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

JACOB CORMAN, in his official capacity as Majority Leader of the Pennsylvania Senate, MICHAEL FOLMER, in his official capacity as Chairman of the Pennsylvania Senate State Government Committee, LOU BARLETTA, RYAN COSTELLO, MIKE KELLY, TOM MARINO, SCOTT PERRY, KEITH ROTHFUS, LLOYD SMUCKER, and GLENN THOMPSON,	:	No. 18-cv-00443-CCC Judge Jordan Chief Judge Conner Judge Simandle (*filed electronically*)
Plaintiffs,	:	
v.	:	
ROBERT TORRES, in his official capacity as Acting Secretary of the Commonwealth, and JONATHAN M. MARKS, in his official capacity as Commissioner of the Bureau of Commissions, Elections, and Legislation,	:	
Defendants.	:	

PLAINTIFFS' BRIEF IN OPPOSITION TO THE NATIONAL DEMOCRATIC REDISTRICTING COMMITTEE'S MOTION TO INTERVENE AS DEFENDANT (DOC. 12)

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INTRODUCTION

Proposed Intervenor, the National Democratic Redistricting Committee (the "NDRC") should not be permitted to intervene in this action because: (1) it cannot satisfy the requisite criteria set forth by Fed. R. Civ. P. 24(a) since it lacks any rights or significantly protectable legal interest in this case and any interest the NDRC has will be adequately represented by the named defendants ("Defendants"); (2) it cannot satisfy Fed. R. Civ. P. 24(b) because it cannot assert any claim or defense related to the sole issue to be determined in this case – whether Pennsylvania's Supreme Court overstepped its authority under the Elections Clause; and (3) it lacks standing to be a party-litigant.

The NDRC is a self-described "political organization" whose "mission" is to ensure "fair maps" that protect against the dilution of Democratic votes and "combat the deleterious effects of extreme Republican partisan gerrymanders" in order to protect the rights of Democratic voters. NDRC's Memorandum of Law in Support of Motion to Intervene (Doc. 13) ("Memo. of Law") at 4-5. But the NDRC's political interest in replacing Republican maps it views as unfairly partisan does not afford it a legally protectable interest justifying its intervention as a party-litigant. Instead, the NDRC's interest is no different from that of any other outside political observer who follows these matters and has a rooting interest to support the Pennsylvania Supreme Court's actions mandating the implementation

of a new congressional districting plan (the "Court Drawn Plan").[1] And it is hard to imagine parties more prepared, willing, and able to adequately represent the very same political goals of the NDRC than Defendants, Democratic gubernatorial appointees who have already – *in three separate litigations* – argued passionately for the invalidation of the 2011 Plan and in support of the Court Drawn Plan. And these Defendants have already made clear their intention to continue to advance those same political interests in this case – the very interests that the NDRC espouses here as part of its "core mission" – as well as a vigorous defense.

Separately, the Third Circuit has concluded that because the factors considered on a motion for permissive intervention are similar to those considered with respect to a motion for intervention as of right, a finding that a party is not entitled to intervene as of right almost always results in the denial of permissive intervention. Thus, the NDRC's request for permissive intervention should be denied for all of the same reasons warranting the denial of its intervention as of right, as well as the fact that the NDRC does not have any alleged rights or cognizable legal interest at stake in this case and lacks any concrete and particularized injury affording it independent standing to assert any claim or defense related to the Pennsylvania Supreme Court's authority under the Elections Clause.

[1] Capitalized terms used herein shall have the meanings afforded such terms within Plaintiffs' Complaint ("Compl."; Doc. 1) unless otherwise defined herein.

For each of these reasons, the NDRC's Motion should be denied.

I. COUNTER STATEMENT OF HISTORY OF THE CASE

Plaintiffs present narrow claims that seek specific relief. Contrary to the NDRC's suggestion, Plaintiffs do not challenge the Pennsylvania Supreme Court's ability to declare the 2011 Plan unconstitutional under Pennsylvania's Constitution. Nor do Plaintiffs challenge the Pennsylvania Supreme Court's ability, in appropriate circumstances, to craft a remedial map. Rather, the claims advanced in this action concern only whether the map Defendants seek to implement violates the Elections Clause of the U.S. Constitution in two discrete ways: (1) by relying upon criteria found nowhere within Pennsylvania's Constitution or statutory framework for Congressional districting to invalidate the 2011 Plan; and (2) by ordering the use of its own Court Drawn Plan without first affording Pennsylvania's General Assembly an "adequate opportunity" to enact a remedial plan of its own. On the other hand, this action *does not* concern the claimed gerrymandered nature of the 2011 Plan, *i.e.* the claims at issue in the *League of Women Voters v. Commonwealth* Action before the Supreme Court of Pennsylvania (the "*LWV* Action"). *See* Compl. ¶¶ 93-117. And the relief sought in this case – a finding that the Pennsylvania Supreme Court's action violates the Elections Clause and enjoining implementation of the Court Drawn Plan for the

2018 elections – is distinct from the relief sought in the *LWV* Action, which sought to (and did) invalidate the 2011 Plan.

II. ARGUMENT

A. The NDRC Fails To Meet The Test For Intervention As A Matter Of Right Under Rule 24(a)(2).

A non-party is permitted to intervene as of right under Rule 24(a)(2) only if each of the following requirements have been satisfied:

> (1) The application for intervention is timely;
>
> (2) The applicant has sufficient interest in the litigation;
>
> (3) The interest may be affected or impaired, as a practical matter by the disposition of the action; **and**
>
> (4) The interest is not adequately represented by an existing party in the litigation.

Liberty Mut. Ins. Co. v. Treesdale, Inc., 419 F.3d 216, 220 (3d Cir. 2005); *Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 366 (3d Cir. 1995) ("Each of these requirements must be met to intervene as of right.").

As detailed below, the NDRC fails to satisfy the second, third and fourth requirements of this standard because: (1) it lacks a direct and sufficient legal interest in this litigation; (2) it can show no unique interest that may be affected or

impaired if Plaintiffs are afforded the requested relief, and (3) its interests are adequately represented by Defendants.[2]

1. The NDRC Lacks A Sufficiently Protectable Legal Interest In This Litigation.

Without a sufficiently protectable legal interest in this matter, the NDRC cannot possibly satisfy the requirements of Rule 24(a)(2). In order to have "an interest sufficient to intervene as of right, the interest advanced must be a *legal interest* as distinguished from interests of a general and indefinite character." *Harris v. Pernsley*, 820 F.2d 592, 601 (3d Cir. 1987) (emphasis added). Furthermore, it must be a "significantly protectable" legal interest. *Mountain Top Condo.*, 72 F.3d at 366 (citing *Donaldson v. U.S.*, 400 U.S. 517, 531 (1971)). As such, the NDRC must demonstrate that there is a "tangible threat" to its legally cognizable interest, and not merely that it has some general interest that may be incidentally affected. *Seneca Res. Corp. v. Twp. of Highland*, 863 F.3d 245, 256-57 (3d Cir. 2017). Stated differently, the asserted interest cannot be speculative or collateral. *Liberty Mut.,* 419 F.3d at 225. This element is satisfied where a proposed intervenor can show that a ruling will have a "significant stare decisis effect on their claims, or if the [proposed intervenors'] rights may be affected by a proposed remedy." *Seneca Res. Corp.*, 863 F.3d at 257; *see also Mountain Top Condo.*, 72 F.3d at 366.

[2] Plaintiffs concede that the NDRC's Motion is timely.

The NDRC argues that it has a "significant and cognizable interest in ensuring fair redistricting plans that will reverse the unconstitutional dilution of Democratic voting strength in Pennsylvania…" Memo. of Law at 7. It argues that "Plaintiffs' attempt to invalidate the Remedial Plan strikes at the heart of NDRC's core mission, and its efforts to ensure a fair districting map for Democrats in Pennsylvania." *Id.* at 9. But these are not legal interests.

Indeed, the NDRC does not have any *legal* interest in this case, let alone one that is a "significantly protectable" legal interest sufficient to permit it the right to intervene as a party-litigant. Its only interest is that of an arm-chair outside observer. In fact, by its own admission, the NDRC is merely a "political organization" with a *political* interest in congressional districting maps which favor Democrats. *See* Memo. of Law at 4. Thus, the NDRC's interest here is no more specific to the NDRC than it would be to any other interested outside observer who, like the NDRC, is interested in favoring Democrats and fighting against maps which purportedly favor Republicans. This generalized political interest in the outcome of a case falls far short of meeting the standards for intervention as a matter of right.

Furthermore, this particular case is not about the NDRC's "core mission" relating to the merits of "extreme partisan gerrymandering" or the dilution of Democratic votes. Rather, this case is about the unconstitutional actions of the

Pennsylvania Supreme Court in usurping the legislative authority of the Pennsylvania General Assembly relating to the time, place and manner of congressional redistricting, a power explicitly reserved to the state legislature pursuant to the Elections Clause of the U.S. Constitution. U.S. CONST. art. I, § 4.

The NDRC's reliance on *American Farm Bureau Federation v. EPA*, 278 F.R.D. 98 (M.D. Pa. 2011) ("*American Farm*") and *Benjamin ex rel. Yock v. Department of Public Welfare of Pennsylvania,* 701 F.3d 938 (3d Cir. 2012) ("*Benjamin*") is misplaced. In *American Farm*, intervention was permitted because each of the intervenors *would be directly impacted* by the invalidation of the EPA rule at issue in that case. *See* 278 F.R.D. at 104-08 (allowing intervention of members who held permits to discharge nutrients and sediments which would be affected by the EPA rule which was the subject of the litigation and of members who personally used the Bay, educated others on the importance of restoring the Bay, and had undertaken physical efforts towards achieving that goal).[3] In *Benjamin*, the Court held that "the claimed interest in the litigation must be one

[3] The NDRC relies on *American Farm* in an attempt to likening the interests at stake in *American Farm* to the NDRC's "core mission" of seeking to "more accurately reflect the will of Pennsylvania's voters." Memo. of Law at 7. This reliance is ironic given the NDRC's full-throated support of the Pennsylvania Supreme Court's actions invalidating the 2011 Plan signed into law by Pennsylvania's elected officials *and* its imposition – by judicial fiat – of the Court Drawn Plan without permitting the Legislature an adequate opportunity to enact remedial legislation on its own. There could be no clearer reflection of the "will of Pennsylvania's voters" than the enactment of legislation by its democratically elected representatives, which the NDRC now seeks to wholly ignore.

that is *specific* to those seeking to intervene, is capable of definition, and will be directly affected in a substantially concrete fashion by the relief sought." 701 F.3d at 951 (citing *Benjamin v. Dep't of Pub. Welfare of Pa.*, 432 Fed. App'x 94, 98 (3d Cir. 2011)).

