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

Barbara Diamond, *et al.*,	:	
	:	
Plaintiffs,	:	**Civil Action No. 2:17-cv-5054**
	:	
v.	:	
	:	
Robert Torres, *et al.*,	:	
	:	
Defendants.	:	
	:	

MOTION TO INTERVENE BY MICHAEL C. TURZAI, SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, and JOSEPH B. SCARNATI III, PENNSYLVANIA SENATE PRESIDENT PRO TEMPORE

Proposed Intervenors Michael C. Turzai, in his official capacity as Speaker of the Pennsylvania House of Representatives, and Joseph B. Scarnati III, in his official capacity as Pennsylvania Senate President Pro Tempore (collectively, the "Applicants"), by and through their undersigned counsel, respectfully request, pursuant to Rule 24 of the Federal Rules of Civil Procedure, to intervene as defendants in the above-captioned proceeding for the purpose of participating in the disposition of the proceeding. In support of this Motion, Applicants submit the accompanying Memorandum of Law. Additionally, Applicants submit the following proposed pleadings in response to the Complaint filed in the above-captioned proceeding: (1) Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) with Memorandum of Law and attachments, attached hereto as **Exhibit 1**; and (2) Motion to Stay and/or Abstain, with Memorandum of Law and attachments, attached hereto as **Exhibit 2**.

WHEREFORE, Applicants respectfully request that the Court grant their Motion to Intervene and permit the Applicants to intervene as Defendants in this proceeding.

Dated: November 20, 2017

Respectfully submitted,

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	:	
Defendants.	:	
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ORDER

AND NOW, this ____ day of _____, 2017, upon consideration of the Motion to Intervene by Michael C. Turzai, in his official capacity as Speaker of the Pennsylvania House of Representatives, and Joseph B. Scarnati III, in his official capacity as Pennsylvania Senate President Pro Tempore (the "Motion") filed herein, the Court having considered the Motion, the Memorandum of Law in support thereof, any opposition thereto, and any oral argument thereon, it is hereby **ORDERED** that the Motion is **GRANTED**.

It is further **ORDERED**, that Michael C. Turzai, in his official capacity as Speaker of the Pennsylvania House of Representatives, and Joseph B. Scarnati III, in his official capacity as Pennsylvania Senate President Pro Tempore, are each permitted to intervene as a defendant in the above-captioned proceeding as a matter of right.

It is further **ORDERED** that the Defendant-Intervenors' proposed (1) Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), attached to the Motion as

Exhibit 1; and (2) Motion to Stay and/or Abstain, attached as **Exhibit 2**, are deemed filed as of the date of this Order.

BY THE COURT:

_____

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

Barbara Diamond, *et al.*,	:	
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Plaintiffs,	:	**Civil Action No. 2:17-cv-5054**
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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE BY MICHAEL C. TURZAI, SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, and JOSEPH B. SCARNATI III, PENNSYLVANIA SENATE PRESIDENT PRO TEMPORE

Proposed Intervenors Michael C. Turzai, in his official capacity as Speaker of the Pennsylvania House of Representatives, and Joseph B. Scarnati III, in his official capacity as Pennsylvania Senate President Pro Tempore (collectively, the "Applicants") submit the within Memorandum of Law in Support of their Motion to Intervene as named Defendants in this action pursuant to Federal Rule of Civil Procedure 24(a)(2) (the "Motion").

I. INTRODUCTION

On November 3, 2017, Barbara Diamond, Steven Diamond, Nancy Chiswick, William Cole, Ronald Fairman, Colleen Guiney, Gillian Kratzer, Deborah Noel, Margaret Swoboda, Susan Wood, and Pamela Zidik (collectively, the "Plaintiffs") filed a Motion to Intervene as Plaintiffs together with a proposed Complaint in Intervention in the related case of *Agre et al. v. Wolf et al.*, no. 2:17-cv-4392 (E.D. Pa.), another action commenced before this Court on October 2, 2017 challenging the constitutionality of Pennsylvania's 2011 Congressional districting plan (the "2011 Plan") in which Applicants had previously intervened as Intervenor-

Defendants.[1] On November 7, 2017, after hearing oral argument on Plaintiffs' Motion to Intervene as Plaintiffs in *Agre*, the presiding three-judge panel denied that motion.[2]

Following the denial of their Motion to Intervene as Plaintiffs in the *Agre* action, Plaintiffs filed this independent Complaint on November 9, 2017 (ECF No. 1) also seeking declaratory and injunctive relief based on the claim that the 2011 Plan is unconstitutional. Unlike the *Agre* plaintiffs, Plaintiffs have asserted claims not only under 42 U.S.C. § 1983 and the Elections Clause of the United States Constitution, Article I, Section 4 but, like plaintiffs in *Gill v. Whitford*, No. 16-1161 (U.S.), also bring independent claims under the Equal Protection Clause of the Fourteenth Amendment and under the First Amendment of the United States Constitution.[3] Specifically, Plaintiffs contend that by continuing to implement the 2011 Plan, named Defendants have impermissibly discriminated against Plaintiffs as an identifiable political group (Democratic voters) in contravention of the Equal Protection Clause of the Fourteenth Amendment, unreasonably burdened Plaintiffs' right to express their political views and associate with the political party of their choice in contravention of the First Amendment, and

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[1] Plaintiffs in the *Agre* action also originally failed to sue Applicants. Thus, on October 24, 2017, Applicants filed their Motion to Intervene in the *Agre* action, advancing substantially the same reasons for intervention in that case as presented in the instant memorandum. On October 25, 2017, the Court granted that Motion to Intervene. Order, *Agre v. Wolf*, no. 2:17-cv-4392 (E.D. Pa. Oct. 25, 2017). For the same reasons the Court granted Applicants' Motion to Intervene in *Agre*, so too should the Court grant Applicants' present Motion to Intervene.

[2] The panel entered the Order denying Plaintiffs' Motion to Intervene on November 9, 2017. Order re: Motion to Intervene as Plaintiffs, *Agre v. Wolf*, no. 2:17-cv-4392 (E.D. Pa. Nov. 9, 2017).

[3] *Agre* plaintiffs' original complaint included two hybrid claims apparently based on combinations of the Elections Clause in conjunction with the Equal Protection Clause of the Fourteenth Amendment and the Elections Clause in conjunction with the First Amendment. *See* Complaint ¶¶ 1, 7-8, 41-52, *Agre v. Wolf*, no. 2:17-cv-4392 (E.D. Pa. Oct. 2, 2017). This Court dismissed those two claims, determining *Agre* plaintiffs had failed to identify clear relationships between the Elections Clause and the First and Fourteenth Amendments, but permitted *Agre* plaintiffs leave to amend their hybrid First Amendment claim. Statement of Reasons for the Court's Decision on the Motion to Dismiss (ECF 45, Exh. 1) at 2-4, *Agre v. Wolf*, no. 2:17-cv-4392 (E.D. Pa. Nov. 16, 2017). On November 17, 2017, *Agre* plaintiffs filed their First Amended Complaint, which *inter alia* re-pleaded their hybrid Elections Clause-First Amendment claim. *See* First Amended Complaint ¶¶ 64-80, *Agre v. Wolf*, no. 2:17-cv-4392 (E.D. Pa. Nov. 17, 2017). For the reasons to be addressed in Applicants' forthcoming motion to dismiss that amended complaint, *Agre* plaintiffs have again failed to plead a cognizable claim based on their confusing and undefined mishmash of the Elections Clause and First Amendment.

violated the Elections Clause.[4] Plaintiffs seek to enjoin the further implementation of the 2011 Plan in the upcoming 2018 Congressional elections.

