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. 5:17-cv-5054**

PLAINTIFFS' MOTION FOR RECONSIDERATION

Plaintiffs respectfully move for reconsideration of the Court's Order, ECF No. 40, staying this action pending the completion of trial in *Agre v. Wolf*, and request a Rule 16 scheduling conference at the Court's earliest convenience. For the reasons discussed in the memorandum in support, lifting the stay is essential to preserve Plaintiffs' right to relief before the 2018 general election with minimal disruption to the pre-election schedule, as well as to provide the Court with legal and factual argument that will place the Court in the best possible position to decide whether Pennsylvania's current Congressional districting plan is a partisan gerrymander in violation of the United States Constitution.

WHEREFORE, Plaintiffs pray that the Court grant the motion for reconsideration and hold a Rule 16 scheduling conference at the Court's earliest convenience.

Dated: November 28, 2017

By: *s/ Bruce V. Spiva*

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CERTIFICATE OF SERVICE

I certify that on November 28, 2017, I filed the foregoing with the Clerk of the Court using the ECF System which will send notification of such filing to the registered participants as identified on the Notice of Electronic Filing.

Date: November 28, 2017

/s/ Bruce V. Spiva
Bruce V. Spiva

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PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

Plaintiffs respectfully move for reconsideration of the Court's Order, ECF No. 40, staying this action pending the completion of trial in *Agre v. Wolf*, and allow Plaintiffs to present their unique claims— with the support of different testimony— at a trial to be held on the most expeditious possible schedule. Lifting the stay is essential to preserve Plaintiffs' right to relief before the 2018 general election with minimal disruption to the pre-election schedule, as well as providing the Court with legal and factual argument that will place the Court in the best possible position to decide these important Constitutional questions. Plaintiffs further request a Rule 16 scheduling conference at the Court's earliest convenience.

INTRODUCTION

In *Agre*, this Court is moving expeditiously to adjudicate a matter of the utmost public importance: whether Pennsylvania's current Congressional districting plan is a partisan gerrymander in violation of the United States Constitution. However, the Court is at risk of undertaking this critical task without the benefit of a full presentation of the legal theories and expert analysis developed in response to Justice Kennedy's concurrence in *Vieth v. Jurbelier*, which have been presented to other district courts currently adjudicating partisan gerrymandering claims across the country. As a result, the Court will be deprived not only of highly probative evidence of how the 2011 Plan burdens voters in an invidious manner that is unrelated to any legitimate legislative objective, *see Vieth*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring), but also of emerging legal frameworks that offer clear, manageable, and politically neutral standards for adjudicating partisan gerrymandering claims, *see id.* at 307–08.

Plaintiffs respectfully request the opportunity to present the Court with its own claims, evidence, and legal argument in a timely fashion, in order to minimize any changes that would be required in the pre-election schedule for the 2018 general election if Plaintiffs prevail and to place the Court in the best possible position to decide these important Constitutional questions. A stay throughout the pendency of *Agre* would jeopardize both objectives. Plaintiffs' claims and evidence are not duplicative of the claims and evidence in *Agre*, nor will Plaintiffs' claims be controlled by the outcome of *Gill v. Whitford* currently pending before the Supreme Court. Plaintiffs will present the Court with testimony from three leading expert witnesses regarding topics and methodologies not addressed by the *Agre* plaintiffs' experts, and Plaintiffs will offer the court two distinct legal theories of relief that are not currently advanced by the *Agre* plaintiffs. While one of these claims proceeds under a *Whitford*-style theory, the Supreme Court's disposition of *Whitford* is highly unlikely to be dispositive of that claim in this case.

Moreover, this Court's timely adjudication of Plaintiffs' claims will contribute to the development of the law (including but not limited to the theory of relief advanced in *Whitford*) and will aid the Supreme Court in its current effort to refine workable standards for partisan gerrymandering claims.

An expedited schedule is feasible and will not prejudice other parties. The Executive Defendants and the legislators who have moved to intervene ("Legislators") have been preparing for litigation involving partisan gerrymandering claims against the 2011 Plan since early this summer. Plaintiffs' Amended Complaint is substantially identical to the proposed complaint in intervention disclosed in the *Agre* action on November 3. Plaintiffs' expert reports, which are authored by the same experts disclosed in the *Agre* action on November 6 and 7, have already been disclosed to the Executive Defendants. Plaintiffs are ready and willing to work in good faith with Defendants on an expedited trial schedule that reasonably accommodates the needs of Defendants.

For those reasons, Plaintiffs request that the Court exercise its inherent authority to reconsider its interlocutory orders because doing so is consonant with justice. This matter of utmost public importance deserves a full and thorough presentation of relevant legal theories and expert analysis.

