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

Barbara Diamond, *et al.*,	:	
	:	
Plaintiffs,	:	**Civil Action No. 5:17-cv-5054**
	:	
v.	:	
	:	
Robert Torres, *et al.*,	:	
	:	
Defendants.	:	
	:	

LEGISLATIVE DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO STAY OR ABSTAIN

In support of their Motion to Stay or Abstain, Intervenor-Defendants President Pro Tempore of the Pennsylvania Senate, Joseph B. Scarnati III and Speaker of the Pennsylvania House of Representatives, Michael C. Turzai (the "Legislative Defendants") state as follows:

I. PRELIMINARY STATEMENT

This action is the third of three cases filed in the last 6 months challenging the constitutionality of Pennsylvania's 2011 Congressional redistricting plan (the "2011 Plan"). Like the first two cases, *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa. Oct 2, 2017) ("*Agre*") and *League of Women Voters of Pennsylvania v. Commonwealth*, No. 159 MM 2017 (Pa. S. Ct.) (the "Pennsylvania Action"), this case asks the Court to strike down the 2011 Plan as an unconstitutional partisan gerrymander and to enjoin Pennsylvania from using the 2011 Plan for the 2018 Congressional elections.

These three cases advance similar and overlapping, if not identical, legal claims. Plaintiffs' constitutional claims, with the exception of an *Agre*-like Elections Clause claim, mirror those asserted in *Gill v. Whitford*, No. 16-1161, 2017 U.S. LEXIS 4040 (U.S. June 19, 2017). Plaintiffs' First Amendment claim is strikingly similar to the First Amendment claim

being litigated in a case the Supreme Court just added to its docket last month, *Benisek v. Lamone*, No. 17-333 (U.S.).

Legislative Defendants anticipate that by June, the Supreme Court will have resolved both *Whitford* and *Benisek*.[1] The Supreme Court is expected to decide whether partisan gerrymandering claims are justiciable or not, and, if they are, under what elements, standards, or tests courts should evaluate them. The Court should stay this matter pending *Whitford* and *Benisek* so the parties and the Court can conduct discovery and trial consistent with the Supreme Court's upcoming decisions.

Finally, this Court should abstain from considering the instant case, because the Pennsylvania Action seeks the same relief as this case: invalidation of Pennsylvania's 2011 Plan. If the Pennsylvania Action results in a finding that the plan is unconstitutional, is not reversed, and a new plan is enacted by the Commonwealth, then this case will be moot. Because the U.S. Supreme Court has reasoned that state legislatures and state courts are better suited to decide legislative redistricting claims in the first instance, the Supreme Court has instructed federal courts to abstain from adjudicating redistricting matters when state courts are actively addressing similar challenges. *See Growe v. Emison*, 507 U.S. 25, 33 (1993).

Under these circumstances, there is no need to charge forward with this case now. Plaintiffs waited six years to challenge the 2011 Plan, and it is now too late as a practical matter for this case to affect the 2018 elections. As such, Plaintiffs can afford to wait a few more months for *Whitford*, *Benisek*, and *LWV* to be decided, so that the parties and the Court can do

[1] *Whitford* was argued on October 3, 2017 and a decision is expected by June 30, 2018. *Benisek* was accepted in December 2017, and based on the current briefing schedule, argument is expected in April with a decision to follow. Both cases are being heard under a "Jurisdiction Postponed" notation, indicating that one or more Justices are concerned that the Supreme Court lacks subject matter jurisdiction over the cases.

the hard work of litigating this complex matter with the benefit of the guidance those decisions will provide.

