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' REPLY 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*. Executive Defendants—the only Defendants currently before this Court and the parties responsible for the administration of elections in the State—do not oppose Plaintiffs' motion, and agree that the issues presented in Plaintiffs' First Amended Complaint should be resolved without delay. ECF No. 46. Only the Proposed-Intervenors—who have no control over elections—oppose Plaintiffs' motion. Yet, their arguments fall short. Proposed Intervenors do not contest that Plaintiffs will bring unique evidence, expert testimony, and legal theories that will help the Court decide these important constitutional questions on the expedited timeline that the Court believed necessary to resolve

such claims. Rather, Proposed Intervenors oppose an expedited schedule apparently precisely *because* Plaintiffs' presentation will be helpful to the Court, and that as a result, the Court may invalidate the 2011 Plan and its substantial, illegitimate partisan advantage prior to the 2018 election. They seek not to prevent the duplication of evidence and legal theories, but to keep the Court in the dark about the most probative evidence of partisan gerrymandering, and the most cogent legal theories in harmony with existing precedent. Surely, their insistence that trying another case (one in which they have not yet been granted leave to intervene) would be inconvenient for their counsel provides no basis to prevent Plaintiffs in *this* action the opportunity to try their claims expeditiously. Accordingly, this Court should reconsider its stay of this action and allow Plaintiffs to move forward with their case under an expedited schedule.

A. THE COURT HAS BROAD DISCRETION TO RECONSIDER ITS ORDERS, INCLUDING ORDERS STAYING PROCEEDINGS

The Proposed-Intervenors' argument that Plaintiffs have not met the legal standard for reconsideration is wrong. Reconsideration is appropriate "to correct a clear error of law or fact *or to prevent manifest injustice*." *Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999) (citing *North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir.1995)) (emphasis added). As set forth in Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Reconsideration, ECF No. 43-1 ("Motion"), failure to lift the stay would be manifestly unjust as swift adjudication of this action is not only necessary to preserve Plaintiffs' right to relief before the 2018 general election with minimal disruption to the pre-election schedule, but also to ensure that critical issues implicating all Pennsylvanian's fundamental rights are evaluated with the most robust legal and factual information available.

In addition, the Court's Order staying this case was entered in an unusual procedural posture. To the extent that the Order, ECF No. 40, was a ruling on the merits of Proposed

Intervenors' Motion to Stay and/or Abstain, ECF No. 26-4, it was entered before Plaintiffs had the opportunity to submit their opposition to the motion and be heard on this issue. As set forth in Plaintiffs' Motion and discussed below, Proposed Intervenors' motion repeatedly mischaracterizes Plaintiffs' claims and evidence, and misstates applicable precedents. To the extent that the Court's Order relied upon such erroneous statements of facts and law without the benefit of Plaintiffs' response, reconsideration is appropriate.

Finally, while it is undisputed that this Court has broad discretion to stay proceedings as an incident to its power to control its own docket, *see Davis v. Nationstar Mortg., LLC*, No. 15-CV-4944, 2016 WL 29071, at *1 (E.D. Pa. Jan. 4, 2016), this broad discretion is not a one-way ratchet. If the Court, in its sound judgment, finds that the interests of justice will be served by lifting the stay and allowing this case to proceed, it certainly has the power to do so and should act accordingly. *See Cheyney State Coll. Faculty v. Hufstedler*, 703 F.2d 732, 738 (3d Cir. 1983) (reviewing stay orders for clear abuse of discretion); *see also Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985) (reviewing appeal of motion for reconsideration for abuse of discretion). As such, there are ample grounds justifying and supporting Plaintiffs' request for reconsideration, and Plaintiffs have more than met the standard for this Court to do so.

B. STAYING THIS ACTION PENDING *WHITFORD* IS NOT WARRANTED

The Proposed Intervenors' assertion in their opposition that this action should be stayed pending the Supreme Court's ruling in *Gill v. Whitford* is misplaced for multiple reasons. *First*, the Supreme Court has repeatedly found that partisan gerrymandering offends the Constitution, *see, e.g.*, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n.*, 135 S. Ct. 2652, 2658 (2015); *Vieth v. Jubelirer*, 541 U.S. 267, 316 (2004) (Kennedy, J., concurring), and has declined to hold Constitutional challenges to partisan gerrymanders nonjusticiable, *see League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 414 (2006) (Kennedy, J.) (citing *Davis v. Bandemer*,

