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** **and** **Michael C. Turzai, Speaker of the Pennsylvania House of Representatives, and Joseph Scarnati III, Pennsylvania Senate President Pro Tempore, in their official capacities,** **Defendant-Intervenors.**	**Civil Action No. 5:17-cv-5054**

PLAINTIFFS' RESPONSE IN OPPOSITION TO LEGISLATOR DEFENDANTS' MOTION TO STAY OR ABSTAIN

INTRODUCTION

Plaintiffs oppose Defendant-Intervenors' (hereinafter "Legislator Defendants") request to further delay adjudication of the important constitutional questions presented by this action. Plaintiffs respectfully ask that the Court deny Legislator Defendants' motion for a stay, and instead enter an expedited trial schedule. Executive Defendants—the parties responsible for the administration of elections in the State—do not oppose Plaintiffs' proposed schedule, and agree that the important issues presented in Plaintiffs' First Amended Complaint should be resolved without delay. Moreover, Executive Defendants have made it clear that, if necessary, it can administer a primary election moved to a date later than the current May 15, 2018 schedule to facilitate use of a Court-ordered remedial plan. Marks Aff., ECF No. 70, at 6 ¶ 22.

There is no reason to delay pending the outcome of cases in the United States Supreme Court or the Pennsylvania Supreme Court. There is an adequate but short window for this Court to order a Constitutional map for the 2018 election. But if more time is lost, that window will soon close, leaving the possibility that even if this Court ultimately finds for the Plaintiffs, the citizens of Pennsylvania will have to live under an unconstitutional map for yet another election.

The *Agre v. Wolf* Court,[1] the U.S. Supreme Court, and the Pennsylvania Supreme Court have so far rejected Legislator Defendants' persistent invitations to delay relief to other plaintiffs

[1] Legislator Defendants do not advance the *Agre* court's entry of judgment against the *Agre* plaintiffs as grounds for a stay of this action, for good reason. As counsel for the Legislative Defendants argued in opposing the *Diamond* Plaintiffs' motion to intervene in *Agre*, the *Diamond* Plaintiffs' claims are "fundamentally different" from the claims in *Agre*. *See* 11/7/2017 Hearing Tr. at 20:3-24, *Agre v. Wolf*, 2:17-4392 (E.D. Pa. 2017). In particular, Counts II and III of the *Agre* plaintiffs' complaint, which the *Agre* court ultimately dismissed for failure to state a claim, were hybrid claims premised on a connection between the First Amendment and Elections Clause, and between the Fourteenth Amendment and the Elections Clause. *See* Order, ECF No. 83, *Agre v. Wolf*, 2:17-4392 (E.D. Pa. Nov. 16, 2017); Order, ECF No. 160, *Agre v. Wolf*, 2:17-4392 (E.D. Pa. Nov. 30, 2017). The *Diamond* Plaintiffs' First and Fourteenth Amendment claims are not premised on any such connection.

challenging the 2011 Congressional Plan (hereinafter "the 2011 Plan") on the exact same grounds they advance here.[2] Legislator Defendants' incentives are not difficult to understand. If they successfully delay adjudication of challenges until after the 2018 Congressional election, Legislator Defendants will have reaped the fruits of an unconstitutional redistricting plan—one that confers a substantial and illegitimate partisan advantage—for yet another election. Further delay of this litigation would result in further deprivation of Plaintiffs' constitutional rights. And, as other similarly situated courts have recognized, a delay that has the effect of subjecting voters to unconstitutional districting plans for another election would empower state legislatures to engage in unlawful districting practices by rendering the federal courts effectively powerless to redress voters' grievances. *Common Cause v. Rucho*, No. 1:16-CV-1026, 2017 WL 3981300, at *7 (M.D.N.C. Sept. 8, 2017); *see also Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 560 (E.D. Va. 2016).

Plaintiffs here respectfully request this Court permit them a timely opportunity to vindicate their rights. An expedited trial schedule is eminently workable and this Court has the power to issue relief in time for the 2018 Congressional elections.

