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

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

PROPOSED INTERVENORS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION

Although Plaintiffs style their motion "Plaintiffs' Motion for Reconsideration" (ECF No. 43) (the "Motion"), Plaintiffs fail to identify the proper standard for reconsideration, likely because they cannot possibly meet it. Plaintiffs do nothing more than repeat, at length, facts, arguments, and circumstances that the Court is and was well aware of when it entered its November 22, 2017 Order staying this action. (ECF No. 40.) And, in spite of the length of that recitation, Plaintiffs do not ultimately dispute the basis for the Court's Order—that Plaintiffs' "*Whitford*-style" claim is the same as the claims in *Gill v. Whitford*, No. 16-1161 (U.S.) and that Plaintiffs' Elections Clause claim is duplicative of the Elections Clause claim in *Agre, et al. v. Wolf, et al.*, No. 17-cv-4392 (E.D. Pa.) (the "*Agre* Action"). Finally, Plaintiffs' request for an expedited schedule is no less workable and prejudicial now than it was a week and a half ago. Plaintiffs have not even given the Court reason to rethink its decision, let alone reverse it; they are merely dissatisfied with it. The Court should deny Plaintiffs' Motion for Reconsideration.

A. Standard of Review

The Court has "'inherent power over interlocutory orders,' which permits the Court to 'reconsider them when it is consonant with justice to do so.'" *Bridges v. Colvin*, 136 F. Supp. 3d

620, 628-29 (E.D. Pa. 2015) (quoting *United States v. Jerry*, 487 F.2d 600, 605 (3d Cir. 1973)). "[H]owever, to preserve the interest in finality inherent in judicial decision-making. . . . '[c]ourts tend to grant motions for reconsideration sparingly and *only upon the grounds* traditionally available under [Rule] 59(e).'" *Id.* at 629 (quoting *A&H Sportswear Co. v. Victoria's Secret Stores, Inc.*, No. Civ.A. 94-7408, 2001 WL 881718, at *1 (E.D. Pa. May 1, 2001)) (emphasis in original). A proper motion for reconsideration "*must* rely on one of three grounds: "(1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error of law or prevent manifest injustice." *Id.* (quoting *Lazaridis v. Wehmer*, 591 F.3d 666, 669 (3d Cir. 2010)) (emphasis added).

"The scope of a motion for reconsideration . . . is extremely limited. Such motions are not to be used as an opportunity to relitigate the case". *Blystone v. Horn*, 664 F.3d 397, 415 (3d Cir. 2011) (citing *Howard Hess Dental Labs., Inc. v. Dentsply Int'l Inc.*, 602 F.3d 237, 251 (3d Cir. 2010)). Nor are motions for consideration "properly grounded on a request that the Court simply rethink a decision it has already made." *Douris v. Schweiker*, 229 F. Supp. 2d 391, 408 (E.D. Pa. 2002) (citing *Glendon Energy Co. v. Borough of Glendon*, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993)). "Mere dissatisfaction with a court's ruling is not a proper basis for reconsideration." *See, e.g.*, *Liverman v. Gubernik*, Nos. 10-1161, 10-2049, 10-2500, 10-2558, 2010 WL 4054195, at *1 (E.D. Pa. Oct. 15, 2010).

B. Argument

1. The Court Should Deny Plaintiffs' Motion for Reconsideration Because Plaintiffs Have Not Identified Any Proper Ground for Reconsideration

Reconsideration is unwarranted because Plaintiffs have completely failed to identify any appropriate grounds supporting reconsideration. They have not identified any (1) intervening change in controlling law, (2) new evidence, or (3) clear error of law. *See Bridges*, 136 F. Supp. 3d

at 629. Instead, they attempt to obscure the fact that they are required to demonstrate the existence of one of these three limited grounds by conveniently failing to mention that requirement in their "Legal Standard" section. (*See* Pls.' Mem. in Supp. of Mot. for Reconsideration (ECF No. 43-1) ("Memorandum") at 7-8.) Plaintiffs then devote 21 pages to arguing why a stay in this matter is inappropriate and why they should receive "the most expeditious possible schedule", making the same request they had previously made in their denied Motion for Expedited Pretrial Scheduling Order (ECF No. 2). But Plaintiffs' arguments are all irrelevant for purposes of assessing reconsideration.

Plaintiffs do not identify any intervening change in controlling law. In fact, they do not cite any case (let alone a controlling one) that was decided after this Court's Order.