Applicants seek leave of this Court to intervene in this matter based on established Supreme Court precedent, Applicants' significant interests in this litigation, and because none of the currently named parties adequately represent Applicants' interests in this proceeding. Applicants were an integral part of the process of the drawing and enactment of the 2011 Plan. Accordingly, Applicants have a substantial interest in this litigation and the redrawing of the 2011 Plan should the Court ultimately so order. Moreover, Applicants' interests cannot be adequately and fairly represented by any other existing party to this action. Permitting Applicants to intervene will promote and ensure the presentation of complete and proper evidence and legal arguments, and lend finality to the Court's adjudication on the merits.

For these reasons, as more fully discussed *infra*, Applicants request leave of the Court to intervene as Defendants in this matter in order to protect their interest in the outcome of this litigation and the impact such an outcome will have, if any, on the 2011 Plan.

II. APPLICANTS ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT

Pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure, intervention as a matter of right is appropriate when, upon a timely motion, a party:

> Claims an interest relating to the property or transaction that is the subject of the actions, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

[4] As Plaintiffs' Complaint recognizes, the Elections Clause grants the Pennsylvania General Assembly the exclusive authority to draw Congressional district lines, and thus, to the extent that the 2011 Plan allegedly violates that clause, it is the Pennsylvania General Assembly first and foremost that has "exceeded its constitutional authority". Compl. ¶ 68. Indeed, Plaintiffs' allegations in Count III reference only the Pennsylvania legislature and not the named, executive branch Defendants. Notwithstanding the above, Plaintiffs failed to name as parties any representatives of the Pennsylvania legislature in this action.

FED. R. CIV. P. 24(a)(2). The United States Court of Appeals for the Third Circuit has recognized that "intervention controversies arise in many different contexts, and require the court to consider the pragmatic consequences of a decision to permit or deny intervention." *Harris v. Pernsley*, 820 F.2d 592, 596 (3d. Cir. 1987). As a result, the Third Circuit has avoided establishing strict legal standards by which courts can measure applications under Rule 24(a)(2). *Id.* at 597.

While there is no strict legal standard, the Third Circuit has provided the following four (4) pragmatic criteria to be considered on an application to intervene under Rule 24(a)(2):

(1) the application must be timely;

(2) the applicant has a sufficient interest in the litigation;

(3) the interest may be affected or impaired by disposition of the action; and,

(4) the interest is not adequately represented by an existing party to the litigation.

Id. at 596; *United States v. Terr. of the V.I.*, 748 F.3d 514, 519 (3d Cir. 2014); *Estate of Kelly ex rel. Gafni v. Multiethnic Behavioral Health, Inc.*, Civ. A. No. 08-3700, 2009 U.S. Dist. LEXIS 82385, at *15-16 (E.D. Pa. Sept. 9, 2009). For the reasons discussed below, Applicants readily meet each of the four (4) criteria, thereby entitling them to intervene in this matter.

A. Applicants' Motion to Intervene Has Been Timely Filed.

It cannot be disputed that Applicants' Motion seeking intervention has been timely filed. The timeliness of a motion to intervene is "determined from all the circumstances' and, in the first instance, 'by the [trial] court in the exercise of it sound discretion.'" *In re Fine Paper Antitrust Litigation*, 695 F.2d 494, 500 (3d Cir. 1982) (citing *NAACP v. New York*, 413 U.S. 345, 366, 37 L. Ed. 2d 648, 93 S. Ct. 2591 (1973)). The Third Circuit has outlined three factors to be

considered when assessing the timeliness of a motion to intervene: (1) the stage of the proceeding; (2) the prejudice that delay may cause the parties; and (3) the reason for the delay. *Mt. Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 369 (3d. Cir. 1995) (citing *In re Fine Paper Antitrust Litigation*, 695 F.2d at 500). Concerning the assessment of the stage of the proceeding, the critical inquiry is the degree to which any proceedings of substance on the merits have occurred. *Mt. Top*., 72 F.3d. at 369. The prejudice inquiry is related, as the later in the proceedings the motion to intervene is filed, the greater the likelihood of prejudice to the opposing parties. *See, generally*, *In re Fine Paper Antitrust Litigation*, 695 F.2d 494.

Here, the Complaint was filed about one week ago on November 9, 2017, and no substantive action has yet been taken. The named Defendants have not yet filed a responsive pleading to the Complaint, and in fact, under this Court's November 14, 2017 scheduling Order (ECF No. 14), the named Defendants are not required to do so until November 22, 2017.

Moreover, in filing this present action and failing to include Applicants, Plaintiffs have likely known from the outset that Applicants would almost certainly seek immediate intervention. Not only is their own Complaint replete with allegations about how Pennsylvania's General Assembly and individual legislators allegedly perpetrated the offending 2011 Plan (*See*, *e.g.*, Compl. ¶¶ 2, 5, 26, 66-68.), but also, as previously mentioned, Plaintiffs are more than familiar with the related *Agre* action in which they sought to intervene as intervenor-plaintiffs and in which Applicants were permitted to intervene.

Consequently, Plaintiffs and the currently named Defendants will not suffer any prejudice in the event the Court grants Applicants' Motion and permits them leave to intervene at this very early stage of the case. To the contrary, permitting Applicants to intervene at this point will allow them to assert their defenses without any delay or disruption to the litigation.

For all of these reasons, Applicants' Motion is timely.

B. Applicants Have A Sufficient Interest That May Be Affected By Disposition Of This Litigation Which Is Not Adequately Represented By Any Current Party.

Applicants readily satisfy the three remaining criteria for intervention set forth in *Harris, supra*, in that they possess a sufficient interest in the subject of this litigation, which could be affected by the disposition of this matter and which is not adequately represented by any current party. This matter concerns the Congressional districting plan enacted and implemented by the Pennsylvania legislature in 2011, which allegedly violates the First and Fourteenth Amendments and the Elections Clause of the United States Constitution. (*See* Comp. at ¶1). Applicants played an integral part in drawing and enacting the redistricting plan at issue. (*See id.* at ¶¶ 2, 5, 25-28, 66-68). Thus, Applicants have a sufficient interest in the subject matter of this litigation. *See Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 194 (1972) (recognizing that a state legislative body has the right to intervene because the legislative body would be directly affected by a district court's orders.). From a pragmatic perspective, Applicants possess at least certain of the information regarding the 2011 Plan, which is necessary to this litigation.[5] In this regard, permitting Applicants to intervene would limit to some degree the need for cumbersome third-party discovery and serve to streamline the use of judicial resources.

Moreover, in the event that the Court ultimately determines that the 2011 Plan must be redrawn, Applicants' interests would be directly implicated and affected. Plaintiffs request, *inter alia*, that the Court issue "an injunction prohibiting Defendants from calling, holding, administering or taking any action with respect to the 2018 Congressional elections and future

[5] Plaintiffs concede this point in their Motion for Expedited Pretrial Scheduling Order, in which they state that they "plan to serve subpoenas upon Michael Turzai and Joseph Scarnati III [the Applicants] . . . . Those subpoenas will contain substantially the same requests for production served by the *Agre* Plaintiffs as well as by the *League of Women Voters* Plaintiffs." (ECF No. 2 at pg. 2). In fact, Plaintiffs have since attempted to serve those subpoenas, which, for the reasons to be addressed by Applicants in their forthcoming Motions to Quash (if necessary), are legally defective.

primary and general elections under the 2011 Plan." (Compl. at ¶ 6). That request necessarily entails the drawing of a new redistricting plan. And it is the Commonwealth of Pennsylvania's House of Representatives and Senate that are the legislative bodies bestowed with the constitutional obligation to prepare and enact redistricting plans. *See* Pa. Const. Art. II, Sec. 16-17. These state governmental bodies, led by Applicants, therefore would be directly affected by any Order of this Court that would require any modification or redrawing of the 2011 Plan.

