

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

Barbara Diamond, Steven Diamond, Samuel
Bashioum, Tracy Baton, Nancy Chiswick,
William Cole, Patrick Costello, Stephen
Dupree, Ronald Fairman, Joseph Foster,
Colleen Guiney, Robert Kefauver, Elizabeth
King, Gillian Kratzer, James Landis, Matthew
Munsey, Deborah Noel, Zachary Rubin,
Thomas Spangler, Margaret Swoboda, Susan
Wood, and Pamela Zidik,

Plaintiffs,

v.

Robert Torres, Acting Secretary of the
Commonwealth of Pennsylvania, and
Jonathan Marks, Commissioner of the Bureau
of Elections, in their official capacities,

Defendants.

CIVIL ACTION

No. 17-05054

**EXECUTIVE BRANCH DEFENDANTS’ RESPONSE IN
OPPOSITION TO LEGISLATIVE DEFENDANTS’ MOTION TO DISMISS**

Acting Secretary of the Commonwealth of Pennsylvania Robert Torres and
Commissioner of the Bureau of Elections Jonathan Marks, in their official capacities (together,
“Executive Branch Defendants”), oppose the motion of Defendant-Intervenors 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, “Legislative Defendants”) to dismiss Plaintiffs’ First Amended Complaint pursuant
to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), ECF No. 68 (Jan. 11, 2018).

Certain of Legislative Defendants’ arguments raise issues that can only be resolved
through discovery. For example, first, Legislative Defendants argue that Plaintiffs “fail to show”

injury “to a legally protected interest that is both concrete and particularized,” and cite to an opinion holding that one plaintiff in a redistricting case failed to make such a showing at trial, while other plaintiffs did make such a showing. *See* Legislative Defts.’ Mem. at 2 (quoting *Agre v. Wolf*, No. 2:17-cv-04392-MMB, ECF No. 212, at 2 (Shwartz, J., concurring)). Critically, the Legislative Defendants do not argue that Plaintiffs have failed to *allege* injuries. Only discovery will show whether or not Plaintiffs can back up those allegations with evidence. Second, Legislative Defendants argue that the 2011 Plan “is justified by legitimate state interests.” Legislative Defts.’ Mem. at 10. Discovery would be required to show that “legitimate state interests” explain the 2011 Plan.

Other of the Legislative Defendants’ arguments are simply not supported by existing law. As Legislative Defendants themselves acknowledge in their Motion to Stay or Abstain, ECF No. 69 (Jan. 11, 2018), the Supreme Court has not ruled that partisan gerrymandering claims under the First Amendment and the Equal Protection Clause are non-justiciable under any possible standard. *See* Motion to Stay at 9 – 10 (“*If* the Supreme Court rules that partisan gerrymandering claims under the Equal Protection Clause or the First Amendment are non-justiciable . . .”) (emphasis added). Notably, Legislative Defendants do not point to any Supreme Court precedent that has rejected an Elections Clause claim as non-justiciable – nor could they, as no such case has come before the Court.

In light of the significant public interest in resolving the constitutionality of the 2011 Plan, the Court should permit this case to go forward. Accordingly, Executive Branch Defendants respectfully request that this Court deny Legislative Defendants’ Motion to Dismiss.

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

Dated: January 18, 2018

By: /s/ Michele D. Hangley

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Legislation, in their official capacities*

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2018, I caused a true and correct copy of the foregoing Response in Opposition to Legislative Defendants' Motion to Dismiss to be electronically filed pursuant to the court's electronic court filing system, and that the filing is available for downloading and viewing from the electronic court filing system by counsel for all parties.

/s/ Michele D. Hangle

Michele D. Hangle