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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

)	
League of Women Voters of Pennsylvania, <i>et al.</i> ,)	
)	
<i>Petitioners,</i>)	
)	No. 261 MD 2017
v.)	
)	
The Commonwealth of Pennsylvania, <i>et al.</i> ,)	
)	
<i>Respondents.</i>)	

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF
RESPONDENTS WOLF, TORRES AND MARKS**

I. Discussion

At trial, Respondents Governor Thomas W. Wolf, Acting Secretary of the Commonwealth Robert Torres, and Commissioner Jonathan Marks, in their official capacities (together, “Respondents”), neither attacked nor defended the congressional redistricting plan at issue (the “2011 Plan”). Respondents understood that their appropriate roles at trial were to allow the Legislative Respondents, who created the 2011 Plan, to defend it as they saw fit; to provide the Court with information where necessary, including information about parallel proceedings; and to prevent disruption of the 2018 elections by keeping the Court and the other parties apprised of election schedules and potential alterations to those schedules.

Now that the trial has ended, however, Respondents have concluded that Petitioners have made a compelling showing that the 2011 Plan is an intentionally partisan plan to hold and protect Republican seats. Respondents have further concluded that the evidence does not support an alternative explanation for the choices made in creating the 2011 Plan. However, Respondents will not propose findings regarding the details of the evidence or the constitutionality of the 2011 Plan, because they are confident that Petitioners and the Legislative Respondents will do so and wish to avoid cumulative submissions to the Court.

As representatives of the branch of the Commonwealth government charged with executing and implementing the statutes that the General Assembly enacts, Respondents intend to enforce the 2011 Plan unless and until a Court orders them to do otherwise. Should the Pennsylvania Supreme Court order that a new plan be drafted, however, Respondents believe that they must provide the Court with information on potential remedies and the timing of those remedies, in order to ensure that the 2018 elections proceed under a constitutional plan with minimal disruption. Respondents thus propose limited findings of fact and conclusions of law regarding what remedies might be available in the event that the Supreme Court holds that the 2011 Plan is unconstitutional.

II. Proposed Findings of Fact

A. Facts Regarding Respondents

1. Respondent Thomas W. Wolf is Governor of the Commonwealth and is sued in his official capacity. (Joint Stip. Facts at ¶ 23.)
2. One of the Governor's official duties is signing or vetoing bills passed by the General Assembly. Pennsylvania's governors, including Governor Wolf, are charged with, among other things, faithfully executing valid laws enacted by the General Assembly. (Joint Stip. Facts at ¶ 24.)

3. Respondent Thomas Wolf was elected Governor of Pennsylvania in November 2014, and assumed office on January 20, 2015. (Joint Stip. Facts at ¶ 25.)

4. Governor Wolf did not hold public office at the time that Senate Bill 1249 (“SB 1249”) was drafted and enacted. (Joint Stip. Facts at ¶ 26.)

5. Respondent Robert Torres is the Acting Secretary of the Commonwealth and is sued in his official capacity. (Joint Stip. Facts at ¶ 27.)

6. Respondent Jonathan Marks is the Commissioner of the Bureau of Commissions, Elections, and Legislation of the Pennsylvania Department of State (“Department”) and is sued in his official capacity. (Joint Stip. Facts at ¶ 28.)

7. Neither the Secretary of the Commonwealth, nor the Commissioner for the Bureau of Commissions, Elections, and Legislation, had any role in the drafting or enactment of SB 1249. (Joint Stip. Facts at ¶ 29.)

B. Facts Regarding the Current Election Schedule

8. Under the current election schedule, Pennsylvania’s 2018 general primary election is scheduled for May 15, 2018. (Joint Stip. Facts at ¶ 130; *see* 25 P.S. § 2753(a).)

9. Under the current election schedule, the first day to circulate and file nomination petitions is February 13, 2018. (Joint Stip. Facts at ¶ 131; *see* 25 P.S. § 2868.)

10. Under the current election schedule, the last day to circulate and file nomination petitions is March 6, 2018. (Joint Stip. Facts at ¶ 132; *see* 25 P.S. § 2868.)

11. Under the current election schedule, the first day to circulate and file nomination papers is March 7, 2018. (Joint Stip. Facts at ¶ 133; *see* 25 P.S. § 2913(b).)

12. Under the current election schedule, the last day for candidates who filed nomination petitions to withdraw their candidacy is March 21, 2018. (Joint Stip. Facts at ¶ 134; 25 P.S. § 2874.)

13. Under the current election schedule, the County Boards of Elections must send remote military-overseas absentee ballots by March 26, 2018. (Joint Stip. Facts at ¶ 135; 25 Pa.C.S. § 3508(b)(1).)

14. Under the current election schedule, the County Boards of Elections must send all remaining military-overseas absentee ballots by March 30, 2018. (Joint Stip. Facts at ¶ 136; 52 U.S.C. § 20302(a)(8)(A); 25 Pa.C.S. § 3508(a)(1).)