Additionally, no current party to the litigation adequately represents the interests of Applicants. Plaintiffs' interests are adverse to the current 2011 Plan, and the existing Defendants do not adequately represent Applicants' interests in defending the challenged redistricting plan. While the named Defendants are the parties charged with the implementation of the 2011 Plan, they had no involvement in its enactment or creation. Rather, it was Applicants (in their official capacities) who were charged with the drawing and enactment of the 2011 Plan. As such, Applicants have a substantial interest in defending the 2011 Plan that is not possessed by any currently named party.

Accordingly, Applicants respectfully request leave of this Court to intervene in this case as a matter of right pursuant to Federal Rule of Civil Procedure 24(a)(2).

III. ALTERNATIVELY, APPLICANTS ARE ENTITLED TO PERMISSIVE INTERVENTION

Alternatively, pursuant to Federal Rule of Civil Procedure 24(b), this Court should permit Applicants to intervene. Rule 24(b) provides for permissive intervention where a party timely files a motion and "has a claim or defense that shares with the main action a common question of law or fact." FED. R. CIV. P. 24(b)(1)(B). Intervention under Rule 24(b) is a "highly discretionary decision" left to the judgment of the district court. *Brody v. Spang*, 957 F.2d 1108, 1115 (3d Cir. 1992); *accord Harris*, 820 F.2d at 597. In exercising its broad discretion under

this Rule, the Court must consider whether intervention will unduly delay or prejudice the adjudication of the original parties' rights. FED. R. CIV. P. 24(b)(3).

For the same reasons outlined above, Applicants have demonstrated their right to intervene in this matter. Applicants have filed their Motion at the earliest possible time in the litigation, prior to any substantive action on the merits. Applicants possess interests, claims, and defenses in line with the 2011 Plan, given that Applicants were directly involved in the drawing and enactment of the 2011 Plan. Further, disallowing Applicants to intervene could prejudice Applicants' interests and rights. This case asks this Court to rule on the validity of the 2011 Plan, and possibly order that it be redrawn – doing so without the input of the parties responsible for creation of the 2011 Plan and any future plan would be inefficient and unjust. The only way to protect the fairness of the litigation and lend credibility and finality to the Court's decision on the merits is to permit Applicants to intervene.

IV. CONCLUSION

For all of the foregoing reasons and authorities, Applicants' Motion to Intervene should be granted and Applicants permitted to intervene as Defendants in order to protect their interests

in the subject matter and outcome of this litigation concerning the constitutionality of the 2011 Plan.

Dated: November 20, 2017

Respectfully submitted,

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Attorneys for Intervenor Defendant Representative Michael C. Turzai

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
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Barbara Diamond, *et al.*,	:	
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Plaintiffs,	:	**Civil Action No. 2:17-cv-5054**
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Robert Torres, *et al.*,	:	
	:	
Defendants.	:	
	:	

LEGISLATIVE DEFENDANTS MICHAEL C. TURZAI, SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, and JOSEPH B. SCARNATI, III, PENNSYLVANIA SENATE PRESIDENT PRO TEMPORE'S MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)

Legislative Defendants Michael C. Turzai, in his official capacity as Speaker of the Pennsylvania House of Representatives, and Joseph B. Scarnati, III, in his official capacity as Pennsylvania Senate President Pro Tempore (collectively, "Legislative Defendants"), file the present Motion to Dismiss Plaintiffs' Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). In support of their Motion, Legislative Defendants rely upon their

Memorandum of Law filed herewith.

Dated: November 20, 2017

Respectfully submitted,

BLANK ROME LLP

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Attorneys for Legislative Defendant Representative Michael Turzai

IN THE UNITED STATES DISTRICT COURT
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	:	
Robert Torres, *et al.*,	:	
	:	
Defendants.	:	
	:	

ORDER

AND NOW, this ____ day of _____, 2017, upon consideration of the Motion to Dismiss Plaintiffs' Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) filed by Michael C. Turzai, in his official capacity as Speaker of the Pennsylvania House of Representatives, and Joseph B. Scarnati, III, in his official capacity as Pennsylvania Senate President Pro Tempore (the "Motion"), and any responses thereto, it is hereby **ORDERED** that the Motion is **GRANTED** and Plaintiffs' Complaint is **DISMISSED**.

BY THE COURT:

_____

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

Barbara Diamond, *et al.*,	:	
	:	
Plaintiffs,	:	**Civil Action No. 2:17-cv-5054**
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	:	
Defendants.	:	
	:	

LEGISLATIVE DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS

Legislative Defendants, President Pro Tempore of the Pennsylvania Senate, Joseph B. Scarnati III and Speaker of the Pennsylvania House of Representatives, Michael C. Turzai (collectively, "Legislative Defendants") hereby submit this Memorandum of Law in support of their Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

I. PRELIMINARY STATEMENT

Plaintiffs seek to invalidate Pennsylvania's now six-year old Congressional districting plan ("2011 Plan") as an "impermissible" gerrymander – alleging Equal Protection, First Amendment, and Elections Clause violations – but possess neither the legal standing nor the legal support to do so. Collectively, Plaintiffs are residents of only 8 of the 18 Congressional districts, and as such do not have the standing to challenge the 2011 Plan on a statewide level.[1]

[1] Before filing the instant action, Plaintiffs first attempted to intervene in a related action, but their motion to intervene was denied. *Agre v. Wolf*, Civil No. 17-4392 (E.D. Pa. Nov. 7, 2017). In addition, and as explained below, standing to challenge a Congressional redistricting (a fraction of the entire Congress) is a very different type of standing than Mr. Whitford claimed in *Whitford v. Gill* because of the nature of the caucus system in the Wisconsin Assembly (where he was challenging the map applicable to the entire body).

But even if they could cure their standing issues, Plaintiffs' claims still cannot succeed as a matter of law because partisan gerrymander claims are not justiciable. For more than 30 years, neither the U.S. Supreme Court nor the lower courts have been able to devise a manageable standard to adjudicate such claims. Moreover, the Supreme Court has recognized that because the Elections Clause vests an inherently political branch (i.e., state legislatures) with drawing Congressional districts, substantial political considerations in districting are inevitable – and indeed, have been accepted practice for over 200 years. Thus, the kind of judicial condemnation of politically-minded redistricting that Plaintiffs seek is simply not found in – and not supported by – our jurisprudence.

For these reasons, and those more fully explained below, Legislative Defendants respectfully submit that the Complaint should be dismissed in its entirety, with prejudice.

II. FACTUAL BACKGROUND

Plaintiffs are eleven individual citizens of Pennsylvania who reside in only 8 of the 18 Congressional districts. (Complaint ¶¶ 7-17.) Each purports to be a registered Democrat, who "has supported Democratic candidates for Pennsylvania's Congressional delegation in the past, and plans to support Democratic candidates in the future." *Id.*

The Complaint asserts three causes of action. Count I alleges an Equal Protection violation under the Fourteenth Amendment and 42 U.S.C. § 1983, alleging that the 2011 Plan "has the purpose and effect of discriminating against an identifiable political group [Democrats], by maximizing the power and influence of the Republican Party and Republican-affiliated voters, without regard to the degree of popular support enjoyed by each party's candidates." *Id.* ¶¶ 57-

59. Count II alleges a violation of the First Amendment, claiming that the 2011 Plan "burden[s] the ability of [Democratic] voters to influence the legislative process". *Id.* ¶¶ 61-64. Finally, Count III alleges that the 2011 Plan violates the Elections Clause, Article I, Section IV of the U.S. Constitution. *Id.* ¶¶ 66-68.

