No. _____

In The
Supreme Court of the United States

LOUIS AGRE et al.,

Appellants,

v.

THOMAS W. WOLF, Governor of Pennsylvania, et al.,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Pennsylvania

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Do the Elections Clause and the Privileges or Immunities Clause permit a state legislature to interpose itself between the people and their national government by means of a partisan gerrymander?

2. Did the Pennsylvania General Assembly act outside its authority under the Elections Clause, and did it violate the Privileges or Immunities Clause, when it adopted a map that was drawn by Republican caucus staff with no input from Democrats, using detailed precinct election data to redraw Congressional boundaries with the purpose of electing as many members of one political party as possible?

3. Did the 2011 Plan adopted by the Pennsylvania General Assembly have a significant and durable effect in favor of one preferred political party in the United States Congressional elections held in 2012, 2014, and 2016?

4. As more appropriate and judicially manageable relief, should federal courts avoid the drawing or direct review of new Congressional maps and instead require state legislatures to develop neutral and even-handed processes for creating such maps, with safeguards against abuse of the states' limited authority under the Elections Clause?

5. Does this case present a live controversy despite the action to date of the Pennsylvania Supreme Court, where plaintiffs seek additional relief not provided by that Court and where the rulings of that Court are still being challenged in this Court and in federal district court?

PARTIES TO THE PROCEEDINGS

The following were the parties to the proceedings below.

Plaintiffs:

Louis Agre, William Ewing, Floyd Montgomery, Joy Montgomery, Rayman Solomon, John Gallagher, Ani Diakatos, Joseph Zebrowitz, Shawndra Holmberg, Cindy Harmon, Heather Turnage, Leigh Ann Congdon, Reagan Hauer, Jason Magidson, Joe Landis, James Davis, Ed Gragert, Ginny Mazzei, Dana Kellerman, Brian Burychka, Marina Kats, Douglas Graham, Jean Shenk, Kristin Polston, Tara Stephenson, and Barbara Shah.

Defendants:

Thomas W. Wolf, Governor of Pennsylvania; Jonathan Marks, Commissioner of the Bureau of Elections; Robert Torres, Secretary of State of Pennsylvania; Joseph B. Scarnati, III, President Pro Tempore of the Pennsylvania Senate; and Michael C. Turzai, Speaker of the Pennsylvania House of Representatives; in their official capacities.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

OPINIONS BELOW

Plaintiffs appeal from the order of the three-judge panel of the United States District Court for the Eastern District of Pennsylvania, entered January 10, 2018. That order is not included in any known reporter but is reprinted in the appendix at App. 336-37. The district court issued three separate opinions in conjunction with the order, with no judge joining another's opinion; Chief Judge Smith (App. 1-89) and Judge Shwartz (App. 90-128) ruled for dismissal, and Judge Baylson (App. 129-335) would have ruled for plaintiffs. The three opinions are not yet reported but are available at 2018 U.S. Dist. LEXIS 4316.

JURISDICTION

Plaintiffs filed their notice of appeal on January 18, 2018. App. 346-47. This Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Elections Clause and Privileges or Immunities Clause of the United States Constitution; and 28 U.S.C. § 2284. The text of those provisions is reprinted at App. 348-49.

STATEMENT OF THE CASE

I. Introduction

This case presents the first legal challenge in this Court to a partisan gerrymander as a violation of the Elections Clause, U.S. Const. art. I, § 4 *and* the Privileges or Immunities Clause, U.S. Const. amend. XIV, § 1.

Recently, this Court stated that the Elections Clause "was . . . intended to act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate." *Arizona State Legislature v. Arizona Indep. Redistricting Comm.*, 135 S.Ct. 2652, 2672 (2015). The enforcement of the Election Clause sought by plaintiffs is crucial to the design of the Constitution. As Justice Kennedy wrote when concurring in *U.S. Term Limits Inc. v. Thornton*, 514 U.S. 779, 842 (1995): "The federal character of congressional elections follows from the political reality that our National Government is republican in form and that national citizenship has privileges and immunities protected from state abridgment by the force of the Constitution itself."

For three reasons, this Court should set down this appeal for briefing and oral argument on an expedited basis, and consolidate it with any briefing schedule that may be set in *Rucho v. Common Cause*, No. 17-A-745 (docketed Jan. 12, 2018).

First, in view of a contrary three-judge court decision holding that the partisan gerrymander in North

Carolina violates the Elections Clause, this Court should resolve a conflict among the lower courts. *See Common Cause v. Rucho*, 2018 U.S. Dist. LEXIS 5191 *232-48 (M.D.N.C. Jan. 9, 2018) (striking down partisan gerrymander as violation of the Elections Clause). It is hard to exaggerate the importance of this issue. As Justice Kennedy stated in his concurring opinion in *Cook v. Gralike*, 531 U.S. 510, 527 (2010) (internal citation and some punctuation omitted):

> A State is not permitted to interpose itself between the people and their National Government. . . . [T]he Elections Clause is a grant of authority to issue procedural regulations, and not a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates. . . . [This] dispositive principle . . . is fundamental to the Constitution.

Second, this Court should address the right to relief under the Privileges or Immunities Clause. No other pending gerrymandering case addresses this, the strongest legal basis for challenging a partisan gerrymander of federal elections.

Third, this case seeks to provide a new and judicially manageable form of judicial relief when a constitutional violation has been established – namely, to require a neutral and fair redistricting process, to be developed by State defendants, with safeguards against partisan abuse. Rather than seek for the court to redraw the map, plaintiffs seek to establish a fair process that if followed will not require the court to determine where the new boundaries should go. Plaintiffs

assert that any State gerrymander of a Federal election exceeds the State's limited grant of authority under the Elections Clause. The appropriate relief – when a constitutional violation is established – is a set of safeguards to ensure that the State defendants in the immediate case, and in the new redistricting to come in 2020, complies with the Election Clause.

