

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

Barbara Diamond, <i>et al.</i> ,	:	
	:	
Plaintiffs,	:	Civil Action No. 2:17-cv-5054
	:	
v.	:	
	:	
Robert Torres, <i>et al.</i> ,	:	
	:	
Defendants.	:	
	:	

PROPOSED INTERVENORS SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES MICHAEL C. TURZAI and PENNSYLVANIA SENATE PRESIDENT PRO TEMPORE JOSEPH B. SCARNATI III’S OPPOSITION TO PLAINTIFFS’ MOTION FOR EXPEDITED PRETRIAL SCHEDULING ORDER

Proposed Intervenor 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, “Proposed Intervenor”) respectfully submit the within opposition to Plaintiffs’ Motion for Expedited Pretrial Schedule (ECF No. 2) (the “Motion”).

PRELIMINARY STATEMENT

The present action is the last filed of three actions all challenging Pennsylvania’s 2011 Congressional districting plan (the “2011 Plan”) as unconstitutional. Despite the fact that Pennsylvania enacted the 2011 Plan nearly *six years ago*, Plaintiffs in the instant action have just now—a few short months before the primary election cycle officially begins in February 2018—rushed into court, demanding “the most expeditious possible trial schedule in order to enable the Court to order relief in time for the 2018 Congressional elections”. (Motion at 1, ECF No. 2.) However, Plaintiffs are too late. Their proposed expedited pretrial schedule—which would leave

the parties with less than 28 days before trial—is unworkable and highly prejudicial to Proposed Intervenor. Moreover, the proposed schedule rests on a faulty premise—that compliance with the schedule would allow this Court to order relief in time for the 2018 Congressional elections. But even if the parties were able to comply with the proposed expedited schedule and giving Plaintiffs the benefit of every possible doubt, it is simply not possible for this case to affect the 2018 election cycle. Finally, as more thoroughly briefed in Proposed Intervenor’s Motion to Stay and/or Abstain filed concurrently herewith, the instant case should be stayed pending the United States Supreme Court’s decision in *Gill v. Whitford*, No. 16-1161, 2017 LEXIS 4040 (U.S. Jun. 19, 2017), this Court’s decision in the related case of *Agre, et al. v. Wolf, et al.*, No. 2:17-cv-4392 (E.D. Pa. Oct. 2, 2017) (the “*Agre* Action”) and the Pennsylvania Commonwealth Court’s decision in *League of Women Voters of Pennsylvania, et al. v. Commonwealth, et al.*, No. 261 MD 2017 (Pa. Commw. Ct. Jun. 15, 2017) (the “*Pennsylvania* Action”). For all of the above reasons, the Court should deny Plaintiffs’ Motion for Expedited Pretrial Scheduling Order.

I. Plaintiff’s Proposed Expedited Schedule is Unworkable and Highly Prejudicial to Proposed Intervenor

Even standing alone, Plaintiffs’ proposed expedited schedule is extreme on its face—40 days from the filing of the Complaint to trial, and at this point, the parties have fewer than 28 of those 40 days left. However, this case does not stand alone. As previously mentioned, this action is the last among three other actions, all seeking to invalidate the 2011 Plan before the 2018 Congressional elections. To that end, the other two actions have already received expedited schedules. The result is that Proposed Intervenor (along with the Executive Branch Defendants) face back-to-back-to-back trials beginning on December 4: The *Agre* Action is

scheduled for trial on December 4, 2017. Order, *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa. Oct. 25, 2017). The Pennsylvania Action is scheduled for trial on December 11, 2017. See Order, *League of Women Voters of Pennsylvania, et al. v. Commonwealth, et al.*, No. 261 MD 2017 (Pa. Commw. Ct. Nov. 13, 2017). Finally, Plaintiffs in the instant action have requested a trial date of December 18, 2017. (See Motion at 1, ECF No. 2.) Thus, practically speaking, Proposed Intervenors will have fewer than 14 days (or 8 business days) to conduct all pretrial proceedings before three continuous trials, each of which involves different sets of plaintiffs advancing what they each repeatedly assert are three very different claims based on different theories.

Given the many parties, the complex legal issues in play, and the high stakes of the case, that is simply not enough time for the parties, including Proposed Intervenors, to fairly and effectively litigate these issues.