The NDRC does not have a property interest in the redistricting process like the permitted groups in *American Farm* or an interest which is *specific* to it like the intervenors in *Benjamin.* In fact, the only claimed interest that the NDRC has articulated is the fact that it has "expended, and continues to invest, significant time and resources into ensuring Pennsylvania's redistricting plan reflects the will of its voters, and protects the rights of Democratic voters within the state." Memo. of Law at 5. But, this is tantamount to saying that any political organization which has spent or donated money towards a political cause should have the ability to intervene as a party in any case where those causes are being litigated. This would lead to an absurd result that should not be countenanced by this Court. As the numerous press reports about this case make clear, many third parties across the country are interested in the outcome of this case. This does not mean they are all entitled to become party-litigants.

2. <u>The NDRC's Interests Will Not Be Impaired If Intervention Is Denied.</u>

The NDRC argues that it must be allowed to intervene in this case because if its intervention is not permitted, there "would be no realistic option for NDRC to

vindicate its rights in a separate proceeding, following the resolution of this action, because such action could not be resolved in time for the 2018 primary or general election." Memo. of Law at 10. This argument misses the point, as the NDRC does not have any cognizable legal interest which could ever be impaired or any legal "rights" at stake in this matter to be vindicated. But, even assuming *arguendo* that the Court finds that the NDRC has a sufficient legal interest in this litigation, it cannot possibly show that it will be "affected in a substantially concrete fashion by the relief" Plaintiffs seek. *See Benjamin*, 701 F.3d at 951.

In addition to the out-of-circuit case of *Natural Resources Defense Council v. Costle*, 561 F.2d 904 (D.C. Cir. 1977),[4] the NDRC cites to *Mountain Top Condominium Association v. Dave Stabbert Master Builder, Inc.* for the proposition that "proposed intervenors must also demonstrate that their interest might become affected or impaired, as a practical matter, by the disposition of the action in their absence." Memo. of Law at 9. Plaintiffs agree with this statement of the law, but the NDRC does not, and cannot, show that it has any legal interest at stake in this matter which would be impaired.

The NDRC also cites to *Brody By & Through Sugzdinis v. Spang,* 957 F.2d 1108 (3d Cir. 1992), to argue that its rights may be affected by the injunctive relief

[4] This case is easily distinguishable from the instant matter as it involved a settlement agreement obligating the EPA to undertake rule-making which would directly impact the intervenors. *See* 561 F.2d at 908-11. The NDRC has no similar interest here.

requested by Plaintiffs and that it does not need to prove that it would be "barred from bringing a later action or that intervention constitutes the only possible avenue of relief." Memo. of Law at 9-10. But this rationale, once again, puts the cart before the horse because it presumes the NDRC has significantly protectable legal rights at stake in this litigation when it does not. Moreover, and separately, an injunction preventing the implementation of the unconstitutionally drawn Court Drawn Plan would not pose a "tangible threat" to the NDRC's self-described "mission" of "combat[ing] the deleterious effects of extreme Republican partisan gerrymanders." Even if this Court should find in Plaintiffs' favor and hold that the Court Drawn Plan violates Article I, Section IV of the U.S. Constitution, the NDRC's mission will no doubt remain fully intact and its interests would not be impacted in any way.

3. Any Interest The NDRC Does Have Is Adequately Represented by Defendants.

"[W]hen the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented." *In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortg. Loan Litig.*, 418 F.3d 277, 315 (3d Cir. 2005) ("*In re Cmty. Bank*") (internal citations omitted). "To overcome the presumption of adequate representation, the proposed intervenor must ordinarily demonstrate adversity of interest, collusion, or nonfeasance on the part of a party to the suit." *Id*.

The NDRC cannot demonstrate that its primary interest – defense of the Court Drawn Plan – is not and cannot be adequately represented by Defendants. Indeed, it is difficult to fathom any parties better equipped and able to represent this interest than Defendants. For example, Defendants were defendants in the *LWV* Action and fully supported the Petitioners in that case in their efforts to invalidate the 2011 Plan. And the NDRC's suggestion here that Defendants' primary concern is merely election administration "whatever the applicable districting plan may be," *see* Memo. of Law at 12, is wholly disingenuous. Defendants here – appointees of Pennsylvania's Governor Wolf, who was also represented in these matters by the same counsel who currently represent Defendants – actively participated at trial in the *LWV* Action to the benefit of the Petitioners who sought to overturn the 2011 Plan.

For example, Defendants argued to the Pennsylvania Supreme Court that the 2011 Plan must be deemed unconstitutional. They actually argued for the very remedy being challenged in this case. Defendants' pre-argument submissions to that court also advanced identical sentiments. *See* January 10, 2018 Supreme Court Brief at 1, a copy of which is attached hereto as **Exhibit A** ("The evidence weighed overwhelmingly in favor of the conclusion that the Congressional map put in place in 2011 (the '2011 Plan') is not only a partisan gerrymander, but is an extreme outlier on the scale of partisan gerrymanders, one of the most excessively

partisan maps that the nation has ever seen."). Defendants worked hand in glove with the Petitioners to advance precisely the same interests that the NDRC is advancing here.

Additional examples from federal cases also seeking to invalidate the 2011 Plan also show that Defendants will adequately represent the NDRC's purported interests. In *Agre v. Wolf*, No. 17-4392 (E.D. Pa. 2017), where other plaintiffs sought to invalidate the 2011 Plan, Defendants' counsel here, Mark Aronchick, delivered an impassioned closing statement in which he criticized the 2011 Plan and stated that the plaintiffs therein presented compelling evidence that the 2011 Plan was unconstitutional, an argument which Defendants reiterated in their post-trial submission. *See* December 15, 2017 Post-Trial Brief at 3, attached hereto as **Exhibit B.** Furthermore, Defendants' opposition to a motion to dismiss in *Diamond v. Torres*, No. 17-5054 (E.D. Pa. 2017), provides yet another example of the synchronized interests between Defendants and the NDRC. The motion to dismiss would have terminated all claims, *including those against Defendants*, but they opposed it in an attempt to have the 2011 Plan declared unconstitutional. *See Diamond v. Torres*, No. 17-5054 (E.D. Pa. Jan. 23, 2018) (ECF 83-1 at 6). In fact, so aligned were Defendants' positions with those advanced by the *Diamond* Plaintiffs, that the legislative defendants in that action filed a motion to realign the parties such that Defendants would be deemed party-plaintiffs. *See* ECF 83; *see*

also ECF 83-1 at 6-10 (identifying instances from the *LWV* action, *Agre* and *Diamond* where Defendants aligned themselves with parties seeking to invalidate the 2011 Plan).[5]

Defendants' desire to invalidate the 2011 Plan and preserve the Court Drawn Plan is also already evident in *this* suit. Defendants wrote to the Court requesting, *inter alia*, assignment of a specific judge to the three-judge panel and a deferral of action by this Court while a stay application is pending in the U.S. Supreme Court. ECF No. 10. Defendants recited a laundry list of defenses and perceived factual, legal, and procedural hurdles that they claimed bar Plaintiffs' requested relief. *Id*. These are hardly the actions of a party uninterested or unmotivated in defending the same interests as the NDRC.[6] Thus, because it is clear that Defendants – *in at least three cases already* – have advanced precisely the same objectives as the NDRC, it is abundantly clear that Defendants are more than capable and fully

[5] Plaintiffs note that counsel for the NDRC is also counsel for the *Diamond* plaintiffs.

[6] Plaintiffs also note for the Court that Governor Wolf has vocally supported the Pennsylvania Supreme Court's actions in drawing the Court Drawn Plan. *See, e.g.*, *Governor Wolf Statement on Remedial Congressional Map from PA Supreme Court* (Feb. 19, 2018), https://www.governor.pa.gov/governor-wolf-statement-remedial-congressional-map-pa-supreme-court ("I applaud the court for their decision and I respect their effort to remedy Pennsylvania's unfair and unequal congressional elections."). Defendant Secretary of the Commonwealth and Defendant Commissioner of the Bureau of Commissions, Elections, and Legislation of Pennsylvania serve at the pleasure of Governor Wolf, and it can safely be assumed that they will aggressively fight in favor of the Supreme Court's Court Drawn Plan – in the same manner sought by the NDRC.

willing to adequately represent the NDRC's interests here too. *See In re Cmty. Bank*, 418 F.3d at 315 ("When the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented.").[7]

The NDRC cites *Trbovich v. United Mine Workers*, 404 U.S. 528, 539 (2010), for the proposition that "a proposed intervenor's interests are not adequately represented where current defendant is obligated to serve two distinct interests, which, are related, but may not always dictate precisely the same approach to the conduct of the litigation." Memo. of Law at 13. In *Trbovich*, the Secretary of Labor had two roles imposed upon him by statute: (1) to effectively serve as the lawyer for the union member seeking to enforce union election rights; and (2) to protect the public interest in assuring free and democratic union elections. 404 U.S. at 538-39. Pennsylvania has no statute imposing similar conflicting roles on Defendants.

The NDRC also argues that, even if Defendants have the same or overlapping interests as the NDRC, Defendants "cannot prioritize the interests of

[7] In addition, it is disingenuous to suggest that a national political organization represented by a group of lawyers from Chicago and Washington, D.C., can better protect Pennsylvania voters than the named Defendants, Pennsylvania's own Secretary of the Commonwealth and Commissioner of the Bureau of Commissions, Elections, and Legislation, particularly when these officials were heavily involved in the underlying litigation in the Pennsylvania state courts.