III. ARGUMENT

A. This Action Must Be Dismissed Because Plaintiffs Lack Standing Pursuant to Federal Rule of Civil Procedure 12(b)(1)

A party may move to dismiss based on lack of standing pursuant to Federal Rule of Civil Procedure 12(b)(1). *See In re Schering-Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 243 (3d Cir. 2012) ("A motion to dismiss for want of standing is . . . properly brought pursuant to Rule 12(b)(1), because standing is a jurisdictional matter.") (citations and quotations omitted).

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). And 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." *Id*. at 750-51. Therefore, to invoke the power of federal courts, a plaintiff bears the burden of demonstrating that s/he has suffered an injury to a legally protected interest that is both concrete and particularized to the plaintiff, and is an injury that the court can redress. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 & n.1 (1992); *Ballentine v. U.S.*, 468 F.3d 806, 810 (3d Cir. 2007) ("On a motion to dismiss for lack of standing, the plaintiff bears the burden of

establishing the elements of standing, and each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof.").

1. Plaintiffs Lack Standing To Challenge The 2011 Plan On A Statewide Level

In the context of racial gerrymandering claims, the Supreme Court has held that a plaintiff has standing to bring a challenge only to the district where the plaintiff resides. *See United States v. Hays*, 515 U.S. 737, 744-45 (1995); *Shaw v. Hunt*, 517 U.S. 899, 904 (1996). In *Hays*, the U.S. Supreme Court based its decision in part on the fact that, "[w]hen a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Id*. (*quoting Shaw*, 509 U.S. at 648). The Court concluded that, "where a plaintiff does not live in such a district, he or she does not suffer those special harms, and any inference that the plaintiff has personally been subjected to a racial classification would not be justified absent specific evidence tending to support that inference." *Id*. at 745.

For this reason, an organization lacks standing to bring a statewide gerrymandering claim on behalf of its members unless it can show that it has members in every district of the state. *Id*; *see also Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265, 1268-70 (2015) (holding that an organization bringing a racial gerrymandering case on behalf of its constituents does not have standing). The district-specific rule makes sense because congressional elections are on a district wide basis, not on a statewide or proportional basis. *Davis v. Bandemer*, 478 U.S. 109, 159 (1986) (O'Connor, J., concurring). Indeed, someone who lives outside of the challenged

district does not suffer a personal, individualized injury by the election of a congressperson who does not represent him. *See Ala. Legis. Black Caucus*, 135 S. Ct. at 1265; *Hays*, 515 U.S. at 745.

The same logic applies to partisan gerrymandering claims. In fact, while the Supreme Court has not specifically addressed the issue of whether the district-specific rule applies to partisan gerrymandering cases, several Justices have indicated that it does. *See Vieth v. Jubelirer*, 541 U.S. 267, 327-28 (2004) (Stevens, J., dissenting) ("Because *Hays* has altered the standing rules for gerrymandering claims—and because, in my view, racial and political gerrymanders are species of the same constitutional concern—the *Hays* standing rule requires dismissal of the statewide claim."); *id*. at 347-48 (Souter, J., and Ginsburg, J., dissenting) (relying on *Hays* for the proposition that to succeed in a partisan gerrymandering claim, a plaintiff must show that the district of his residence disregarded traditional districting criteria)[2]; *Bandemer*, 478 U.S. at 159 (O'Connor, J., concurring) (stating that elections are on a district wide basis for specific candidates not for party); *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016) (dismissing appeal for lack of standing because intervenor congressional defendants—who alleged that the remedial map would flood their districts with Democrats making it more difficult to get reelected—did not live in or represent the challenged districts, Congressional Districts 3 and 4).

This case is readily distinguishable from the standing found by the divided three-judge panel opinion in *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016). And even that standing finding was a major subject at the recent oral arguments before the United States Supreme Court.

[2] While the plurality in *Vieth* did not specifically address whether the plaintiffs therein possessed standing to challenge the plan at issue on a statewide basis, this was only because the plurality found that the claims advanced were otherwise non-justiciable. *Vieth*, 541 U.S. at 292.

Mr. Whitford was challenging the map for the entire Wisconsin Assembly. *Id.* at 855. In the Wisconsin Assembly, as explained in official state publications, the "caucus" system essentially controls whether legislation succeeds or fails in the legislature because of the "majority of the majority" practice described therein. *See id.* at 845. So, if Mr. Whitford's claims prevail, he would stand a much better chance at seeing his preferred party take control of the Assembly as a result of the Court's remedy. Here, there is no such legislative control at issue. Pennsylvania's 18 Congressional Districts are but a fraction of the 435 Congressional seats. There is no legal action that the Congressional Delegation takes as a body. In other words, majority control of any particular state's Congressional Delegation means absolutely nothing with respect to control of any legislative outcomes. This is a dramatic juxtaposition with where the Plaintiffs stood in *Whitford*, because success there could actually shift control of the entire legislative body at issue.

Recent federal court decisions have found differently than the divided panel in *Whitford*, and for good reasons. *E.g., Ala. Legis. Black Caucus v. Alabama*, No. 2:12-CV-691, 2017 WL 4563868, at *5 (M.D. Ala. Oct. 12, 2017) (dismissing partisan gerrymandering claims involving districts in which none of the Plaintiffs resided); *see also* Statement of Reasons For The Court's Decision Denying The Motion To Dismiss, at 2, *Agre v. Wolf*, Civil Action No. 17-4392 at 4 (E.D. Pa. Nov. 16, 2017).

Here, Plaintiffs purport to challenge the 2011 Plan on a statewide basis. But to advance such a claim, Plaintiffs are required to establish that they collectively live in all 18 Pennsylvania Congressional districts. *See Ala. Legis. Black Caucus*, 135 S. Ct. at 1265, 1268-70. Because there are only eleven Plaintiffs in this action, who reside in only 8 of the 18 districts in the state, Plaintiffs

necessarily lack standing to challenge the 2011 Plan on a statewide basis, and the Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1).

2. Plaintiffs Lack Standing Because They Have Alleged Only A General Harm With No Particularized Injury

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." *Lujan*, 504 U.S. at 573-74.

Plaintiffs here have failed to show that their alleged injuries are to a legally protected interest that is both concrete and particularized to themselves. Their Equal Protection and First Amendment claims in Counts I and II center on the effects of the redistricting, which affects all Pennsylvania voters and is not particularized to Plaintiffs. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006) (refusing to create an exception to the general prohibition on taxpayer standing for challenges to state tax or spending decisions, and observing that taxpayer standing has been rejected "because the alleged injury is not 'concrete and particularized,' but instead a grievance the taxpayer 'suffers in some indefinite way in common with people generally'").

With respect to Count III, the Supreme Court has squarely rejected the concept of generalized standing under the Elections Clause in *Lance v. Coffman*, 549 U.S. 437 (2007). In that case, four Colorado voters filed suit, alleging a violation of the Elections Clause where the Colorado redistricting plan was passed, not by the Colorado Legislature, but by a state court. The voters argued that the state legislature was deprived of its responsibility to draw congressional

districts when a subsequently passed plan was enjoined from being implemented by a Colorado Constitutional provision which limited redistricting to once per census. *Id.* at 438. In dismissing the voters' claims for lack of standing, the U.S. Supreme Court reasoned this was precisely the kind of undifferentiated, generalized grievance about the conduct of government that it has refused to countenance in the past, and because plaintiffs asserted no particularized stake in the litigation, plaintiffs lacked standing to bring their Election Clause claim. *Id.* at 442. *See also United States v. Richardson*, 418 U.S. 166 (1974) (a federal taxpayer lacked standing to force the Government to disclose certain CIA expenditures under the Accounts Clause of the Constitution). The Court even suggested that private plaintiffs would not have standing to bring an Elections Clause challenge, citing two cases from the 1930s brought on behalf of a state under the now rarely used relator method of bringing an action. *Lance*, 549 U.S. at 442 (citing *State ex rel. Smiley v. Holm, 184 Minn. 647, 238 N.W. 792 (1931) (per curiam), rev'd sub nom. Smiley v. Holm, 285 U.S. 355, 52 S. Ct. 397, 76 L. Ed. 795 (1932)*, and *Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565, 36 S. Ct. 708, 60 L. Ed. 1172 (1916)*).