II. FACTUAL BACKGROUND

A. Plaintiffs' Present Action

On November 3, 2017, some of the current Plaintiffs, including Barbara Diamond, Steven Diamond, Nancy Chiswick, William Cole, Ronald Fairman, Colleen Guiney, Gillian Kratzer, Deborah Noel, Margaret Swoboda, Susan Wood, and Pamela Zidik, moved to intervene in *Agre.* On November 7, 2017, the three-judge panel presiding over *Agre* denied that motion.[2]

In response, Plaintiffs commenced this action by filing a Complaint on November 9, 2017 (ECF No. 1). Plaintiffs filed a First Amended Complaint ("FAC") on November 22, 2017, adding eleven plaintiffs. (ECF No. 42). Specifically, Plaintiffs allege that the 2011 Plan "purposefully maximized the power and influence of . . . Republican-affiliated voters and minimized the power and influence [of]. . . Democratic-affiliated voters" by "packing" some Democratic-affiliated voters into certain heavily Democrat-leaning districts to dilute their voting power and "cracking" other Democratic-affiliated voters among Republican-leaning districts "to deny them a realistic opportunity to elect candidates of their choice".[3] (FAC ¶ 2).

From this theory, Plaintiffs assert three claims, the first two of which are functionally identical to *Whitford.* In Count I, Plaintiffs allege that by continuing to implement the 2011 Plan, Defendants—who are officials holding office in Pennsylvania's executive branch—have deprived Plaintiffs of the "equal protection of the laws as [the 2011 Plan] has the purpose and

[2] The panel entered the Order denying Plaintiffs' Motion to Intervene on November 9, 2017. Order re: Motion to Intervene as Plaintiffs, *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa. Nov. 9, 2017).

[3] As Plaintiffs explain in the FAC, "packing" involves placing "supporters of the disfavored party into a small number of districts that candidates of the disfavored party win by overwhelming margins." (FAC ¶ 50.) "Cracking" involves "spreading [supporters of the disfavored party] among the remaining districts such that candidates from favored party win by narrower but still comfortable margins." (*Id.*).

effect of discriminating against an identifiable political group [Democratic-affiliated voters] . . . and singles out this group for disparate and unfavorable treatment" in contravention of the Equal Protection Clause of the Fourteenth Amendment. (*Id.* ¶¶ 69-70). In Count II, Plaintiffs allege that the "2011 Plan purposely burdens, penalizes, and retaliates against [the same] identifiable group of voters based upon their past participation in the political process, their voting history, their association with a political party, and their expression of their political views" in violation of the First Amendment. (*Id.* ¶ 73.) Count II is also nearly identical to *Benisek v. Lamone* ("jurisdiction postponed" on December 8, 2017). Finally, Count III alleges that the "Pennsylvania General Assembly exceeded its constitutional authority in [enacting] the 2011 Plan by gerrymandering Pennsylvania's eighteen Congressional districts" in contravention of the Elections Clause, which "does not include the power to dictate or control . . . electoral outcomes . . . or favor or disfavor a class of candidates." (*Id.* ¶¶ 78-79.) Plaintiffs seek to permanently enjoin Defendants "from administering, preparing for, or moving forward with any future primary or general elections of Pennsylvania's U.S. House members using the 2011 Plan." (*Id.* at 23.)

B. The *Agre* Action

Over a month prior to the filing of the instant action, on October 2, 2017, plaintiffs Louis Agre, William Ewing, Floyd Montgomery, Joy Montgomery, and Rayman Solomon filed a three-count Complaint seeking declaratory and injunctive relief based *inter alia* on the claim that the 2011 Plan is unconstitutional under 42 U.S.C. § 1983 and the Elections Clause. (Compl. ¶ 1, *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa. Oct. 2, 2017)). By Order dated and filed November 7, 2017, the Court dismissed all but Count One of *Agre* plaintiffs' Complaint and granted leave to amend the Complaint to add one plaintiff from each of Pennsylvania's 18 Congressional districts

and to re-plead Count Three, which had asserted an ill-defined hybrid claim based on a novel combination of the Elections Clause and the First Amendment. (*See* Order re: Motion to Dismiss Complaint, *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa. Nov. 7, 2017)); *see also* Statement of Reasons for the Court's Decision on the Motion to Dismiss (ECF 45, Exh. 1) at 3-4, *id.* (E.D. Pa. Nov. 16, 2017)). On November 17, 2017, *Agre* plaintiffs filed a First Amended Complaint, adding 21 additional plaintiffs and re-pleading their hybrid Elections Clause-First Amendment claim as Count Two. *See generally* First Amended Complaint, *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa. Nov. 17, 2017).