Nor do Plaintiffs identify any newly available evidence. "In the context of a motion for reconsideration, new evidence 'does not refer to evidence that a party . . . submits to the court after an adverse ruling. Rather, new evidence . . . means evidence that a party could not earlier submit to the court because that evidence was not previously available.'" *Askew v. R.L. Reppert, Inc.*, No. 11-cv-04003, 2016 WL 749945, at *2 (E.D. Pa. Feb. 26, 2016) (quoting *Blystone*, 664 F.3d at 415-16). Plaintiffs' Memorandum makes no reference to "new evidence" or "newly available evidence", because it cannot. There is no new evidence bearing on this Court's decision to stay the case that Plaintiffs only uncovered between November 22, 2017, when this Court issued its Order, and November 28, 2017, when Plaintiffs filed the instant Motion.

Finally, Plaintiffs have not identified any legal error (let alone *clear* legal error) that this Court has committed. In fact, apart from one citation in their "Legal Standard" section, Plaintiffs' Memorandum makes no mention of "error" at all. Nor could it. The Court has "'broad discretion to stay proceedings as an incident to its power to control its own docket.'" *Davis v. Nationstar*

Mortg. LLC, No. 15-CV-4944, 2016 WL 29071, at *1 (E.D. Pa. Jan. 4, 2016) (quoting *Clinton v. Jones*, 520 U.S. 681, 706 (1997)). And although it is clear that Plaintiffs disagree with the Court's exercise of that discretion, Plaintiffs do not and could not argue that the Court has abused that discretion. Put differently, Plaintiffs wholly fail to demonstrate any "clear error", which entails a "definite and firm conviction that a mistake has been committed", required to justify reconsideration. *United States v. Jasin*, 292 F. Supp. 2d 670, 676 (E.D. Pa. 2003) (quoting *Easley v. Cromartie*, 532 U.S. 234, 242 (2001)).

Because Plaintiffs have raised no grounds properly justifying reconsideration, their Motion should be denied.

2. The Court Should Deny Plaintiffs' Motion for Reconsideration Because It Merely Repeats Arguments The Court Has Already Considered

Not only have Plaintiffs failed to advance any of the three limited grounds justifying reconsideration, Plaintiffs have not even advanced any arguments that were not already before the Court when it issued its November 22, 2017 Order. At its essence, Plaintiffs' Memorandum argues that "lifting the stay is essential [1] to preserve Plaintiffs' right to relief before the 2018 general election with minimal disruption to the pre-election schedule, as well as [2] 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." (Motion at 1; *see also* Memorandum at 1-2.) But the Court is and was well aware of these considerations when it issued the stay.

Regarding the schedule of this matter, Plaintiffs have made clear from the outset that they seek "the most expeditious possible trial schedule in order to enable the Court to order relief *in time for the 2018 Congressional elections*." (Motion for Expedited Pretrial Schedule at 1

(emphasis added); *see also* Complaint ¶ 6.) Moreover, as Plaintiffs must concede, because of the Court's involvement in the related *Agre* Action, it is well aware of the deadlines and obstacles that the parties face in order to affect the 2018 Congressional elections, as well as the fact that it can order an expedited schedule to attempt to do so. (*See, e.g.*, Memorandum at 16, 19.)

Similarly, the Court is surely more than familiar with the "legal and factual argument" that Plaintiffs here intend to advance. In addition to the Court's review of Plaintiffs' Complaint in the instant action, the Court had specific occasion to consider Plaintiffs' allegedly "unique" legal and factual arguments when Plaintiffs sought to intervene in the *Agre* Action. Both in Plaintiffs' written submissions to the Court as well as at oral argument regarding their motion to intervene, Plaintiffs specifically highlighted for the Court the differences between their case and the *Agre* Action and what they believed they could contribute to the *Agre* Action. (*See* Memorandum of Law in Support of Motion to Intervene as Plaintiffs at 7-8, 10-11, *Agre v. Wolf*, No. 17-cv-4392 (E.D. Pa. Nov. 3, 2017); Transcript of Oral Argument on November 7, 2017 at 6:16-8:2, 10:25-11:15, 13:11-17, *id.*) As Plaintiffs themselves acknowledge, "Plaintiffs' Amended Complaint is substantially identical to the proposed complaint in intervention disclosed in the *Agre* action on November 3. Plaintiffs' expert reports . . . are authored by the same experts disclosed in the *Agre* action on November 6 and 7". (Memorandum at 3.) [1]