478 U.S. 109, 118-27 (1986)); *Vieth*, 541 U.S. at 314, 317, 343, 355 (2004)). As Plaintiffs explain in their Motion and First Amended Complaint, Pennsylvania's 2011 Plan is such an outlier that it can be shown to be a partisan gerrymander under any test. Motion, ECF No. 43-1, at 3-6; First Am. Compl., ECF No. 42, at ¶¶ 34-66. Accordingly, the only way that *Whitford* will be dispositive of Plaintiffs' claims—as the Proposed Intervenors admit—is if the Supreme Court upends its own precedents and holds that *all* partisan gerrymandering claims are nonjusticiable under *any* legal theory.[1] The pendency of *Whitford* simply cannot warrant a stay in this case "on the bare possibility that the Supreme Court may reverse its precedent" and prohibit all Constitutional challenges to a practice that the Supreme Court has described as "'incompatible with democratic principles.'" *Common Cause v. Rucho*, No. 1:16-CV-1026, 2017 WL 3981300, at *6 (M.D.N.C. Sept. 8, 2017) (citing *Ariz. State Legislature*, 135 S. Ct. at 2658) (declining to stay partisan gerrymandering action pending *Whitford* and finding that if a precedent of the Supreme Court has direct application in a case, lower courts should follow the cases which directly control, leaving the prerogative of overruling its precedent to the Court); *see also Georgia State Conference of NAACP v. State*, No. 1:17-CV-1427-TCB-WSD-BBM, 2017 WL 3698494, at *11 (N.D. Ga. Aug. 25, 2017) (declining to stay partisan gerrymandering action pending *Whitford* and finding that a pending appeal does not change the law).

Second, while Plaintiffs do advance a First and Fourteenth Amendment claim as the Proposed Intervenors point out, the Supreme Court's disposition of *Whitford* will not necessarily control Plaintiffs' claim, and the arguments set forth by the Proposed Intervenors do nothing to

[1] While the Proposed Intervenors state in their opposition that there are "many ways" in which the pending *Whitford* decision could dispose of Plaintiffs' claims, ECF No. 45, at 7, they can name only one: that the Supreme Court could hold all partisan gerrymandering claims nonjusticiable. *Id.* at 7 n.2.

undermine this conclusion. Indeed, as explained in Plaintiffs' Motion, the Supreme Court could resolve *Whitford* on standing grounds, which would have no implication for this case, as Plaintiffs represent all districts in the 2011 congressional map. First Am. Compl., ECF No. 42, at ¶¶ 7-28. Moreover, the instant action proceeds under different facts and—as even the Proposed Intervenors do not contest—will involve the application of social science methodologies that were not considered by the district court in *Whitford* and are not part of the record before the Supreme Court. *See* Motion, ECF No. 43-1, at 11-12 (discussing Justices' questions regarding use of computer simulations). And the evidence that will be adduced at trial in this action—which will concern the discriminatory intent and effect of the 2011 Plan—will be relevant to any conceivable Equal Protection Clause theory that might be adopted by the Supreme Court in *Whitford*. Accordingly, and as the courts in *Common Cause* and *Georgia State Conference of NAACP* recognized, "if the Supreme Court's ruling in *Whitford* impacts any ruling in this case, that ruling can be adjusted accordingly[,]" *Common Cause*, 2017 WL 3981300, at *6; *Georgia State Conference of NAACP*, 2017 WL 3698494, at *11. These are not "cavalier suggestion[s]." *See* ECF No. 45, at 7 n.3. Rather, these courts—which faced the same decision that this Court does—accurately recognized that it is common for district courts to continue to adjudicate a claim at the same time that the Supreme Court is considering an appeal raising legal issues relevant to that claim. And, moreover, it is proper for lower courts to do so.[2]

[2] Indeed, as Plaintiffs discuss in their Motion, and contrary to the Proposed Intervenors' assertions, ECF No. 45, at 5 n.1, it is particularly important for this Court to adjudicate this action, because Plaintiffs' claims and unique expert testimony will contribute to the overall development of the law in this area and aid the Supreme Court in developing workable partisan gerrymandering standards. *See* Motion, ECF No. 43-1, at 3-6, 11-12. It is precisely the adversarial testing of such claims and evidence by the trier of fact—and the neutral trier of fact's reasoned resolution of such conflicting claims and evidence—that is most helpful to the Supreme Court. This is particularly true in cases involving Congressional reapportionment, which are not

Third, Plaintiffs advance claims and legal theories distinct from and not before the court in *Whitford*—and the Proposed Intervenors offer no response to the contrary. In particular, this case presents a distinct framework for assessing partisan gerrymandering claims under the First Amendment which will not necessarily be resolved by *Whitford*. *See Common Cause*, 2017 WL 3981300, at *5 (declining to issue stay in part because *Whitford* "will not address, much less resolve, the viability of […] Plaintiffs' proposed [legal] framework, much less whether Plaintiffs' evidence entitles them to relief under that framework."). Thus, *Whitford* provides for no basis for staying the instant case and to the extent that the Court stayed this action on that basis, it should reconsider its prior ruling.