First, at present, these three actions involve 55 different individual plaintiffs, but it is highly likely this number will soon rise to 62 individual plaintiffs if Plaintiffs in the instant case also amend their Complaint to add a plaintiff from each of Pennsylvania's 18 Congressional districts. See Statement of Reasons for the Court's Decision on the Motion to Dismiss (ECF 45, Exh. 1, *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa. Nov. 16, 2017) (suggesting that, by adding a voter from each Congressional district, *Agre* plaintiffs will have standing). Just in terms of party depositions, Proposed Intervenors will need to coordinate, schedule, and depose 62 plaintiffs, the majority of whom live in far-flung Congressional districts. In the *Agre* Action alone, even though the parties have been working with each other diligently and in good faith, it has proven difficult to coordinate and schedule the depositions of the 5 original *Agre* plaintiffs—in fact, the Proposed Intervenors have not even been able to complete those depositions even after several

weeks due to *Agre* plaintiffs' unavailability. Proposed Intervenors still have to schedule and conduct the depositions of the 18 plaintiffs in the Pennsylvania Action.¹ It will be impossible for the parties to also coordinate and schedule the depositions of the 11 current Plaintiffs in the present suit, all within the next 8 business days. Of course, even if the parties could schedule the depositions of the 11 Plaintiffs, there is simply not enough time to properly prepare for and conduct full depositions, or even half-length depositions, of each of the Plaintiffs in that timeframe.

With respect to expert witnesses, each group of plaintiffs in the three actions will presumably be retaining its own set of experts for trial. *Agre* plaintiffs have designated five experts in total. Proposed Intervenors expect to designate three or four experts in rebuttal. Assuming Plaintiffs in the instant action and the Pennsylvania Action plaintiffs also designate a comparable number of experts (three to five), there will be a *minimum* of *fourteen experts* across the three actions. But there is already not enough time just in the *Agre* Action alone. For example, motions in limine in the *Agre* Action are due on November 20, 2017. Order, *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa. Nov. 13, 2017). Again, despite the parties working together diligently and in good faith, to accommodate each other's schedules, the parties will not be able to depose each other's experts until *after* the deadline to challenge those experts has expired. These types of issues will only be multiplied and magnified if the already compressed schedule is required to also accommodate the demands of the instant action. Indeed, pursuant to

¹ Although the Pennsylvania Action was filed in June, it is not significantly advanced. In fact, the Commonwealth Court originally stayed the case pending the U.S. Supreme Court's decision in *Whitford*, and the Pennsylvania Supreme Court only vacated that stay 12 days ago. See Order, *League of Women Voters of Pennsylvania, et al. v. Commonwealth, et al.*, No. 159 MM 2017 (Pa. Nov. 9, 2017). Indeed, Respondents (including Legislative Defendants (Proposed Intervenors) in this action) just filed their Answer to Petition for Review on Friday, November 17, 2017.

Plaintiffs' proposed expedited schedule, Proposed Intervenors would have just seven business days to identify and hire rebuttal experts and have them prepare rebuttal expert reports, all while taking and defending the aforementioned party and expert depositions. Even if the lawyers could work at breakneck speed to try to accommodate this timeframe, it would be unreasonable to expect that adequate experts could be identified, hired and prepared in time to meet these deadlines.

The above calculus does not even factor in the various discovery disputes and dispositive motions that will need to be filed and resolved in advance of trial in each of these three matters, including in the instant case, Proposed Intervenors' motions to intervene, to stay and/or abstain, and to dismiss. There is simply no way that Proposed Intervenors can concurrently comply with the expedited schedules in the *Agre* Action and the Pennsylvania Action *in addition* to Plaintiffs' proposed expedited schedule here. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Forcing Proposed Intervenors to meet impossible deadlines would preclude them from preparing and presenting an effective and meaningful defense. *Cf. Marshall Durbin Farms, Inc. v. Nat'l Farmers Org., Inc.*, 446 F.2d 353, 356-57 (5th Cir. 1971) (reversing grant of preliminary injunction where defendants were placed in "impossible position insofar as both preparing and presenting an effective response"); *Anderson v. Sheppard*, 856 F.2d 741, 748 (6th Cir. 1988) (reversing jury verdict where trial judge refused to grant plaintiff reasonable time to obtain counsel and reasoning "[w]hile the matter of continuance is traditionally within the discretion of the trial judge, a myopic insistence upon expeditiousness in the face of justifiable request for delay can render the right to defend with counsel an empty formality") (internal quotations and

corrections omitted); *Hardin v. Wal-Mart, Inc.*, 89 F.R.D. 449, 451-52 (E.D. Ark. 1981), *aff'd* 676 F.2d 702 (8th Cir. 1981) (dismissing plaintiff's complaint where plaintiff failed to adequately disclose witnesses and anticipated testimony in advance of trial and where defendants argued they would be prejudiced by their inability to interview or ascertain material facts from plaintiff's witnesses).

II. Plaintiff's Proposed Expedited Schedule Will Not Enable the Court to Order Relief in Time for the 2018 Congressional Elections

Moreover, Plaintiffs' proposed expedited schedule would not even serve their desired aim of affecting the 2018 election cycle. Even assuming *arguendo* that the Court and the parties could comply with such an extreme schedule—litigating all pretrial motions, completing all necessary discovery, and going to trial in fewer than 28 days on December 18, 2017—and giving Plaintiffs the benefit of every possible other doubt, there would still not be enough time for new redistricting legislation to be enacted before the 2018 Congressional elections.

