

If the Court is inclined to reach the merits, the motion should be denied because it is based on the faulty premise that this litigation has just begun. In its recitation of the deferral standards under *Grove v. Emison*, 507 U.S. 25 (1993) and *Scott v. Germano*, 381 U.S. 407 (1965), the motion ignores the long history of this case and the remedial nature it has now reached, both of which make *Grove* deferral inappropriate.¹

In the early stages of this case, this Court properly delayed consideration of plaintiffs' challenge to Act 1 pending concurrent state court review. On February 15, 2002, the Pennsylvania Supreme Court issued a decision dismissing certain claims challenging the General Assembly's latest redistricting effort. *See Erfer v. Commonwealth*, 794 A.2d 325 (Pa. 2002) (opinion filed in support of earlier per curiam order).

Following the state court decision, litigation in this Court proceeded on an expedited basis. The case went to trial on March 11-12, 2002 and the Court issued its decision on April 8, 2002, declaring Act 1 unconstitutional. *Vieth v. Pennsylvania*, 195 F.Supp. 2d 672 (M.D. Pa. 2002). In its decision, the Court gave the Pennsylvania General Assembly three weeks to "prepare, enact, and submit for review and final approval by this Court, a congressional redistricting plan in

¹ Even if this litigation were in its nascent phase, recent case law casts doubt on the propriety of *Grove* deferral. In *Smith v. Clark*, 189 F.Supp.2d 548 (S.D. Miss. 2002), *probable jurisdiction noted sub nom. Branch v. Smith*, 122 S.Ct. 2355 (2002), a three-judge district court held unconstitutional a state court's congressional redistricting plan. The court distinguished and limited *Grove* in concluding that state courts lack the constitutional authority to engage in congressional redistricting. *See* 189 F. Supp. 2d at 554-558. The Supreme Court recently noted probable jurisdiction in the case and will hear oral argument on December 10, 2002.

conformity with [its] opinion.” *Id.* at 679. The Court retained jurisdiction over the redistricting process “pending issuance of a final order in this matter.” *Id.*

The Court has not yet issued that final order, as the parties continue to litigate whether Act 34, the remedial measure offered by defendants in response to the Court’s Order, complies with the Court’s earlier decision and the relevant constitutional requirements discussed in that decision. Indeed, the parties in this ongoing case have filed numerous briefs addressing those very issues,² and the Court is now poised to rule on the adequacy of Act 34 as a remedy.

Thus, this is not a situation, like that addressed in *Grove*, involving the early stages of concurrent federal and state court challenges to redistricting. Quite the contrary, this case is now in its final hour. Having originally deferred to the state court system, and having already ruled on the constitutionality of Pennsylvania’s 2000-round redistricting legislation, this Court is uniquely positioned to see this litigation to its imminent conclusion. The Court’s previous rulings – including numerous factual findings and legal conclusions that constitute the law of the case – govern the remedial phase of this litigation, over which the Court expressly has retained jurisdiction.

Deferral at this late stage – for which *amicus* provides no support³ – would waste judicial resources, deprive this Court of its proper role in redistricting

² The parties have filed at least eighteen briefs in this case addressing Act 34.

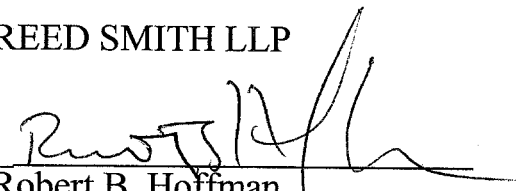
³ Notably, prior to the recent motion to stay, *amicus* Mellow filed two briefs in this Court addressing the constitutionality of Act 34 without ever suggesting the impropriety of continuing review in this Court. *See* Response by *Amicus* to Defs’ Status Reports, June 18, 2002, and Response by *Amicus* to Defs’ Second Status Reports, Sept. 9, 2002.

adjudication, and create the possibility of conflicting legal conclusions or factual findings. It makes no sense to read *Grove* as requiring a federal court to stop in its tracks in the midst of a post-trial remedy phase, just because a different party has filed a new in state court lawsuit challenging the remedy that is before the federal court. Accordingly, this Court should deny the motion to stay and proceed to oral argument and a ruling on the constitutionality of Act 34.

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Dated: October 17, 2002

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

RICHARD VIETH et al
Plaintiffs,

v.

**THE COMMONWEALTH OF
PENNSYLVANIA;, MARK S.
SCHWEIKER, et al**
Defendants

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No. 1: CV 01-2439
(Judge Nygaard, Judge Rambo,
and Judge Yohn)

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing document to be served by first class mail, postage prepaid October 17, 2002, as follows:

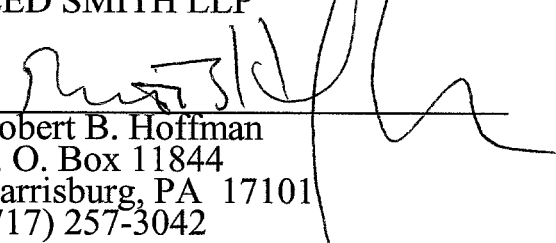
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