Agre proceeded to trial from December 4 through December 7, 2017. (*See* Minute Entries, ECF Nos. 181, 189–191, *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa.)). All parties filed Post-Trial Submissions on December 15, 2017. (*See* ECF Nos. 204, 206, 207, *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa.)).

On January 10, 2018, the Court entered a final judgment in favor of all defendants and against the *Agre* plaintiffs. (ECF No. 210, *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa.)). Chief Judge Smith held that the *Agre* plaintiffs' Elections Clause claim was non-justiciable. (ECF No. 211 at 4, *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa.)). Judge Shwartz held that the *Agre* plaintiffs lacked standing to assert a claim under the Elections Clause, and, moreover, that the legal test for such a claim proposed by the *Agre* plaintiffs was "inconsistent with established law." (ECF No. 212 at 2, *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa.)).

C. The Pennsylvania Action

On June 15, 2017, the League of Women Voters of Pennsylvania and a number of other petitioners (the "Petitioners") filed a Petition for Review (the "Petition") of the 2011 Plan in the

Pennsylvania Commonwealth Court,[4] alleging that the 2011 Plan was devised to impermissibly maximize the number of Republican Congressional representatives by "packing" Democrat leaning jurisdictions and "cracking" Democrat leaning jurisdictions into multiple Republican leaning jurisdictions. (*See* Petition ¶¶ 42-49, 61-66, 73-74.) Thus, Petitioners claim that the 2011 Plan violates Pennsylvania's Free Speech and Expression Clause and the Freedom of Association Clause codified at art. I, §§ 7, 20 of the Constitution of the Commonwealth of Pennsylvania and the equal protection provisions in Pennsylvania's Constitution, codified at art. I, §§ 1 and 26, and art. I, §5 (the "Pennsylvania Equal Protection Clause"). (*See id.* ¶¶ 99-112, 116-17).

On October 16, 2017, the Commonwealth Court partially stayed the Pennsylvania Action pending the U.S. Supreme Court's decision in *Whitford*. Order, *League of Women Voters of Pennsylvania, et al. v. Commonwealth, et al.*, No. 261 MD 2017 (Pa. Commw. Ct. Oct. 16, 2017). However, on November 9, 2017, the Pennsylvania Supreme Court vacated that stay and directed the Commonwealth Court to conduct all necessary proceedings and file findings of fact and conclusions of law by December 31, 2017. Order, *League of Women Voters of Pennsylvania, et al. v. Commonwealth, et al.*, No. 159 MM 2017 (Pa. Nov. 9, 2017). The Pennsylvania Action was tried from December 11 to December 15, 2017, and the parties filed Proposed Findings of Fact and Conclusions of Law on December 18, 2017. The Commonwealth Court entered its Recommended Findings of Fact and Conclusions of Law on December 29, 2017, finding that Petitioners "failed to meet their burden of proving that the 2011 Plan, as a piece of legislation, clearly, plainly, and palpably violates the Pennsylvania Constitution."[5] Within an hour of the

[4] A copy of the Petition for Review in the Pennsylvania Action is attached hereto as **Exhibit A**.

[5] Commonwealth Court's Recommended Findings of Fact and Conclusions of Law, attached as **Exhibit B**, at ¶ 64.

filing of those findings, the Pennsylvania Supreme Court announced it will hear oral argument this coming Wednesday, January 17, 2018.

For all of the reasons detailed below, the Court should stay this action pending the U.S. Supreme Court's decision in *Whitford* and *Benisek* or abstain from considering this action in light of the pendency of the Pennsylvania Action.