BACKGROUND

Plaintiffs' Unique Evidence. Plaintiffs will offer the testimony of three expert witnesses–– none of whom have precise counterparts in the *Agre* case. These expert witnesses will provide the Court with a full understanding of the history and consequences of the 2011 Plan and demonstrate the availability of judicially administrable criteria by which to adjudicate the constitutionality of a partisan gerrymander. Plaintiffs disclosed the reports of all three expert witnesses to the Executive Defendants on November 20, 2017.

Plaintiffs will offer testimony of Stanford University political scientist Jonathan Rodden that: 1) the degree of partisan advantage conferred upon the Republican party by the 2011 Plan is, by a variety of measures, an outlier among *all prior Congressional plans in Pennsylvania* and among *all plans in other U.S. states from the last six decades*; 2) that the partisan advantage evident in the 2011 Plan is durable and would withstand even an unprecedented statewide swing in favor of Democrats; and 3) that, using two different advanced computational techniques, this degree of partisan advantage cannot be explained by patterns of where Democratic and Republican voters happen to live in Pennsylvania.

Plaintiffs will also offer the testimony of Duke University mathematician Jonathan Mattingly, whose expert report uses a third advanced computational technique to demonstrate that the degree of partisan advantage conferred by the 2011 Plan is an extreme outlier relative to thousands of sample maps generated by a computer algorithm that does not take partisanship into account.

Finally, Plaintiffs will offer the testimony of American University historian Allan Lichtman, whose expert report surveys the direct and circumstantial evidence of the legislature's discriminatory intent in enacting the 2011 Plan, including the deviations from established legislative procedures, and the degree to which data available to the mapdrawers enabled them to gerrymander the 2011 Plan in order to obtain a predictable partisan advantage.

Plaintiffs' Unique Legal Claims. Plaintiffs will also offer the court two distinct legal theories of relief that are not currently advanced by the *Agre* plaintiffs.

The first is a claim based on the three-judge court's holding in *Whitford* that the Wisconsin legislative map violated the First and Fourteenth Amendments. To prove this claim, Plaintiffs will demonstrate that the 2011 Plan was designed with discriminatory intent, that the

2011 Plan causes a large and durable discriminatory effect, and that there is no valid justification for the effect based upon legitimate state prerogatives and neutral principles. This Court's consideration of a *Whitford*-style claim is especially warranted because it has the distinction of being the only standard adopted by a federal court to invalidate a partisan gerrymander since *Vieth*. Indeed, the Supreme Court and other federal courts will benefit from this Court's application of the *Whitford* analysis to the 2011 Plan—in particular, from this Court's consideration of Dr. Rodden and Dr. Mattingly's advanced computational techniques that identify redistricting plans which are outliers from neutrally drawn maps, and that distinguish between the effects of geography and the effects of intentional partisan manipulation. The Justices have expressed great interest in the use of computer simulations for these purposes, *see* Oral Argument Tr. at 53-58, *Gill v. Whitford* (No. 16-1161) (S. Ct. 2017), but the *Whitford* plaintiffs did not submit such expert testimony at trial. Although this theory is like the one pursued in *Whitford*, as discussed further below, even a reversal of *Whitford* by the Supreme Court is unlikely to foreclose Plaintiffs' claims in this case. Indeed, two federal courts recently declined to stay similar partisan gerrymandering claims proceeding under a *Whitford*-style theory. *See Common Cause v. Rucho*, No. 1:16-cv-1026, No. 1:16-cv-1164, 2017 WL 3981300, at *7 (M.D.N.C. Sept. 8, 2017); *Georgia State Conference of NAACP v. State of Georgia*, No. 1:17-cv-1427-TCB-WSD-BBM, 2017 WL 3698494, at *11 (N.D. Ga. Aug. 25, 2017).

The second distinct legal theory of relief advanced by Plaintiffs is a First Amendment claim based on Justice Kennedy's concurrence in *Vieth*, and from ordinary First Amendment analysis of viewpoint discrimination claims. *See* 541 U.S. at 315 (Kennedy, J., concurring) ("The inquiry [. . .] is whether political classifications were used to burden a group's representational rights. If a court were to find that a State did impose burdens and restrictions on

groups or persons by reason of their views, there would likely be a First Amendment violation, unless the State shows some compelling interest."). Unlike the *Whitford* court, which conflated the First and Fourteenth Amendment analysis, this distinct First Amendment theory does not require Plaintiffs to demonstrate—or a Court to decide upon—what constitutes a sufficiently severe or "durable" First Amendment violation in order to make out a claim. This is because courts have not required intentional viewpoint discrimination to be "severe" or "durable" to warrant relief. Instead, severe and durable discriminatory effects are simply highly probative evidence of the invidiously discriminatory intent of a redistricting plan.