During the October 10, 2017 pretrial conference held before Judge Baylson in the related *Agre* Action, counsel for Defendants, including the Commissioner of Pennsylvania's Elections Bureau, explained that Pennsylvania's Bureau of Elections needs a significant amount of time to prepare in advance of the 2018 elections. (*See* Excerpts from Oct. 10, 2017 Conference Tr. at 17:22-25; 18:1-22, attached as **Exhibit A**.) Counsel for the Commissioner of the Elections submitted a document entitled "2018 Pennsylvania Elections Important Dates to Remember [the Official Schedule]." ²

The Official Schedule sets forth events that must occur prior to Congressional elections. The first event on the Official Schedule will occur on February 13, 2018, and that deadline is

² The Official Schedule is attached hereto as **Exhibit B**.

followed by seventeen other events leading up to the election on November 6, 2018. As counsel for Defendants explained, the Official Schedule is “very compressed” and “there is not a lot of room [to adjust the dates].” *See id.* Counsel also made clear that, the Elections Bureau needs, *at an absolute minimum, three weeks* to prepare for the elections prior to the first events listed in the schedule.³ *Id.* Thus, the Elections Bureau must have the final redistricting plan for the 2018 election, at the very latest, on or before January 23, 2018.

Again, assuming that trial could be scheduled for December 18, 2017 and assuming that it will take an amount of time for the parties in the instant action to present their respective cases at trial comparable to the time required in the *Agre* Action (four to eight days), the last day of trial will be between December 21 and December 28. (*See Exhibit A*, Oct. 10, 2017 Conference Tr. at 26:3-11.) If trial concludes in the middle of that range in only six days, the last day of trial would be December 26, 2017.

Assuming *arguendo* the Court rules in favor of Plaintiffs, it will then need to draft an Opinion and Order that provides the General Assembly with specific guidance as to how a new redistricting plan must be drafted.⁴ Because of the complexity of the factual issues raised in this case and the compressed time frame required to comply with such an Order, any such decision will require a great deal of specificity. By way of comparison, in the *Whitford* case, which addressed the exact same issues as here, the District Court issued two separate opinions, the first addressing the constitutionality of the Wisconsin plan and the second addressing the appropriate relief. *See Whitford*, 218 F. Supp. 3d, at 837-965; *Whitford v. Gill*, 2017 WL 383360 (W.D. Wisc. Jan. 1,

³ Counsel noted that Defendants would actually prefer to have at least five weeks.

⁴ Of course, depending on the outcome of the related *Agre* Actions, the Court may need to draft *two* harmonized Opinions and Orders in the same abbreviated time frame.

2017). Collectively, the opinions were *over 125 pages* and were not issued until *over five months* and *over seven months* after the trial was completed, respectively. *Id.* In addition, the *Whitford* opinions were issued only after the Court resolved numerous post-trial motions and disputes. It is hard to imagine any scenario where the trial in this matter concludes on December 26, 2017; all post-trial motions are adjudicated; a final Order and Opinion is issued;⁵ a new Congressional map is created consistent with the Court's Order and passed by both chambers of the General Assembly and signed by the Governor (or a map is imposed by the Court after a reasonable process if the Commonwealth is unable to adopt new legislation)—all before the January 23, 2018 deadline described by the Commissioner of Elections.

This conclusion is not just a theoretical possibility but a near mathematical certainty. Assuming trial concludes on December 26, 2017 and the Court heroically issues an Order and Opinion by the end of the year (in 3 business days), there would be only 23 days for new maps to be created and then passed into law. By comparison, following the release of the 2010 and 2000 census results, it took 6 months and 8 months, respectively, for new plans to be created.⁶

Moreover, even after a new plan is created, it would be extremely difficult to pass new legislation through both chambers of the General Assembly prior to January 23, 2018. Any new

⁵ And this does not even account for the fact that any ruling overturning the 2011 Plan would almost certainly be appealed to the U.S. Supreme Court, which could stay implementation of any remedial order, just as it did in nearly identical circumstances in *Whitford*. 137 S. Ct. 2289; *see also Abbott v. Perez*, No. 17A225, 2017 U.S. LEXIS 4434 (U.S. Sept. 12, 2017) (in which the U.S. Supreme Court recently issued a stay of a liability determination seven months before a primary election).