Democratic voters whose votes were unconstitutionally diluted in the prior redistricting plan." Memo. of Law at 13. This argument is misdirected. First, as demonstrated above, Defendants can (and have) adequately represented these interests in no less than three very aggressively fought litigations to date. Second, the NDRC does not have a *legal* interest in this case to be prioritized; it merely has a generalized *political* interest. As such, it should not have its interests elevated above all others. Finally, if "interests of Democratic voters" are prioritized over all others, it would result in the very type of extreme partisanship that the NDRC professes to stand against.

The NDRC has failed to show that Defendants will not adequately represent its interests. Therefore, its Motion must be denied.

B. The Court Should Not Allow Permissive Intervention Under Rule 24(b).

The NDRC argues that if it is not entitled to intervene as a matter of right, the Court should nevertheless permit its intervention pursuant to Federal Rule of Civil Procedure 24(b). This Court may grant permissive intervention under that Rule where the proposed intervenor "has a claim or defense that shares with the main action a common question of law or fact." *See* Fed. R. Civ. P. 24(b)(1)(B). But, because the factors considered on a motion for permissive intervention are similar to those considered for a motion for intervention as a right, a finding that a party is not entitled to intervene as a right almost always results in a denial of

permissive intervention. *Brody*, 957 F.2d at 1124. The NDRC's request should be denied here.

The NDRC does not have a separate claim or defense that shares with the main action a common question of law or fact. The sole issue in dispute in this case is whether the Supreme Court of Pennsylvania's actions violate the Elections Clause of the U.S. Constitution by usurping legislative authority reserved for the General Assembly. The NDRC's interest in seeing that the 2011 Plan is invalidated and the Court Drawn Plan is implemented in time for the 2018 primary is not being litigated in this action. And the NDRC has failed to assert, nor could it, any claim or defense it has relating to the Elections Clause. Moreover, the NDRC's stated interest is *identical* to that of Defendants – upholding the invalidation of the 2011 Plan and the implementation of the Court Drawn Plan.

Furthermore, the cases cited to by the NDRC in support of its application for permission to intervene are inapposite. *See* Memo. of Law at 14-15 (citing cases which the NDRC claims support for the proposition that "Courts have specifically permitted intervention by parties whose interest are affected by the implementation of a districting plan.").[8] Each of the cases cited involved a challenge to the actual

[8] Specifically, the NDRC cites to *League of Women Voters of Haverford Twp. v. Bd. of Comm'rs of Haverford Twp.,* CIV. A. No. 86-0546, 1986 WL 3868 (E.D. Pa. Mar. 27, 1986); *Graham v. Thornburgh*, 207 F. Supp. 2d 1280, 1282 (D. Kan. 2002); *PAC for Middle Am. v. State Bd. of Elections*, No. 95 C 827, 1995 WL

districting plans. This is not the case here. In this case, Plaintiffs are not seeking to reargue the merits of the 2011 Plan, but are instead challenging the Pennsylvania Supreme Court's authority to impose new requirements regarding congressional redistricting and its failure to afford the Legislature an adequate opportunity to develop and implement a new plan. Accordingly, the NDRC finds no support in its cited cases, and the Court should deny its request to permissively intervene.

C. The NDRC Lacks Standing To Be A Party-Litigant.

The NDRC also lacks standing and therefore should not be permitted to intervene. Article III of the U.S. Constitution limits the jurisdiction of federal courts to actual cases or controversies. *See* U.S. CONST. art. III, § 2; *Allen v. Wright*, 468 U.S. 737, 750 (1984). The most important aspect of the case and controversy requirement is the doctrine of standing, which prevents litigants from "raising another person's legal rights," and prohibits the adjudication of generalized grievances "more appropriately addressed in the representative branches." *Allen*, 468 U.S. at 750-51. "Standing to sue *or defend* is an aspect of the case or controversy requirement." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) (emphasis added). A party seeking to intervene must therefore establish standing to be a party-litigant. *See In re Endangered Species Act Section 4 Deadline Litig.*, 704 F.3d 972, 976 (D.C. Cir. 2013).

571893 (N.D. Ill. Sept. 22, 1995); and *Bossier Parochial Sch. Bd. v. Reno*, 157 F.R.D. 133 (D.D.C. 1994).

To establish standing, a party, including a defendant, bears the burden of demonstrating that it has suffered an injury to a legally protected interest that is both concrete and particularized. *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560–61 & n.1 (1992). The Supreme Court has "consistently held that a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy." *Id.* at 573-74.

The NDRC fails to show that its alleged injuries are to a legally protected interest that is both concrete and particularized. Specifically, the NDRC's stated interest is to "remedy the deliberate and extreme partisan gerrymandering and the dilution of Democratic votes." Memo. of Law at 4. Its purported interest centers on the fact that it seeks to "increase voter engagement in the redistricting process, enact fairer redistricting plans, and challenge unconstitutional redistricting plans in court." *Id*. This is nothing more than a general grievance with the redistricting process.

The Court Drawn Plan and this lawsuit alleging violations of Article I, Section IV of the U.S. Constitution involve interests which are not concrete or particularized to the NDRC, but instead generally implicates the interests of all

voters in Pennsylvania.[9] *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006) (taxpayer standing rejected because the alleged injury was a grievance suffered in common with people in general). Accordingly, the NDRC does not have independent standing as it can only plead a generalized grievance, a grievance felt by all Pennsylvania voters equally. *See Lance v. Coffman*, 549 U.S. 437, 442 (2007) (rejecting generalized standing under the Elections Clause).

III. CONCLUSION

For the foregoing reasons, the NDRC's Motion should be denied.

[9] The fact that the NDRC purports to represent Democratic voters is of no consequence as "Democratic voters" are no more an identifiable group of people than voters at large. *See Vieth v. Jubelirer*, 541 U.S. 267, 297 (2004) (plurality op.) ("Political affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line.").

February 27, 2018

Respectfully submitted,

/s/ Brian S. Paszamant

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WORD COUNT CERTIFICATION

I hereby certify that the foregoing brief complies with the word-count limitation set forth in LR 7.8(b). Based on the word count feature of the word-processing system used to prepare this brief, I certify that it contains 4622 words, exclusive of the cover page, tables, and the signature block.

Dated: February 27, 2018 /s/ Brian S. Paszamant

EXHIBIT A

IN THE SUPREME COURT OF PENNSYLVANIA

NO. 159 MM 2017

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, *et al.*,
Petitioners,

v.

THE COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

BRIEF OF RESPONDENTS GOVERNOR THOMAS W. WOLF, ACTING SECRETARY ROBERT TORRES, AND COMMISSIONER JONATHAN MARKS

On Review of the Commonwealth Court's Recommended Findings of Fact and Conclusions of Law, No. 261 M.D. 2017 (Dec. 29, 2017)

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INTRODUCTION

At trial, Petitioners produced compelling evidence that Pennsylvania's bizarrely shaped Congressional districts are the products of a deliberate, secretive effort to minimize the value of votes for Democratic Congressional candidates and maximize the number of Congressional seats held by Republicans. The evidence weighed overwhelmingly in favor of the conclusion that the Congressional map put in place in 2011 (the "2011 Plan") is not only a partisan gerrymander, but is an extreme outlier on the scale of partisan gerrymanders, one of the most excessively partisan maps that the nation has ever seen. Respondents Michael C. Turzai and Joseph B. Scarnati, III (together, the "Legislative Respondents") let this evidence go largely unopposed. They provided no explanation of how traditional redistricting principles, or any considerations other than pure partisanship, could have caused the mapmakers to create such oddly shaped districts.

In its Recommended Findings of Fact ("FOF"), the Commonwealth Court agreed that partisan intent – the desire to advantage Republican candidates and disadvantage Democratic ones – underlay the creation of the 2011 Plan. Nonetheless, and in spite of this Court's direction that Pennsylvania courts should correct "egregious" and "excessive" political gerrymandering, the Commonwealth Court recommended that this Court rule against Petitioners. The Commonwealth Court's chief reason for its conclusion was that Petitioners had failed to provide a

finely tuned, mathematically precise formula for distinguishing redistricting plans that comply with the Pennsylvania Constitution from redistricting plans that do not. It would be unfair and inappropriate, however, to place that burden on Petitioners. They have shown that the 2011 Plan falls far outside any possible constitutional grey zone, and thus are entitled to relief. The task of navigating within the grey zone will fall to future courts in future cases, who will have ample guidance from established principles of law; it is not Petitioners' responsibility to provide an exacting measuring stick for lawsuits that may never be brought.

As representatives of the branch of the Commonwealth government charged with executing and implementing the statutes that the General Assembly enacts, Respondents Governor Thomas W. Wolf, Acting Secretary of the Commonwealth Robert Torres, and Commissioner Jonathan Marks, in their official capacities (together, the "Executive Branch Respondents") intend to enforce the 2011 Plan unless and until a Court orders them to do otherwise. However, the Executive Branch Respondents are deeply concerned that the 2011 Plan infringes upon rights that lie at the very heart of what it means to be a citizen of a democracy: the rights to speak about politics without fear of punishment and to take part in free and fair elections. The Executive Branch Respondents believe that this Court should make it clear that blatant manipulation of political boundaries intended to secure lasting political dominance violates the Pennsylvania Constitution and will not be

tolerated. Such a ruling, especially if the redistricting process that follows is open and transparent, could do much to restore Pennsylvanians' faith that their votes matter and that the state and federal officials they elect will truly represent them.

SUMMARY OF ARGUMENT

In this Brief, the Executive Branch Respondents discuss what they believe to be a few of the most critical errors in the Commonwealth Court's Conclusions of Law, and offer recommendations regarding the relief that this Court may grant.