III. ARGUMENT

A. A Stay of This Action Is Warranted

Courts have broad discretion to stay proceedings. *In re Chickie's & Pete's Wage & Hour Litig.*, No. Civ. A. 12-6820, 2013 U.S. Dist. LEXIS 78573, *5 (E.D. Pa. June 4, 2013) (citing *Landis v. North American Co.*, 299 U.S. 248 (1936)). A court's "power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Clientron Corp. v. Devon IT, Inc.*, No. Civ.A. 13-05634, 2014 U.S. Dist. LEXIS 31086 (E.D. Pa. 2014). Accordingly, a court may "[i]n the exercise of its sound discretion . . . hold one lawsuit in abeyance to abide the outcome of another which may substantially affect it or be dispositive of the issues." *Id.* (citing *Bechtel Corp. v. Local 215*, 544 F.2d 1207, 1215 (3d Cir. 1976)); *see also Rodgers v. U.S. Steel Corp.*, 508 F.2d 152, 162 (3d Cir. 1975) ("The district court had inherent discretionary authority to stay proceedings pending litigation in another court."). Decisions to stay call "for the exercise of the court's judgment in 'weigh[ing] competing interests and maintain[ing] an even balance.'" *In re Chickie's & Pete's Wage & Hour Litig.*, 2013 U.S. Dist. LEXIS 78573 at *5 (citing *Infinity Computer Prods. Inc. v. Brother Int'l Corp.*, 909 F. Supp. 2d 415 (E.D. Pa. 2012)). In determining whether to grant a stay, this Court must balance the competing interests of the parties as well as whether the grant of a stay may harm one of the

parties. *See Dimensional Music Publ'g, LLC v. Kersey*, 448 F. Supp. 2d 643, 655 (E.D. Pa. 2006).

There are numerous reasons why the Court should stay this matter: (1) the United States Supreme Court's forthcoming decisions in *Whitford* and *Benisek* will dictate if and how this litigation should proceed; (2) there is no need to rush this case to judgment as it is already far too late to impact the 2018 election cycle; and finally, (3) the balance of equities weighs in favor of granting a stay.

1. This Court Should Stay This Matter Pending the U.S. Supreme Court's Resolution of *Whitford* and *Benisek*, Which Will Dictate If and How This Litigation Should Proceed

Critically—unlike plaintiffs in the related *Agre* action or Petitioners in the Pennsylvania Action—Plaintiffs in the present action do not attempt to distinguish their legal claims from the claims pending in *Whitford*.[6] Indeed, with the exception of Plaintiffs' Elections Clause claim, Plaintiffs' constitutional claims *are identical* to the constitutional claims asserted in *Whitford*.[7]

First, Plaintiffs here—like the plaintiffs in *Whitford*—claim that the 2011 Plan violates the Equal Protection Clause of the Fourteenth Amendment, because it:

> fails to provide Pennsylvania voters with equal protection of the laws as [the 2011 Plan] has the purpose and effect of discriminating against an identifiable political group . . . those who registered to vote as Democrats, who lived in neighborhoods that supported Democratic candidates in the past, and who are anticipated to support Democratic candidates in the future . . . and singles out this group for disparate and unfavorable treatment.

(FAC ¶¶ 69-70; *compare with Whitford v. Gill*, No. 15-0421 (W.D. Wis. July 8, 2015) (three-judge court) (Compl. ¶¶ 2, 31, 35, 82, 89) (ECF No. 1) ("*Whitford* Compl.") (alleging that

[6] *Compare e.g.*, FAC ¶ 5 and *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa. Oct 2, 2017) ("Plaintiffs recognize that *Gill, et al. v. Whitford, et al.* (16-1161) is now pending before the United States Supreme Court. The present action raises a different type of legal claim not at issue in *Whitford*. . . . None of the three counts set out below duplicates the particular issue pending before the Court in *Whitford*.").