15. Under the current election schedule, the last day for voters to register before the primary election is April 16, 2018. (Joint Stip. Facts at ¶ 137; 25 Pa.C.S. § 1326(b).)

16. Under the current election schedule, the last day to apply for a civilian absentee ballot is May 8, 2018. (Joint Stip. Facts at ¶ 138; 25 P.S. § 3146.2a(a).)

17. Under the current election schedule, the last day for County Boards of Elections to receive voted civilian absentee ballots is May 11, 2018. (Joint Stip. Facts at ¶ 139; 25 P.S. § 3146.6(a).)

18. Under the current election schedule, the first day for voters to register after the primary election is May 16, 2018. (Joint Stip. Facts at ¶ 140; *see* 25 Pa.C.S. § 1326(c)(2)(iii).)

19. Under the current election schedule, the last day for County Boards of Elections to receive voted military-overseas ballots for the primary election is May 22, 2018. (Joint Stip. Facts at ¶ 141; *see* 25 Pa.C.S. § 3511(a).)

20. Under the current election schedule, the last day to circulate and file nomination papers is August 1, 2018. (Joint Stip. Facts at ¶ 142; *see* Consent Decree, *Hall v. Davis*, No. 84-1057 (E.D. Pa. June 14, 1984).)

21. Under the current election schedule, the last day for minor political party and political body candidates who filed nomination papers to withdraw their candidacy is August 8, 2018. (Joint Stip. Facts at ¶ 143; *see* 25 P.S. § 2937.)

22. Under the current election schedule, the last day for candidates nominated by a political party to withdraw their candidacy is August 13, 2018. (Joint Stip. Facts at ¶ 144; *see* 25 P.S. § 2938.1.)

23. Under the current election schedule, the County Boards of Elections must send remote military-absentee ballots by August 28, 2018. (Joint Stip. Facts at ¶ 145; *see* 25 Pa.C.S. § 3508(b)(1).)

24. Under the current election schedule, the County Boards of Elections must send all remaining military-overseas absentee ballots by September 21, 2018. (Joint Stip. Facts at ¶ 146; *see* 52 U.S.C. § 20302(a)(8)(A); 25 Pa.C.S. § 3508(a)(1).)

25. Under the current election schedule, the last day for voters to register before the November election is October 9, 2018. (Joint Stip. Facts at ¶ 147; *see* 25 Pa.C.S. § 1326(b).)

26. Under the current election schedule, the last day for voters to apply for a civilian absentee ballot is October 30, 2018. (Joint Stip. Facts at ¶ 148; *see* 25 P.S. § 3146.2a(a).)

27. Under the current election schedule, the last day for County Boards of Elections to receive voted civilian absentee ballots is November 2, 2018. (Joint Stip. Facts at ¶ 149; *see* 25 P.S. § 3146.6(a).)

28. Under the current election schedule, Pennsylvania's 2018 general election is scheduled for November 6, 2018. (Joint Stip. Facts at ¶ 150; *see* Pa. Const. Art. VII, § 2; 25 P.S. § 2751.)

29. Under the current election schedule, the first day for voters to register after the General Election is November 7, 2018. (Joint Stip. Facts at ¶ 151; *see* 25 Pa. C.S. § 1326(c)(2)(iii).)

30. Under the current election schedule, the last day for County Boards of Elections to receive voted military-overseas ballots for the general election is November 13, 2018. (Joint Stip. Facts at ¶ 152; *see* 25 Pa.C.S. § 3511(a).)

31. All of the deadlines set forth in paragraphs 130-152 of the Joint Stipulation of Facts are required by federal or state law. (EBD Ex. 2 (Marks Aff.) at ¶ 10.)

C. Facts Regarding Alterations to the Current Election Schedule

32. In order to prepare for the first deadline on the current election calendar, which is February 13, 2018, it would be highly preferable to have all Congressional district boundaries finalized and in place by January 23, 2018, which would give the Department three weeks to prepare. (EBD Ex. 2 (Marks Aff.) at ¶¶ 11-12.)

33. However, should there be a Court order directing that a new plan be put in place, and that plan is not ready until after January 23, it may still be possible for the 2018 primary election to proceed as scheduled using the new plan. (EBD Ex. 2 (Marks Aff.) at ¶ 13.)

34. Through a combination of internal administrative adjustments and Court-ordered date changes, it would be possible to hold the primaries on the scheduled May 15 date even if a new plan is not put into place until on or before February 20, 2018. (EBD Ex. 2 (Marks Aff.) at ¶ 14.)

35. First, the current election schedule gives the counties ten weeks between the last date for circulating and filing nomination petitions (currently March 6) and the primary election date to prepare for the primary election. (EBD Ex. 2 (Marks Aff.) at ¶ 15.)

36. The counties could fully prepare for the primary election in six to eight weeks. (EBD Ex. 2 (Marks Aff.) at ¶ 16.)

37. Therefore, the close of the nomination petitions period could be moved back two weeks to March 20, without compromising the election process in any way. (EBD Ex. 2 (Marks Aff.) at ¶ 17.)