[2] *See* Intervenor Defendants' Mot. to Stay or Abstain, ECF No. 45-2, at 5-6, *Agre v. Wolf*, 2:17-4392 (E.D. Pa. Oct. 24, 2017) (characterizing *Agre* Plaintiffs' claims as "substantively identical" to claims in *Whitford* and arguing that it is too late to enact new Congressional map for 2018); Order, ECF No. 47, *Agre v. Wolf*, 2:17-4392 (E.D. Pa. Oct. 25, 2017) (denying motion); Speaker Turzai's Emergency Application for Stay, at 4, *In re Turzai*, No. 17A-480 (S. Ct. Nov. 1, 2017) (characterizing *Agre* Plaintiffs' claims as "substantively identical" to claims in *Whitford* and arguing that it is too late to enact new Congressional map for 2018); Order, *In re Turzai*, 17A-480 (S. Ct. Nov. 3, 2017) (Alito, J.) (denying stay); Resp't. Answer to Pet'r Application for Extraordinary Relief, *League of Women Voters v. Pennslyvania*, at 15-18, 22, No. 159 MM 2017 (Pa. Oct. 20, 2017) (arguing that *League of Women Voters* plaintiffs' state constitutional claims should continue to be stayed because they "require the exact same analysis as the federal law claims currently being considered by the U.S. Supreme Court in *Whitford*" and that it is too late to enact new Congressional map for 2018); Order, *League of Women Voters v. Pennsylvania*, No. 159 MM 2017 (Pa. Nov. 9, 2017) (vacating stay).

ARGUMENT

A. STAYING OR ABSTAINING FROM THIS ACTION PENDING *LEAGUE OF WOMEN VOTERS* IS NOT WARRANTED

Legislator Defendants' request for this Court to stay or abstain from this action pending the Pennsylvania Supreme Court's resolution of *League of Women Voters v. Pennsylvania* (hereinafter "*League of Women Voters*") is legally unsound. Legislator Defendants erroneously argue that because the *League of Women Voters* action is "an essentially identical constitutional challenge" asserting "substantially the same claims," this action should be stayed. ECF No. 69-2, at 17. But this action and the *League of Women Voters* action do not assert the same claims. This action asserts violations of the United States Constitution, while the *League of Women Voters* action asserts violations of the Pennsylvania Constitution. If the Pennsylvania Supreme Court finds against the *League of Women Voters* plaintiffs, that decision will not answer the question presented to this Court: whether the 2011 Plan violates the United States Constitution. If the Pennsylvania Supreme Court finds in favor of the *League of Women Voters* plaintiffs and orders a remedial map, this Court can evaluate at that time whether a stay is warranted while the Pennsylvania Supreme Court completes a remedy phase. But there is no reason to delay adjudication of this action, and thereby delay a remedy for a violation of federal constitutional rights, simply because a state court may, at some point in the future, find a state constitutional violation that may be sufficient to cure the federal constitutional violations asserted here. That is simply far too much uncertainty to justify putting this litigation on hold, thereby jeopardizing the ability of Plaintiffs to obtain a remedy in time for the next election.

In addition, Legislator Defendants flatly misstate applicable precedent when they assert that this Court is "required" to abstain from this action in light of the ongoing Pennsylvania State action. ECF No. 69-2, at 17. Though the states are vested with primary responsibility for

apportionment, federal courts do not abstain from consideration of a redistricting plan solely because the plan's validity is also before state courts. The cases cited by the Legislators instead concern federal interference with state courts that have *already invalidated a redistricting plan*, and are therefore inapposite. *See Growe v. Emison*, 507 U.S. 25, 34 (1993) (federal court erred by enjoining the state supreme court from implementing plan after state court had declared the prior plan unconstitutional); *Scott v. Germano*, 381 U.S. 407, 409 (1965) (federal court erred by refusing to vacate its own order apportioning state legislature after state supreme court declared the apportionment unconstitutional and retained jurisdiction to ensure its valid redrawing) (directing district court to retain jurisdiction "in the event a valid reapportionment plan for the State Senate is not timely adopted"); *Pileggi v. Aichele*, 843 F. Supp. 2d 584, 597 (E.D. Pa. 2012) (declining to enjoin primary elections after the Pennsylvania Supreme Court declared the challenged state redistricting plan unconstitutional, ordered it to be reapportioned, and retained jurisdiction pending the creation of a new plan).