Accordingly, allowing Plaintiffs to proceed would not duplicate the evidence or claims presented by the *Agre* Plaintiffs.

PROCEDURAL HISTORY

In October, the *Agre* plaintiffs filed a complaint alleging that the 2011 Plan is a partisan gerrymander in violation of the Elections Clause of the U.S. Constitution.[1] After reviewing the complaint and initial filings, Plaintiffs in this action concluded that the *Agre* plaintiffs were unlikely to present this Court with certain legal theories and expert testimony that are directly responsive to the Supreme Court's call for judicially manageable standards for partisan gerrymandering claims, and that have been raised other pending partisan gerrymandering cases in other federal courts. Believing that the adjudication of claims with common issues of fact would promote judicial efficiency, Plaintiffs sought the Court's leave to intervene in the *Agre* action on November 3.[2] Plaintiffs submitted a complaint in intervention, disclosed the identity of Plaintiffs' expert witnesses and subjects of their expert reports, and indicated Plaintiffs' willingness to largely rely upon the discovery requests propounded by the *Agre* plaintiffs and to

[1] Complaint, ECF No. 1, *Agre v. Wolf*, 2:17-cv-04392-MMB (E.D. Pa. Oct. 2, 2017).
[2] Motion to Intervene as Plaintiffs, ECF No. 54, *Agre v. Wolf*, 2:17-cv-04392-MMB (E.D. Pa. Nov. 3, 2017).

proceed without adversely affecting the *Agre* scheduling order. This Court, in its discretion, denied Plaintiffs' motion to intervene on November 7.[3]

Plaintiffs promptly filed the instant action on November 9, and moved for an expedited scheduling order on November 13. ECF No. 2. The proposed scheduling order requested a trial date that would begin at least two weeks after the start of the *Agre* trial, affording additional time to complete any necessary discovery and pretrial matters. The next day, Executive Defendants consented to the proposed scheduling order. ECF No. 13. This Court ordered that any responses to the motion for an expedited scheduling order be filed by 3:00 PM on November 20. Minutes before this deadline, Legislators filed their motion to intervene and their opposition to the proposed scheduling order, ECF No. 25, which Plaintiffs opposed later that day, ECF No. 27. Legislators attached a motion to stay and/or abstain to their motion to intervene. ECF No. 26-4.

On November 22, the Court stayed the case at least pending the completion of trial in *Agre*. ECF No. 40. The Order described Count One of the Complaint as "similar to the pending *Gill v. Whitford* case in the United States Supreme Court, and Counts Two and Three alleging violation of First Amendment rights and Article I, Section 4 of the Constitution, are duplicative or overlapping the claim in *Agre.* At the time of the issuance of the Court's Order, Plaintiffs had not filed any response to the Legislators' motion to stay and/or abstain.

LEGAL STANDARD

"A federal district court has inherent power to reconsider interlocutory orders [] when it is 'consonant with justice.'" *Walker by Walker v. Pearl S. Buck Found., Inc.*, No. CIV. A. 94-1503, 1996 WL 706714, at *2 (E.D. Pa. Dec. 3, 1996) (quoting *United States v. Jerry*, 487 F.2d 600, 605 (3d Cir. 1973)); *see also Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros*, 176

[3] Order, ECF No. 77, *Agre v. Wolf*, 2:17-cv-04392-MMB (E.D. Pa. Nov. 9, 2017).

F.3d 669, 677 (3d Cir. 1999) (citation omitted) (Rule 59(e) applies to reconsideration of an interlocutory order in the same manner as a final judgment, including "the need to correct a clear error of law or fact or to prevent manifest injustice").

ARGUMENT

I. THIS ACTION SHOULD NOT BE STAYED

A. Staying this Action Pending *Whitford* is Not Warranted Because this Action Involves Different Facts, Different Expert Testimony, and Additional Claims

Legislators argue that this action should be stayed pending the Supreme Court's ruling in *Gill v. Whitford*, because *Whitford* will "dictate" how this action will proceed. Legislators are wrong, for three reasons.