[7] A copy of plaintiffs' Complaint in *Gill v. Whitford* is attached as **Exhibit C**.

Wisconsin's plan violates the Fourteenth Amendment's Equal Protection Clause by treating voters unequally and intentionally discriminating against Democratic voters).)

Second, Plaintiffs—as in *Whitford*—claim that the 2011 Plan violates the First Amendment, because it "purposely burdens, penalizes, and retaliates against an identifiable group of voters based upon their past participation in the political process, their voting history, their association with a political party, and their expression of their political views." (FAC ¶ 73; *compare Whitford* Compl. ¶¶ 2, 91-94 (making similar allegations regarding Wisconsin's plan).

And Plaintiffs here—like the plaintiffs in *Whitford*—allege that this discriminatory plan was effectuated by the "cracking" and "packing" of Democratic-affiliated voters, diluting the power of their vote and making it more likely to elect Republicans to Congress. (*See* FAC ¶¶ 2-3, 5, 50-55, 69-70, 73-74; *compare Whitford* Compl. ¶¶ 15, 31, 35, 57-58, 82, 91-94) (alleging that Wisconsin's plan "packed" and "cracked" Democratic voters, "wasting" their votes in an effort to benefit Republicans and disadvantage Democrats)).

Since Plaintiffs commenced this action, the United States Supreme Court added another partisan redistricting case, *Benisek v. Lamone*, No. 17-333 (U.S.) ("jurisdiction postponed" on December 8, 2017), to its docket. Although the claims in *Benisek* are not identical to those asserted in *Whitford*—*Benisek* is a First Amendment retaliation challenge to an alleged partisan gerrymander of a single district in Maryland—*Benisek* may serve as another avenue for the U.S. Supreme Court to clarify whether such claims are justiciable, and if so, the standard to be used.

Because Plaintiffs' Equal Protection Clause and First Amendment claims are identical to the claims advanced in *Whitford*, and Plaintiffs' First Amendment claims raise similar issues to those in *Benisek*, the Supreme Court's decision in those cases will directly determine if and how this litigation should proceed. If the Supreme Court rules that partisan gerrymandering claims

under the Equal Protection Clause or the First Amendment are non-justiciable, that will be dispositive of at least two of Plaintiffs' three claims. Moreover, if the Supreme Court decides the merits of *Whitford* and *Benisek*, then it will decide the standards, elements, and contours for how courts should adjudicate partisan gerrymandering claims. Those decisions, therefore, will be hugely significant in determining how the parties approach fact and expert discovery and trial in this case. *Burlington*, No. 09-1908, 2011 U.S. Dist. LEXIS 1988 at *4-6. Given that both *Whitford* and *Benisek* are expected to be decided this Term, staying this case a few months to allow the Supreme Court to decide these directly relevant cases is prudent and appropriate.

2. This Case Should Be Stayed Because It Is Already Far Too Late for Disposition of This Case to Have Any Impact on the 2018 Election Cycle

Plaintiffs oppose Legislative Defendants' Motion for a Stay and "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 Scheduling Order at 1, ECF No. 2; *see also* FAC ¶ 6.) The forthcoming 2018 elections should not factor into the Court's stay analysis for two reasons.

a. Plaintiffs Had Six Years To Challenge the 2011 Plan and Should Not Be Afforded Extraordinary Relief Based on an Alleged Crisis of their Own Creation.

Plaintiffs should not be permitted to benefit through any purported emergency caused by their own delay in filing suit. The current Congressional map went into effect *six years ago*. And nothing has occurred since that time that has suddenly provided Plaintiffs with the ability to assert the claims they now allege. The *only* thing new since 2011 is that in 2016—for the first time in more than a generation—a three judge panel found that partisan gerrymander claims were justiciable and ordered a state legislative map to be redrawn. *Whitford v. Gill*, 218 F. Supp. 3d 837, 837-965 (W.D. Wis. 2016). That decision and remedial order was stayed by the United

States Supreme Court and that case remains pending. However, other lower courts have continued to reject these challenges or stay these cases. *See, e.g.*, *Alabama Legis. Black Caucus v. Alabama*, No. 2:12-cv-00691 (ECF No. 372) at 10-15 (Oct. 12, 2017) (rejecting partisan gerrymandering challenge); *Benisek v. Lamore*, 266 F. Supp. 3d 799 (D. Md. 2017) (granting stay pending *Whitford*).