For this last reason in particular this case raises an important question that cries for resolution – namely, what is the most appropriate, judicially manageable way to redress a partisan gerrymandering violation of the Elections and Privileges or Immunities Clauses? As set out above, on February 19, 2018, the Supreme Court of Pennsylvania issued an order that set out new Congressional districts. *League of Women Voters*, 2018 Pa. LEXIS 927. But the *process* for drawing a new map is still "broken." Plaintiffs welcome the decision of the Pennsylvania Supreme Court and seek no relief to interfere with what that Court is doing. However, plaintiffs seek and are entitled for full redress of their constitutional rights. *See Monroe v. Pape*, 365 U.S. 167, 183 (1961) ("It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy. . . .").

Plaintiffs, a bipartisan group of voters, seek not a particular map but a neutral process that will provide prospective relief and avoid the need for courts themselves to engage in map drawing. Even should the state courts provide some relief respecting the 2018 election, defendants would remain free to engage in partisan

gerrymanders in the 2020 elections and beyond. Full relief for plaintiffs in this case – and the most appropriate judicial relief in general – is a fair and neutral *process* for political actors to create Congressional maps, rather than continual judicial re-drafting of new maps. Plaintiffs thus seek an order not for a particular map but for a process that protects against repetition of the legal injury they have suffered in this case. This Court's endorsement of such relief in this continuing (and otherwise likely to be repeated) controversy would be an important and highly desirable exercise of this Court's supervisory authority respecting the relief to be afforded in partisan gerrymandering cases by the lower courts.

Therefore, this Court should note probable jurisdiction and reverse the order of the district court.

II. Proceedings Below

On October 2, 2017, Louis Agre and four other Pennsylvania citizens filed a complaint under 28 U.S.C. § 1331 and 42 U.S.C. § 1983 alleging that the Congressional map adopted by the Pennsylvania General Assembly in 2011 (the 2011 Plan) was a deliberate partisan gerrymander. Plaintiffs alleged that while the statewide popular votes cast for Congress were close to evenly divided between Democrats and Republicans, the 2011 Plan – *intentionally seeking to determine electoral outcomes* – had the lasting and durable effect of creating 13 Republican seats and 5 Democratic seats in election after election: in 2012, in 2014, and 2016.

Plaintiffs alleged that in drawing a map that ignored neutral criteria to elect as many Republicans as possible, the state legislature had acted beyond its authority under the Elections Clause, U.S. Const. art. I, § 4. In doing so, the 2011 Plan had deprived plaintiffs of their rights as federal citizens under the Privileges or Immunities Clause to choose their representatives without interposition by the State in that choice or to guide or control it.

At a status hearing scheduled on October 10, 2017, a week after the filing of the complaint, the district court granted the request for a three-judge court under 28 U.S.C. § 2284. The court tentatively set the case for trial on December 4, 2017, and ordered expedited discovery, including expert discovery. As stated from the bench, the court set this schedule to ensure a final decision of the three-judge court in time to comply with the calendar of election-related events which was to begin under state law in February, 2018.

On October 25, 2017, the district court granted the motion to intervene of the legislative defendants Scarnati and Turzai but denied their motion to stay the case based on the pendency of *Gill v. Whitford* before this Court, No. 16-1161 (argued Oct. 3, 2017). On November 7, 2017, the district court – now a three-judge court – denied in part the legislative defendants' motion to dismiss under Rule 12(b)(6). App. 344-45. The district court let stand plaintiffs' claim under the Elections Clause and Privileges or Immunities Clause, but granted the motion with respect to the Equal Protection and First Amendment claims. The district court

dismissed the Equal Protection claim as barred by *Vieth v. Jubelirer*, 541 U.S. 267 (2004). As to the First Amendment claim, the district court also gave leave to amend the claim to explain the relation between the First Amendment and the Elections Clause. Plaintiffs did re-plead, but on November 30, 2017 the district court dismissed this claim as well. App. 338-42.

The legislative defendants also moved to challenge the standing of five plaintiffs to challenge the 2011 Plan on a statewide basis. While plaintiffs argued for standing, they also asked for leave if necessary to add plaintiffs from all eighteen Congressional districts. Without deciding the standing issue, the district court granted leave to amend. On November 30, 2017 the plaintiffs filed an amended complaint with twenty-six plaintiffs, including voters from every single Congressional district.

The trial opened on December 4, 2017.[1] The plaintiffs' evidence showed that in 2011, Pennsylvania's Republican legislative majority drew district boundaries in secret with the intent to elect as many Republicans as possible, using – as the legislative staff acknowledged – detailed voter election data. The result was that the 2011 Plan had bizarre, sometimes surreal boundaries that defy explanation by traditional neutral map-drawing criteria. It was undisputed that the 2011 Plan had the effect of ensuring that 51 to 65

[1] Before trial, the defendants had also filed an Emergency Petition for Writ of Mandamus with this Court, seeking to prevent the trial from going forward. This Court denied the petition. *In re Turzai*, 138 S. Ct. 670 (2018).

percent of the voters would be Republican in districts held by Republican members of Congress. The plaintiffs showed that this map allowed the politicians to choose their voters, rather than the other way around. The legislature thus interposed itself between the people and their national government.

The plaintiffs' evidence consisted of the testimony of two expert witnesses, Daniel McGlone and Anne Hanna, as well as the live and deposition testimony of all the plaintiffs. Plaintiffs also introduced the deposition testimony of Erik Arneson and William Schaller, who worked respectively for the State Senate Republican Caucus and the State House Republican Caucus. Both testified that they had used detailed voter election data to draw the maps for the 2011 Plan, which were submitted in secret for consideration by the Republican leadership in the General Assembly and incumbent Republican members of Congress. Mr. Schaller testified that the wishes of these so-called "stakeholders" were the primary or most important factor in fixing the new boundaries in the 2011 Plan.

For relief, the plaintiffs sought to enjoin the defendants, Governor Thomas Wolf, the Secretary of State Robert Torres, and the Commissioner of the Bureau of Elections Jonathan Marks (the "executive defendants"), from using the map to conduct the elections for Congress in 2018. Plaintiffs further sought an order from the court not to draw a new map but to enjoin the defendants from implementing a map unless it resulted from a neutral process to create such a map –

with safeguards against partisan manipulation – to be approved as the final relief from the court.