First, the only way that *Whitford* will be dispositive of Plaintiffs' claims is if the Supreme Court upends its own precedents and holds that *all* partisan gerrymandering claims are nonjusticiable under *any* legal theory. Put another way, Legislators ask this Court to deny Plaintiffs any opportunity to obtain relief from the state's ongoing violations of their Constitutional rights for the 2018 Congressional election "on the bare possibility that the Supreme Court may reverse its precedent and flatly bar claims challenging a practice the Court has characterized as 'incompatible with democratic principles.'" *Common Cause*, 2017 WL 3981300, at *6 (citing *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n.*, 135 S. Ct. 2652, 2658 (2015). But as the *Common Cause* court recognized in a nearly identical situation, in ruling on a stay motion, this Court should follow the Supreme Court's holdings in *LULAC*, *Vieth*, and *Bandemer* that partisan gerrymandering claims are justiciable and, therefore, refrain from exercising its discretion to stay these proceedings on the bare possibility that the Supreme Court reverses course entirely. *Id.* at *6 (citing *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 413-14 (2006) ("*LULAC*")); *see also Georgia State Conference of NAACP*, 2017 WL

3698494, at *11 ("The Supreme Court's jurisprudence on partisan gerrymandering teaches us that the Court could rule in a variety of ways on the issues before it in *Whitford*, including not ruling on them at all. We will not delay consideration of this case for possibly a year or more, waiting for a decision that may not ultimately affect it. If the Supreme Court's ruling in *Whitford* impacts any ruling in this case, that ruling can be adjusted accordingly.").[4]

Second, although Plaintiffs advance a *Whitford*-style First and Fourteenth Amendment claim, the Supreme Court's disposition of *Whitford* will not necessarily control Plaintiffs' claim. Most obviously, the Supreme Court could resolve *Whitford* on standing grounds and require statewide partisan gerrymandering claims to be brought by a group of plaintiffs from each congressional district. *Common Cause*, 2017 WL 3981300, at *6. Plaintiffs, who reside in every Congressional district in Pennsylvania, would meet this hypothetical standing requirement. Similarly, the Supreme Court may adopt the *Whitford* district court's proposed legal test, but disagree with the district court's application of the test to the facts *in that case*. This action proceeds under different facts than *Whitford*, and will involve the application of social science methodologies that were not considered by the district court in *Whitford*. Moreover, even if the Supreme Court's opinion in *Whitford* articulates an entirely novel legal standard, the evidence that will be adduced at trial in this action—which will concern the discriminatory intent and effect of the 2011 Plan—will undoubtedly be relevant under any conceivable legal test or standard adopted by the Supreme Court. As the district court in *Georgia State Conference of*

[4] The Maryland district court's decision to stay a pending partisan gerrymandering claim in light of *Whitford* is not to the contrary. In that case, which proceeded under a different legal theory than those asserted in this case and in *Agre*, the court granted the stay only after it denied the plaintiff's motion for a preliminary injunction. The preliminary injunction motion was made after fully briefed cross motions for summary judgment based upon extensive discovery and expert testimony. In other words, the Maryland court only issued a stay after they decided that Plaintiffs were not likely to prevail on the merits, based on a thorough presentation of evidence. *See Benisek v. Lamone*, No. CV JKB-13-3233, 2017 WL 3642928, at *2 (D. Md. Aug. 24, 2017).

NAACP recently noted, "if the Supreme Court's ruling in *Whitford* impacts any ruling in this case, that ruling can be adjusted accordingly." 2017 WL 3698494, at *11.

Third, Plaintiffs advance claims and legal theories distinct from and not before the court in *Whitford*. In particular, Plaintiffs advance a First Amendment theory that is distinct from the First and Fourteenth Amendment theory adopted by the district court in *Whitford*. Consistent with the approach of the *Whitford* court, Plaintiffs' evidence at trial will demonstrate that that the 2011 Plan was designed with discriminatory intent; that the 2011 Plan causes a large and durable discriminatory effect; and that there is no valid justification for the effect based upon legitimate state prerogatives and neutral principles. But Plaintiffs believe that the *Whitford* court improperly conflated its First and Fourteenth Amendment analysis. These two provisions protect against different "underlying…constitutional harms," and thus require different analyses. *Vieth*, 541 U.S. at 294 (plurality). Justice Kennedy's concurrence in *Vieth* contrasts equal protection analysis, which focuses on the permissibility of an enactment's classifications, with First Amendment analysis, which focuses on whether the legislation burdens representational rights for reasons of political association. *See* 541 U.S. at 315.

Accordingly, Plaintiffs submit that the proper analysis under the First Amendment is simply "whether political classifications were used to burden a group's representational rights. If a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the State shows some compelling interest." *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring). Unlike the approach of the *Whitford* court, this First Amendment analysis would proceed like conventional First Amendment viewpoint discrimination claims, which have never required Plaintiffs to show a severe or "durable" First Amendment violation in order to state a claim for relief. Instead, severe

and durable discriminatory effects are simply highly probative evidence of the discriminatory intent of the redistricting plan. In addition, while the *Whitford* court assumed that Plaintiffs bore the burden of proof in showing that a redistricting plan's partisan intent is not justifiable, *see* 218 F. Supp. 3d 837, 911 (W.D. Wisc. 2016), standard First Amendment viewpoint discrimination claims require the *state* to bear the burden of justifying viewpoint discrimination once strict scrutiny has been triggered. This distinct First Amendment framework is similar to the approach taken by the *Common Cause* plaintiffs in the partisan gerrymandering action currently proceeding in North Carolina.