As justification for its recommendation that this Court uphold the 2011 Plan, the Commonwealth Court attempted to place an extraordinary burden upon Petitioners: that they not only show that the 2011 Plan falls far beyond any conceivable boundaries provided in the Pennsylvania Constitution, but also provide a precise metric for applying those boundaries to any conceivable plan. This is an unnecessary (and impossible) task; a petitioner who has shown that a statute is flagrantly unconstitutional does not, as the price of relief, have to provide an analysis of hypothetical improved statutes. Here, the Executive Branch Respondents submit, governing law provides a standard that is precise enough to adjudicate this case: When partisan intent subordinates traditional districting principles to advantage one party's voters over another's, a violation of the Pennsylvania Constitution has taken place. The 2011 Plan subordinated traditional districting principles to partisan intent in an extreme and flagrant way, and thus the

Court should find that it violated Petitioners' rights under the Pennsylvania Constitution's Free Expression and Association Clause, Free and Equal Clause, and Equal Protection Guarantee.

The Commonwealth Court also found that Democratic voters are not an "identifiable political group" for purposes of an Equal Protection analysis. The Commonwealth Court did not elaborate on the basis for this conclusion, and the Executive Branch Respondents believe that it is incorrect for a number of reasons (chief among them that the 2011 Plan's mapmakers actually did identify Democratic voters and distributed them to advantage Republican candidates).

Should the Court find that the 2011 Plan violates the Pennsylvania Constitution, as the Executive Branch Respondents believe it should, the Executive Branch Respondents urge the Court to ensure that a new map is put in place in time for the 2018 Congressional elections. To allow the creators of the 2011 Plan to benefit from their unconstitutional actions for one more electoral cycle would be unfair to voters and would cloud confidence in the Commonwealth's government. In Part II of this Brief, the Executive Branch Respondents offer suggestions for creating a new map and putting it in place in time for the 2018 primary elections.

ARGUMENT

I. The Commonwealth Court's Conclusions of Law Contain Critical Errors

Because this Court exercises plenary jurisdiction over this matter, its review of the Commonwealth Court's recommended findings is *de novo*. *Erfer v. Commonwealth*, 794 A.2d 325, 329 (Pa. 2002). Although the Commonwealth Court's Findings of Fact are thus not binding upon this Court, the Court should give them "due consideration, as the jurist who presided over the hearings was in the best position to determine the facts." *Id.* This Court need not, however, give any deference to the Commonwealth Court's Conclusions of Law; it should not do so, because the Commonwealth Court reached incorrect legal conclusions on several critical points.

A. The Commonwealth Court Incorrectly Concluded That the Petitioners Were Required to Provide Precise Tools to Resolve Not Only This Case, But Any Conceivable Redistricting Case

In its recommended Conclusions of Law, the Commonwealth Court suggested that Petitioners could not prevail in this case unless they not only demonstrated the unconstitutionality of the 2011 Plan, but also showed, with mathematical precision, how far the 2011 Plan deviated from the constitutional line. (*See* COL ¶31 ("Petitioners, in order to prevail, must articulate a judicially manageable standard by which a court can determine that partisanship crossed the line into an unconstitutional infringement on Petitioners' free speech and associational rights.").) The Commonwealth Court interpreted this task to include

an inquiry into hypothetical factual circumstances not before the court, stating, "[t]he comparison, then, that is most meaningful for a constitutional analysis, is the partisan bias (by whatever metric) of the 2011 Plan when compared to the most partisan congressional plan that could be drawn, but not violate the Pennsylvania or United States Constitution." (FOF ¶421.)

The Commonwealth Court faulted Petitioners' experts for failing to draw a precise line between constitutional and unconstitutional plans:

> Bringing this back to Drs. Chen, Pegden, and Warshaw, none of these experts opined as to where on their relative scales of partisanship, the line is between a constitutionally partisan map and an unconstitutionally partisan districting plan.

(FOF ¶421; *see also* FOF ¶312 ("Dr. Chen's testimony, while credible, failed to provide this Court with any guidance as to the test for when a legislature's use of partisan considerations results in unconstitutional gerrymandering.").) The Commonwealth Court also made clear that this hypothetical line-drawing would have to take into account any number of variables:

> Some unanswered questions that arise based on Petitioners' presentation include: (l) what is a constitutionally permissible efficiency gap; (2) how many districts must be competitive in order for a plan to pass constitutional muster (realizing that a competitive district would result in a skewed efficiency gap); (3) how is a "competitive" district defined; (4) how is a "fair" district defined; and (5) must a plan guarantee a minimum number of congressional seats in favor of one party or another to be constitutional.

(COL ¶61 n.24.)

It is difficult to imagine how any expert could combine these factors, without any factual context, and provide the exacting recipe for constitutionality that the Commonwealth Court demanded. Moreover, to set forth such a bright line rule would be contrary to the role of the expert, who is not charged with determining what is constitutional and what is not. *See Waters v. State Employees' Ret. Bd*., 955 A.2d 466, 471 n.7 (Pa. Cmwlth. 2008) ("It is well settled that an expert is not permitted to give an opinion on question of law."). Doing so would also be contrary to the role of the Court, which need not, and should not, rule on hypothetical issues or make determinations that are "unnecessary to the adjudication of the parties' dispute." *Powell v. Hous. Auth. of City of Pittsburgh*, 812 A.2d 1201, 1210 (Pa. 2002).

Fortunately, in this case, no bright line rule is required. Where, as here, the level of partisan gerrymandering is extreme, the court has all the information it needs to make a decision; there is no need for it to speculate about how much less egregiously partisan a redistricting plan would have to be to pass muster under the Pennsylvania Constitution. While the Executive Branch Respondents believe that all gerrymanders undertaken with the intent to disadvantage a political party are problematic, even if they are far less extreme than the 2016 Plan, analysis of the

less extreme gerrymanders can be left for another day; the Court need only examine the blatant, flagrant piece of partisan engineering that is before it now.

1. The Court Need Not Develop Tools for Assessing All Possible Constitutional Violations in Order to Correct an Egregious Violation

The Court's task in this case is to set forth and apply a standard to determine whether *the 2011 Plan* is constitutionally permissible, not to assess hypothetical future plans. A vast body of law demonstrates that courts do not require precise line-drawing in order to recognize constitutional violations, particularly where, as here, a violation lies far beyond any reasonable constitutional line. In fact, courts routinely decide constitutional cases using judicially manageable standards that are rooted in constitutional principles but that are not susceptible of precise calculation. *See Common Cause v. Rucho*, No. 1:16-CV-1026, Memorandum Opinion at 65-66, ECF No. 118 (M.D.N.C. Jan. 9, 2018) ("Plaintiffs need not show that a particular empirical analysis or statistical measure appears in the Constitution to establish that a judicially manageable standard exists. . . . Rather, Plaintiffs must identify cognizable constitutional standards to govern their claims, and provide credible *evidence* that Defendants have violated those standards.").[1]

[1] Throughout this Brief, the Executive Branch Respondents point to federal court cases only to illustrate or give examples of concepts. For example, *Common Cause v. Rucho* ("*Rucho*"), decided the day before this Brief was filed, is instructive because it examines, and overturns, a similarly egregious partisan gerrymander

For example, in this Court's jurisprudence regarding the Fourth Amendment and its analogous provision of the Pennsylvania Constitution – Article I, Section 8 – the Court has applied a "reasonableness" standard for evaluating seizures, and has declined to set "a hard and fast rule[,]" recognizing the "fact-specific nature of the reasonableness inquiry." *Com. v. Revere*, 888 A.2d 694, 706-07 (Pa. 2005). Similarly, at the federal level, in evaluating whether an award of punitive damages in a fraud action was "grossly excessive" such that it violated the Due Process Clause of the Fourteenth Amendment, the U.S. Supreme Court stated: "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. [. . .] When the ratio [between punitive damages and the assessment of actual damages] is a breathtaking 500 to 1, however, the award must surely raise a suspicious judicial eyebrow." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582-83 (1996).

In *BMW*, the court "declin[ed] to draw a bright line marking the limits of a constitutionally acceptable punitive damages award," but nevertheless was "fully convinced that the grossly excessive award imposed in this case transcends the constitutional limit." *Id.* at 585-86. *See also Lynch v. Donnelly*, 465 U.S. 668, 678-

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using statistical techniques similar to those used in this case. However, this Court does not need to, and should not, interpret or apply federal law; as Petitioners state, "this Court should expressly hold that the [2011 Plan] runs afoul of Pennsylvania law irrespective of federal law." (Pet. Br. at 42.)

79 (1984) (deciding case under Establishment Clause of First Amendment, but noting that "no fixed, per se rule can be framed" and the "line between permissible [government-religion] relationships and those barred by the Clause can be no more straight and unwavering than due process can be defined in a single stroke or phrase or test"); *Indianapolis Power & Light Co. v. Pennsylvania Pub. Util. Comm'n*, 711 A.2d 1071, 1075 (Pa. Cmwlth. 1998) (deciding Commerce Clause case but acknowledging that "there is no bright-line test to determine whether a statute violates the Commerce Clause" because modern jurisprudence under the Clause "involves a case-by-case examination" of each particular statute at issue).

Indeed, when invalidating a prior state legislative redistricting plan as contrary to law, this Court nevertheless reiterated its rejection of "the premise that any predetermined [population] percentage deviation [existed] with which any reapportionment plan [had to comply]," and declined to "set any immovable 'guideposts' for a redistricting commission to meet that would guarantee a finding of constitutionality." *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 736 (Pa. 2012); *see also Butcher v. Bloom*, 203 A.2d 556, 572 (Pa. 1964) ("In our view, the establishment of a rigid mathematical standard is inappropriate in evaluating the constitutional validity of a state legislative apportionment scheme."). While the lack of a precise answer to the question of how much partisanship renders a redistricting plan unconstitutional may yield some

uncertainty for parties and the courts, "that is often the case when constitutional principles are at work," particularly in areas of law requiring case-by-case, fact-specific determinations. *Holt*, 38 A.3d at 757. Fortunately, as this Court has recognized, courts are more than capable of applying standards flowing from constitutional principles that have developed incrementally over several cases rather than being stated with certainty in the first instance. *See Com. v. Lyles*, 97 A.3d 298, 306 n.4 (Pa. 2014) (applying "reasonable person test" for evaluating seizures under Fourth Amendment and acknowledging that the standard "evolved from cases following *Terry v. Ohio*," 392 U.S. 1 (1968)); *Joseph v. Scranton Times L.P.*, 129 A.3d 404, 425 (Pa. 2015) (discussing the "evolving constitutional infrastructure" of defamation law in light of decades of precedent).