The trial closed on December 8, 2017, and the parties submitted post-trial memoranda.

On January 10, 2018, the district court dismissed the action in a 2-to-1 split decision. App. 336-37. No judge joined another judge's opinion.

Chief Judge Smith (opinion at App. 1-89) found that any claim under the Elections Clause, including the case at hand, presented a non-justiciable political question. App. 5. And so he made no findings of fact, instead ruling the case should be dismissed as a matter of law. App. 7-8.

Judge Shwartz (opinion at App. 90-128) agreed with plaintiffs that claims under the Elections Clause are justiciable and that the right to vote in federal elections is protected by the Privileges or Immunities Clause. App. 106-108 n.22, 121 n.27. But she found that the plaintiff from the Fourth Congressional district (though not others) lacked standing, and so a statewide challenge could not proceed. App. 115-18. Judge Shwartz also found that plaintiffs had not presented a manageable standard for determining a violation of the Elections Clause – and in particular appeared to be seeking proportional representation which the Constitution did not require. App. 121. At the same time Judge Shwartz disagreed with plaintiffs' statement that all partisan gerrymandering was illegal under the Elections Clause. *E.g.*, App. 127 n.31.

Judge Schwarz made only one explicit finding of fact.[2] She did not indicate any view as to whether plaintiffs had shown or failed to show that the General Assembly had acted with partisan intent, or that such intent was a substantial or even predominant motivating factor in drawing the maps for the 2011 Plan.

Judge Baylson dissented (opinion at App. 129-335). He would have found the Privileges or Immunities Clause applicable and ruled the 2011 Plan violated the Elections Clause. App. 297 n.20, 307. Judge Baylson alone made extensive findings of fact. App. 189-93. Without requiring proof of subjective partisan intent, Judge Baylson found that plaintiffs had established by clear and convincing evidence that the General Assembly had gerrymandered five Congressional districts: the Sixth, Seventh, Tenth, Eleventh and Fifteenth Districts. App. 306-31. He found that the shapes of those districts were so irregular as to be indefensible under normal redistricting criteria and that defendants had made little attempt to explain or justify them. *Id*. Furthermore, Judge Baylson found that such extreme departures from neutral criteria had the effect of alienating voters and discouraging them from political activity. App. 333.

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[2] She relied on fact-finding in her conclusion that one of the plaintiffs lacked standing. App. 92 n.4. Judge Shwartz did however summarize the evidence presented at trial in some detail. App. 92-101. She refrained from commenting on credibility except to question how forthcoming Mr. Arneson and Mr. Schaller were in their testimony. App. 93 n.7.

On January 18, 2018 and pursuant to 28 U.S.C. § 2284, plaintiffs filed their notice of appeal to this Court.

III. Simultaneous State Court Proceedings

Meanwhile, on January 22, 2018, the Supreme Court of Pennsylvania issued an order and decision in *League of Women Voters of Pa. v. Commonwealth of Pennsylvania*, No. 159 MM 2017, 2018 Pa. LEXIS 438. On February 7, majority and dissenting opinions followed. 2018 Pa. LEXIS 771. The per curiam order of January 22 ruled that the same 2011 Plan "plainly and palpably violates the Constitution of the Commonwealth of Pennsylvania and on that sole basis we strike it as unconstitutional." The Court's order barred the use of the 2011 Plan in the upcoming elections and allowed the Pennsylvania General Assembly to submit a new plan for consideration by the Governor on or before February 9, 2018 and then to that Court on or before February 15, 2018. *Id.* at *1-*3. Soon after, defendants in the Pennsylvania action made emergency applications for a stay to this Court. *See* Emergency Application for Stay, *Turzai v. League of Women Voters*, No. 17-A-795 (Jan. 25, 2018) and Emergency Application for Stay, *McCann v. League of Women Voters*, No. 17-A-802 (Jan. 29, 2018). This Court denied those applications on February 5, 2018.

The Pennsylvania General Assembly and Governor failed to submit a new map by the Pennsylvania Supreme Court's deadline, and so the Court issued its

own redistricting plan in an opinion by Justice Todd. *League of Women Voters*, 2018 Pa. LEXIS 927 (Feb. 19, 2018). The defendants in the Pennsylvania action again appealed to this Court for an emergency stay on February 27, 2018. *Turzai v. League of Women Voters of Pa.*, No. 17-A-909 (briefing completed March 6, 2018).

Meanwhile, another group of Pennsylvania legislators filed suit in the Middle District of Pennsylvania to enjoin the Pennsylvania Supreme Court's orders. *See Corman v. Torres*, No. 1:18-CV-004433 (complaint filed Feb. 22, 2018; argued March 12, 2018).

REASONS FOR NOTING PROBABLE JURISDICTION

I. Plaintiffs have set forth and met the proper elements for a claim that the state acted beyond its authority under the Elections Clause and abridged plaintiffs' rights as federal citizens under the Privileges or Immunities Clause.

As plaintiffs argued below, a violation of the Elections Clause should be found in the context of partisan gerrymandering where three elements are proven: partisan intent to dictate electoral outcomes or favor or disfavor a class of candidates; a significant effect on those outcomes; and abridgment of the rights of plaintiffs under the Privileges or Immunities Clause as federal citizens to choose their representatives without state interference (i.e., injury to voters). Plaintiffs

demonstrated that they met those three elements, as follows.