Plaintiffs' Motion filed on November 28, 2017 identifies nothing that the Court was not already aware of six days earlier on November 22, 2017, when the Court stayed the instant action, or three weeks earlier on November 7, 2017, when the Court denied Plaintiffs' motion to intervene

[1] Plaintiffs also argue that they will contribute to and "aid the Supreme Court in its ongoing effort to refine workable standards for the adjudication of partisan gerrymandering claims." (*Id.* at 11.) But that is what amicus briefs are for.

in the *Agre* Action. Plaintiffs' Motion manifests nothing more than mere disagreement with the Court's decision and asks nothing more than for the Court to rethink that decision.

3. The Court Should Deny Plaintiffs' Motion for Reconsideration Because Plaintiffs Do Not Dispute the Fundamental Reasons for the Court's November 22, 2017 Order Staying This Action

However, even after 21 pages, Plaintiffs do not provide a reason for the Court to rethink its decision; indeed, Plaintiffs fail to challenge the reasons for the Court's November 22, 2017 Order. In its Order, the Court stayed this action "at least pending the completion of the trial in" the *Agre* Action, because it determined that (1) "Count One [of Plaintiffs' Complaint] pursuant to the Equal Protection Clause of the United States Constitution[] is similar to the pending Gill v. Whitford case in the United States Supreme Court" and (2) "Counts Two and Three alleging violation of First Amendment rights and Article I, Section 4, of the Constitution[] are duplicative or overlapping [of] the claim[s] in" the *Agre* Action. (Order at 1.)

Plaintiffs do not dispute that they "advance a *Whitford*-style First and Fourteenth Amendment claim". (Memorandum at 9.) Nor do they dispute the fact that the Supreme Court's forthcoming decision in *Gill v. Whitford* may be entirely dispositive of Plaintiffs' claims or may otherwise control the disposition of Plaintiffs' First and Fourteenth Amendment claim. (*See id.* at 8 ("[T]he only way that *Whitford* will be dispositive of Plaintiffs' claims is if the Supreme Court . . . hold that *all* partisan gerrymandering claims are nonjusticiable under *any* legal theory.") (emphasis in original); *id.* at 9 ("[A]lthough Plaintiffs advance a *Whitford*-style First and Fourteenth Amendment claim, the Supreme Court's disposition of *Whitford* will *not necessarily control* Plaintiffs' claim.") (emphasis added).) Although Plaintiffs attempt to minimize the many

ways in which the Supreme Court's forthcoming decision could dispose of their claims,[2] they cannot avoid the fundamental reasoning behind this Court's decision—that *Gill v. Whitford* may be wholly dispositive of their claims and, in any event, will likely control Plaintiffs' *Whitford*-style claim.[3] There is no reason for the Court to rethink its decision.

Similarly, Plaintiffs do not even attempt to dispute that their Elections Clause claim is the exact same Elections Clause claim being litigated in the *Agre* Action. (*See* Memorandum at 12-13.) Nor could they. (*See* Memorandum in Support of Law in Support of Motion to Intervene as Plaintiffs at pgs. 7-8, *Agre v. Wolf*, No. 17-cv-4392 (E.D. Pa. Nov. 3, 2017); Transcript of Oral Argument on November 7, 2017 at 6-7, *id*.) Straining for a distinction, Plaintiffs now suggest that they seek different relief from *Agre* plaintiffs, but this is a distinction without a difference. (*See* Memorandum at 13.) Both seek the same ultimate outcome—that the Court invalidate the 2011 Pennsylvania Congressional redistricting plan and that state officials, in the first instance, draw a new redistricting plan. Again, try as they might, Plaintiffs cannot escape the fundamental

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[2] For example, pointing to *League of United Latin Am. Citizens v. Perry ("LULAC")*, 548 U.S. 399 (2006), *Vieth v. Jubelirer*, 541 U.S. 267 (2004), and *Davis v. Bandemer*, 478 U.S. 109 (1986), Plaintiffs argue that "the only way that *Whitford* will be dispositive of [all] of Plaintiffs' claims is if the Supreme Court upends its own precedents and . . . . reverses course entirely." (Memorandum at 8.) Of course, Plaintiffs conveniently ignore the outcomes of those three cases as well as the fact that they produced 15 different opinions, none of which resulted in a judicially manageable rule or standard endorsed by a majority of the Supreme Court. That the Supreme Court might determine that there is no judicially manageable standard is more than just a "bare possibility". (*Id.* at 8.)