In sum, Plaintiffs propose a distinct framework for assessing partisan gerrymandering claims under the First Amendment. There are meaningful differences between the First Amendment framework advanced by Plaintiffs and the framework applied by the *Whitford* trial court, which treated the First Amendment claim as substantively indistinguishable from the Equal Protection claim. "Accordingly, *Whitford* likely will not address, much less resolve, the viability of […] Plaintiffs' proposed First Amendment framework, much less whether Plaintiffs' evidence entitles them to relief under that framework." *Common Cause*, 2017 WL 3981300, at *5. Similarly, *Whitford* addressed state legislative districts, while this action involves Congressional districts. "Therefore, *Whitford* will not address, much less resolve, whether the Plan violates [the Elections Clause]." *Id.* at *5.

Fourth, Plaintiffs' claims and expert testimony will contribute to the development of the law and will aid the Supreme Court in its ongoing effort to refine workable standards for the adjudication of partisan gerrymandering claims. In particular, Plaintiffs' expert testimony is directly responsive to Justice Kennedy's call for "new technologies [that] may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders

impose on the representational rights of voters and parties[, which . . .] would facilitate court efforts to identify and remedy the burdens[.] *Vieth*, 541 U.S. at 312–13. For example, at oral argument in *Whitford*, the Justices expressed great interest in the use of computer simulations to generate neutrally drawn maps in order to determine whether the enacted plan is an outlier, and to distinguish between the effects of geography and the effects of intentional partisan manipulation. Oral Argument Tr. at 53-58, *Gill v. Whitford* (No. 16-1161) (S. Ct. 2017). Such evidence is directly relevant to the third step of the *Whitford* analysis, which asks whether legitimate state prerogatives and neutral principles can justify a redistricting plan. *See also Vieth*, 541 U.S. at 307 (Kennedy, J., concurring) (stating that a finding of partisan gerrymandering must "rest [. . .] on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective."). While the *Whitford* plaintiffs provided other types of evidence sufficient to establish the lack of justification, the *Whitford* plaintiffs did not submit expert testimony at trial that relied upon computer simulations to generate neutrally drawn maps. Here, Plaintiffs' experts will present three distinct, but complementary, computer simulation methods that are directly responsive to the Justices' call for new methods of analysis.

B. Staying this Action Pending the *Agre* Action or the Pennsylvania Action is Not Warranted Because this Action Involves Different Claims, Different Legal Theories, and Different Expert Testimony

Legislators argue that this action should be stayed pending the disposition of the *Agre* action and/or *League of Women Voters v. Commonwealth* ("the Pennsylvania state action"), currently pending in the Pennsylvania Supreme Court. Disposition of the *Agre* action, they argue, may moot or dispose of Plaintiffs' Elections Clause claim. The Pennsylvania state action, they argue, concerns an "*essentially* identical constitutional challenge" that "asserts *substantially* the

same legal claims." ECF No. 26-4, at 25 (emphasis added). The Court should reject this delay tactic.

With respect to the *Agre* action, this Court will be in the best position to decide how to dispose of the different claims for relief in the *Diamond* and the *Agre* actions after it has the benefit of full trial presentation in both actions. Moreover, the Legislators' request to stay *Diamond* may foreclose Plaintiffs from obtaining any relief from an ongoing Constitutional violation in time for the 2018 Congressional elections, should the Court find against the *Agre* plaintiffs. This result would be particularly inappropriate given that Plaintiffs are proceeding, in part, under a legal theory and with the type of expert evidence actually relied upon by another federal court to invalidate a partisan gerrymander. By contrast, the *Agre* plaintiffs, by their own admission, are proceeding under a novel legal theory. Moreover, the *Agre* Plaintiffs are seeking different relief. The *Agre* Plaintiffs "do not ask this Court to redraw the map or take over the redistricting process" and instead ask the Court to require "a process that will safeguard against the manipulation of Congressional districting with partisan intent," which may include a redistricting commission, or a bipartisan or non-partisan technical body to develop alternative maps.[5] Plaintiffs do not oppose having a neutral redistricting body draw a remedial map. However, if such a remedy was not possible because it is foreclosed by precedent or state law, or because of the timing concerns regarding the 2018 election, Plaintiffs would seek the traditional remedy in a redistricting challenge, in which this Court would enjoin use of the 2011 Plan, permit the State an opportunity to adopt a Constitutional plan, and, failing that, impose a map drawn by the Court..