A. Intent. First, plaintiffs showed that the state legislature acted with partisan intent – and that such intent was a substantial motivating factor in creating new and bizarre boundaries that ignored traditional redistricting criteria. By partisan intent, plaintiffs mean a specific unlawful intent "to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints," as deemed by this Court to be beyond state authority under the Elections Clause. *Thornton*, 514 U.S. at 833-34. *See also Arizona Indep. Redistricting Comm.*, 135 S. Ct. at 2672 (recounting how James Madison promoted Elections Clause as counter to South Carolina's "malapportioned" legislature, which favored coastal plantation-owning class). While Judge Baylson does not regard proof of partisan intent as a necessary element of a claim under the Elections Clause, he did find by clear and convincing evidence that the state legislature engaged in an unlawful partisan gerrymander. App. 299, 306. Plaintiffs are in full agreement with the analysis in Judge Baylson's opinion of the bizarre boundary changes in the 2011 Plan compared to the prior 2001 Plan and of the departure from usual lawmaking procedures to put the 2011 Plan in place. No judge denied that the General Assembly acted with substantial partisan intent to create boundaries that could not be justified exclusively by traditional neutral criteria. (Indeed, none of the defendants, their counsel, or their witnesses attempted to justify them, except

for a cursory reference by counsel to "incumbent protection.")

As plaintiffs showed at trial, the first and most important evidence of partisan intent – or an unlawful gerrymander – is the 2011 Plan map itself: meandering lines, squiggles, necks, tentacles, and weird shapes. The districts – just to the eye – are not compact, and some, like the five identified by Judge Baylson, are surreal. App. 308-27. They are not compact and they do not follow county and township and other boundaries, especially compared to maps introduced at trial for the period from 1943 through 1991.

As set out in Judge Baylson's findings of fact, plaintiffs' expert Daniel McGlone used Geographic Information Systems (GIS) technology to show visually for the district court how the boundary changes in the 2011 Plan created the maximum possible number of Republican-leaning districts, and a small number of overwhelmingly Democratic districts. App. 167-72. It is true as Judge Baylson found that five of the Congressional district boundaries are especially egregious. But McGlone went through virtually every district to show that the change in the shape of the districts comes from adherence to a formula. That formula is as follows: create the maximum number of Republican leaning districts where the Republicans have typically 51 to 60 percent of the vote share and pump up five Democratic districts into "super-majority" districts. App. 168-69. The result is striking: while prior to the 2011 Plan, ten of the (then) nineteen districts were Democratic leaning, the number in the 2011 Plan dropped to

six out of eighteen (Pennsylvania had lost a district) – and that the sixth, because of demographic trends, was on the verge of being a Republican leaning district. App. 172. As Judge Baylson found, it is partisan intent, and not traditional redistricting criteria, that provides the explanatory key to the bizarre shapes seen in the 2011 Plan's map.[3] *See, e.g.*, App. 164 (recounting plaintiff expert Anne Hanna's testimony), 327 (analyzing Seventh Congressional District).

But more fundamentally, in this case the legislative defendants' staff admitted partisan intent. These admissions come from the men who literally drew the maps.

Mr. Arneson and Mr. Schaller worked not for legislative committees but the State Senate and House Republican caucuses respectively. App. 172, 175. Those party caucuses in secret – and *not* the official legislative committees which had nominal jurisdiction – controlled the process. App. 173-74. Closeted in redistricting rooms, closed off to the public and to the Democratic legislators, App. 152-56, both men admitted using a trove of detailed partisan voter data from numerous past elections to develop possible maps. App. 173-76. They submitted these maps not just to Republican state legislative leaders but directly to Republican members of Congress, after having learned of their

[3] Plaintiffs emphasize the bizarre shapes in the 2011 Plan, but of course agree that a change in one boundary ripples through to all the others, and even to change *one* district in any significant way – much less five – requires changing all of them.

preferences for particular areas and towns. App. 93 (opinion of Shwartz, J.).

Mr. Schaller, who worked with the House Republican Caucus, was clear that any neutral criteria – of any kind – were subordinated to the purely partisan goals of those whom he calls "the stakeholders," including the Republican members of Congress. His testimony is candid as to the primary motive:

> Q. Is it fair for me to say that the information you got about the discussions among the Republican stakeholders in [the] legislative process was probably the most important factor that you used in drawing the map?
>
> A. *Yes, I would say so.*

App. 174 (emphasis supplied). Here was a direct admission from the chief mapmaker that satisfying the Republican legislators including members of Congress was the "most important" factor in drawing the map.

In finding an unlawful gerrymander, Judge Baylson also relied on the extreme departure in this case from the normal legislative process. App. 329-31. As noted above, the caucuses acted in secret – not the legislative committees with the official jurisdiction, like the Senate State Government Committee. One witness, Senator Dinniman, a Democratic member of the Committee, said he saw no substantive map of any kind until a shell bill was amended on December 14, 2011 – and then at last an actual map was presented and adopted *the very same day.* App. 153-55. As Judge Baylson found, this extraordinary and unexplained

departure from normal legislative procedure is in itself evidence of an unlawful gerrymander.

B. Effect. Second, though no judge below required such evidence, plaintiffs showed that the map had a significant and indeed durable effect on the state's overall House of Representatives delegation. Plaintiffs start here with a self-evident effect: creating more Republican-leaning districts has made them safer for Republicans. The number of Republican-leaning districts increased. The number of Democratic-leaning districts dropped from ten to six – and soon to five. There is yet another measure of effect – a comparison with elections under the prior plan. As this Court is aware, Pennsylvania has a history of litigation over gerrymandering. The prior Congressional map – adopted in 2003 – was challenged as an unlawful gerrymander in *Vieth*, and indeed, most Justices agreed that it was a gerrymander. Yet even under *that* map, the Congressional elections were still competitive. The Republicans had the majority of seats in the 2004 elections, then the Democrats took the majority in the 2006 and 2008 elections, and then the Republicans took it back again in the 2010 elections. *See* United States House of Representatives, *Election Statistics, 1920 to Present*, http://history.house.gov/Institution/Election-Statistics/Election-Statistics. But under the 2011 Plan, there has been no change in outcome in the 2012, 2014, and 2016 elections. In the first such election, in 2012, the Democrats had a majority of statewide votes cast for Congress: it was a Democratic "wave" year. Yet the Democrats actually lost two seats

– the defendants had predetermined the electoral outcome by adopting the 2011 Plan. Pennsylvania remains a closely divided, even politically volatile state, with frequent party turnover in statewide races. But in Congress, no matter what the political climate, there has been the same outcome in 2012, 2014, and 2016: 13 to 5, 13 to 5, and 13 to 5. *Id.*; App. 98 (opinion of Shwartz, J.).