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

The Supreme Court's ongoing consideration of appeals in *Gill v. Whitford* (No. 16-1161) (S. Ct. 2017) (hereinafter "*Whitford*") and *Benisek v. Lamone* (No. 17-333) (S. Ct. 2017) (hereinafter "*Benisek*") do not warrant a stay of this action. Legislator Defendants claim that *Whitford* and *Benisek* "*will dictate* if and how this litigation should proceed." ECF No. 69-2, at 8 (emphasis added). Legislator Defendants are wrong, for multiple reasons.

1. *Whitford* and *Benisek* could only dictate whether this action can proceed if the Supreme Court overrules its precedents and holds all possible partisan gerrymandering claims nonjusticiable under any theory.

First, there is only one way that *Whitford* or *Benisek* could dictate whether this action can proceed: the Supreme Court would have to upend its own precedent and hold that *all* partisan

gerrymandering claims are nonjusticiable under *any* legal theory. This outcome is extraordinarily unlikely. 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 (2004) (Kennedy, J., concurring). The pendency of *Whitford* and *Benisek* simply cannot warrant a stay in this case and further harm to Plaintiffs' constitutional rights "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*, 2017 WL 3981300, at *6 (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 Supreme Court); *see also Ga. State Conference of NAACP v. Georgia*, 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).

2. The Supreme Court may not resolve *Whitford* and *Benisek* on the merits.

Second, the Supreme Court may resolve *Whitford* and *Benisek* on grounds other than the merits, in a way that has limited or no applicability to this action. *See, e.g.*, *Ga. State Conference of NAACP*, 2017 WL 3698494, at *11 ("The Supreme Court's jurisprudence on partisan gerrymandering teaches us that the Court could rule in a variety of ways on the issues before it in *Whitford*, including not ruling on them at all."); *see also Wittman v. Personhuballah*, 136 S. Ct.

1732, 1735–36 (2016) (challenge to congressional districts as racial gerrymanders) (hearing argument on both the merits and standing, and dismissing appeal on standing grounds alone). For example, the threshold legal question in *Whitford* is whether the plaintiffs have standing to challenge the redistricting plan on a statewide basis because the *Whitford* plaintiffs do not live in each of the state legislative districts in the state. By contrast, the plaintiffs in this action represent each Congressional district in Pennsylvania. As a result, even if the Supreme Court were to find that the *Whitford* plaintiffs lack standing for their claims, such a holding would have no bearing on any claims in this action.

3. Plaintiffs' claims are distinct from those advanced by the *Whitford* plaintiffs.

Third, it is simply not true that Plaintiffs' claims are "identical" or "nearly identical" to the claims in *Whitford*. Most obviously, *Whitford* is a First and Fourteenth Amendment challenge, and could not resolve Plaintiffs' Elections Clause claim.

Moreover, the *Whitford* plaintiffs and plaintiffs in this action advance different legal theories under the First Amendment. *Whitford* adopts the same three-part legal test for partisan gerrymandering claims raised under both the First and Fourteenth Amendments. *See, e.g.*, Br. of Appellees, *Gill v. Whitford*, No. 16-1161, at 33-36, *available at* http://www.scotusblog.com/wp-content/uploads/2017/08/16-1161-bs.pdf (explaining why *Whitford* court's test captures the First and Fourteenth Amendment harms inflicted by partisan gerrymandering). Most notably, the *Whitford* test requires a showing of a "large and durable discriminatory effect[s]" in order to find liability. *See id.* at 46-49 (internal citations and emphasis omitted). In this action, however, plaintiffs present a different framework for assessing partisan gerrymandering claims under the First Amendment: that Plaintiffs must simply demonstrate that political classifications were used to burden a group's representational rights. That is distinct from the framework advanced in *Whitford*. Plaintiffs in this action are informed by the Supreme Court's recognition of the fact

