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,	:	CIVIL ACTION
Plaintiffs,	:	No. 17-05054
v.	:	
Robert Torres, Acting Secretary of the Commonwealth of Pennsylvania, and Jonathan Marks, Commissioner of the Bureau of Elections, in their official capacities,	:	
Defendants.	:	

EXECUTIVE BRANCH DEFENDANTS' RESPONSE IN
OPPOSITION TO LEGISLATIVE DEFENDANTS' MOTION TO STAY OR ABSTAIN

Acting Secretary of the Commonwealth of Pennsylvania Robert Torres and Commissioner of the Bureau of Elections Jonathan Marks, in their official capacities (together, "Executive Branch Defendants"), oppose the request of Defendant-Intervenors Michael C. Turzai, in his official capacity as Speaker of the Pennsylvania House of Representatives, and Joseph B. Scarnati III, in his official capacity as Pennsylvania Senate President Pro Tempore (collectively, "Legislative Defendants") to stall the progress of this action and delay this Court's adjudication of the fundamental rights of the citizens of the Commonwealth of Pennsylvania. Executive Branch Defendants respectfully request that this Court deny Legislative Defendants' Motion to Stay or Abstain, ECF No. 69 (Jan. 11, 2018), and join with Plaintiffs in requesting that the Court instead enter an expedited trial schedule.

The outcomes of pending litigation in the Pennsylvania and United States Supreme Courts are far too uncertain to justify delay in this action, and, contrary to Legislative Defendants' argument, the elections schedule is flexible enough that the 2018 elections can proceed under a constitutional map if this Court invalidates the 2011 Plan. Accordingly, a stay is unwarranted.

I. Because the Outcome of *League of Women Voters* Is Uncertain and Proceeding With Discovery Would Not "Impede" That Case, The Pendency of That Case Does Not Warrant a Stay.

In their brief urging this court to delay the advancement of this litigation, Legislative Defendants erroneously cite *Growe v. Emerson*, 507 U.S. 25 (1993), for the proposition that the pendency of the Pennsylvania Supreme Court's decision in *League of Women Voters of Pennsylvania v. Commonwealth of Pennsylvania*, No. 159 MM 2017 (Pa.), "require[s]" this court to abstain from hearing Plaintiffs' claims. *See* Legislative Defendants' Motion to Stay or Abstain ("Legislative Defts.' Br."), at 16. The issues that underlay the holding in *Growe* are not present here. In *Growe*, a federal district court in a redistricting case enjoined the implementation of a

state court's adopted reapportionment plan and instead imposed its own. *Growe*, 507 U.S. at 31. Reversing the district court, the Supreme Court held that "[a]bsent evidence that [a state] will fail timely to perform [reapportionment], a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Id.* at 34. No one in this action is asking this Court to do anything of the kind – there is no request that this Court enjoin or otherwise "impede" the *League of Women Voters* case.

At this point, the outcome of *League of Women Voters* is far too uncertain to justify halting this action. While oral argument took place on January 17, 2018, it remains unclear when the Pennsylvania Supreme Court will issue its ruling, let alone whether it will invalidate the map as unconstitutional, and, if it does so, whether it will order relief in time for the 2018 elections. For as long as those questions remain unanswered, permitting this action to go forward would certainly not run afoul of *Growe*. If developments in *League of Women Voters* during the coming weeks alter the balance of factors weighing in favor of proceeding with this case, this Court has the discretion to revisit its decision on the question of a stay at any time. *Clinton v. Jones*, 520 U.S. 681, 706 (1997) (A "[d]istrict Court has broad discretion to stay proceedings as an incident to its power to control its own docket."). But at this juncture, the mere existence of a state court case on the subject of redistricting and the possibility of a decision invalidating the map do not outweigh the significant prejudice to the rights of Pennsylvania citizens that would result from delaying this action. Such a delay would increase the risk that the 2018 elections will proceed under an unconstitutional map; this fact strongly counsels in favor of denying Legislative Defendants' motion to stay or abstain.