Multiple lawsuits, including this one, *Agre*, and the Pennsylvania Action, were filed that alleged partisan gerrymandering claims. But Plaintiffs were the most tardy of all, waiting until November 9, 2017 (only a few short months before the primary election cycle officially begins in February 2018) to assert claims they could have and should have asserted years ago.[8] Plaintiffs should not be rewarded for their delay by granting the extraordinary relief they seek.

b. The Outcome of This Case Could Not Realistically Affect the 2018 Congressional Elections

There is simply no way that this case could affect the 2018 election cycle. Specifically, for any new redistricting legislation to be enacted in time to impact the 2018 election, at a bare minimum, the following events would have to occur:

1. This Court would have to adjudicate all pretrial motions, the attendant Motions to Dismiss and Stay, as well as all future discovery disputes;

2. Plaintiffs must prevail at trial;

3. The Court would have to enter an Order and Opinion detailing how the 2011 Plan must be replaced with a Congressional map that meets whatever standards the Court imposes;

4. A new Congressional map would then need to be created that complies with the Court's Order;

[8] Legislative Defendants recognize that this Court declined to dismiss *Agre* on the basis of laches. *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). The question here is narrower—whether Plaintiffs' unreasonable delay (even compared with plaintiffs in *Agre* and the Pennsylvania Action) should entitle them to an extremely expedited schedule that will be highly prejudicial to Legislative Defendants.

5. Both chambers of the General Assembly would need to consider and separately pass the bill;

6. The Governor would need to sign the bill;

7. The Commissioner of Elections would need sufficient time to prepare for the 2018 primaries based on the newly-formed districts either formed by legislation or by order of this Court; and

8. If the political branches are unable to agree upon a new map, then it becomes incumbent on this Court to devise and order a remedial map.

It is unrealistic to expect that these events can be completed in time to impact the 2018 elections.[9] During an October 10, 2017 pretrial conference held before Judge Baylson in *Agre*, 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 D**.) Counsel for the Commissioner of the Elections proffered a document entitled "2018 Pennsylvania Elections Important Dates to Remember [the Official Schedule]" that set forth the events that must occur prior to Congressional elections, the first of which occurs on February 13, 2008.[10]

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, and they would prefer five weeks. *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. An affidavit of Jonathan M. Marks, Commissioner of the Bureau of

[9] All of this, of course, presupposes that the Supreme Court does not stay any such judgment pending a review on the merits, as occurred in *Whitford*. *See Gill v. Whitford*, 137 S. Ct. 2289 (2017).

[10] The Official Schedule is attached hereto as **Exhibit E**.

Commissions, Elections, and Legislation, was admitted into evidence in the Pennsylvania Action and confirmed these deadlines. (*See* **Ex. B ¶¶** 422–61). Commissioner Marks also averred that postponing the congressional primary would cost Pennsylvania $20 million. (**Ex. B ¶¶** 458–59).

It is virtually impossible for a new plan to be enacted into law by January 23, 2018, just 12 days (7 business days) after the status conference. This case is in its infancy. The Court and parties have yet to confer and set a schedule, including a trial date, for this action. It took the *Whitford* court five months after trial to issue its first opinion, as simply one example. The Court in *Agre* issued its decision 33 days after trial concluded.