that the First and Fourteenth Amendments protect against different "underlying…constitutional harms," and thus require different analyses. *Vieth*, 541 U.S. at 294 (plurality). Justice Kennedy's concurrence in *Vieth* contrasts equal protection analysis, which focuses on the permissibility of an enactment's classifications, with First Amendment analysis, which focuses on whether the legislation burdens representational rights for reasons of political association. *See* 541 U.S. at 315.

Accordingly, Plaintiffs assert the same First Amendment framework set forth by Justice Kennedy in *Vieth*: "if a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the State shows some compelling interest." *Id.* at 315 (Kennedy, J., concurring). Unlike the approach of the *Whitford* court, this First Amendment analysis would not require Plaintiffs to show a severe or "durable" partisan effect in order to state a First Amendment violation—instead, a showing of a more than *de minimus* burden is sufficient. In addition, while the *Whitford* court assumed that Plaintiffs bore the burden of proof in showing that a redistricting plan's partisan intent is not justifiable, *see* 218 F. Supp. 3d at 911, standard First Amendment claims require the *state* to bear the burden of justification once strict scrutiny has been triggered.

For these reasons, *Whitford* will not resolve the viability of Plaintiffs' First Amendment claim. *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."). Indeed, two federal courts recently declined to stay similar partisan gerrymandering claims proceeding under a *Whitford* theory. *See id.* at *7; *Ga. State Conference of NAACP*, 2017 WL 3698494, at *11.

4. Plaintiffs' legal theories are distinct from those advanced by the *Benisek* plaintiffs.

Fourth, the Supreme Court's resolution of *Benisek* also will not control this action. *Benisek* is a First Amendment retaliation claim, asserted against a single Congressional district. Because *Benisek* proceeds only under the First Amendment, *Benisek* will not resolve Plaintiffs' Fourteenth Amendment and Elections Clause claims. Moreover, plaintiffs in this action advance a different First Amendment theory than the *Benisek* plaintiffs. The *Benisek* plaintiffs' retaliation theory expressly disclaims any reliance upon quantitative or statistical evidence of invidious partisan intent or effect, or any evidence of discriminatory intent or effect with respect to the plan as a whole. *See* Jurisdictional Statement, *Benisek v. Lamone*, No. 17-333, at 32-33, *available at* http://www.scotusblog.com/wp-content/uploads/2017/09/17-333-Benisek-jurisdictional-statement.pdf (distinguishing *Benisek* retaliation theory from statewide claim and statistical evidence in *Whitford*). Instead, under the *Benisek* retaliation theory, if the map drawers move voters into and out of a district held by the opposing party with the intent to flip control of that district to the map-drawing party, and the district in fact changes hands, then the plaintiffs have shown a First Amendment violation unless the state can prove that the district would have been drawn the same way in the absence of invidious intent. *See id.* at 20-23.

This approach, even if adopted by the Supreme Court as a workable partisan gerrymandering standard, is highly unlikely to resolve the distinct First Amendment harms alleged by plaintiffs in this action. The *Benisek* plaintiffs allege they were harmed because they elected a particular candidate in their district under the prior redistricting plan, and their ability to elect that candidate was taken away by the new redistricting plan. By contrast, the burden on the *Diamond* plaintiffs' representational rights is not primarily that the 2011 Plan caused Democratic-held districts to flip to Republican control; rather, it is that the 2011 Plan was