II. Because the U.S. Supreme Court's Disposition of *Gill* and *Benisek* is Extremely Unlikely to End This Case Entirely, the Case Should Proceed

As Plaintiffs explain in their brief, a decision in either *Gill v. Whitford*, No. 16-1161 (U.S.) or *Benisek v. Lamone*, No. 17-333 (U.S.) would be highly unlikely to dispose of this case entirely. *See* Plaintiffs' Response in Opposition to Legislator Defendants' Motion to Stay or Abstain, ECF No. 73 (Jan. 17, 2018), at 5-13. At best, a ruling in those cases could clarify the standards for one or two of Plaintiffs' claims, but it would not affect their Elections Clause claim. Moreover, neither case will have any effect on the need for discovery in this case. Under any legal standard, the process by which the 2011 Plan was created and the ultimate effect of the resulting map will be relevant to the Court's ultimate decision on Plaintiffs' claims. Thus, it would be prudent for the Court to allow discovery to go forward in order to facilitate the development of a complete factual record.

III. This Action Can and Should Be Decided in Time to Ensure That the 2018 Elections Proceed Under a Constitutional Map

As the government officials tasked with administering the election process in Pennsylvania, the Executive Branch Defendants are in the best position to speak to the feasibility of altering the election schedule. Despite the Legislative Defendants' dogged insistence that adjustment of the election schedule would be impossible and unduly expensive, the Executive Branch Defendants reiterate that it is both feasible and practical to reschedule the 2018 primary. Doing so would provide this Court sufficient time to assess the constitutionality of the 2011 Plan and, if necessary, allow time for the enactment of a new map.

The Legislative Defendants' extended discussion of the impossibility of meeting a January 23 deadline for a new map is nothing more than a red herring. *See* Legislative Defts.' Br. at 12-14. As the Executive Branch Defendants have repeatedly pointed out in this case and others, it would be possible, through a combination of internal management steps and court-

ordered deadline changes, to run the 2018 primaries as scheduled, even if a new map is not available until February 20. Moreover, the election schedule is sufficiently flexible to extend the deadline for a new map through the first week of April and allow the Commonwealth to hold a special primary by July 31, if that is what is required.[1] *See* Executive Branch Defendants' Exhibits Regarding the Timeline for the 2018 Congressional Election, ECF No. 70 at Ex. A, ¶¶ 23-24. Thus, if the 2011 Plan is held unconstitutional, it will be possible to replace it in time for the 2018 elections. The Executive Branch Defendants stand ready to do whatever is necessary to ensure that those elections proceed under a constitutional plan.

Even if the Legislative Defendants' contention that it is too late to grant relief in time for the 2018 elections were correct (as stated above, it is not), it would nevertheless be necessary to move this case forward quickly. The start of the 2020 election cycle is not far away; in that cycle, much of the election calendar will be advanced by three weeks, compared to the 2018 dates, to accommodate the different schedule used during presidential election years. *See* 25 P.S. § 2753(a). There is, accordingly, no reason to delay this case.

IV. Conclusion

For the foregoing reasons, Executive Branch Defendants request that the Court deny the Legislative Defendants' Motion to Stay or Abstain.

[1] Legislative Defendants' suggestion that rescheduling the primary will cost the Commonwealth $20 million is incorrect. *See* Legislative Defendants' Br. at 13. The primary will cost $20 million regardless of when it occurs. Marks Affidavit, ECF No. 70, at ¶ 27.

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Dated: January 18, 2018

By: /s/ Michele D. Hangley

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2018, I caused a true and correct copy of the foregoing Response in Opposition to Legislative Defendants' Motion to Stay or Abstain to be electronically filed using the Court's electronic court filing system, and that the filing is available for downloading and viewing from the electronic court filing system by counsel for all parties.

/s/ Michele D. Hangley
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