38. Second, if the Court were to order a time period for circulating and filing nomination petitions that lasted two weeks, instead of three, the nominations period could start on March 6. (EBD Ex. 2 (Marks Aff.) at ¶ 18.)

39. Although the Department would normally need three weeks of preparation time before the first date for filing and circulating nomination petitions, it would be possible for the Department to complete its preparations in

two weeks instead of three with the addition of staff and increased staff hours. (EBD Ex. 2 (Marks Aff.) at ¶¶ 19-20.)

40. Accordingly, if the first date for filing and circulating nomination petitions was moved to March 6, the Department would need to have a final plan in place by approximately February 20, 2018. (EBD Ex. 2 (Marks Aff.) at ¶ 21.)

41. Should there be a Court order directing that a new plan be put in place, and that plan is not ready until after February 20, 2018, it would also be possible, if the Court so ordered, to postpone the 2018 primary elections from May 15 to a date in the summer of 2018. (EBD Ex. 2 (Marks Aff.) at ¶ 22.)

42. There would be two options under this scenario: (1) the Court could postpone all of the primary elections currently scheduled for May 15; or (2) the Court could postpone the Congressional primary election alone. Either option would require a primary date no later than July 31, 2018. (EBD Ex. 2 (Marks Aff.) at ¶ 23.)

43. 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 2018. (EBD Ex. 2 (Marks Aff.) at ¶ 24.)

44. Postponement of the primary in any manner would not be preferable, because it would result in significant logistical challenges for County election administrators. If postponement takes place, for administrative and cost savings

reasons, the Department's preferred option would be postponement of the entire primary. (EBD Ex. 2 (Marks Aff.) at ¶ 25.)

45. Postponing the Congressional primary alone would require the administration of two separate primary elections (one for Congressional seats and one for other positions), which would result in an additional expenditure of a significant amount of public funds. (EBD Ex. 2 (Marks Aff.) at ¶ 26.)

46. The cost of holding a single primary in 2018 would be approximately \$20 million. If two primaries are held, each will cost approximately \$20 million. (EBD Ex. 2 (Marks Aff.) at ¶ 27.)

47. For each primary, Pennsylvania's 67 counties will be reimbursed a portion of the costs associated with mailing absentee ballots to certain military and overseas civilian voters and bedridden or hospitalized veterans. The other costs of the primary are paid by the counties. This is similar to the way that costs are allocated in special Congressional elections. (EBD Ex. 2 (Marks Aff.) at ¶ 28.)

III. Proposed Conclusions of Law

1. If the Pennsylvania Supreme Court finds that the 2011 Plan is unconstitutional, the Court has the authority to issue deadlines by which the General Assembly must enact a new congressional redistricting plan conforming to the criteria set forth by the Court, the Governor must sign that plan, and the

General Assembly must submit the new plan to the Court for review and approval. *See, e.g., Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 679 (M.D. Pa. 2002).

2. Respondents submit that it would be reasonable to allow the General Assembly and the Governor three weeks to accomplish these tasks. *See, e.g. Vieth v. Pennsylvania*, 241 F. Supp. 2d 478, 480 (M.D. Pa. 2003), *aff'd sub nom. Vieth v. Jubelirer*, 541 U.S. 267 (2004) (noting the General Assembly's successful enactment of a revised congressional districting plan within 10 days of the court's order to remedy the existing map).

3. In the course of enacting a new Plan, the General Assembly may also amend the Pennsylvania Election Code to make any necessary changes to the current election schedule, including those changes discussed in ¶¶ 35-43 above. *See* Pa. Const. art. II, § 1 and art. III.

4. In the alternative, the Court has the power to order changes to the current election schedule, without the General Assembly's involvement. *See, e.g., Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 761 (Pa. 2012); *In re 1991 Pennsylvania Legislative Reapportionment Comm'n*, 609 A.2d 132, 134 (Pa. 1992).

5. If the General Assembly fails to pass a plan that the Governor could sign and submit to the Court by the Court's deadline, or if the Court finds that the submitted plan is unconstitutional, the Court, upon consideration of evidence

submitted by the parties, should assume the responsibility for drafting a new plan. *See, e.g., League of Women Voters of Florida v. Detzner*, 179 So. 3d 258 (Fla. 2015).

6. At any point, the Court may appoint a special master to assist the Court by, *inter alia*, helping the Court evaluate any plan enacted by the General Assembly, proposing alternative plans, and otherwise providing recommendations and guidance. *See, e.g., In re 2012 Legislative Districting*, 80 A.3d 1073 (Md. 2013).

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Dated: December 18, 2017

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CERTIFICATE OF SERVICE

I, Michele D. Hangley, hereby certify that on this 18th day of December 2017, the foregoing Proposed Findings of Fact and Conclusions of Law of Respondents Wolf, Torres and Marks has been served upon counsel in the manner indicated below, which service satisfies the requirements of Pennsylvania Rule of Appellate Procedure 121:

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