C. STAYING THIS ACTION PENDING *AGRE* IS NOT WARRANTED

The Proposed Intervenors' assertions that *Agre* provides an independent basis for staying Plaintiffs' claims under the First Amendment and Elections Clause because they are duplicative also miss the mark. ECF No. 45, at 7-8. The legal claims advanced in this case—as well as the factual evidence supporting them—are distinct from the claims in *Agre* and, as the *Agre* panel recognized, warrant the independent hearing of this action that *Agre* cannot foreclose. *See* 11/7/2017 Hearing Tr., at 11:17-22 (Baylson, J.) (indicating that if Court sided for defendants in *Agre*, the Court's judgment is only as to those claims); *id.* at 12:14-18 (Shwartz, J.) (indicating that a separate *Diamond* action would proceed upon a different factual record for a different trial).

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subject to an intermediate appellate process, and do not benefit from the development of a cohesive body of law within a circuit. *See Georgia State Conference of NAACP*, 2017 WL 3698494, at *8 n.7 (discussing slow development of voting rights law resulting from lack of guidance from circuit courts).

As an initial matter, the *Agre* Court dismissed the *Agre* Plaintiffs' Hybrid-First Amendment Theory. *See* Order, ECF No. 160, *Agre v. Wolf*, 2:17-cv-4392 (E.D. Pa. Nov. 30, 2017). As a result, there is not even a potential First Amendment claim pending in the *Agre* case, and Plaintiffs' First Amendment claim cannot be duplicative of the *Agre* Plaintiffs' claims.

Faced with this inconvenient fact, Proposed Intervenors argue that there "is no articulable difference" between Plaintiffs' First Amendment claim and the dismissed *Agre* Hybrid-First Amendment theory, asserting that for that reason, Plaintiffs' claim should be dismissed. ECF No. 45, at 8 n.4. Advancing that argument—which is an argument for dismissal——in this context is simply improper. Nonetheless, as the *Agre* Court observed, the theory advanced and dismissed in that case was a novel and hybrid theory alleging a relationship between the Elections Clause and the First Amendment, in which the former is used to "enforce" the latter. *See* Order, ECF No. 160, at 1, 4, *Agre v. Wolf*, 2:17-cv-4392 (E.D. Pa. Nov. 30, 2017). By contrast, Plaintiffs assert a distinct First Amendment analysis that is not connected to their Elections Clause claim and is not novel. Indeed, Justice Kennedy explicitly recognized this type of claim in *Vieth* and it has never been disavowed by the Supreme Court. *See Vieth*, 541 U.S. at 314 (2004) (Kennedy, J., concurring) (explaining that First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views); *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015) (facially neutral laws adopted by the government because of disagreement with the message the speech conveys are subject to strict scrutiny); *see also Benisek v. Lamone*, No. CV JKB-13-3233, 2017 WL 3642928, at *25 (D. Md. Aug. 24, 2017) (Niemeyer, J., dissenting) ("Given these stringent limitations on the government's ability to advance ideological motives by regulating speech, it would be strange indeed if a State's administration of elections were not similarly limited.").

Moreover, contrary to the Proposed Intervenors' assertions*, see* ECF No. 45, at 8 n.4, and distinct from the theory set forth in *Agre*, the Plaintiffs' First Amendment claim presents the Court with a variety of reliable measures of the partisan effect of the 2011 Plan, its severity, and its durability. The First Amended Complaint alleges that the 2011 Plan is an extreme partisan gerrymander with reference to no fewer than *five* different methodologies for detecting and measuring partisan gerrymandering. First Am. Compl., ECF No. 42, at ¶¶ 56-66. Plaintiffs have three expert witnesses who are prepared to offer testimony, that, among other things, quantifies the degree to which the partisan advantage conferred by the 2011 Plan is an outlier among *all Congressional plans nationwide from the last six decades*, demonstrates the durability of the partisan advantage of the 2011 Plan across a wide range of plausible election outcomes, and shows that the degree of partisan advantage cannot be explained by geographic patterns or other neutral factors. Similarly, Plaintiffs' First Amended Complaint alleges—and the evidence at trial will support—that Republican map drawers used voters' party registration and other data to systematically single out voters who had demonstrated support for the Democratic Party in the past, cracking and packing these voters into districts where their votes are wasted and their electoral influence is severely diluted, all with the intent to burden and dilute the Democratic vote. *Id.* at ¶¶ 37, 50-55, 57-61, 73-75. In sum, staying this action pending *Agre* is not warranted and the Court should reconsider its decision to do so.