The reply of defendants is that this all just reflects geography – that Republican voters are more spread out, and Democrats are more concentrated in Philadelphia and Pittsburgh. *See* App. 188-89. But that was true under the 2003 plan as well, when there was frequent turnover of seats. Whether there is a natural effect from where people choose to live, the 2011 Plan flouts redistricting criteria to increase that effect. Indeed, for defendants to say that geography matters – to say that what matters is the way Republican and Democratic voters are distributed – is to say that the gerrymander scheme in this case also mattered. People may choose where to live, but it is the legislature that puts them into districts.

C. Voter injury. Plaintiffs strongly agree with Judge Baylson that a determination of a gerrymander should take the *voter's* point of view. He, like the other judges, reviewed the testimony of the twenty-six plaintiffs in this case. As he recounted, from the voter's point of view, the spectacle of this map – a form of district manipulation that is obvious to the eye – has a demoralizing effect on citizens. *See* App. 291, 323-27, 333-34. The bizarre shapes show voters that the General

Assembly has made its own judgment as to who should win. *It is evidence that the voters are not in control*. In addition, as plaintiffs themselves testified, these bizarre shapes also caused real injury as they hampered the ability of individual voters to have their voices heard by their Congressional representatives. *See* App. 98-101 (opinion of Shwartz, J., summarizing plaintiff voters' testimony), 136-52 (dissenting opinion of Baylson, J., doing the same).

Throughout this case, the defendants harped on the fact that many (though not all) of the plaintiffs are Democrats, and that in at least five districts, the plaintiffs have members of Congress who are Democrats. Defendants purported to be puzzled because in the case of the super-majority districts the state legislators gave them the "Democrats they wanted." What the defendants fail to grasp is that, under the Privileges or Immunities Clause, plaintiff *citizens – not defendant state legislators* – are entitled to make those decisions for themselves. In this case, that decision-making right of federal citizenship has been taken from them. As Justice Kennedy stated in his concurring opinion in *Cook*, "A State is not permitted to interpose itself between the people and their National Government. . . . [T]he Elections Clause is a grant of authority to issue procedural regulations, and not a source of power to dictate electoral outcomes." 531 U.S. at 527 (citation omitted).

For the reasons set out above, at trial the plaintiffs made out a successful claim of partisan gerrymandering

under the Elections Clause and Privileges or Immunities Clause.

II. Plaintiffs presented a judicially manageable standard.

In the case of a federal election, the Elections Clause places a more specific limit on state authority than other legal bases for the challenge of gerrymanders. The standards under the Elections Clause cannot be clearer. Either the boundaries of the 2011 Plan are "procedural regulations" *only* – or they are not. Either the state is making a deliberate attempt to affect the outcome of the elections – or it is not. For that reason, the term-limit laws in *Thornton* and *Cook* were struck down without any showing of partisan intent. And so, as in *Thornton* and *Cook*, the plaintiffs in this case introduced evidence simply showing that the legislative defendants were trying to affect the outcome of the elections by the changes made in the 2011 Plan.

But ordered by the district court to present a more specific standard, plaintiffs also showed (under the first part of the three-element standard set out above) that partisan intent was a substantial – and indeed the predominant – motivating factor in the map-drawing process, a familiar standard from racial gerrymandering cases. *See Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017) (in racial gerrymandering challenges, "plaintiff must first prove that 'race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular

district.' ") (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). Indeed plaintiffs presented evidence that partisan intent was the *decisive* factor in why the State defendants chose a map that disregarded or even flouted neutral criteria, choosing to spread out Republican voters and pack Democrats into super-majority districts. Partisan intent was *the* reason that the 2011 Plan's map looked the way it did, and defendants did not even try to justify it by non-political or neutral criteria, or by use of an even-handed process. Mr. Schaller, as noted above, agreed that the wishes of partisan "stakeholders" were the "most important" factor in drawing the map.

In the opinions below, Judges Shwartz and Baylson took issue with plaintiffs' standard, but for quite different reasons.[4]

Judge Baylson said that plaintiffs need not establish partisan intent but only what he called a "lesser included offense" of partisan intent: the failure to use neutral criteria and to develop a map through the normal and customary lawmaking process. App. 293-94. In effect, it is a standard that emphasizes the open and public scandal of a map that disregards neutral criteria. The focus of the standard proposed by Judge Baylson is entirely on traditional neutral principles – which include compactness, historic continuity, respect for political boundaries, and some limited degree of

[4] Chief Judge Smith for his part argued that plaintiffs' proposed standard was too different from those previously endorsed by members of this Court. App. 74-78.

incumbent protection. In plaintiffs' view, the approach taken by Judge Baylson would amount to a de facto finding of intent,[5] especially when irregularity of shape is combined with his second objective factor, namely the departure of the General Assembly from the normal or usual legislative process to put in place such an irregular map. But it is also significant that the defendants were using voter election data to increase systematically the number of Republican leaning districts. At any rate plaintiffs clearly met the "lesser" standard of Judge Baylson for a claim under the Elections Clause, as Judge Baylson would have held. App. 306.

Judge Shwartz also disagreed with the standard proposed by plaintiffs. She objected to a remark made by plaintiffs in briefing and in open court that the Elections Clause would prohibit any partisan intent – that is, there is no safe harbor for *some* partisan intent. *See* App. 120-21. But this is the necessary teaching of *Thornton* and *Cook*, which state that the Elections Clause is a source of only procedural regulations. "Some" partisan intent does not a "procedural" regulation make – and it can never be within the authority of the states under the Elections Clause to issue regulations with partisan intent such that they predetermine the outcomes of federal elections. The Elections Clause grants no authority for a state legislature to act with "some" partisan intent because it grants no authority

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[5] And indeed in this case Judge Baylson did make an explicit finding that plaintiffs proved partisan intent. App. 194.

for states to engage in "some" gerrymandering of *federal* elections.