systematically engineered to make it more difficult for Democratic-affiliated voters across the state to translate their votes into seats than it is for Republican-affiliated voters to do the same. As a result, Plaintiffs' claim is both more expansive and more limited than the claim advanced in *Benisek*. It is more expansive because it pertains to the harms suffered by plaintiffs statewide, rather than just those who happen to live in a district that happens to flip control after enactment of a redistricting plan. But it is more limited because Plaintiffs propose to identify and measure the plan's burden on their representational rights using statistical and quantitative measures of vote dilution, rather than by merely showing that a plan caused a district to flip to the map-drawing party's control. Accordingly, if the Supreme Court affirmed the *Benisek* plaintiffs' theory, it would necessarily leave unanswered the question of its application to Plaintiffs' statewide claim. Similarly, if the Supreme Court rejected the *Benisek* plaintiffs' theory, it would not resolve whether plaintiffs in this case have alleged and proven a different First Amendment theory that relies in part upon statistical and quantitative measures of vote dilution.

5. The Supreme Court is unlikely to set out a comprehensive legal test for partisan gerrymandering claims in *Whitford* or *Benisek*.

Fifth, staying this action pending *Whitford* and *Benisek* is inappropriate because the Supreme Court is highly unlikely to resolve these cases with sweeping opinions setting forth a comprehensive legal test for partisan gerrymandering claims under either the First or Fourteenth Amendments. According to Defendants, the Supreme Court's opinions in *Whitford* and *Benisek* will necessarily "dictate" the legal elements and evidentiary standards for all potential partisan gerrymandering theories advanced under these two constitutional provisions. The implication is that the lower Federal courts should simply sit back and wait for the Supreme Court to provide a fully fleshed-out doctrine that they can mechanically apply to partisan gerrymandering claims.

This fundamentally misunderstands the role of the lower federal courts in constitutional jurisprudence. Common sense and experience counsel otherwise.

In elections cases, the Supreme Court has generally proceeded by articulating a workable principle that lends itself to a manageable test, while allowing the lower courts to adapt and refine that test over time. *See* Br. of Amicus Curiae Heather K. Gerken, et al., *Gill v. Whitford*, No. 16-1161, at 7-10, *available at* http://www.scotusblog.com/wp-content/uploads/2017/09/16-1161-bsac-heather-gerken.pdf (collecting and discussing cases). For example, in the one-person, one-vote cases, the Supreme Court identified the core principle undergirding the claim in broad terms, but did not identify a precise test for assessing violations of the principle, instead allowing the lower courts to refine and adapt the principle to fact patterns raised in litigation. *See id.* at 7; *Reynolds v. Sims*, 377 U.S. 533, 578 (1964) ("Lower courts can and assuredly will work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation. For the present, we deem it expedient not to attempt to spell out any precise constitutional tests. [. . .] Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements[.]"). Accordingly, the Supreme Court has not treated the lower Federal courts as mere receptacles of the Supreme Court's pronouncements, as the Legislator Defendants imply, but rather as the adjudicators of the adversarial, case-by-case process upon which the Supreme Court relies. *See, e.g.*, *Maslenjak v. United States*, 137 S. Ct. 1918, 1931–32 (2017) (Gorsuch, J., concurring) ("[I]t seems to me at least reasonably possible that the crucible of adversarial testing on which we usually depend, along with the experience of our thoughtful colleagues on the district and circuit benches, could yield insights (or reveal pitfalls) we cannot muster guided only by our own lights.").

Such considerations particularly counsel against a stay where, as here, Plaintiffs support their claims with types of advanced social scientific evidence of partisan gerrymandering that have not yet been considered by the Supreme Court. A stay would prevent this Court from performing the adversarial testing of evidence upon which the Supreme Court will depend in an ongoing process of evaluating workable partisan gerrymandering standards. Indeed, the need for the lower federal courts' careful consideration and weighing of new forms of empirical evidence is particularly important for partisan gerrymandering claims. These claims have foundered in the past not because of an absence of governing legal principles,[3] but rather because courts have lacked sufficiently precise measurements of the burdens imposed by partisan gerrymanders, as well as sufficiently precise means of distinguishing invidious partisan intent from the application of neutral redistricting factors. These were primarily failures of evidence, not legal theory. For this reason, as Justice Kennedy recognized nearly fourteen years ago in *Vieth*, new advances in computational social science may provide a workable partisan gerrymandering standard: "[T]echnologies may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties. That would facilitate court efforts to identify and remedy the burdens, with judicial intervention limited by the derived standards." *Vieth*, 541 U.S. at 312–13 (Kennedy, J., concurring).