D. AN EXPEDITED SCHEDULE IS WORKABLE

At the current juncture there are only two parties to this case—one of which is directly responsible for the administration of elections in Pennsylvania—and both agree that an expedited schedule is workable and, moreover, necessary to the adjudication of the case as well as the proper administration of constitutional elections in the Commonwealth. *See* ECF No. 46. The Proposed Intervenors' arguments to the contrary—as demonstrated by their ample ability to

comply with an expedited schedule in the *Agre* case—are both disingenuous and in many respects a problem of their own making. Specifically, Plaintiffs were more than willing to submit to the schedule that the *Agre* Court had set. Diamond Mot. to Intervene, ECF No. 54-1, at 10, *Agre v. Wolf*, 2:17-cv-4392 (E.D. Pa. Nov. 3, 2017). Nevertheless, the Proposed Intervenors opposed that request, thus they cannot credibly argue here that Plaintiffs' desire to prosecute their claim on a schedule similar to *Agre* that will afford them the best chance at relief is an "arrogant" and "cavalier[]" attempt to "trample the legitimate due process interests of the other parties in this case[.]" *See* ECF No. 45, at 8. Proposed Intervenors' position is particularly untenable where the parties in this case have agreed that an expedited procedure is the best way to resolve this action. ECF No. 46. Thus, this Court should reconsider its earlier order and recognize the same.

Moreover, the Proposed Intervenors made these same arguments in the *Agre* case and the Court in that case rejected them. Order, ECF No. 47, *Agre v. Wolf*, 2:17-cv-4392 (E.D. Pa. Oct. 25, 2017). And indeed, these arguments are even less persuasive here, where the existence of the *Agre* case and its procedural posture affords certain efficiencies that reduce any potential burden of an expedited schedule.[3] In particular, much of the factual evidence pertinent to this case has been adduced and, as Plaintiffs predicted, the Proposed Intervenors have already retained expert

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[3] The Proposed Intervenors also attempt to imply—incorrectly—that there is an inherent contradiction between Plaintiffs' argument that the parties can realize efficiencies from the *Agre* action and this action proceeding in parallel, and Plaintiffs' argument that this action should not be stayed because their claims and evidence are sufficiently distinct. ECF No. 45, at 9. However, there is no contradiction between the fact that both cases involve the same underlying facts, *i.e.*, the creation of the 2011 congressional map, but advance different legal theories and seek to prove those theories in a different way. Given that much of pretrial preparation is simply the gathering of underlying facts through the discovery process, there can be no question that parallel actions lead to efficiencies even where the ultimate outcome may turn on different theories.

witnesses who are familiar with Plaintiffs' experts' academic work and the topics of Plaintiffs' experts reports—and in at least one case, have already offered rebuttal testimony against Plaintiffs' experts on similar topics in other cases.[4]

Finally, the Proposed Intervenors decry the potential of this litigation to "throw the next election cycle into disarray" "all because of an emergency of [Plaintiffs'] own creation." ECF No. 45, at 10. This particular objection is revealing. In order for this action to affect the upcoming election cycle, *this Court would need to find that the 2011 Plan violates the United States Constitution*. If the Court finds against Plaintiffs, the election calendar will not change. Put differently, Proposed Intervenors ask the Court to delay adjudicating this action because a law that they enacted may be unconstitutional, and as a result, remedying it could prove disruptive. This is plainly not grounds for a stay but, rather, all the more reason that this Court should move forward in deciding this case expeditiously.[5]

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.

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[4] *See, e.g.*, Wendy Tam Cho and Yan Y. Liu, *Towards a Talismanic Redistricting Tool*, 15 Elec. L. J. 351, 355 (2016) (critiquing Dr. Rodden's computer simulation methodology); Expert Report of James G. Gimpel, *Common Cause v. Rucho*, 16-CV-1026-WO-JEP (M.D.N.C. Apr. 3, 2017) (critiquing Dr. Mattingly's computer simulation methodology).

[5] Needless to say, the propriety and feasibility of a particular remedial order need not be, and should 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. Until such time, Proposed Intervenors' proffered harms on this front are pure speculation, particularly where the Executive Defendants, who control the election processes in the Commonwealth, recognize that changes to the election apparatus are feasible. *See* ECF No. 46 ("[T]he Court, if it deems it necessary to do so, may order that certain election deadlines be altered to some extent.").

Dated: December 5, 2017

By: *s/ Bruce V. Spiva*

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CERTIFICATE OF SERVICE

I certify that on December 5, 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: December 5, 2017

/s/ Bruce V. Spiva
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