At the same time, however, plaintiffs have also have made it clear that under their proposed standard, a prevailing party would have to show that partisan intent was a motivating factor in drawing up the map. And that is for an obvious reason – it is improbable that a court could find a map to be unlawfully gerrymandered unless partisan intent was a motivating factor in the actual drawing of the map. Furthermore, while the difference between "motivating" factor and "predominant" factor may be significant in a case of discrimination against a specific group, it is unclear that it has the same significance when a state is demonstrably going beyond its authority under the Elections Clause to issue neutral or procedural rules. This is not a case about the degree of animus against the Democrats, but one that shows a state legislature interposing itself between the citizens and the National Legislature and trying to influence, if not determine, their choice.

In addition, Judge Shwartz thought that plaintiffs' standard for enforcement was just not manageable; plaintiffs disagree. On that score, while plaintiffs believe their three-element standard is both clear and manageable, it may also be helpful to place the current case in the context of *Thornton* and *Cook*. *Thornton* used the Elections Clause as an independent basis, along with the Qualifications Clause, to strike down an Arkansas law that provided for strict term limits on members of Congress elected from that state. *Cook*

struck down a much less egregious version of a term limit law: namely, a Missouri law that had printed material on ballots as to whether candidates for Congress would carry out the directive of the Missouri legislature to support a national term limit law. The present case falls squarely between *Thornton* and *Cook*. *Thornton* was a near dictate of an election result, i.e., the removal of incumbents after a specific period; by comparison, *Cook* was just a nudge, a reminder to voters as to who was on the side of the Missouri legislature. If *Thornton* was a near decree, and if *Cook* was a kind of "nudge," then a partisan gerrymander as in this case is a kind of "hard shove"[6] by the state legislature to get the election outcomes it wanted: not quite the near dictate of *Thornton* but much more egregious than the "nudge" in *Cook*. Putting it colloquially, any gerrymander that amounts to a "shove" – when the state is not issuing neutral or procedural regulations but is trying to determine, if not dictate, how voters in the state will be represented in Congress – is unlawful. Far from presenting unworkable standards, partisan gerrymandering falls squarely within the range of state actions this Court has already found unlawful under the Elections Clause.[7]

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[6] The terminology of "nudges" and "hard shoves" to describe different ways that policymakers attempt to influence the behavior of voters (in the much different context of jury voting) was first used by Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. Chi. L. Rev. 607 (2000).

[7] Significantly, not even in *Vieth* or *Bandemer* did any Justice ever doubt that the state map manipulated the boundaries to favor a political party. While there is disagreement in partisan

III. Controversies arising under the Elections Clause are justiciable, and violations of the Elections Clause can be challenged under the Privileges or Immunities Clause of the Fourteenth Amendment.

Ever since *The Slaughter House Cases*, 83 U.S. 36 (1873), this Court has held that the Privileges or Immunities Clause protects certain rights of federal citizenship arising from the structure of the Constitution. These include "the right to vote for National officers." *Twining v. New Jersey*, 211 U.S. 78, 97 (1908) (citing *Ex parte Yarborough*, 110 U.S. 651, 663-64 (1884)). The Privileges or Immunities Clause protects such rights "which owe their existence to the Federal Government, its National character, its Constitution or its laws." *Slaughter House Cases*, 83 U.S. at 79. As stated by Justice Kennedy in his concurrence in *Cook*, "A State is not permitted to interpose itself between the people and the National Government. . . . [This] dispositive principle . . . is fundamental to the Constitution." 531 U.S. at 527-28.

This dispositive principle is what plaintiffs seek to enforce here under the Privileges or Immunities Clause. It is a compelling reason for this Court to take

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gerrymandering cases as to the degree to which plaintiff voters need to show unfair discrimination, there has rarely if ever been disagreement as to whether a particular map *was in fact a gerrymander*, an attempt to influence the outcome and hence an act that would be outside the authority of the state under the Elections Clause. With respect to the actual existence of a gerrymander, the Court has never found it difficult to "know it when it sees it."

up this case for briefing and oral argument. By seeking to promote the election of Republicans over Democrats, the state legislature abridged the privileges and immunities of plaintiffs' federal citizenship – specifically their right to vote for representatives in Congress without the state's encroachment. Concurring in *Thornton*, Justice Kennedy wrote:

> The federal character of congressional elections flows from the political reality that our National Government is republican in form and that national citizenship has privileges and immunities protected from state abridgment by the force of the Constitution itself. . . .
>
> [T]hat federal rights flow to the people of the United States by virtue of national citizenship is beyond dispute. . . .
>
> Quite apart from any First Amendment concerns neither the law nor federal theory allows a State to burden the exercise of federal rights in this manner. Indeed, as one of the "rights of the citizens of this great country, protected by implied guarantees of its constitution," the Court [in *The Slaughter House Cases*] identified the right "to come to the seat of government . . . to share its offices, to engage in administering its functions."

514 U.S. at 842-44 (internal citations and some punctuation omitted). Of course the First Amendment may be implicated in partisan gerrymandering as well, but the Elections Clause, enforceable under the Privileges

or Immunities Clause, provides a clearer limit on state authority.

In his opinion below, Chief Judge Smith argued that any claim under the Elections Clause – *any* claim – involved a political question and was not judicially enforceable. Under his reasoning, *Thornton* and *Cook* are wrong as well. But this Court has long been deciding cases involving the allocation of power between the state and federal government. *E.g.*, *McCulloch v. Bank of Maryland*, 17 U.S. 316 (1819) (barring state taxation of a federal bank). Such line drawing is a necessary judicial function in our system of dual sovereignty. *See Thornton*, 514 U.S. at 546. Furthermore, in recent cases, this Court has only narrowly applied the political question doctrine. Here in particular the Court as in *Thornton* and *Cook* is applying constitutional *text* – indeed, text that was meant to apply to gerrymandering. In *Arizona Indep. Redistricting Comm.*, quoted in part above, the Court made that clear. The Court's full statement is as follows:

> The [Elections] Clause was also intended to act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate. As Madison urged, without the Elections Clause, whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations *as to favor the candidates they wished to succeed*. . . . The problem Madison identified has hardly lessened over time. Conflict of interest is inherent

> when legislators draw district lines that they ultimately have to run in.