2. Governing Law Supplies a Standard for Evaluating Petitioners' Claims

The Pennsylvania Supreme Court has explicitly ruled that judicial intervention is appropriate to stop "egregious abuses" (*Erfer*) and "excesses" (*Holt*) in the redistricting process. (COL ¶15.) The U.S. Supreme Court has also consistently held that extreme partisan gerrymandering is unconstitutional and "incompatible with democratic principles." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion)); *see also Vieth*, 541 U.S. at 294 ("an excessive injection of politics [into redistricting] is unlawful"). Regardless of

where the exact line between acceptable and excessive partisanship may lie, there should be no dispute that that line has been crossed when partisan intent subordinates traditional districting principles – namely, compactness, contiguity, and preservation of political subdivisions – to advantage one party's voters over another's. *See Whitford v. Gill*, 218 F. Supp. 3d 837, 887 (W.D. Wis. 2016) ("[w]hatever gray may span the area between acceptable and excessive, an intent to entrench a political party in power signals an excessive injection of politics into the redistricting process" that violates the Constitution). These principles, which seek to protect and promote voters' interests, have "deep roots in Pennsylvania constitutional law" and "represent important principles of representative government"; namely, "that communities indeed have shared interests for which they can more effectively advocate when they can act as a united body and when they have representatives who are responsive to those interests." *Holt*, 38 A.3d at 745. Their subversion to partisan aims is constitutionally impermissible.[2]

[2] However, it should be noted that adherence to the principles of compactness, contiguity, and preservation of political subdivisions will not necessarily be sufficient to ensure a fair map; nor is deviation from these principles a necessary element of a partisan gerrymandering claim. *See Whitford v. Gill*, 218 F. Supp. 3d 837, 888 (W.D. Wis. 2016) ("the Court has made clear that 'traditional districting principles' are not synonymous with equal protection requirements. Instead, they are objective factors that may serve to defeat a claim that a district has been gerrymandered . . . . a map's compliance with traditional districting principles does not necessarily speak to whether a map constitutes a partisan gerrymander.") (internal quotation marks and citations omitted); *see also Rucho* Mem. Op. at 112-

3. The 2011 Plan Falls Far Outside What Should Be Permissible Under the Pennsylvania Constitution

At trial, Petitioners presented compelling evidence that the 2011 Plan jettisons traditional districting principles in favor of partisan advantage. The bizarre configuration of the map itself supplies the first indication that the traditional principles of compactness, contiguity, and avoiding splits of political subdivisions played a scant role in the mapmakers' work. (*See* Pet. Br. at 9-21.) The 2011 Plan is riddled with geographic "anomalies," using narrow tracts, isthmuses, and appendages to join disparate plots of land while dividing communities. (FOF ¶318.) The boundaries of the 7th District deliberately skirt Democratic areas to maintain a Republican majority (PX83; PX53 at 31-32); a tentacle of land reaches up the Allegheny River to drain important Democratic precincts out of the 12th District. (FOF ¶334.) The 2011 Plan also detaches Democrat-leaning cities from their moorings, relocating Erie, Swarthmore, Harrisburg, Bethlehem, Easton, Scranton, and Wilkes-Barre to alter partisan breakdowns. (FOF ¶¶320-334.) For example, the map plucks Reading, the Berks County seat and a Democratic stronghold, from Berks County's 6th District, feeding it to the Republican 16th District via a skinny arm only two stores wide. (FOF ¶324; Tr.618:25-620:6; PX99.) The map is also a jumble of improbable splits: the 2011 Plan breaks up 28 counties and 68

13 (compliance with traditional redistricting criteria does not immunize a plan from scrutiny).

municipalities between at least 2 different congressional districts, and even divides several neighborhoods in half. (FOF ¶¶149-176.)

The circumstances of the 2011 Plan's creation also suggest partisan aims. (*See* Pet. Br. at 6-8.) The map was created in a process under the exclusive control of Republicans, behind closed doors, with almost no public deliberation. (FOF ¶¶97-108.) Republicans introduced the bill as an empty shell and did not amend it to include descriptions of the new districts until the morning of the day on which it was adopted by the Senate, which suspended procedural rules to hasten its passage. (FOF ¶¶104-109, 126.) Within a week, the bill had been passed by the Republican House and signed into law by the Republican Governor.[3] (FOF ¶¶114-121, 128.) While the 2011 Plan's official consideration was rushed, however, evidence

[3] The Commonwealth Court suggested that unilateral Republican control of the legislative and executive branches somehow justified the partisan nature of the 2011 Plan:

> In the elections . . . leading up the drawing of the 2011 Plan, Pennsylvania voters elected Republicans to control the congressional redistricting process. There should be no surprise then that when choices had to be made in how to draw congressional districts, elected Republicans made choices that favored their party (and thereby their voters).

(FOF ¶420.) By their very nature, however, Constitutional rights do not come and go with changes in political control; members of a minority party do not have to tolerate infringement of their rights simply because they do not have the good fortune to be in the majority. If anything, the exclusive Republican control of the mapmaking process should buttress the Court's conclusion that the Plan was an unconstitutional partisan gerrymander.

demonstrates that the map itself was painstakingly and deliberately crafted to have partisan effect.

Petitioners' experts credibly demonstrated that by multiple measures, the Pennsylvania map prioritizes partisan goals. Dr. Kennedy showed that the 2011 map "packed" and "cracked" Democratic voters into bizarre districts that fractured Pennsylvania's communities in order to maximize Republican seats. (FOF ¶¶313-39; Tr.579:18-644:15.) Dr. Warshaw used an efficiency gap analysis to establish that the map's pro-Republican advantage is historically extreme. (FOF ¶380; Tr.865:2-866:10.) Dr. Chen created simulated districting plans governed by traditional districting criteria and concluded with 99.9% statistical certainty that the 2011 Plan's 13-5 Republican advantage would never have emerged from a districting process adhering to those traditional principles. (FOF ¶291; Tr.203:14-204:16.) Dr. Pegden generated hundreds of billions of maps using an algorithm that enabled him to conclude, with 99.99% certainty, that the 2011 Plan could *only* be the product of partisan intent. (FOF ¶359; Tr.1384:22-1386:12.). As set forth by Petitioners in greater detail, these experts each "demonstrated, using objective measures, the extent to which the map targets Democratic voters for disfavored treatment."[4] (*See* Pet. Br. at 9-34.)

[4] The Commonwealth Court found that each of these experts was credible. It had few criticisms of their work, each of which are easily refuted. First, the

The trial record contains no evidence that any considerations other than purely partisan ones could explain the 2011 Plan. Moreover, the Legislative Respondents could not rebut the facts and expert analysis that Petitioners had presented. The Commonwealth Court found that the Legislative Respondents' rebuttal experts were not credible. (FOF ¶¶398-400, 409-410.) Dr. McCarty, who attempted to criticize Dr. Chen's methodology, admitted that his own simulation had proven incorrect 97% of the time. (Tr.1517:3-6.) (Meanwhile, as the Commonwealth Court pointed out, Dr. Chen's methodology resulted in accurate

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Commonwealth Court noted that no single expert provided an analysis of every aspect of the inquiry. (*See, e.g.*, FOF ¶¶310-312, 340.) In a complex inquiry such as this, however, it is not unusual for a party to present different experts from different fields whose analyses lead to the same conclusion. The court in *Rucho*, faced, as here, with a group of experts who, using different data and methods, separately concluded that a districting plan was a partisan outlier, stated that this diversity would give the court "*greater* confidence in the correctness of the conclusion." *Rucho* Mem. Op. at 75. Second, the Commonwealth Court criticized the experts for failing to consider incumbency protection as a traditional districting principle. (*See, e.g.*, FOF ¶¶284, 398.) However, the Commonwealth Court's critique is based on a misinterpretation of the case law and erroneously elevates the role of incumbency considerations in redistricting. Incumbency protection is not recognized as a valid districting criterion in the Pennsylvania Constitution, and is recognized in case law only "in the *limited form* of avoiding contests between incumbents," *see Bush v. Vera*, 517 U.S. 952, 964 (1996) (plurality opinion) (citing cases) (emphasis added), and, even in its proper form, must always be secondary to constitutional requirements and traditional redistricting principles. *See Larios v. Cox*, 314 F. Supp. 2d 1357, 1362 (N.D. Ga. 2004); *see also Abrams v. Johnson*, 521 U.S. 74, 84 (1997) (finding that incumbency protection should be subordinated to other districting factors because it is "inherently more political"). Moreover, Dr. Chen demonstrated that even after incumbency was factored in, the 2011 Plan was still an extreme outlier. (FOF ¶¶285-291.)

predictions for 54 out of 54 congressional elections under the 2011 Plan. (FOF ¶409).) Dr. Cho, who was supposed to rebut Dr. Pegden's and Dr. Chen's analyses, did not even review either expert's algorithm or code, and the Commonwealth Court found her criticisms were also not credible. (FOF ¶¶398-401.) The Legislative Respondents offered no rebuttal at all to Dr. Kennedy's work, and offered no other defense of the map.

The Court should find that the 2011 Plan's successful effort to subordinate traditional districting objectives to Republican partisan goals violates Petitioners' rights under the Pennsylvania Constitution. Petitioners have set forth tests anchored in Pennsylvania constitutional precedent that recognize the central importance of voting under our democracy. First, under the Free Expression Clause, Pa. Const. Art. I, § 7, and Free Association Clause, Pa. Const. Art. I, § 20, it is unconstitutional to discriminate against or burden protected speech – like voting – based on its viewpoint unless the law is narrowly tailored to accomplish a compelling governmental interest. *See Pap's A.M. v. City of Erie*, 812 A.2d 591, 612 (Pa. 2002). The Court should find that mapmakers' decision to subvert traditional districting principles designed to protect voters' rights in order to disadvantage one party's voters at the polls constitutes prohibited viewpoint discrimination.