It follows that Plaintiffs' lack standing and the Complaint must be dismissed.

B. The Complaint Should Be Dismissed For Failure To State A Claim Pursuant to Federal Rule of Civil Procedure 12(b)(6)

1. Applicable Legal Standard

When considering a motion to dismiss pursuant to Rule 12(b)(6), courts "consider only the complaint, exhibits attached to the complaint, [and] matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents."

Mayer v. Belichick, 605 F.3d 223, 230 (3d Cir. 2010) (*citing Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993)). In evaluating the legal sufficiency of a complaint, courts accept the factual allegations of the complaint as true and "construe the complaint in the light most favorable to the plaintiff." *DelRio-Mocci v. Connolly Props., Inc.*, 672 F.3d 241, 245 (3d Cir. 2012) (internal citations omitted). A plaintiff's pleading obligation is to set forth "'a short and plain statement of the claim,' " which gives the defendant "'fair notice of what the ... claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The complaint must contain "'sufficient factual matter to show that the claim is facially plausible,' thus enabling 'the court to draw the reasonable inference that the defendant is liable for [the] misconduct alleged.'" *Warren Gen. Hosp.*, 643 F.3d at 84 (*quoting Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009)).

2. Partisan Gerrymandering Claims Are Not Justiciable, And Therefore All Three Counts Should Be Dismissed

Where no judicially manageable standard exists to adjudicate a claim or where the question presented is one confined to the political branches, the claim must be dismissed as non-justiciable. *See Baker v. Carr*, 369 U.S. 186, 217 (1962); *Vieth*, 541 U.S. 722; *Rodriquez v. 32nd Legislature of the V.I*, 859 F.3d 199, 202 (3d Cir. 2017). The history of partisan gerrymandering cases in the Supreme Court makes abundantly clear that there is, at present, no manageable standard to evaluate such claims. As a result, the Complaint should be dismissed.

a. A Brief History of Partisan Gerrymandering Claims

In 1986, in *Davis v. Bandemer*, the Supreme Court considered, for the first time, whether a partisan gerrymandering claim under the Fourteenth Amendment's Equal Protection Clause was

justiciable. 478 U.S. 109 (1986).[3] Six Justices of the *Bandemer* Court indicated that while they could not agree upon a single standard for adjudicating such claims, they were "not persuaded that there are no judicially discernible and manageable standards by which political gerrymander cases are to be decided." *Id*. The splintered Court issued four separate opinions, and the majority of the Court did not agree with the plurality opinion regarding the standard for adjudicating partisan gerrymandering. Over the course of the next 18 years, lower courts attempted with futility to apply some standard adopted by the plurality in *Bandemer*.

In 2004, the Supreme Court rejected the *Bandemer* test. *See Vieth*, 541 U.S. at 283-84. Although the Justices in *Vieth* issued five separate opinions, they once again failed to identify any workable standard to evaluate partisan gerrymandering claims. The four Justice plurality explained that the *Bandemer* test provided nothing more than "one long record of puzzlement and consternation." *Id*. The plurality noted that any attempt to apply the plurality opinion in *Bandemer*, "has almost invariably produced the same result (except for the incurring of attorneys' fees) as would have obtained if the question were non-justiciable: Judicial intervention has been refused." *Id*. After engaging in extensive analysis, the plurality concluded that "eighteen years of essentially pointless litigation have persuaded us that *Bandemer* is incapable of principled application. We would therefore overrule that case, and decline to adjudicate these political gerrymandering claims." *Id*. at 282, 306. Justice Kennedy concurred in the judgment in *Vieth*,

[3] Claims of partisan gerrymandering were presented to the Court prior to *Bandemer*, but none were decided on that issue. *See, e.g.*, *Smiley v. Holm*, 285 U.S. 186 (1932) (finding the statute to be invalid based on the then-existing federal congressional apportionment statute); *Wood v. Broom*, 287 U.S. 1 (1932) (in which the Court sidestepped the gerrymandering allegation and decided the case on other grounds).

and acknowledged that he could not identify any judicially discernable standards to guide courts in evaluating partisan gerrymandering claims. *Id.* at 308. He concluded that although the arguments in favor of holding partisan gerrymandering claims non-justiciable are "weighty" and in fact "may prevail in the long run…some limited and precise rationale" might be discovered in the future. *Id*. at 306.

Two years after *Vieth*, the Supreme Court again revisited the justiciability of partisan gerrymandering claims advanced under the Equal Protection Clause. *See League of United Latin Am. Citizens v. Perry,* 548 U.S. 399 (2006) ("*LULAC*"). The *LULAC* case produced six opinions, but once again failed to produce a discernable standard upon which to evaluate partisan gerrymandering claims. 548 U.S. at 461 (Kennedy, J. concurring) (acknowledging that disagreement still persists in articulating the standard to evaluate partisan gerrymandering claims but declining to address the justiciability issue).

From the four opinions in *Bandemer*, to the five opinions in *Vieth*, to the six opinions in *LULAC*, the U.S. Supreme Court has produced 15 opinions, none of which produced a judicially manageable rule or standard to determine if an unconstitutional partisan gerrymander occurred. *Shapiro v. McManus*, 203 F. Supp. 3d 579, 594 (D. Md. 2016) (three-judge court) ("Taken together, the combined effect of *Bandemer*, *Vieth*, and *LULAC* is that, while political gerrymandering claims premised on the Equal Protection Clause remain justiciable in theory, it is presently unclear whether an adequate standard to assess such claims will emerge."); *Pearson v. Koster*, 359 S.W.3d 35, 42 (Mo. 2012) (rejecting partisan gerrymandering claim in part because of the "Supreme Court's inability to state a clear standard"); *Radogno v. Ill. State Bd. of Elections*,

No. 11-4884, 2011 U.S. Dist. LEXIS 122053, *14 and 18 (N.D. Ill. Oct. 21, 2011) (three-judge court) (recognizing that because the U.S. Supreme Court has not adopted a test, trying to find one may be an "exercise in futility"); *Ala. Legislative Black Caucus v. Alabama,* 988 F. Supp. 2d 1285, 1296, (M.D. Ala. 2013) ("The Black Caucus plaintiffs conceded at the hearing on the pending motions that the standard of adjudication for their claim of partisan gerrymandering is 'unknowable.'") (three-judge court); and Statement of Reasons For The Court's Decision Denying The Motion To Dismiss, at 2, *Agre v. Wolf*, Civil Action No. 17-4392 (E.D. Pa. Nov. 16, 2017) (noting that a majority of the Supreme Court has never agreed upon a standard for reviewing a partisan gerrymandering Equal Protection claim).

Without a standard to apply, at least two federal courts have found that the *Vieth* plurality plus Justice Kennedy's concurrence constituted a majority for the proposition that partisan gerrymandering claims are presently non-justiciable. *Lulac of Texas v. Texas Democratic Party*, 651 F. Supp. 2d 700, 712 (W.D. Tex. 2009) (three-judge court) (*Vieth* held that partisan gerrymandering claims are non-justiciable); *Meza v. Galvin*, 322 F. Supp. 2d 52, 58 (D. Mass. 2004) (three-judge court) (noting that *Vieth* held "that political gerrymandering cases are nonjusticiable").