135 S. Ct. at 2672 (emphasis supplied) (internal citations and some punctuation omitted). Entrenchment is the evil that Madison and others sought to address. Since the Elections Clause prohibits a state legislature from dislodging incumbents, as found by this Court in *Thornton* and *Cook*, it should apply even more strongly to any partisan intent to entrench them in the first place.

Nor does judicial enforcement of the Elections Clause show any disrespect or interfere with a coordinate branch of government. It is true that under the Elections Clause, Congress has the authority to override any state law affecting a federal election. However, this so-called "Congressional override" in the Elections Clause does not commit its enforcement exclusively to Congress. *See* App. 106-108 n.22 and cases cited therein (opinion of Shwartz, J., concurring in the judgment below but finding that controversies under the Elections Clause are justiciable). Furthermore, it is rare if not unheard of for Congress to override a state regulation, especially one concerning the boundaries of Congressional districts, no doubt because of the "conflict of interest . . . inherent when legislators draw district lines that they ultimately have to run in." *Arizona Indep. Redistricting Comm.*, 135 S. Ct. at 2672. Understandably reluctant to act, Congress has empowered the courts to do so. Indeed, in 28 U.S.C. § 2284, which authorizes three-judge courts in challenges to state redistricting plans, Congress gives a special status and weight to judicial review of these plans for compliance

with the Constitution. In effect if not formally, Congress has delegated its authority to the courts or at least given an unusually specific authorization for the courts to enforce the Constitution in this politically sensitive area.

Finally, in *Rucho* all three judges found that cases under the Elections Clause are justiciable and that partisan gerrymandering violates that Clause. 2018 U.S. Dist. LEXIS 5191 at *232-*248. *Rucho* thus directly conflicts with the order of the district court appealed from here, and this Court should resolve the conflict. However, *Rucho* seemed to frame the breach of the Elections Clause before it as an instance of viewpoint discrimination that sounded in First Amendment and Equal Protection Clause jurisprudence. The court apparently did so to suggest that the First Amendment and Equal Protection Clause provide a basis for enforcing the limited authority of the state under the Elections Clause. In plaintiffs' view, that is an awkward way to frame a federalism claim – a claim that arises from the federal structure of the Constitution. And such are claims arising under the Elections Clause. As Justice Kennedy indicates in his concurrence in *Thornton*, a breach of the state's legal duty under the Elections Clause is properly seen as an abridgement of a right of federal citizenship, in violation of the Privileges or Immunities Clause. 514 U.S. at 843-44; *and see McDonald v. City of Chi.*, 561 U.S. 742, 839 (2010) (Thomas, J., concurring) (Privileges or Immunities Clause does not depend on a showing of discrimination but is "best understood to impose a

limitation on state power to infringe upon pre-existing substantive rights."). For that reason, this Court should consolidate this case with *Rucho*. The Privileges or Immunities Clause is the most appropriate way to enforce the limit on state authority under the Elections Clause.

IV. This case presents a live controversy because plaintiffs seek and are entitled to supplemental relief and because the Pennsylvania Supreme Court's final order is still being challenged.

A. Supplemental Relief. This Court should set down this case for briefing to determine whether plaintiffs are entitled to additional or supplemental relief even though the Pennsylvania Supreme Court issued an order setting out non-gerrymandered maps for the 2018 elections in *League of Women Voters*, 2018 Pa. LEXIS 927. Indeed, in filing this case, plaintiffs sought a court-approved neutral *process* for drawing a map – now and in the future – rather than a court-approved neutral *map*. Plaintiffs still seek such a process as full relief for their constitutional claims. That is the difference between the remedy ordered by the Pennsylvania Supreme Court in *League of Women Voters* and the remedy sought here.

The supplemental remedy sought here is significant because in the view of plaintiffs, the federal courts should be requiring a neutral process rather than, as the Pennsylvania Supreme Court has done, literally drawing up a new map. A one-time drawing up of a new

map for one election does not give plaintiffs an adequate form of prospective relief. The legislative defendants in this case (the same defendants as in *League of Women Voters*) are free to put in another gerrymandered map in 2020 – a date soon upon us. There is every reason to think they will try, as there is no constraint or process binding them, and they can once again create the next map in stealth and in a similar way as before. The order of the Supreme Court of Pennsylvania only addresses the legality of the particular map to be used in the 2018 elections. Plaintiffs seek a remedy that goes beyond the 2018 elections, a process that comports with the Elections Clause's limited grant of procedural power to the states.

Thus there is still some relief that this Court can grant plaintiffs, and therefore the case is not moot. As this Court has held on several occasions where the initial impetus to bring suit has faded – whether due to a defendant's compliance with another court's injunction, the voluntary cessation of the complained-of conduct, or the passage of time – a case is not moot when there is still effectual relief that a federal court can give. *See Knox v. SEIU Local 1000*, 567 U.S. 298, 307-308 (2012) (case not moot despite voluntary cessation of conduct); *Church of Scientology v. United States*, 506 U.S. 9, 12-13 (1992) (case not moot despite plaintiff compliance with lower court order); *Vitek v. Jones*, 445 U.S. 480, 487 (1980) (case not moot despite defendant compliance with district court injunction); *Allee v. Medrano*, 416 U.S. 802, 809-11 (1974) (case not moot despite defendant compliance with state court

injunction); *see also Monroe v. Pape*, 365 U.S. at 183 (plaintiff entitled to proceed where additional relief was available under § 1983 as compared to state common law actions).