The expert testimony that plaintiffs will present in support of their claims will provide such workable methods of analysis. Some of this testimony is of the same type considered by the *Whitford* court and other federal courts currently adjudicating partisan gerrymandering claims.

[3] *See Vieth*, 541 U.S. at 313-14 (Kennedy, J., concurring) ("The Fourteenth Amendment standard governs; and there is no doubt of that. My analysis only notes that if a subsidiary standard could show how an otherwise permissible classification, as applied, burdens representational rights, we could conclude that appellants' evidence states a provable claim under the Fourteenth Amendment standard."); *id.* at 314 ("First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights[.]").

Plaintiffs' experts will also present testimony regarding analyses in which the Supreme Court has expressed great interest, but that are not part of the trial record before the Supreme Court in *Whitford* or *Benisek*. For example, at oral argument in *Whitford*, the Justices extensively discussed the possibility of using computer simulations to generate neutrally drawn maps in order to determine whether the enacted plan is an outlier, and to distinguish between the effects of geography and the effects of intentional partisan manipulation. Oral Argument Tr. at 53-58, *Gill v. Whitford* (No. 16-1161) (S. Ct. 2017). Here, Plaintiffs' experts will present a number of distinct, but complementary, computer simulation methods that address the issues raised by the Justices. By contrast, neither the *Whitford* nor the *Benisek* plaintiffs submitted expert testimony at trial that relied upon computer simulations to generate neutrally drawn maps.

As a result, the Supreme Court's disposition of *Whitford* or *Benisek* will not resolve whether Plaintiffs' expert testimony represents the kind of analysis that makes "evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties," *Vieth*, 541 U.S. at 312–13, and thereby facilitates a workable partisan gerrymandering standard. Staying this action pending *Whitford* and *Benisek* not only denies plaintiffs the opportunity to obtain timely relief, but also denies the Supreme Court the opportunity to consider this Court's adversarial testing of such evidence.

C. THIS COURT HAS THE POWER TO AWARD RELIEF IN TIME FOR THE 2018 ELECTION, AND AN EXPEDITED SCHEDULE IS WORKABLE

An expedited schedule that offers the possibility of ordering relief in time for the 2018 Election is necessary because voters should not be subjected to further violations of their Constitutional rights. Elections should not be conducted under an invalid plan, and the Court possesses broad equitable power to issue a remedy for an unconstitutional redistricting plan that can be put in place in time for the 2018 election. *See, e.g.*, *Reynolds*, 377 U.S. at 585 ("It is

enough to say now that, once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan"); *Covington v. North Carolina*, No. 1:15CV399, 2017 WL 4162335, at *12 (M.D.N.C. Sept. 19, 2017) (citing cases holding that ordering special elections is appropriate when constitutional violation is widespread or serious); *NAACP-Greensboro Branch v. Guilford Cty. Bd. of Elections*, 858 F. Supp. 2d 516, 531 (M.D.N.C. 2012) (enjoining and revising election schedule to remedy unconstitutional reapportionment plan); *Ga. State Conference of the NAACP v. Fayette Cty. Bd. of Comm'rs*, 118 F. Supp. 3d 1338, 1351 (N.D. Ga. 2015) (enjoining and revising election schedule to remedy likely violation of Voting Rights Act).