Nor can a new map be enacted in time for the 2018 elections. Following the release of the 2010 and 2000 census results, it took six and eight months, respectively, for the General Assembly to create plans.[11] Even if a plan could be accelerated, it would be extremely difficult to pass new legislation through both chambers of the General Assembly prior to January 23, 2018. Any new 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).[12] 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).[13]

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[11] 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?syear=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?syear=2011&sind=0&body=S&type=B&bn=1249.

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

[13] *See* PA. CONST. art. III § A(4).

Both the Pennsylvania House and Senate have only one scheduled session day scheduled before the January 23, 2018 deadline.[14] Thus, 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 would be able to reach an agreement by January 23, 2018, which is unclear.

In short, this litigation cannot be concluded in time to affect the 2018 elections. As such, there is no need to expedite trial in this matter. Rather, granting the stay will be a more efficient use of the parties' and judicial resources by waiting for the Supreme Court's guidance in *Whitford* and *Benisek* and the Pennsylvania Action's decision on the 2011 Plan before charging forward with this case.

3. The Balance of the Equities Weighs in Favor of Granting a Stay

A denial of this stay will cause significant harm to Legislative Defendants. Proceeding with this case—which asserts identical claims to those presently being considered by the U.S. Supreme Court—makes little sense. If the U.S. Supreme Court rules that partisan gerrymandering claims are non-justiciable, then taxpayer resources will have been completely wasted. Alternatively, if the Supreme Court promulgates a new standard, then briefing and discovery governed by those new standards will be needed. Therefore, to preserve both taxpayer and judicial resources, this Court should grant a stay until the Supreme Court issues its rulings in *Whitford* and *Benisek*.

Denying a stay would also potentially force Legislative Defendants to litigate all three cases relating to the 2011 Plan—the Pennsylvania Action and any remedial or appellate stages,

[14] *See* Senate Session day schedule, *available at* http://www.legis.state.pa.us/SessionDays.cfm?Chamber=S; House Session Day Schedule, *available at* http://www.legis.state.pa.us/SessionDays.cfm?Chamber=H.

potential appellate stages in the *Agre* action, and this action—simultaneously. In the Pennsylvania Action, argument to the Supreme Court of Pennsylvania is scheduled for January 17, 2018. A decision in *Agre* was filed yesterday. Requiring Legislative Defendants to litigate this matter, particularly on the expedited schedule Plaintiffs are anticipated to request, at the same time as Legislative Defendants are handling the Pennsylvania Action and *Agre* matters and the necessary post-decision actions in those actions would be particularly burdensome. *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).

Conversely, Plaintiffs will face, at most, minimal harm if forced to wait a few more months for the Supreme Court to rule in *Whitford* and possibly *Benisek*. They already let six years and three elections pass before filing this lawsuit the day before *Whitford* was argued in the Supreme Court. By choosing to sit on their alleged rights *for years*, any alleged "emergency" or need for urgency is of Plaintiffs' own making, and should not be credited by this Court in

considering this Motion. *See Am. Int'l Grp., Inc. v. Am. Int'l Airways, Inc.*, 726 F. Supp. 1470, 1481 (E.D. Pa. 1989) (stating that "delay in seeking injunctive relief may justify denial of preliminary injunction on grounds of lack of irreparable harm.") (citing *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985)). This Court should therefore find that the balance of the equities tips in Legislative Defendants' favor and grant the stay.

B. This Court Should "Stay Its Hand" Under *Growe* Abstention Because the Pennsylvania Supreme Court Is Currently Addressing the Highly Political Task of Redistricting

When there are parallel state proceedings addressing legislative reapportionment, a district court's "decision to refrain from hearing the litigant's claims should be the routine course." *See Rice v. Smith*, 988 F. Supp. 1437, 1439 (M.D. Ala. 1997). Courts within this very District have recognized that this rule protects the inherently greater interest a state has in legislative reapportionment. *See, e.g., Pileggi v. Aichele*, 843 F. Supp. 2d 584, 592 (E.D. Pa. Feb. 8, 2012) (Surrick, J.) ("[T]he 'Constitution leaves with the States [the] primary responsibility for apportionment of their federal congressional and state legislative districts.'") (citing *Growe v. Emison*, 507 U.S. 25, 34 (1993); U.S. CONST., art. I, § 2)). Indeed, "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Id.* at 593 (citing *Chapman v. Meier*, 420 U.S. 1, 27 (1975)); *see also Scott v. Germano*, 381 U.S. 407, 409 (1965) (noting the preference to have state legislatures and state courts, rather than federal courts, address reapportionment).