As full relief and more appropriate judicial relief, plaintiffs seek an order going forward to put in place a process that will be open and transparent and with adequate safeguards against partisan abuse. It is the view of plaintiffs that the particulars of the process should be left to state legislative and executive leaders. It could consist of a bipartisan commission or a neutral selected by such a commission or, as plaintiffs' expert Anne Hanna described, a set of objective rules and appropriate criteria by which a computer will reliably and simply generate a fair map. *See* App. 165-66. In other words the scope of the relief should not be a particular map but a particular process that will keep the General Assembly – in the coming months, for the 2020 elections, and during the map-making thereafter – within the scope of its authority under the Elections Clause.[8]

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[8] Several states now have redistricting frameworks that keep the state legislature within the scope of its authority under the Elections Clause, e.g., New Jersey (*see* N.J. Const. art. II, § II; art. IV, §§ II, III); California (*see* Cal. Const. art. XXI; Cal. Gov't Code §§ 8251-8253.6); and Arizona (*see* Ariz. Const. art. IV, pt. 2., § 1). While most states that have adopted such "evenhanded" redistricting processes have given the final power to choose a map to independent commissions, at least one has left that decision in the hands of the state legislature, with guidance from a politically independent actor. *See* Iowa Const. art. III, §§ 34-39; Iowa Code §§ 42.1-42.6 (vesting final power to choose a map in the Iowa

With this form of relief it is the goal of plaintiffs to keep the federal courts from the political entanglement both of deciding how much partisan gerrymandering is "too much," and of repeatedly drawing new maps as relief. Both are indeed controversial acts, and various Justices on this Court have expressed an understandable concern about making the federal courts directly responsible for them. *E.g.*, *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment); *Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring in the judgment). But focusing the courts' review on *process* would help keep the federal courts removed from the bitter partisan wrangling that so often defines Congressional redistricting.[9]

As set out in the prayer for relief in plaintiffs' complaint, the Court should order the executive and legislative defendants – Governor Wolf, Senate President Scarnati and Speaker Turzai – to develop a process for developing maps that will be evenhanded, open, transparent and fair from the point of view of the *voters*. *See* App. 288-91 (dissenting opinion of Baylson, J., urging the adoption of a voter-centered standard of

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legislature subject to gubernatorial veto, but giving substantial map-drawing duties to a nonpartisan agency).

[9] Plaintiffs also note that their proposed remedy would substantially alter the role of the courts at the liability phase of a gerrymandering case. Instead of requiring the court to find that the map itself exceeds some hard-to-define standard of extremity under the Equal Protection Clause or First Amendment, plaintiffs' proposed remedy would depend on a finding that the process by which the map was drawn was partisan in intent and exceeded the authority of the state under the Elections Clause.

review). It is not enough – and not democratic – for the courts to be making the decisions as to where the boundaries can go, and as laudable as the decision of the Pennsylvania Supreme Court may be, a judicial takeover of this legislative function may contribute its own degree of alienation of citizens from the political process.[10]

Plaintiffs seek no particular map.[11] As discussed below, plaintiffs seek a process rather than a map, an evenhanded process by which the state legislature and not the Court can *develop* a map. In this case, such a

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[10] At the same time, plaintiffs in no way seek to interfere with the action of the Pennsylvania Supreme Court or override what that Court is doing. In this respect, the supplemental relief that plaintiffs seek does not raise any issue under this Court's decision in *Growe v. Emison*, 507 U.S. 25 (1993). That case prohibits a federal court from substituting its own remedy for gerrymandering in lieu of or to displace a state court's remedy. But without displacing in any way the orders of the Pennsylvania Supreme Court, plaintiffs are entitled to a supplemental or prospective remedy that is adequate to redress the violations of their constitutional rights.

[11] *Contra* Chief Judge Smith and Judge Shwartz, plaintiffs also do not seek proportional representation. *See* App. 76, 121 (suggesting that is plaintiffs' goal). While plaintiffs call for an "evenhanded" redistricting process, they do so because in *Thornton*, this Court stated that the Elections Clause allows only "evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Thornton*, 514 U.S. at 834 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)). Far from seeking proportional representation by use of such a term, plaintiffs would question whether the Elections Clause even permits a state legislature to use a process that allows the map-drawers to seek *any* particular ratio of Democrats and Republicans, proportional or otherwise. That would seem to be "dictating electoral outcomes" and beyond the authority of the state under the Elections Clause.

process – one which does not require the participation of the Court – has yet to be put in place, and for this reason alone the case is not moot.

B. State-Court Order Still Under Challenge. Moreover, as this Court is aware from filings by the same legislative defendants in this case, the state-court *League of Women Voters* case is still in flux, and far from moot. *See* Emergency Application for Stay Pending Resolution of Appeal to This Court, No. 17-A-909 (Feb. 27, 2018). A petition for certiorari in *League of Women Voters* is likely to come to this Court, and unless or until it is denied, the state court case will continue to be a live controversy. As set out in their Emergency Application, in the coming petition for certiorari, the *League* defendants (the same individuals as the legislative defendants in this case) will argue that under the Elections Clause only the "state legislature" and not the state's highest court can set the "time, place and manner" of the 2018 elections. In addition, another group of state legislators has filed suit in federal district court, also challenging the constitutionality of the Pennsylvania Supreme Court's order under the Elections Clause. *See Corman v. Torres*, No. 1:18-CV-4433 (complaint filed Feb. 22, 2018; argued March 12, 2018). While plaintiffs disagree that the Elections Clause bars state courts from redrawing Congressional maps as part of a state's lawmaking powers, this kind of challenge has arisen before, and the law is not entirely settled. *See Smiley v. Holm*, 285 U.S. 167 (1932); *Lance v. Coffman*, 549 U.S. 437 (2007). Hence, despite the Pennsylvania Supreme

Court's order in *League of Women Voters*, there is still a live controversy in that (and therefore this) case.

CONCLUSION

As this Court has noted, the "core principle of republican government" is "that the voters should choose their representatives and not the other way around." *See Arizona Indep. Redistricting Comm.*, 135 S. Ct. at 2677 (quoting Mitchell N. Berman, *Managing Gerrymandering*, 83 Texas L. Rev. 781 (2005)). For all the reasons set forth above, this Court should note probable jurisdiction and reverse the order of the district court.

Plaintiffs respectfully request that this Court set down this case for briefing and oral argument and consolidate it with *Rucho v. Common Cause*, No. 17-A-745.

Respectfully submitted,

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