[3] Plaintiffs suggest that, if the Supreme Court "articulates an entirely novel legal standard", the Court can just adjust its ruling accordingly and, in support of such a cavalier suggestion, cite two recent cases in which courts declined to stay partisan gerrymandering cases pending the Supreme Court's decision in *Whitford*. (Memorandum at 9-10.) But those cases involved dramatically different circumstances than the instant case: In *Common Cause v. Rucho*, Nos. 1:16-CV-1026, 1:16-CV-1164, 2017 WL 3981300, at *7 (M.D.N.C. Sept. 8, 2017), the court declined to grant a stay where defendants waited until the eve of trial to file their motion to stay, notwithstanding the fact that the *Whitford* court issued its opinion in November 2016 and the fact that the parties had already litigated the case for nearly a year and were ready to go to trial. In this case, it is the precise opposite—Plaintiffs are the ones who waited nearly a year since *Whitford* to file their complaint and then demanded the most expeditious trial schedule possible to accommodate their tardiness. Similarly, in *Georgia State Conference of the NAACP v. Georgia*, No. 1:17-cv-1427, 2017 WL 3698494, at *11 (N.D. Ga. Aug. 25, 2017), the court declined to stay a case that had been pending for four months when a decision in *Whitford* was not expected "for possibly a year or more". By contrast, Plaintiffs filed this Complaint less than a month ago; duplicative claims are being considered in a related action before the same Court; and the Supreme Court could decide *Whitford* at any time.

reasoning behind the Court's decision—that Plaintiffs' claim under the Elections Clause is duplicative of the Elections Clause claim in the *Agre* Action. And again, there is simply no reason for the Court to rethink its decision.[4]

4. The Court Should Deny Plaintiffs' Motion for Reconsideration Because Plaintiffs' Expedited Schedule Is Not Workable And Will Prejudice Other Parties and the Citizens of Pennsylvania

At the end of the day, Plaintiffs complain about a *schedule*. The Court's November 22, 2017 Order staying this action in no way precludes Plaintiffs from presenting their allegedly "unique" facts and legal arguments in due course. But due course apparently will not do. Plaintiffs demand the Court reverse its Order and grant them the most expeditious possible trial schedule, because otherwise, Proposed Intervenors "will have reaped the fruits of an unconstitutional redistricting plan . . . for yet another election." (Memorandum at 16.) Not only does Plaintiffs' demand arrogantly presuppose the outcome of this case, it demonstrates how cavalierly they are willing to trample the legitimate due process interests of the other parties in this case, the Court, and the voters of Pennsylvania all to accommodate their own tardiness.

The Court is well aware of the obstacles the parties and the Court face in attempting to litigate the present action in time to affect the 2018 election cycle. (*See, e.g.*, Proposed Intervenors'

[4] There is also no articulable difference between Plaintiffs' First Amendment claim here and the just-dismissed First Amendment claim raised in the *Agre* Action. (*Compare* Memorandum at 10 *with* Plaintiffs' Brief Regarding the Elements of Their Claims at 1, *Agre v. Wolf*, No. 17-cv-4392 (E.D. Pa. Nov. 30, 2017). Although the Court in the *Agre* Action dismissed the First Amendment claim, that is not an argument for reconsidering this Court's Order; that is an argument for dismissing the First Amendment claim here as well. Indeed, the *Agre* Court dismissed the *Agre* plaintiffs' First Amendment claim, because it "does not mention retaliation, it does not propose any manner of measuring the effect of the apportionment, and it provides little to no factual allegations supporting an injury under the First Amendment." Order re: Motion to Dismiss Amended Complaint at 4, *Agre v. Wolf*, No. 17-cv-4392 (E.D. Pa. Nov. 30, 2017). So too here. Plaintiffs also fail to allege specific facts regarding retaliation, do not propose any manner of measuring the effect of the redistricting plan, and fail to provide factual allegations of injury under the First Amendment. Indeed, Plaintiffs specifically point out that their First Amendment claim (exactly like the claim in *Agre*) does not require a measurement of severity or durability but rather only requires discrimination against persons by reason of their political views and an absence of a compelling state interest. (*See* Memorandum at 10-11.)

Opposition to Plaintiffs' Motion for Expedited Pretrial Scheduling Order, ECF No. 25.) Plaintiffs say nothing here that would change that calculus or the Court's decision.