Second, under the Free Expression and Association Clauses, it is also unconstitutional to retaliate against voters based on how they have voted in the past. *See Uniontown Newspapers, Inc. v. Roberts*, 839 A.2d 185, 192-93, 198-99 (Pa. 2003). The Court should find that deliberately placing Democratic voters in districts that diluted the effectiveness of their votes demonstrates an intent to burden petitioners' speech "because of how they voted or the political party with which they were affiliated"; that this caused Petitioners to suffer a tangible and concrete harm; and that but for that the mapmakers' intent, Petitioners would not have been injured.

Finally, the Equal Protection Guarantee, Pa. Const. Art. I, §§ 1, 26, and Free and Equal Clause, Pa. Const. Art. I, § 5, prohibit intentional discrimination against identifiable political groups where there has been an actual durable discriminatory effect on that group. *See Erfer*, 794 A.2d at 332. The Court should find that the 2011 Plan subordinated traditional principles to partisan goals with the intent of discriminating against Democratic voters as a political group, and that this subordination caused a discriminatory effect on those voters by artificially diminishing their ability to elect candidates of their choice in favor of their Republican counterparts.

Petitioners' approach provides the Court with judicially manageable standards upon which it can rule; the amici have offered other perspectives on how

to evaluate this case, which the Court may also consider. Executive Branch Respondents note that there are a number of formulations available to courts assessing partisan gerrymanders that are susceptible to judicially manageable standards. *See, e.g.*, *DePaul v. Com.*, 969 A.2d 536 (Pa. 2009); *Ins. Adjustment Bureau v. Ins. Comm'r for Commonwealth of Pa.*, 542 A.2d 1317 (Pa. 1988).

B. The Commonwealth Court's Conclusion That Democratic Voters Are Not an Identifiable Group Does Not Stand Up to Examination

The Commonwealth Court also erred in concluding, with no explanation, that "[v]oters who are likely to vote Democratic (or Republican) in a particular district based on the candidates or issues, regardless of the voters' political affiliation, are not an identifiable political group for purposes of the Equal Protection Guarantee under the Pennsylvania Constitution." (COL ¶53.) That conclusion finds no support either in case law or in the facts of this case. This Court acknowledged in 2002 that advances in information technology might facilitate a showing in that Democratic or Republican voters are an identifiable political group. *See Erfer*, 794 A.2d at 332-33 (plaintiffs could "adduce sufficient evidence to establish that such an identifiable class exists").

Similarly, a federal district court evaluating a partisan gerrymander rejected the argument that an identifiable political group could only be established where the plaintiffs "allege facts demonstrating that Democrats in Pennsylvania vote as a

block." *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 543-44 (M.D. Pa. 2002). Noting that "no such requirement" exists, the court suggested that plaintiffs needed only to allege "that they are members of an identifiable political group whose geographical distribution is sufficiently ascertainable that it could have been used in drawing electoral district lines." *Id.* at 544, *rev'd on other grounds*, 541 U.S. 267 (2004). While block voting is not required, however, the U.S. Supreme Court has acknowledged in the context of the Voting Rights Act that a showing that "group members usually vote for the same candidates is one way of proving political cohesiveness" for a claim of vote dilution. *Thornburg v. Gingles*, 478 U.S. 30, 56 (1986).

While courts have not set forth rules regarding what specific evidence would be required to show the existence of an identifiable political group, Petitioners' evidence here has borne out the *Erfer* court's prediction that information technology would provide such evidence. Petitioners' expert Dr. Jowei Chen analyzed six cycles of Pennsylvania statewide election results using precinct-level vote counts. (Tr.189:17-190:2.) The same data, Dr. Chen noted, would have been available to the Pennsylvania General Assembly at the time the 2011 Plan was drafted. *Id.* Using that data, Dr. Chen concluded that voters' "past voting history and federal and statewide election[s]" are "a strong predictor of future voting[.]" (Tr.315:6-9.) Accordingly, such information permits a determination that there

exists "a group of people who consistently vote for Democratic candidates," and whose voting patterns could be expected to persist across future elections. (Tr.314:12-20, 315:6-14, 317:1-15.)

Additionally, Dr. Chen pointed out that the same information permits users to ascertain the geographical distribution of likely Democratic voters, as "recent statewide elections are the most reliable indicator of the underlying partisan tendencies of a particular district." (Tr.190:21-24.) Indeed, it is clear that the drafters of the 2011 Plan had no trouble identifying the existence and location of likely Democratic voters with such precision that they were able to craft a map that accounted for their distribution and produced a durable Republican majority. Thus, the contention that such voters do not, as a matter of law, constitute an identifiable political group contravenes legal precedent and the observed reality of partisan gerrymandering.

C. Petitioners' Injuries Establish Concrete Harms

Petitioners presented extensive testimony that the 2011 Plan harmed each of them individually, as well as collectively, by taking away their ability to cast meaningful votes, lessening the chance that they could elect a Congressperson who represented their views, diminishing the power of their vote, muffling the strength of their voices on the issues, cutting off their access to their Congressmen, and/or harming their community by splitting it off from like-minded communities of interest. (*See* FOF ¶¶221-33.) For example, the 2011 Plan artificially redistributes Petitioners Lawn, Isaacs, and Smith to effectively ensure they will never be able to elect a candidate of their choice. (FOF ¶¶7, 8, 11; PX1 at 35-38.) Petitioners Greiner's, Petrosky's, and Ulrich's votes have been nullified because their districts are now so uncompetitive that there is no one to vote for. (FOF ¶¶191, 197, 233.) Petitioners Febo San Miguel, Solomon, Lichty, Mantell, and McNulty have also seen their votes gutted, by a different tack: their inclusion in packed Democratic districts. (*see*, *e.g.*, PX172 at 33:19-34:8 (Lichty); PX173 at 7:5-20, 66:8-67:3 (McNulty); PX163 at 9:7-8, 34:6-36:13, 41:14-19 (Febo San Miguel); PX169 at 7:2-22, 21:2-22:11 (Solomon); PX174 at 7:6-18, 13:7-13:10, 18:19-18:20 (Mantell).) Petitioners in the other districts have not been spared. Their representatives in Congress are cowed by fellow delegates that have no motivation to be receptive to voters' concerns. (FOF ¶¶ 227-228; 232; 387-388.)

These injuries constitute tangible, cognizable harms – they are not, as the Commonwealth Court suggested, mere "feelings." (*See* COL ¶56(a).) They deny Democratic voters fair representation. *Erfer*, 794 A.2d at 333. They also affect Petitioners' ability to achieve electoral success based on their political beliefs. Indeed, these injuries are at the heart of Petitioners' standing to challenge the map statewide: As the Supreme Court has recognized, "[a] reapportionment plan acts as an interlocking jigsaw puzzle, each piece reliant upon its neighbors to establish a picture of the whole." *Erfer*, 794 A.2d at 329-30. Taken together, Petitioners' harms demonstrate how the 2011 Plan diminishes every Democratic voter's ability to influence the political process, regardless of whether they are personally located in a "packed" or "cracked" district.

II. The Remedy

If this Court finds that the 2011 Plan violates the Pennsylvania Constitution, it should take steps to ensure that a new map is in place in time for the 2018 Congressional elections.[5] In this Section, the Executive Branch Respondents, as

[5] The Commonwealth Court stated that "Petitioners and likeminded voters from across the Commonwealth can exercise their political power at the polls to elect legislators and a Governor who will address and remedy any unfairness in the 2011 Plan through the next reapportionment following the 2020 U.S. Census." (COL ¶56e.) If this Court finds a constitutional violation, however, it cannot abdicate its responsibility to let the violation go uncorrected in the hope that the Legislature might someday correct the problem. Here, the Court has the power to step in in time for the next election, and should do so. *See, e.g.*, *Holt*, 38 A. 3d. at 716

representatives of the Department that administers elections, make suggestions regarding options for achieving that goal.

A. The 2018 Election Schedule

On November 6, 2018, Pennsylvanians will elect their delegation to the 116th U.S. Congress. Leading up to this date are a series of election deadlines imposed by federal or state law, the earliest of which are rapidly approaching. (FOF ¶¶432-445.) Under the current schedule, candidates must submit their nomination petitions by March 6, and the primary election is scheduled for May 15, 2018. (FOF ¶¶424, 422.) In anticipation of these deadlines, ideally the congressional district boundaries should be finalized by January 23. (FOF ¶446.) However, should the Court order that a new plan be drafted, and that plan cannot be finalized by January 23, the Executive Branch Respondents will make every effort to ensure that the 2018 election cycle can still proceed under the new plan.

Through a combination of internal administrative adjustments and date changes, it would still be possible to hold the primary on May 15 as long as a new map is in place by February 20, 2018. (FOF ¶¶447-451.) It would also be possible, if the Court so ordered, to postpone the 2018 primary elections from May 15 to a

(directing reapportionment and adjusting calendar for impending primary elections).

date in the summer of 2018. (FOF ¶455.)[6] Although any postponements will result in significant logistical challenges for County election administrators, delaying the primary would allow a new plan to be put in place as late as the beginning of April. (FOF ¶¶456-457.)

B. The Process for Creating a New Plan

If this 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).

The Executive Branch 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).

[6] The Court could either postpone the entire primary election or postpone the congressional primary election alone. (FOF ¶455.) As Commissioner Marks testified via affidavit at trial, the former scenario is preferable, since the latter option would result in a significant additional expenditure of public funds. (FOF ¶¶457-460.)

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 above. *See* Pa. Const. Art. II, § 1 and Art. III. 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*, 38 A.3d at 761; *In re 1991 Pennsylvania Legislative Reapportionment Comm'n*, 609 A.2d 132, 134 (Pa. 1992).

If the General Assembly fails to pass a plan that the Governor can 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). 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).

CONCLUSION

For the foregoing reasons, the Executive Branch Respondents respectfully request that the Court rule that the 2011 Plan violates the Pennsylvania

Constitution and put a process in place to replace the 2011 Plan in time for the 2018 primary elections.