On October 3, 2017, the Supreme Court heard oral arguments in *Whitford*, a case on appeal from the Western District of Wisconsin. In *Whitford*, the Supreme Court is considering, once again, whether partisan gerrymandering claims are justiciable, including whether a workable standard exists to evaluate gerrymandering claims based on the First Amendment or the Equal

Protection Clause. *Gill v. Whitford*, No. 16-1161, *jurisdictional statement* at 40 (U.S. Mar. 24, 2017); *Gill v. Whitford*, 137 S. Ct. 2268 (2017).[4]

b. Count I Should Be Dismissed Because It Is Not Justiciable

Notwithstanding the pendency of *Whitford*, it is abundantly clear that, after thirty years of consideration, the U.S. Supreme Court has failed to establish any workable standard for adjudicating gerrymandering claims under the Equal Protection Clause. As this Panel recently observed, "A majority of the Supreme Court has never … held that a particular instance of partisan gerrymandering violates the Equal Protection Clause. Nor has a majority of the Supreme Court agreed upon a standard for reviewing such a claim." Statement of Reasons For The Court's Decision Denying The Motion To Dismiss, at 2, *Agre v. Wolf*, Civil Action No. 17-4392 (E.D. Pa. Nov. 16, 2017). Thus, absent the emergence of a test that can be broadly applied, current Supreme Court precedent dictates that partisan gerrymandering claims under the Equal Protection Clause are simply not justiciable. *See LULAC of Texas*, 651 F. Supp. 2d at 712; *Meza v. Galvin*, 322 F. Supp. 2d at 58.

Importantly, Plaintiffs do not even propose or identify any such tests. Instead, they base their Equal Protection claim on the allegation that the 2011 Plan was drawn using partisan classifications and, based upon those classifications, voters were placed into districts through a process of cracking and packing to make it easier for Republicans to get elected. (Compl. ¶¶ 58-

[4] In light of the pending decision in *Whitford*, Legislative Defendants have contemporaneously filed a motion asking to the Court to stay this matter until the Supreme Court has rendered its opinion. If the U.S. Supreme Court concludes that partisan gerrymandering claims are non-justiciable, it simply does not matter which constitutional provision Plaintiffs rely upon to support their claims. This entire action will be moot.

59.) But, it is well-established that a congressional map is not unconstitutional merely because it makes it more difficult for a party to win elections or because it was created with partisan considerations. *See Vieth*, 541 U.S. at 288 (plurality op.); *id*. at 308 (Kennedy, J., concurring); *id*. at 338 (Stevens, J., dissenting). Count I should therefore be dismissed for failure to state a claim.[5]

c. Count II Of The Complaint Should Be Dismissed Because It Is Not Justiciable

In Count II, Plaintiffs claim that the 2011 Plan "purposely burdens, penalizes, and retaliates against" Democrats by "cracking and packing these voters into districts where their votes will be asymmetrically wasted and their electoral influence will be severely diluted. Plaintiffs further contend that the 2011 Plan has "burdened the ability of these voters to influence the legislative process." (Compl. ¶ 62.) These allegations are insufficient to state a cognizable First Amendment claim.

As an initial matter, courts reviewing First Amendment claims in partisan gerrymandering cases have made clear that there is no independent First Amendment violation without a violation of the Equal Protection Clause. *See Whitford,* 218 F. Supp. 3d at 884 (recognizing that elements to prove an unconstitutional partisan gerrymander under the First Amendment or the Equal Protection Clause are the same); *Pope v. Blue*, 809 F. Supp. 392, 398-399 (W.D.N.C. 1992), *aff'd by* 506 U.S. 801 (1992) (rejecting First Amendment claims as merely co-extensive with plaintiffs' Fourteenth Amendment claim); *Legislative Redistricting Cases*, 629 A.2d 646, 660 (Md. 1993)

[5] Plaintiffs advance each of their claims under 42 U.S.C. § 1983. But, "[s]ection 1983 provides remedies for deprivations of rights established in the Constitution or federal laws. It does not, by its own terms, create substantive rights." *Kaucher v. Cty. of Bucks*, 455 F.3d 418, 423 (3d Cir. 2006) (footnote and citation omitted). As a result, Plaintiffs' Section 1983 claims should be dismissed because Plaintiffs' substantive claims lack merit.

("There is no case holding that the First Amendment visits greater scrutiny upon a districting plan than the Fourteenth. Rather, the cases uniformly counsel the opposite.") (citing *Anne Arundel County Republican Cent. Comm. v. State Advisory Bd. of Election Laws*, 781 F. Supp. 394, 401 (D. Md. 1991), *sum. aff'd,* 504 U.S. 938 (1992); *Badham v. Eu*, 694 F. Supp. 664. 675, *sum. aff'd*, 488 U.S. 1024, (1989); *see also Republican Party v. Martin*, 980 F.2d 943, 959 n.28 (4th Cir. 1992) ("This court has held that in voting rights cases no viable First Amendment claim exists in the absence of a Fourteenth Amendment claim."). Since Plaintiffs' Equal Protection claim must be dismissed because it is not justiciable, Plaintiffs' First Amendment Claim should be dismissed for the same reason.

But more to the point, no First Amendment rights have been infringed. Indeed, notably absent from the Complaint is any allegation that Plaintiffs were actually silenced, or prevented from speaking, endorsing a candidate, or campaigning for a candidate because of the 2011 Plan. *See, e.g.*, *League of Women Voters*, No. 1:11-cv-5569, 2011 U.S. Dist. LEXIS 125531 at *12-13; *Badham*, 694 F. Supp. at 675 ("Plaintiffs here are not prevented from fielding candidates or from voting for the candidate of their choice."). Similarly, Plaintiffs' vague contention that the 2011 Plan burdens their right "to influence the legislative process" is not well-pled. The legislative process can be influenced in a myriad of ways, and is not limited to merely voting for a single successful candidate in a Congress of 435 House members. Simply stated, the "First Amendment guarantees the right to participate in the political process; it does not guarantee political success." *Id.*

Further, Plaintiffs' allegation that the 2011 Plan's "packing" and "cracking" of Democrat voters makes it easier for Republicans to win, merely suggests that the General Assembly considered partisan objectives when drafting the 2011 Plan. *See Vieth*, 541 U.S. at 294; *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973); *see Cromartie*, 526 U.S. at 551. Because this precise conduct is contemplated by the Elections Clause, it could not have violated Plaintiffs' First Amendment Rights. *See Shapiro*, 203 F. Supp. 3d at 595; *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 575 (N.D. Ill. 2011) (three-judge court) (rejecting First Amendment partisan gerrymandering claim because redistricting map did not prevent plaintiffs from speaking, endorsing political candidates of their choice, contributing for a candidate, or voting for the candidate and because the First Amendment "does not ensure that all points of view are equally likely to prevail."). Count II should therefore be dismissed.

d. The 2011 Plan Does Not Violate The Elections Clause

Count III alleges that the 2011 Plan exceeded the Pennsylvania General Assembly's authority under the Elections Clause, because the Elections Clause "only allows legislatures to adopt procedural rules for conduct of Congressional elections, and does not include the power to dictate or control the electoral outcomes of those elections or favor or disfavor a class of candidates."

As a threshold matter, and as this Panel has pointed out in the *Agre* case, "[t]he United States Supreme Court has never decided a so-called 'gerrymandering' case on Election Clause grounds". Statement of Reasons For The Court's Decision Denying The Motion To Dismiss, at 1, *Agre v. Wolf*, Civil Action No. 17-4392 (E.D. Pa. Nov. 16, 2017); *see also Vieth*, 541 U.S. at 306

(plur.) (expressly rejecting the plaintiffs' "fleeting" attempt to invoke the Elections Clause as a basis to prohibit partisan gerrymandering). Plaintiffs do not articulate what exactly their theory is in this untried area of the law – and should thus, at a minimum, be required to amend to provide sufficient specificity.[6]

In any event, Plaintiffs' claim must be rejected because it: (a) is inconsistent with the plain language and structure of the Elections Clause, and (b) ignores the Clause's purpose and history.