[5] Plaintiffs' Response to Motion to Dismiss, ECF No. 53, at 15-16, *Agre v. Wolf*, 2:17-cv-04392-MMB (E.D. Pa. Oct. 31, 2017).

With respect to the Pennsylvania state action, there is no reason to stay this case in order to wait out another case based entirely on State law. Should the Pennsylvania Supreme Court invalidate the 2011 Plan, this Court can then re-evaluate the status of this action at that time. But if the Pennsylvania Supreme Court dismisses the state constitutional claims at issue in the Pennsylvania state action, or otherwise declines to issue timely relief, Plaintiffs' federal constitutional claims will remain unresolved. Moreover, this Court would not benefit from waiting to see if the Pennsylvania Supreme Court dismisses the Pennsylvania action on the merits, because such dismissal has no precedential effect upon this Court's adjudication of the federal constitutional claims at issue here. In sum, the Legislators' request would definitively foreclose Plaintiffs from obtaining any relief from an ongoing federal Constitutional violation in time for the 2018 Congressional elections, and would instead leave Plaintiffs dependent on the state courts to impose a remedy for a state constitutional violation that sufficiently protects Plaintiffs' federal constitutional rights.

C. Abstention is Inappropriate Where, As Here, State Courts Have Not Even Invalidated the 2011 Plan, Let Alone Begun the Process of Implementing a Remedial Map

The Legislators incorrectly assert that this Court must abstain from this action in light of the ongoing Pennsylvania state action. Though the States are vested with primary responsibility for apportionment, federal courts do not abstain from consideration of a redistricting plan solely because the plan's validity is also before state courts. The cases cited by the Legislators instead concern federal interference with state courts that have *already invalidated a redistricting plan*, and are therefore inapposite.

In *Pileggi v. Aichele*, 843 F. Supp. 2d 584 (E.D. Pa. 2012), the district court declined to enjoin primary elections from proceeding after the Pennsylvania Supreme Court had already declared the challenged state redistricting plan unconstitutional, ordered it to be reapportioned,

retained jurisdiction pending the creation of a new plan, and ordered elections to proceed under the invalid boundaries. There, the district court simply concluded that "[u]nder these unique circumstances [. . .] [t]he granting of a temporary restraining order at this juncture would make no sense." *Id.* at 597.

Similarly, Legislators' remaining cases in support of deference concern federal interference in redistricting plans that state courts have already determined are invalid and are in the process of redrawing. In *Growe v. Emison*, 507 U.S. 25 (1993), the United States Supreme Court held that a federal district court had erred by enjoining the Minnesota Supreme Court from implementing the plan after the state court had declared the prior plan unconstitutional through a panel already appointed by the Minnesota Supreme Court. The United States Supreme Court found that typically "a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Id.* at 34.

Scott v. Germano, 381 U.S. 407 (1965), was similarly acceded to a state court's decision to propose relief when it had already invalidated a prior map. In *Germano*, a federal court refused to vacate its own order apportioning the Illinois Senate after the Supreme Court of Illinois declared the apportionment unconstitutional and retained jurisdiction to ensure its valid redrawing. Although the U.S. Supreme Court vacated the federal district court's order, resting its decision on the fact that the State was already in the process of redistricting, it directed the district court to retain jurisdiction "in the event a valid reapportionment plan for the State Senate is not timely adopted." *Id.* at 409.

II. AN EXPEDITED SCHEDULE IS WORKABLE

The Legislators have consistently sought to delay this Court's consideration of challenges to the 2011 Plan, including Plaintiffs' claims. Their incentives are not difficult to understand. If the Legislators successfully delay adjudication of this challenge until after the 2018

Congressional election, they will have reaped the fruits of an unconstitutional redistricting plan––one that confers a substantial and illegitimate partisan advantage—for yet another election. As other similarly situated courts have recognized, a delay that has the effect of subjecting voters to unconstitutional districting plans for nearly a decade would empower state legislatures to engage in unlawful districting practices by rendering the federal courts effectively powerless to redress voters' grievances. *See Common Cause*, 2017 WL 3981300, at *7; *see also Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 560 (E.D. Va. 2016).

This Court—as well as the Pennsylvania Supreme Court and the U.S. Supreme Court—has so far declined Legislators' various invitations to delay relief to other plaintiffs. Plaintiffs respectfully request the same protection. An expedited trial schedule is eminently workable, is not prejudicial, and as this Court has implicitly recognized in its prior orders, this Court has the power to issue relief in time for the 2018 Congressional elections.