Respectfully submitted,

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This 10th day of January, 2018, I certify that:

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Public Access Policy. I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

The undersigned verifies that the preceding Brief does not contain or reference exhibits filed in the Commonwealth Court under seal. Therefore, the preceding Brief does not contain confidential information.

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v.		
The Commonwealth of Pennsylvania; The Pennsylvania General Assembly; Thomas W. Wolf, In His Capacity As Governor of Pennsylvania; Michael J. Stack III, In His Capacity As Lieutenant Governor of Pennsylvania And President of the Pennsylvania Senate; Michael C. Turzai, In His Capacity As Speaker of the Pennsylvania House of Representatives; Joseph B. Scarnati III, In His Capacity As Pennsylvania Senate President Pro Tempore; Robert Torres, In His Capacity As Acting Secretary of the Commonwealth of Pennsylvania; Jonathan M. Marks, In His Capacity As Commissioner of the Bureau of Commissions, Elections, and Legislation of the Pennsylvania Department of State, Respondents	:	

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

LOUIS AGRE, *et al.*, *Plaintiffs,* v. THOMAS W. WOLF, Governor of Pennsylvania, in his official capacity, *et al.*, *Defendants.*	:	CIVIL ACTION No. 2:17-cv-4392

EXECUTIVE BRANCH DEFENDANTS' POST-TRIAL BRIEF

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Defendants Governor Thomas W. Wolf, Acting Secretary of the Commonwealth Robert Torres, and Commissioner Jonathan Marks, in their official capacities (together, the "Executive Branch Defendants") offer this brief to identify, summarize and draw conclusions from certain aspects of the evidence offered at trial. The Executive Branch Defendants will not analyze the application of Plaintiffs' legal theories to that evidence, on the assumption that Plaintiffs and Defendants Speaker Michael C. Turzai and Senate President Pro Tempore Joseph B. Scarnati, III (together, the "Legislative Defendants") will provide that analysis.[1]

I. PLAINTIFFS HAVE STANDING TO BRING THIS ACTION

To demonstrate standing, a plaintiff must show that she has suffered an injury in fact that is fairly traceable to the challenged conduct of the defendants and is redressable by a favorable decision from the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1991). Here, the evidence established Plaintiffs' standing by showing a number of harms that have flowed from the 2011 Plan, including: dilution of their votes, s*ee* 12/7/17 A.M. Trial Tr. at 16:22-17:21 (discussing Joy Montgomery, Douglas Graham, Shawndra Holmberg, Barbara Shah); a Congressional representative who does not listen to his constituents because "he's going to get elected whether I vote against him or for him," 12/5/17 P.M. Trial Tr. at 59:20-21 (Jason Magidson); and an inability to effectively advocate to representatives within non-competitive districts, 12/5/17 A.M. Trial Tr. at 99:3-19 (Louis Agre). One plaintiff testified that she was unable to vote for any Democratic Congressional candidate in her district because the Republican candidate has run unopposed since the 2011 Plan went into place, 11/28/17 Dep. of Barbara Shah, Tr. at 12:17-13:1, 13:7-2, while a Republican plaintiff testified that she has been deterred from running for office because the 2011 Plan has made it impossible for any

[1] The Executive Branch Defendants' comments and descriptions apply only to the evidence offered in this case, and should not be read to apply to the evidence in any related case.

Republican to win in her now-overwhelmingly Democratic district, 11/30/17 Dep. of Marina Kats, Tr. at 69:11-70:6 11/30. Another plaintiff testified that she suffers from a severe medical condition, and as a result worries "daily" about the votes taking place in the Republican-majority Congress "because of how much they will affect me personally due to my health conditions." 12/5/17 P.M. Trial Tr. at 40:10-17 (Jean Shenk).

Plaintiff Brian Burychka, a high school civics teacher, testified that in recent years his students have lost interest in democracy because they increasingly believe that their representatives do not listen to them. 12/5/17 P.M. Trial Tr. at 69:15. Similarly, Plaintiff Edwyn Gragert lamented his inability to effectively campaign for candidates he supports because voters believe their money would be "wasted" and their votes "futile." 12/1/17 Dep. of Edwyn Gragert at 38:1-11. Indeed, Legislative Defendants' own expert even conceded that the creation of highly partisan and non-competitive districts causes harm, as it results in depressed voter turnout. *See* 12/5/17 P.M. Trial Tr. at 30:24-31:3 (testimony of Nolan McCarty).

The fact that the Plaintiffs have not been physically or legally restrained from engaging in basic political activities—voting, donating to candidates, speaking their minds, and calling their political representatives—does not obviate Plaintiffs' standing to bring this action. There is more to citizenship in a democratic society than mechanically casting votes that cannot make a difference and voicing opinions that will be ignored; a citizen's ability to cast *meaningful* votes, to make effective contributions to the political process, or to be heard by the representatives she contacts are important rights weighing on the fundamental right to vote. The loss of such abilities vests Plaintiffs with standing to bring this action.

II. PLAINTIFFS PRESENTED COMPELLING EVIDENCE THAT THE PENNSYLVANIA GENERAL ASSEMBLY DREW THE 2011 PLAN WITH THE INTENT TO BENEFIT REPUBLICAN CANDIDATES

A. Plaintiffs' Expert Witnesses Demonstrated That the District Lines Were Drawn in Odd and Convoluted Ways That Could Only Be Explained by Partisan Motivations

Plaintiffs' experts made clear that neutral principles of redistricting—contiguity, compactness, and minimizing splits of political subdivisions—could not justify the shapes of the districts created by the 2011 Plan because those shapes consistently violated those very principles, while at the same time achieving partisan political effects. *See* 12/5/17 A.M. Trial Tr. at 31:20-25 (testimony of Anne Hanna, listing neutral redistricting criteria). Expert witness Daniel McGlone conducted a visual analysis of the 2011 Plan's district boundaries in relation to the geographic distribution of Democratic- and Republican-leaning areas, and illuminated the way that the bizarrely-shaped districts were plainly designed to achieve partisan goals. See 12/4/17 A.M. Trial Tr. at 87:5-88:7. For example, Mr. McGlone testified that the "circuitous boundary" of the Seventh District—which consists of two essentially separate areas connected by a "thin, little arm that extends and wraps around [] Democratic areas" in order to avoid them—was drawn to maintain the Seventh's Republican vote share edge. *Id.* at 185:16-197:12. Regarding the Sixteenth District, he pointed out that the boundaries "extend into the middle of Chester County to pick up the highly Democratic-performing areas of Coatesville and its immediate suburbs," thus "dilut[ing] the Democratic votes in Coatesville and in Reading by putting them in with a more heavily Republican [d]istrict." *Id.* at 183:21-184:23. Expert Anne Hanna similarly attributed the peculiar shapes of certain districts to partisan intent, noting for example that the shape of the Fourteenth District cannot be justified on the basis of "traditional neutral districting principles" due to its "highly non-compact" shape and the resulting split of certain municipalities. 12/4/17 P.M. Trial Tr. at 139:16-140:2.

B. Speaker Turzai's Detailed Partisan Data Was Used to Make the 2011 Plan More Favorable to Republicans

The use of partisan data to draft the 2011 Plan confirms that the Plan was drafted to achieve wholly partisan goals. On November 8, 2017, the Court ordered the Legislative Defendants to produce the "facts and data considered in creating the 2011 Plan." Order Re: Plaintiffs' Motion to Compel, ECF No. 76 (Nov. 9. 2017) at ¶ 2. In response, Defendant Turzai's counsel emailed Plaintiffs a link to a large compilation of data (the "Turzai data set"), stating in their email that "pursuant to paragraph two" of the Court's November 8 order, "the following is a link to download the facts and data [considered] in creating the 2011 plan." 12/4/17 P.M. Trial Tr. at 4:2-8. No other information was produced in response to ¶ 2 of the November 8 Order. Accordingly, the Court can conclude not only that the creators of the 2011 Plan relied on the Turzai data set, but that they relied on nothing but the Turzai data set.

As shown at trial by Plaintiffs' experts, Mr. McGlone and Ms. Hanna, the partisan data in the Turzai data set was applied with great precision to create the 2011 Plan. The Turzai data set included shapefiles that formed the building blocks for the 2011 Plan, "election return data" and "party registration numbers for spring and fall" of every even year from 2004 to 2010, and "votes aggregated at a voting precinct level indicating whether a precinct is more Democratic-performing based on election returns . . . or more Republican performing." 12/4/17 A.M. Trial Tr. at 162:7-163:1 (McGlone). Notably, the party registration and election return data was "available all the way down to the census block level[,]" which is "the smallest geographic unit" that map-makers use, despite the fact that census block level election data is not available from any public source. *Id.* at 164:11-20; 12/4/17 P.M. Trial Tr. at 55:10-14; 56:12-14. The map-makers undertook a special level of effort to disaggregate the data to that level of precision. As defense expert Dr. James Gimpel forcefully testified, "seek[ing] . . . out" partisan information—as opposed to taking

note of publicly available information—strongly indicates that the information is "important" to the people reviewing it, and human nature means the reviewers will almost certainly use the information if they have it. 12/6/17 P.M. Trial Tr. at 57:9-10; 57:25-58:4.

Mr. McGlone also noted that the map shapefiles and the highly detailed partisan data were "already combined" when he received the Turzai production for review, which further supports an inference that they were used in tandem with one another. 12/4/17 A.M. Trial Tr. at 167:19-23. Mr. McGlone testified at length about the precise district shape manipulations that were undertaken in the creation of the map, which would have been facilitated by the use of the partisan data. For example, he described the three-way split of the Harrisburg area, which had the effect of "crack[ing] . . . a core Democratic constituency" by splitting it "among multiple districts to dilute its influence." *Id.* at 132:9-17. Mr. McGlone also discussed the drawing of a district that entirely avoided the city of Reading, and instead "reached out into Central Pennsylvania to grab more Republican-voting areas." *Id.* at 133:10-25.