The Elections Clause provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, *shall be prescribed in each State by the Legislature thereof*; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of Chusing Senators.

U.S. Const. art. I, sec. 4 (emphasis added). Thus, on its face, the Elections Clause quite clearly delegates broad authority to state legislatures (which are inherently political) with the only limitation being Congress's ability (not the judiciary's) to create a statute limiting that authority.

As Justice Scalia explained in his plurality opinion in *Vieth*, "[p]olitical gerrymanders are not new to the American scene." *Vieth*, 541 U.S. at 274. The plurality in *Vieth* traced gerrymandering all the way back to 1732, when the Governor of North Carolina, "divide[d] old Precincts established by Law…to get a Majority of his creatures in the Lower House or to disrupt the assembly's proceedings." *Id*. *citing* 3 Colonial Records of North Carolina 380–381 (W. Saunders ed. 1886). The Framers knew that by delegating authority to oversee elections to state

[6] In *Agre*, the plaintiffs argued that all three of their claims were actually being asserted under the Elections Clause. Two of the claims were dismissed because plaintiffs had not clearly articulated a legitimate theory upon which relief could be granted. In the instant matter, it is similarly unclear what theory under the Elections Clause is being advanced.

legislatures, the redistricting process would be inherently political, and they recognized the need to limit that authority. *Id*. However, the Framers never intended that state legislatures would perform their duties under the Elections Clause in a "neutral" manner. *Id*. Rather, the Framers included a check on the state legislatures by specifically allowing Congress to prescribe laws to limit a state legislature's authority. *Id.* ("It is significant that the Framers provided a remedy for such practices in the [Elections Clause], while leaving in state legislatures the initial power to draw districts for federal elections, permitted Congress to 'make or alter' those districts if it wished.").[7] The Framers therefore specifically endowed inherently partisan state legislatures with substantial, but not unlimited, power to gerrymander.

Acting under the broad authority of the Elections Clause, state legislatures have *always* engaged in political gerrymandering. As the plurality opinion in *Vieth* explained:

> The political gerrymander remained alive and well (though not yet known by that name) at the time of the framing. There were allegations that Patrick Henry attempted (unsuccessfully) to gerrymander James Madison out of the First Congress… And in 1812, there occurred the notoriously outrageous political districting in Massachusetts that gave the gerrymander its name—an amalgam of the names of Massachusetts Governor Elbridge Gerry and the creature ("salamander") which the outline of an election district he was credited with forming was thought to resemble. *By 1840 the gerrymander was a recognized force in party politics and was generally attempted in all legislation enacted for the formation of election districts. It was generally conceded that each party would*

[7] In fact, not only does Congress have the power to enact legislation to limit the State Legislatures' power under the Elections Clause, it has done so previously. *See, e.g.*, 2 U.S.C. § 2c (mandating all Members of the House of Representatives be elected from single-member districts); *see also id*. § 7 (mandating that the first Tuesday after the first Monday in November as Election Day for congressional elections); *see also Vieth*, 541 U.S. at 276-77 (plurality op.) (citing other bills and statutes where Congress has exercised its authority to limit State's power in setting the Time, Place, and Manner of elections, including bills to limit gerrymandering in congressional districts).

> *attempt to gain power which was not proportionate to its numerical strength*.

Id. at 274-75 (internal citations omitted; emphasis added). Since the founding of this Nation, therefore, partisan gerrymandering under the Elections Clause has been expected, accepted, and legally permissible. *See, e.g.*, *Gaffney*, 412 U.S. at 753; *Vieth*, 541 U.S. at 285 (plurality op.); *see id*. at 358, 360 (Breyer, J., dissenting) (noting that the "legislature's use of political boundary-drawing considerations ordinarily does *not* violate the Constitution's Equal Protection Clause," and acknowledging that "political considerations will likely play an important, and proper, role in the drawing of district boundaries."); *Cooper v. Harris*, 137 S. Ct. 1455, 1488 (2017) (Alito, J., dissenting joined by Roberts, C.J., and Kennedy, J.) (noting that all justices agreed that political considerations are a valid defense to racial gerrymandering claims; the court split on a disagreement over whether race or politics predominated in the drawing).

In short, the plain language, legislative history of redistricting in this Country, and a long line of judicial precedents make abundantly clear that the Elections Clause cannot be invoked to prevent partisan gerrymandering. *See Vieth*, 541 U.S. at 306 (plur.) (expressly rejecting plaintiffs' "fleeting" attempt to invoke the Elections Clause as a basis to prohibit partisan gerrymandering); *Balderas v. Texas*, 2001 U.S. Dist. LEXIS 25740 *19-20 (E.D. Tex. Nov. 14, 2001) (stating that "political gerrymandering, a purely partisan exercise, is inappropriate for a federal court drawing a congressional redistricting map. Even at the hands of a legislative body, political gerrymandering is much a bloodfeud, in which revenge is exacted by the majority against its rival. We have left it to the political arena, as we must and wisely should."); *In re Pennsylvania Cong.*

Dist. Reapportionment Cases, 567 F. Supp. 1507, 1517 (M.D. Pa. 1982) (noting that "[w]e may not disapprove a plan simply because partisan politics had a role in its creation" and "it seems fair to conclude that a Republican sponsored Bill would have to make some political accommodation to a Republican legislature in order to obtain sufficient votes for passage."). The 2011 Plan was passed by the General Assembly and signed by the Governor in the very manner that hundreds of legally sound redistricting plans have been passed throughout the country's history.

Accordingly, Count III of the Complaint must be dismissed for failure to state a claim.

3. Even If Plaintiff's Claims Are Viable, Legitimate State Interests Justify The 2011 Plan

Even if Plaintiffs' claims are justiciable, and a prima facie Equal Protection claim could be shown, Plaintiffs' claims still cannot succeed because the 2011 Plan is justified by legitimate state interests. *Bandemer*, 478 U.S. at 141-142. Contrary to Plaintiffs' contention that strict scrutiny applies, the Supreme Court has made it clear that "[w]e have not subjected political gerrymandering to strict scrutiny." *Bush v. Vera*, 517 U.S. 952, 964 (1996).

Courts have found many legitimate state interests which would justify some degree of partisanship. Examples of legitimate state interests in redistricting have included goals like "[c]ompactness, contiguity, respecting lines of political subdivision, preserving the core of prior districts, and avoiding contests between incumbents". *Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042, 1071 (D. Ariz. 2014).

Legitimate state interests that justify the 2011 Plan include the protection of incumbents. *Vera*, 517 U.S. at 964. Avoiding contests between incumbents not only furthers efficiency concerns; it also fosters the benefit a state enjoys by having senior members of the House of

Representatives.[8] Indeed, of the 17 sitting Pennsylvania Congressman (one seat is currently vacant, to be filled in an ongoing election to be held on March 13, 2018), more than half have been in office since before Plan 2011 was enacted.[9] Moreover, two of the three longest-held seats (the most senior being Robert Brady of the 1st District, who has been in Congress for 20 years) are held by Democrats. While Plaintiffs will no doubt argue that politics, rather than protecting incumbents, was the primary intent of the redistricting, here again, "[a] determination that a gerrymander violates the law *must rest on something more than the conclusion that political classifications were applied.*" *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring) (emphasis added); *see also Burns v. Richardson*, 384 U.S. 73, 89, n.16 (1966) (finding nothing invidious in the

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8 This exact point was recently conceded by counsel for plaintiffs in *Agre v. Wolf*:

> JUDGE SMITH: What if it is unquestionably the case that seniority carries benefits in terms of one's legislative influence on committees, which is the most, I think, conspicuous example? Isn't there an interest in a state's having senior members of the House of Representatives?
>
> MR. GEOGHEGAN: Of course there is, but the question is—
>
> JUDGE SMITH: So how can the interest in retaining incumbents so that they can earn seniority be illegitimate?
>
> MR. GEOGHEGAN: Because under the constitutional scheme, that is not the role of the state, to decide. Voters – there's a very good argument that we should have more senior congressman or maybe get rid of the seniority system, but the question—
>
> JUDGE SMITH: We should have better highways. I mean doesn't—
>
> MR. GEOGHEGAN: Of course.
>
> JUDGE SMITH: --it help to have a senior member of Congress who can assist with that?
>
> MR. GEOGHEGAN: Of course

Transcript of Hr'g, pp. 46-47.