Plaintiffs propose an expedited schedule that is consistent with the expedited schedule currently governing the *Agre* action. Plaintiffs have already served their expert reports and discovery requests upon the Executive Defendants, and have issued subpoenas to third parties. Moreover, although the Court declined to allow Plaintiffs to intervene in the *Agre* matter, the parties and the Court can still realize efficiencies from these actions proceeding in parallel by coordinating depositions and other discovery. In addition, the Court has ample authority to structure the trial schedule in this matter to facilitate any motions that the Legislators intend to file—for example, *Daubert* and other motions can be raised before trial but ruled upon by the Court during or after trial. Nor is there anything unusual about election-related litigation proceeding to trial on an expedited schedule. In short, these unique circumstances, and the time and efforts the parties have already devoted to preparing for these related cases, make it is

possible to proceed on an expedited trial schedule that reasonably accommodates the legitimate needs of all parties, and in a manner consonant with the serious Constitutional claims raised by Plaintiffs.

A. The Legislators' Objections Are Meritless, or Are Problems of Their Own Making

Plaintiffs oppose the intervention of the Legislators, because, as explained in Plaintiffs' brief in opposition to the Legislators' motion to intervene, they do not have standing and they seek to delay these proceedings. This Court has yet to rule on the Legislators' motion to intervene. If this Court were to grant that motion, it should be on the condition that this Court expects Legislators to participate in this litigation and not derail it. The Legislators' objections to the workability of an expedited trial schedule are both meritless and are problems of their own making.

First, the Legislators assert that they will not have time to depose each of the individual plaintiffs prior to trial. But the Federal Rules provide for a number of other discovery devices, including interrogatories, requests for admission, and depositions by written question that will allow the Legislators to obtain the information they believe they need from Plaintiffs. Moreover, the Court can provide for streamlined deposition procedures similar to what it has ordered in the *Agre* action.[6] To the extent that Legislators seek to quiz each plaintiff for hours about their individual views on the nature of the Constitutional harms they have suffered, such discovery is utterly irrelevant to the factual and legal questions before the Court. Accommodating such unnecessary discovery is no ground for delay.

Second, the Legislators argue that they will not have sufficient time to retain rebuttal expert witnesses and depose Plaintiffs' experts. But the Legislators have been on notice of the

[6] Order, ECF No. 112, *Agre v. Wolf*, 2:17-cv-04392-MMB (E.D. Pa. Nov. 22, 2017).

identity and topics of Plaintiffs' experts since November 6 and 7. Moreover, the topics of Plaintiffs' experts' reports—such as partisan bias, the efficiency gap, the mean-median gap, and the use of computer modeling to generate neutrally drawn alternative plans—do not come out of the blue. Rather, they are consistent with the methodological approaches to the identification of partisan gerrymandering set forth in the complaint in the Pennsylvania state action,[7] for which the Legislators have surely been seeking rebuttal experts since early this summer. Thus, their analysis on these points should already have been (or be in the process of being performed) and no prejudice will occur.

In addition, Plaintiffs' expert testimony is consistent with methodologies utilized by expert witnesses in partisan gerrymandering lawsuits currently pending in North Carolina, Maryland, and Wisconsin. Indeed, the Legislators' counsel are among a group of legal practitioners who regularly engage with current academic scholarship on these topics. For example, the Legislators' counsel authored an amicus brief to the Supreme Court in the pending *Gill v. Whitford* case, which contained a detailed technical critique of these and other social science methodologies for the measurement of partisan gerrymandering. This brief specifically cited and discussed the scholarship of Plaintiffs' expert Dr. Jonathan Rodden on these topics.[8] Accordingly, while Plaintiffs are willing to discuss an expert witness disclosure and deposition schedule that reasonably accommodates the needs of the Legislators' rebuttal experts, the Legislators cannot credibly claim to lack the ability to identify and prepare qualified rebuttal expert witnesses.

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[7] Pet. for Review, at 33-37, *League of Women Voters v. Commonwealth of Pa.*, 261 MD 2017 (Pa. Commw. Ct. June 15, 2017),

[8] Br. for National Republican Congressional Committee as Amicus Curiae in Support of Appellants, *Gill v. Whitford* (No. 16-1161) (S. Ct. 2017), *available at* http://www.scotusblog.com/wp-content/uploads/2017/08/16-1161-tsac-NRCC.pdf.