The Executive Defendants, who are the parties responsible for the administration of elections in the Commonwealth, have stated that it is possible for the Court to order postponement of the May 15 primary election to a date in the summer of 2018. Marks Aff., ECF No. 70, at 6 ¶ 22. Depending on the date of the postponed primary election, the date by which the new plan would be put in place could be as late as the beginning of April. *Id.* at 6 ¶ 24. Accordingly, completing the trial in early February would afford this Court approximately a month to decide whether the 2011 Plan is unconstitutional before the first ballots are mailed to military and overseas voters on March 26. *See* Joint Stip. of Facts, *League of Women Voters v. Pennsylvania*, ECF No. 70 at 11 ¶ 135. If the Court decides that the plan is unconstitutional by that time, it can order postponement of the primary, and provide the General Assembly an opportunity to enact a remedial districting plan on an expedited basis, to be put in place in early

April.[4] Of particular note, no postponement of the primary election, or any associated deadlines, is necessary unless or until the Court finds that the 2011 Plan is unconstitutional.

To be sure, the schedule that Plaintiffs request is unusually expedited. But as the *Agre* and *League of Women Voters* trials just demonstrated, expedited adjudication of partisan gerrymandering claims is workable. Indeed, *League of Women Voters* was tried just one month after the Pennsylvania Supreme Court lifted its stay, and the Commonwealth Court issued over one hundred pages of findings of fact and conclusions of law just two weeks after trial. Similarly, *Agre* was tried just two months after the filing of the complaint, and the *Agre* court issued opinion in excess of two hundred pages about a month after trial. In order to facilitate this expedited schedule, and as discussed at this Court's January 11, 2018 Status and Scheduling Conference, Plaintiffs are willing to reasonably limit the scope of discovery.

The Legislator Defendants' arguments to the contrary are both disingenuous (as demonstrated by their ability to litigate under an expedited schedule in *Agre* and *League of Women Voters*) and largely a problem of their own making. Specifically, Plaintiffs attempted to intervene in *Agre*, and were more than willing to submit to the schedule on which the *Agre* case was tried. 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. Moreover, Legislative Defendants are not starting from scratch. The Legislative Defendants are uniquely familiar with the factual and legal issues in this case, though having twice tried similar claims regarding the same underlying series of events, and through their own enactment of the 2011 Plan.

[4] As Legislator Defendants admit, this Court has the power and the responsibility to devise and order a remedial map in the event that the General Assembly and the Governor are unable to agree on a new map. Mot. to Stay, ECF No. 69-2, at 12. The same is true if, as the Legislator Defendants imply, the General Assembly is unwilling to work quickly enough to create a remedial map on the timeline set by the Court.

Moreover, the existence of the *Agre* and *League of Women Voters* cases affords certain efficiencies that reduce any potential burden of an expedited schedule. In particular, the Legislative Defendants have presumably already conducted document collections and reviews in responses to requests for production in the *Agre* and *League of Women Voters* cases, which will reduce the time necessary to complete written discovery. The Legislative Defendants engaged expert witnesses in *Agre* and *League of Women Voters* who, by virtue of their testimony, are presumably very well versed in the details of the 2011 Plan. Moreover, these experts are already quite 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.[5]

CONCLUSION

The balance of the equities weighs strongly against granting a stay. Legislator Defendants complain that they will be harmed by having to litigate multiple cases relating to the 2011 Plan at the same time, and that they prefer to try this case after *Whitford* and *Benisek* are decided. ECF No. 69-2, at 14-15. But Legislator Defendants' preference for delay—a preference that plainly suits their political interest in maintaining biased maps for at least one more election—should not outweigh the public interest in an expedited proceeding that can prevent further violations of Plaintiffs' rights, should this Court find that the 2011 Plain is unconstitutional.

[5] *See, e.g.*, Wendy Tam Cho and Yan Y. Liu, *Towards a Talismanic Redistricting Tool: A Computational Method for Identifying Extreme Redistricting Plans*, 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).

Dated: January 17, 2018

By: *s/ Bruce V. Spiva*

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CERTIFICATE OF SERVICE

I certify that on January 17, 2018, 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: January 17, 2018

/s/ Bruce V. Spiva
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