The U.S. Supreme Court has therefore held that federal judges are "**required** . . . to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself." *Growe*, 507 U.S. at 33 (emphasis added). In fact, federal judges are to "prefer[] *both* state branches to federal courts as agents of apportionment." *Id.* at 34 (emphasis in original). The U.S. Supreme Court

has relied on principles of federalism and explained that it has "required deferral, causing a federal court to 'stay its hands,' when a constitutional issue in the federal action will be mooted or presented in a different posture following conclusion of the state-court case." *Id*. at 32. Significant to *Growe* was the fact that the two complaints asked for the same relief: the reapportionment of districts. *Id*. at 35. A state can only have one set of districts, and the primacy of the state in drawing those districts "compels a federal court to defer." *Id*. The Supreme Court has mandated that "[a]bsent evidence that these state branches will fail timely to perform [their] duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Id.* at 34.

Here, as described above, an essentially identical constitutional challenge to the 2011 Plan is currently pending in the Pennsylvania Action. Indeed, not only does the Pennsylvania Action seek the same relief as the instant action, it also asserts substantially the same legal claims. Although the Pennsylvania Action relies exclusively on the Equal Protection and Free Speech and Expression provisions of the Pennsylvania Constitution, the Pennsylvania Supreme Court has held that the Pennsylvania Equal Protection Clause is co-extensive with the Fourteenth Amendment's Equal Protection Clause. *See, e.g.*, *Erfer v. Commonwealth*, 794 A.2d 325, 332 (Pa. 2002). And the Supreme Court of Pennsylvania "ordinarily" and "often" follows U.S. Supreme Court First Amendment jurisprudence when interpreting Pennsylvania's Free Speech and Expression Clause under Article I, § 7. *See Pap's A.M. v. City of Erie*, 812 A.2d 591, 611 (Pa. 2002).

Moreover, the Commonwealth Court has already filed its Recommended Findings of Fact and Conclusions of Law, the parties have filed their principal briefs with the Supreme Court of Pennsylvania, and argument before the Supreme Court of Pennsylvania is scheduled to take

place next week. Given that federal courts are *required* to defer adjudication of a redistricting matter that a state legislative or judicial branch is already considering, this Court should abstain from proceeding with this case pending the Pennsylvania Commonwealth Court's imminent decision.[15]

IV. CONCLUSION

In the event that the Court does not dismiss Plaintiffs' FAC in its entirety for all of the reasons set forth in Legislative Defendants' separately filed Motion to Dismiss and Memorandum of Law, Legislative Defendants respectfully request that the Court stay or abstain from hearing this case until identical claims are decided by the U.S. Supreme Court, or substantively identical claims are decided by the Pennsylvania Supreme Court in *League of Women Voters v. Commonwealth*.

[15] For the same reasons, this Court should stay the instant action under the *Colorado River* abstention doctrine. *See Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). The *Colorado River* doctrine allows a federal court to abstain from exercising jurisdiction when a parallel ongoing proceeding is pending in state court. *Golden Gate Nat'l Senior Care, LLC v. Beavens*, 123 F. Supp. 3d 619, 629 (E.D. Pa. 2015). The instant action and the Pennsylvania Action involve substantially equivalent claims, substantially the same parties, and seek the exact same relief. If the Court does not stay or abstain from hearing the instant action, the significant overlap between the instant action and the Pennsylvania case creates a serious risk of duplicative—or worse, inconsistent—rulings and judgments.

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Respectfully submitted,

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