Finally, to the extent that the Legislators oppose Plaintiffs' motion for an expedited scheduling order because they believe they are unable to comply with concurrent deadlines in this matter as well as the Pennsylvania state action and the *Agre* action, this is a problem of their own creation. As set forth in Plaintiffs' opposition to the motion to intervene, the Legislators are not entitled to intervene as of right, and should not be permitted to intervene permissively if—by their own admission—they will be unable to comply with any expedited scheduling order. If necessary, the Legislators can also retain counsel not occupied by the Pennsylvania state action and the *Agre* action to litigate this matter. But the Legislators should not be permitted to use delay tactics in order to achieve their preferred substantive outcome: to use their unconstitutional districting plan in one additional Congressional election.

B. Consistent with this Court's Prior Rulings, the Court Will Be Able to Order Relief in Time for the 2018 Congressional Elections Under a Workable Expedited Schedule

As the Court has implicitly recognized in its prior rulings rejecting the Legislators' various requests to delay the *Agre* action, the Court possesses broad equitable power to issue a remedy for an unconstitutional redistricting plan that can be put in place in time for the 2018 election. In their opposition, the Legislators repeat the same arguments that have proved unconvincing to this Court, the U.S. Supreme Court, and the Pennsylvania Supreme Court: that it is mathematically impossible for the Court to issue a decision in time for a remedial map to be enacted by a supposed January 23, 2018 deadline.

However, even assuming the Legislators' calculations were correct, they ignore the fact that the Court can, in its equitable discretion, stay or alter relevant election deadlines as necessary to effectuate a remedial order. *See Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("[O]nce a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to

insure that no further elections are conducted under the invalid plan."); *Covington v. North Carolina*, No. 1:15CV399, 2017 WL 4162335, at *12 (M.D.N.C. Sept. 19, 2017) (citing cases holding that ordering special elections is appropriate when constitutional violation is widespread or serious); *NAACP-Greensboro Branch v. Guilford Cty. Bd. of Elections*, 858 F. Supp. 2d 516, 531 (M.D.N.C. 2012) (enjoining and revising election schedule to remedy unconstitutional reapportionment plan); *Georgia State Conference of the NAACP v. Fayette Cty. Bd. of Comm'rs*, 118 F. Supp. 3d 1338, 1351 (N.D. Ga. 2015) (enjoining and revising election schedule to remedy likely violation of Voting Rights Act). For example, the Court can stay candidate filing dates and deadlines, or if necessary, move the Congressional primary date altogether. Indeed, the vast majority of states' primaries will be held after Pennsylvania's scheduled May 15, 2018 primary.[9] While the state will bear some burden in changing an election date, such burden is far outweighed by the harm to voters of continuing to vote under an unconstitutional districting plan.

Regardless, the propriety and feasibility of a particular remedial order need not be decided by the Court at this juncture of the case—the parties can brief the issue if and when the need to issue a remedy arises, and will be able to do so without speculating about the impact of potential deadlines or hypothetical intervening events. By contrast, granting the Legislators' request to further delay this action will imperil Plaintiffs' relief in time for the 2018 Congressional elections. *See Common Cause*, 2017 WL 3981300, at *7 ("Delaying consideration of this case until after *Whitford* creates a substantial risk that, in the event Plaintiffs prevail, this Court will not have adequate time to afford Plaintiffs the relief they seek—constitutionally compliant districting maps for use in the 2018 election.").

[9] *See* National Conference of State Legislatures, 2018 State Primary Election Dates, http://www.ncsl.org/research/elections-and-campaigns/2018-state-primary-election-dates.aspx (Sept. 1, 2017).

Given the Court's responsibility to ensure that future elections will not be conducted under unconstitutional plans, this substantial risk weighs strongly against granting Legislators' request for further delay. *See id.* (citing *Larios v. Cox*, 305 F. Supp. 2d 1335, 1344 (N.D. Ga. 2004); *Johnson v. Mortham*, 915 F. Supp. 1529, 1549–50 (N.D. Fla. 1995)).

CONCLUSION

For the foregoing reasons, the motion for reconsideration should be granted, and a Rule 16 scheduling conference should be held at the Court's earliest convenience.

Dated: November 28, 2017

By: *s/ Bruce V. Spiva*

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CERTIFICATE OF SERVICE

I certify that on November 28, 2017, I filed the foregoing with the Clerk of the Court using the ECF System which will send notification of such filing to the registered participants as identified on the Notice of Electronic Filing.

Date: November 28, 2017

/s/ Bruce V. Spiva
Bruce V. Spiva

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. 5:17-cv-5054**

ORDER

AND NOW, this _____ day of _____, 2017, upon consideration of Plaintiffs' Motion for Reconsideration of the Court's Order staying this action pending the completion of trial in *Agre v. Wolf*, ECF No. 40, and for good cause shown, Plaintiffs' Motion for Reconsideration is **GRANTED**.

The Court sets _____, 2017 at _____ for a telephonic Rule 16 scheduling conference.

BY THE COURT:

_____