⁶ After the 2010 census, redistricting data was released on March 24, 2011, and the initial version of the 2011 Plan was not submitted to the General Assembly until September 14, 2011. *See* Legislative History of the 2011 Plan *available at* http://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?year=2011&sind=0&body=S&type=B&bn=1249 2010 Census Data Products *available at* <https://www.census.gov/population/www/cen2010/glance/>. Similarly, following the 2000 census, redistricting data was released between March 7 and March 30, 2001, and the initial version of the 2002 redistricting plan was not submitted to the General Assembly until November 16, 2001. *See* Legislative History of the 2001 redistricting plan *available at* http://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?year=2011&sind=0&body=S&type=B&bn=1249

plan would need to be submitted to the Senate, which requires at least three session days to consider and pass any bill (assuming that the Senate engages in limited debate and that there are no amendments).⁷ Similarly, the bill would also need to be submitted to the House, which requires at least three session days of consideration (again assuming there are no debates or amendments).⁸

Session days for the House and Senate are pre-scheduled on a very limited number of days each month.⁹ However, because the last Senate session day this year is December 20, 2017, this process *could not even begin* until January 2018. Moreover, because the General Assembly generally does not schedule many session days in January,¹⁰ this process could not possibly be completed—and then the Plan signed into law by the Governor—before the Election Commissioner’s January 23, 2018 deadline. And this assumes that the Commonwealth’s political branches are able to reach an agreement by January 23, 2018. If they are unable to do so, it would be incumbent on this Court to impose a map that complies with all applicable federal and state constitution and statutory requirements and permit the Commissioner of Elections a reasonable time to implement such a map.

Accordingly, even with Plaintiff’s proposed “most expeditious possible trial schedule” of 39 days from Complaint to trial—and even if Plaintiffs prevail at trial and are given the benefit of

⁷ Session days are days that the Pennsylvania Senate or House of Representatives are in session and can take legislative action.

⁸ See PA. CONST. ART. III § A(4) (requiring 3 days of consideration of bills in each house of the General Assembly).

⁹ See Senate Session day schedule, available at <http://www.pasen.gov/session.cfm>; House Session Day Schedule, available at http://www.house.state.pa.us/session.cfm?sess_yr=2011&sess_ind=0&body=H&SessID=20110H&outputType=list

¹⁰ Indeed, although the 2018 session day schedule has not been released, the House and Senate only held one session day prior to January 23, 2017.

every doubt regarding timing— there is no way that a new Plan could possibly be enacted into law in time to impact the 2018 elections.

III. This Action Should Be Stayed Pending the United States Supreme Court’s Decision in *Gill v. Whitford*, this Court’s Decision in *Agre v. Wolf*, and the Pennsylvania Commonwealth Court’s Decision in *League of Women Voters v. Commonwealth*

Additionally, for the reasons more fully articulated in Proposed Intervenor’s Motion to Stay and/or Abstain, the instant action should be stayed pending the United States Supreme Court’s Decision in *Gill v. Whitford*, this Court’s decision in *Agre v. Wolf*, and the Pennsylvania Supreme Court’s decision in *League of Women Voters v. Commonwealth*.

IV. Conclusion

In the event that the Court does not dismiss or alternatively stay and/or abstain from hearing Plaintiffs’ Complaint for all the reasons set forth in Proposed Intervenor’s separately filed Motion to Dismiss and Memorandum of Law and Motion to Stay and/or Abstain and Memorandum of Law, Proposed Intervenor respectfully request the Court deny Plaintiffs’ Motion for Expedited

Pretrial Schedule and set a reasonable trial schedule that will permit the parties to fairly and effectively litigate the important issues at stake in this matter.

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Respectfully submitted,

BLANK ROME LLP

/s/ Brian S. Paszamant
BRIAN S. PASZAMANT
JASON A. SNYDERMAN
JOHN P. WIXTED
One Logan Square
130 N. 18th Street
Philadelphia, Pennsylvania 19103
Phone: 215-569-5791
Facsimile: 215-832-5791
Email: Paszamant@blankrome.com
Snyderman@blankrome.com
JWixed@blankrome.com

*Attorneys for Proposed Intervenor
Senator Joseph B. Scarnati III*

**HOLTZMAN VOGEL JOSEFIK
TORCHINSKY PLLC**

/s/ Jason Torchinsky
JASON TORCHINSKY (Pro Hac Vice pending)
SHAWN SHEEHY (Pro Hac Vice pending)
45 North Hill Drive, Suite 100
Warrenton, Virginia 20186
Phone: 540-341-8808
Facsimile: 540-341-8809
Email: JTorchinsky@hvjt.law
ssheehy@hvjt.law

*Attorneys for Proposed Intervenors Senator Joseph
B. Scarnati III and Representative Michael C. Turzai*

CIPRIANI & WERNER PC

/s/ Kathleen Gallagher
KATHLEEN GALLAGHER
CAROLYN BATZ MCGEE
650 Washington Road, Suite 700
Pittsburgh, Pennsylvania 15228
Phone: 412-563-4978
Email: KGallagher@c-wlaw.com
CMcgee@c-wlaw.com

*Attorneys for Proposed Intervenor
Representative Michael C. Turzai*