights by (1) compelling them (but not others) to vote for governor in violation of due process (which incorporates their First Amendment rights); (2) giving less weight to Applicants' votes as opposed to other votes on the proposed constitutional amendment in violation of equal protection; (3) subjecting them to a fundamentally unfair voting system in violation of due process; and (4) tabulating votes contrary to the state constitution. Applicants sued days after the release of preliminary election results—but before certification—seeking, among other relief, a judgment declaring State Actors' counting scheme unconstitutional on its face or as-applied and either voiding the November 4, 2014 election results on the proposed constitutional amendment or requiring a recount pursuant to the plain language of the Tennessee Constitution.

After the district court denied State Actors' attempts to dismiss Applicants' federal civil rights case and with trial set only a few months away, two of the State Actors—Secretary of State Tre Hargett and Coordinator of Elections Mark Goins, acting in their official capacities and represented by Tennessee's Attorney General—filed a new, retaliatory declaratory judgment lawsuit, *Hargett et al. v. George et al.* (“the State's Declaratory Judgment Action”), against Applicants in Williamson County, Tennessee Chancery Court—a forum where, under state law, Applicants

the State Election Commission of Tennessee, and its then-members Judy Blackburn, Donna Barrett, Gregg Duckett, Tommy Head, Jimmy Wallace, Tom Wheeler, and Kent Younce—all named in their official capacities.

could not have sued State Actors and one of the counties where the contested vote on the proposed constitutional amendment passed by the highest margin. The State's Declaratory Judgment Action, which sued Applicants only in their individual capacities, functionally sought a declaration that the actions undertaken by State Actors that formed the basis of Applicants' federal civil rights lawsuit were proper. Because the State's Declaratory Judgment Action could not bind anyone with the possible exception of Applicants, the only utility of the State Actor's retaliatory suit was as a countermeasure to Applicants' federal civil rights action.

In the federal civil rights action, the district court ruled after a bench trial that State Actors had acted unlawfully in their application of the law toward Applicants and other Tennessee voters, finding that State Actors' operation and tabulation of the vote on the proposed constitutional amendment violated the due process and equal protection rights of the Applicants. In particular, the district court found that State Actors' tabulation method resulted in the improper dilution of Applicants' votes, fundamental unfairness, disenfranchisement, and compelled voting and therefore concluded that Applicants' Fourteenth Amendment due process and equal protection rights had been violated.

Meanwhile, the state court, at the behest of the State Actors and over the objections of Applicants, fast-tracked the summary judgment process and then rushed to issue an order in between the federal court's bench trial and its issuance of its 50-plus page findings of fact and conclusions of law. The state court purported to

declare that State Actors acted lawfully and thereby effectively declared that Applicants' civil rights had not been violated.

State Actors timely appealed the district court's decision, raising for the first time that the State's Declaratory Judgment Action had preclusive effect on Applicants' federal civil rights action. The court of appeals heard oral argument on August 2, 2017. On January 9, 2018, the Sixth Circuit issued a published decision concluding that the State's Declaratory Judgment Action had preclusive effect on the federal proceeding and "undermine[d] the district court's analysis of plaintiffs' civil rights claims." *George v. Hargett*, 879 F.3d 711, 723 (6th Cir. 2018). The appellate court reversed the district court's decision. A copy of the Sixth Circuit's January 9, 2018 decision is attached as Exhibit A to this application.

Applicants timely filed a petition for rehearing *en banc* on January 23, 2018. On the Sixth Circuit's request, State Actors filed a response to this petition on February 9, 2018. On February 28, 2018, the court of appeals denied Applicants' petition for rehearing *en banc*; a copy of this decision is attached as Exhibit B to this application.

Applicants intend to petition this Court for a writ of certiorari to review the Sixth Circuit's judgment and now ask for additional time to file such a petition.

ARGUMENT

Applicants respectfully ask for a 45 day extension to file a petition for writ of certiorari so that the new deadline would be Friday, July 13, 2018. To establish good

cause for this request, Applicants make the following four arguments in favor of extending the deadline.

First, this Court's decision in *Gill v. Whitford* (No. 16-1161), which was argued on October 3, 2017, will likely provide guidance on the contours of the equal protection issues for which Applicants will be requesting review. Admittedly, the issues in this case—one of individual voters pursuing their constitutional rights in a state referendum election—and the gerrymandering at issue in *Gill* are not so overlapping that the outcome in *Gill* should be controlling. However, there is a distinct possibility that this Court's decision on the equal protection questions in *Gill*, and particularly on the arguments regarding vote dilution and an efficiency gap advanced by the petitioners there, will offer guidance on the equal protection issues present in this case. Both out of a duty to provide the best possible representation to their clients and to advance their petition for a writ of certiorari most effectively and efficiently in this Court, Applicants' attorneys request an extension of time to receive this Court's decision in *Gill* and incorporate it as is necessary and appropriate into Applicants' petition for a writ of certiorari.

Second, Applicants' intended petition will raise important constitutional questions for this Court to address. First, the Sixth Circuit's decision giving preclusive effect to the State's Declaratory Judgment Action validates a troubling procedure by which any state actor facing a federal civil rights lawsuit can circumvent federal court jurisdiction by suing the federal court plaintiffs in a favorable state court forum. Second, the Sixth Circuit's ruling that the dilution of individual voting power does not violate equal protection raises whether non-race-based vote dilution is ever actionable

under this Court's precedent. Third, the Sixth Circuit's ruling limiting recognition of non-race-based fundamentally unfair voting systems warrants guidance from this Court, which has not spoken on this issue in the context of vote tabulation for over 60 years. Finally, the Sixth Circuit's limit on the concept of compelled voting provides an opportunity for this Court to resolve conflicts among the circuits.

Third, the State Actors are not prejudiced by Applicants' requested extension. This is a civil action addressing constitutional violations that first arose in November 2014, and there are no pressing issues or events that would be affected by a 45-day extension of time for filing a petition for a writ of certiorari.

Finally, this application satisfies the express procedural requirements of Supreme Court Rule 14.5. This Court would have subject matter jurisdiction to hear Applicants' petition for a writ of certiorari because Applicants assert claims under 42 U.S.C. § 1983 and the Due Process and Equal Protection Clauses of the Constitution, which provide federal question jurisdiction. This Court would also have appellate jurisdiction to hear Applicants' petition for a writ of certiorari because Applicants timely filed a petition for rehearing *en banc* in the Sixth Circuit, which was denied, and Applicants now seek to timely file a petition for writ of certiorari.

Applicants have included copies of both the Sixth Circuit's January 9, 2018 decision (Exhibit A) reversing the district court and the February 28, 2018 order (Exhibit B) denying Applicants' timely petition for rehearing *en banc*. Applicants file this application more than 10 days before the date their petition would be due because, as of now and without any extension, their petition would be due on May 29,

2018. Applicants ask for an extension of time only for themselves, as no other party has need to file a petition for writ of certiorari.

CONCLUSION

For these reasons, Applicants respectfully ask for a 45 day extension of time to file a petition for writ of certiorari so that the new deadline would be Friday, July 13, 2018.

Respectfully submitted on May 18, 2018,

/s/ William L. Harbison

William L. Harbison (*Counsel of Record*)

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