Ms. Hanna also reviewed the Turzai data set, and similarly noted that the districts in the 2011 Plan were drawn to reflect partisan data. For example, Ms. Hanna testified that the outlines of the Seventh District "track very closely the border between the red regions and the blue regions of [the] map, the red regions being the ones that voted more strongly for Republicans." 12/4/17 P.M. Trial Tr. at 136:18-23. Ms. Hanna also identified violations of traditional redistricting principles, such as districts that were "highly non-compact." *Id.* at 139:16-20.

C. The Need to Satisfy Partisan Concerns Was an Important—Perhaps the Most Important—Factor in the Map-Making Process

Plaintiffs also submitted the deposition testimony of legislative staffers who worked on the redistricting process that led to the creation of the 2011 Plan. 12/6/17 P.M. Trial Tr. at 95:16-19; 104:5-10; 107:7-8; 111:23-24. Both admitted that they took note of partisan data during the

process because elected officials expressed an interest in knowing how certain areas had performed in previous elections and made clear that the views of Democratic lawmakers were not meaningfully incorporated into the project. 12/6/17 P.M. Trial Tr. at 79:25-80:4 (Arneson); 112:24-113:13 (Schaller). The deposition testimony submitted by Plaintiffs shows that no input from a single Democratic senator was considered during the process of creating the 2011 Plan, and that there were no Democrats "in the room" when the maps were being drawn. 12/6/17 P.M. Trial Tr. at 76:9-20. The deposition testimony submitted by Plaintiffs also demonstrates that "discussions among Republican stakeholders" were "probably the most important factor . . . used [in] drawing [the] map," and that no Democrats were involved in those discussions. *Id.* at 128:22-129:2.

Both staffers made clear that the maps were created based on "discussions" and "negotiations" with the goal of drafting a plan that could obtain enough support to ensure final passage in both chambers of the General Assembly and the signature of Pennsylvania's then-Republican governor. 12/6/17 A.M. Trial Tr. at 133:25-134:6 (Arneson) (noting the key consideration in the process was the ability to "come up with a plan that would have 26 votes in the Senate"); 12/6/17 P.M. Trial Tr. at 78:2-7 (Arneson) (describing the effort to "cobble[] something together that can get 26 votes"); 163:2-15 (Schaller). The decision to place particular municipalities into certain districts arose from "the legislative process," meaning "getting the necessary votes to pass a piece of legislation." 12/6/17 P.M. Trial Tr. at 128:11-17 (Schaller).

D. Incumbency Protection Does Not Establish a Nonpartisan Basis for the 2011 Map

In contrast to Plaintiffs' evidence that the 2011 Plan was drawn to give Republicans an advantage over Democrats, the record is devoid of any credible nonpartisan explanation for such an effect. While "incumbency protection" has been oft-mentioned as a justifiable reason to draw

the 2011 Plan as it currently exists, *see, e.g.*, 12/5/17 A.M. Trial Tr. at 142:6-9; 12/6/17 P.M. Trial Tr. at 8:10-13; 82:2-7; 94:15, "incumbency protection" appears, in this instance, to have been one-sided, given the dearth of input from Democratic lawmakers into the process and the protection of Republican incumbents by buttressing their districts with Republican voters.

Indeed, "incumbency protection" cannot be used to carry out politically motivated redistricting. While "avoiding contests between incumbents" may be a legitimate state goal, the U.S. Supreme Court has never approved of reliance upon "incumbency protection" to achieve partisan ends. *Bush v. Vera*, 517 U.S. 952, 964 (1996) (O'Connor, J.), citing *White v. Weiser*, 412 U.S. 783, 797 (1973) (stating that the drawing of district boundaries "in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness."); *see also Karcher v. Daggett*, 462 U.S. 725, 740 (1983) ("avoiding contests between incumbent Representatives" might justify some variance in district populations). Apart from that specific form of the practice, the Supreme Court is well aware "that incumbency protection can take various forms, not all of them in the interests of the constituents." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440-41 (2006). With that understanding, the court has stated unequivocally that "[i]f . . . incumbency protection means excluding some voters from the district simply because they are likely to vote against the officeholder, the change is to benefit the officeholder, not the voters." *Id.* The Supreme Court has certainly never endorsed incumbency protection as a redistricting criterion that could, merely by its invocation, justify discriminatory gerrymandering.

One of the Legislative Defendants' experts, Dr. Gimpel, testified that drawing districts to protect incumbents benefits citizens, because their representatives will have: (1) seniority, which increases their effectiveness in the committee system; (2) expertise that facilitates representation;

(3) institutional knowledge of how best to navigate federal agencies and the legislative system; and (4) a deeper understanding of their constituents' interests, developed over time. 12/6/17 P.M. Trial Tr. at 21:7-22:6. In contrast to Dr. Gimpel's testimony, however, the 2011 Plan did not focus on protecting long-term incumbents who might plausibly possess those allegedly beneficial characteristics. Rather, the Plan protected and secured the reelection of four *freshman* Republican representatives – Representatives Pat Meehan, Lou Barletta, Tom Marino, and Mike Kelly – and another Republican representative, Mike Fitzpatrick, who had previously held and lost a Congressional seat and had only returned to the legislature one term before implementation of the Plan. *See* Pl. Ex. 4 at 0721-23. Moreover, the Plan *eliminated* two incumbent Democratic representatives, Jason Altmire and Mark Critz.[2] *Id.* at 0723. Such a result does not appear to engender the beneficial effects that Dr. Gimpel would seem to expect.

III. PLAINTIFFS DEMONSTRATED THAT THE 2011 PLAN HAS HAD ITS INTENDED PARTISAN EFFECT

Plaintiffs have shown that the 2011 Plan has, as intended, given Republican candidates significant advantages over Democratic ones. At the district level, Mr. McGlone's analysis of the Plan's boundaries in conjunction with election data and the Cook Partisan Voter Index determined that Democratic constituencies were efficiently packed into a handful of districts and cracked elsewhere to minimize their influence within Republican-leaning districts. For example, Mr. McGlone testified that the boundaries of the First District are drawn such that they include the Democratic-performing area of Swarthmore—which might "more naturally reside" in the adjacent Seventh District—thus packing Democratic voters into the First District and making the

[2] Rather than providing incumbency *protection*, the 2011 Plan may have functioned as an incumbency *creation* program that locked a number of first- and second-term representatives into their seats for a period of time, with the hope that protecting their seats might be more plausibly described as incumbency "protection" during a future redistricting process.

Seventh District safer for Republicans. 12/4/17 A.M. Trial Tr. at 120:23-121:4; 123:1-5. Similarly, the Second District's inclusion of Lower Merion Township, "an area that's been trending Democratic and voting more and more Democratic over the past decade or so" and which was previously part of the Seventh District, "keeps the Seventh more Republican[.]" *Id.* at 126:6-18. Mr. McGlone also presented examples of effective cracking, such as the "very heavily Republican" Sixteenth District, which took in "the Democratic-performing areas of Reading and Coatesville," therefore diluting the Democratic vote and minimizing its influence. *Id.* at 155:7-14. Meanwhile, the design of the Third and Fifth Districts cracked another Democratic constituency by "putting the City of Erie in the Third District but [its] suburbs and the rest of the county in the Fifth District." *Id.* at 128:4-14. As a result, the Third and Fifth Districts became "less likely to elect a Democratic congressperson," especially the Third. *Id.* at 129:8-10.

Plaintiffs also demonstrated that the 2011 Plan effectively secured Republicans a partisan advantage statewide. As shown in Plaintiffs' Exhibit 4, since the implementation of the 2011 Plan, Republicans have maintained 13 seats to Democrats' 5 seats in every election. Pl. Ex. 4 at 0723-25. That seat distribution has persisted even through the resignation of incumbent Congressional representatives. *Id.* Dr. McCarty, an expert called by the defense, proffers the unlikely theory that the 2011 Plan theoretically permits Democrats to win eight seats, but that they have simply underperformed by precisely the same margin in each of the last three elections. 12/5/17 A.M. Trial Tr. at 139:18-23; 140:11-18. A far more plausible explanation is that the 2011 Plan has functioned precisely as it was designed to, reliably guaranteeing a majority Republican congressional delegation since its implementation.

IV. THE EXECUTIVE BRANCH DEFENDANTS' ROLE IN ENFORCING OR REPLACING THE 2011 PLAN

As representatives of the branch of the Commonwealth government charged with enforcing the statutes that the General Assembly enacts, the Executive Branch Defendants intend to administer and enforce the 2011 Plan unless and until a Court orders them to do otherwise.[3] Should the Court order that a new plan be drafted, however, the Executive Branch Defendants will make every effort to ensure that the 2018 elections cycle can proceed under the new plan.

The Executive Branch Defendants have informed the Court that in order for the May 15, 2018 primaries to proceed under a new districting plan, that plan would need to be in place by January 23, 2018. *See* Joint Statement of Stipulated and Undisputed Facts, ECF No. 150 (Nov. 29, 2017), at ¶¶ 19-28; 12/7/17 P.M. Trial Tr. at 54:18-20. If, however, the Court changes a number of election deadlines and the Department of State devotes additional resources to certain tasks, it would be possible to put a new plan in place by around February 20, and still hold the primary election on May 15. It would also be possible for the Court to order postponement of the May 15 primary election, although such a postponement would entail significant logistical challenges for county election administrators. Should the Court wish for additional information about potential changes to the elections schedule, the Executive Branch Defendants stand ready to provide details in an evidentiary hearing or in written submissions.

[3] At closing argument, the Legislative Defendants' counsel accused the Executive Branch Defendants of "utterly abandon[ing] the state's duly enacted law." 12/7/17 P.M. Trial Tr. 55:14-16. In fact, the Executive Branch Defendants are enforcing the law and will continue to do so as this Court, and the Pennsylvania state courts, weigh the 2011 Plan's constitutionality.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL
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Dated: December 15, 2017

By: /s/ Michele D. Hangley

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CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2017, I caused a true and correct copy of the foregoing Post-Trial Brief to be electronically filed pursuant to the Court's electronic 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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