First, they devote substantial space pointing out all the "unique" factual and legal claims they seek to present, (*see, e.g.*, Memorandum at 3-6), but then, ten pages later, argue that "the parties and the Court can still realize efficiencies from these actions proceeding in parallel by coordinating depositions and other discovery", (*Id.* at 16). Put differently, Plaintiffs apparently cannot make up their mind whether their case is so different from the pending cases that it should not be stayed or whether it is so similar that the parties and the Court will have no difficulty in litigating it on an extremely compressed schedule.

Second, Plaintiffs suggest that Proposed Intervenors specifically will not face any prejudice, because they "have been preparing for litigation involving partisan gerrymandering claims against the 2011 Plan since early this summer." (*Id.* at 3.) That is misleading. As the Court knows, the related action of *League of Women Voters, et al. v. Commonwealth of Pennsylvania*, 261 MD 2017 (Pa. Jun. 15, 2017) (the "Pennsylvania Action") was not significantly advanced prior to the Pennsylvania Supreme Court's lifting of the stay in that action on November 9, 2017. Indeed, Petitioners in the Pennsylvania Action only disclosed their expert reports a week ago on November 27, 2017. And Plaintiffs' claim that Proposed Intervenors could not be prejudiced by needing to find rebuttal experts and have those experts prepare rebuttal reports, because Proposed Intervenors can guess the content of Plaintiffs' expert reports (which have been disclosed to Executive Defendants but *not* to Proposed Intervenors) based on the Pennsylvania Action, is, in a word, ridiculous.[5] (*See* Memorandum at 17-18.) Similarly, Plaintiffs' claim that Proposed

[5] Again, Plaintiffs simultaneously argue that the instant action is so similar to the Pennsylvania Action that Proposed Intervenors can guess the content of Plaintiffs' expert evidence, but that the instant action should not be stayed pending the Pennsylvania Action.

Intervenors need not depose them, because doing so would be "irrelevant" does not merit a response. At bottom, it is abundantly clear that Plaintiffs have no issues with a trial by ambush and that they have little interest in a fair, adversarial testing of their claims because, in their mind, that would "derail" this litigation from proceeding to its preordained end.[6]

But Plaintiffs do not just ignore the interests of the other parties in this action, Plaintiffs also ignore the interests of the prospective candidates and voters of the Commonwealth of Pennsylvania when they suggest that, if they have in fact come too late, the Court can just upend the Pennsylvania's election schedule. (*See* Memorandum at 19-21.) In other words, Plaintiffs are happy to throw the next election cycle into disarray—candidates will not know if and where to run; incumbents will not know who their constituents will be; voters will not know who their candidates are—and waste the time, money, and other resources countless parties have already invested in the 2018 Congressional elections all because of an emergency of their own creation.[7] Again, Plaintiffs were the ones who failed to file this action until November 9, 2017—six years and three elections after Pennsylvania's 2011 Congressional redistricting plan was passed, nearly a year since the district court's decision in *Whitford*, nearly five months after Petitioners filed in the Pennsylvania Action, and over a month after plaintiffs in the *Agre* Action—and who now demand the Court move heaven and earth to accommodate that tardiness.

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[6] And Plaintiffs know full well that Proposed Intervenors have back-to-back trials in the *Agre* and Pennsylvania Actions during the next two weeks, but they brush aside Proposed Intervenors' concerns by proposing that they simply retain additional counsel. In other words, so long as Plaintiffs receive they want—their "most expeditious possible schedule"—Plaintiffs expect everyone else (including the Court which will be busy adjudicating the *Agre* Action as well) to do whatever is necessary to accommodate them.

[7] As the Supreme Court counseled in *Purcell v. Gonzalez*, a "state indisputably has a compelling interest in preserving the integrity of its election process." 549 U.S. 1, 4 (2006) (per curiam). Judicial orders that change the rules of an election too close to an election *are* prejudicial because they "can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.* at 4-5. For that reason, appellate courts have stayed district court judgments that would force election officials to depart from duly-enacted election statutes close to elections. *See, e.g.*, *Serv. Employees Intern. Union Local 1 v. Husted*, 698 F.3d 341, 345-46 (6th Cir. 2012) ("As a general rule, last-minute injunctions changing election procedures are strongly disfavored.").

C. Conclusion

For the foregoing reasons, this Court should deny Plaintiffs' Motion for Reconsideration.

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Respectfully submitted,

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