9 *See* https://www.govtrack.us/congress/members/PA#representatives.

practice of drawing district lines in a way that helps current incumbents by avoiding contests between them).

It follows that if legitimate state interests do exist – and they do – Plaintiffs' claims cannot succeed. *Harris*, 993 F. Supp.2d at 1079 (plaintiffs failed to carry burden of showing that partisanship outweighed legitimate state interest of obtaining preclearance with the Voting Rights Act). Accordingly, Plaintiffs' claims cannot succeed and must be dismissed.

4. Plaintiffs' Claims Are Barred By Laches

Finally, Plaintiffs' claims are barred by the doctrine of laches due to their six-year delay in filing, and the prejudice that would result. Laches is an affirmative defense that allows for dismissal of claims where the movant can show that the plaintiff unreasonably delayed filing an action and the delay caused injury to other parties. *See, e.g., Gruca v. United States Steel Corp*., 495 F.2d 1252, 1258-59 (3d. Cir. 1974). Courts regularly dismiss redistricting challenges based on laches. *Cohen v. Osser*, 56 Pa. D. & C.2d 672, 679-80 (Ct. Comm. Pleas 1971) (declining to postpone or judicially interfere with election procedures underway because to do so would wreak "havoc" and confusion for the candidates where defendants enacted new districts in February 1971, nominating petitions began circulating in the same month for primary elections in May 1971 and plaintiffs brought their suit shortly after enactment); *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990) (dismissing a claim that a county board of supervisors' method of elections violated the Voting Rights Act where plaintiffs waited seventeen years after plan was first initiated to file their claim, and the challenge was brought only two years prior to the new census.). Plaintiffs offer no excuse for their six-year delay, and the Complaint does not allege any newly-discovered

information that might justify it. The prejudice to the defendants, to the Legislature, to the current candidates – and indeed, to this Panel – in trying to force breakneck discovery and a rushed trial at the eleventh hour before the March 2018 primaries, is manifest.[10]

[10] Because a laches argument was recently rejected by the Panel in the related case of *Agre v. Wolf*, Civil No. 17-4392 (E.D. Pa. Nov. 16, 2017), Legislative Defendants merely include it here to preserve it in the event of an appeal.

IV. CONCLUSION

For the reasons and authorities set forth herein, Legislative Defendants respectfully request that the Court dismiss the Complaint in its entirety, with prejudice, pursuant to Federal Rules of Civil Procedure 12(b)(1) and (b)(6).

Dated: November 20, 2017

Respectfully submitted,

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EXHIBIT 2

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

Barbara Diamond, *et al.*,	:	
	:	
Plaintiffs,	:	**Civil Action No. 2:17-cv-5054**
	:	
v.	:	
	:	
Robert Torres, *et al.*,	:	
	:	
Defendants.	:	
	:	

LEGISLATIVE DEFENDANTS MICHAEL C. TURZAI, SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, and JOSEPH B. SCARNATI III, PENNSYLVANIA SENATE PRESIDENT PRO TEMPORE'S MOTION TO STAY AND/OR ABSTAIN

Legislative Defendants Michael C. Turzai, in his official capacity as Speaker of the Pennsylvania House of Representatives, and Joseph B. Scarnati III, in his official capacity as Pennsylvania Senate President Pro Tempore (collectively, "Legislative Defendants"), file the

present Motion to Stay and/or Abstain. In support of their Motion, Legislative Defendants rely upon their Memorandum of Law filed herewith.

Dated: November 20, 2017

Respectfully submitted,

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

Barbara Diamond, *et al.*,	:	
	:	
Plaintiffs,	:	**Civil Action No. 2:17-cv-5054**
	:	
v.	:	
	:	
Robert Torres, *et al.*,	:	
	:	
Defendants.	:	
	:	

ORDER

AND NOW, this ____ day of _____, 2017, upon consideration of the Motion to Stay and/or Abstain filed by Michael C. Turzai, in his official capacity as Speaker of the Pennsylvania House of Representatives, and Joseph B. Scarnati III, in his official capacity as Pennsylvania Senate President Pro Tempore (the "Motion"), and any responses thereto, it is hereby **ORDERED** that the Motion is **GRANTED**. It is further **ORDERED** that the Court shall **STAY** this action until a final adjudication on the merits is issued in *Gill v. Whitford*, No. 16-1161 (U.S.); *Agre, et al. v. Wolf, et al.*, No. 2:17-cv-4392 (E.D. Pa. Oct 2, 2017); and *League of Women Voters of Pennsylvania, et al. v. Commonwealth*, *et al.,* No. 261 MD 2017 (Pa. Commw. Ct. June 15, 2017).

BY THE COURT:

_____

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

Barbara Diamond, *et al.*,	:	
	:	
Plaintiffs,	:	**Civil Action No. 2:17-cv-5054**
	:	
v.	:	
	:	
Robert Torres, *et al.*,	:	
	:	
Defendants.	:	
	:	

LEGISLATIVE DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO STAY AND/OR ABSTAIN

Legislative Defendants, President Pro Tempore of the Pennsylvania Senate, Joseph B. Scarnati III and Speaker of the Pennsylvania House of Representatives, Michael C. Turzai (collectively, "Legislative Defendants") hereby respectfully submit this Memorandum of Law in support of their Motion to Stay and/or Abstain.

I. PRELIMINARY STATEMENT

The present action is the last filed of three actions all challenging Pennsylvania's 2011 Congressional redistricting plan (the "2011 Plan") as unconstitutional. All three of the actions seek the exact same relief—a declaration that the 2011 Plan is unconstitutional and an injunction precluding Pennsylvania from using the Plan for the 2018 Congressional elections. All three actions also advance similar and overlapping, although not identical, legal claims.

Unlike plaintiffs in the other two related actions—*Agre, et al. v. Wolf, et al.*, No. 2:17-cv-4392 (E.D. Pa. Oct 2, 2017) (the "*Agre* action") and *League of Women Voters of Pennsylvania, et al. v. Commonwealth*, *et al.,* No. 261 MD 2017 (Pa. Commw. Ct. June 15, 2017) (the "Pennsylvania Action")—Plaintiffs in the instant action do not attempt to distinguish their legal claims from the ones currently pending before the United States Supreme Court in *Gill v. Whitford*,

No. 16-1161, 2017 U.S. LEXIS 4040 (U.S. June 19, 2017). Indeed, with the exception of Plaintiffs' Count III Elections Clause claim—an apparent duplicate of the Elections Clause claim at issue in *Agre*—Plaintiffs' constitutional claims *are identical* to the constitutional claims asserted in *Whitford*. Because the Supreme Court's resolution of those claims—including the critical issues of whether partisan gerrymandering claims, in any form, are non-justiciable political questions and, if they are justiciable, under what standard or test they should be evaluated—will dictate the entire course of the present action, it is appropriate and just for the Court to stay this case pending the Supreme Court's forthcoming decision in *Whitford*.[1]

In the alternative, the present action should also be stayed pending this Court's imminent decision in the *Agre* action, which is scheduled to begin trial on December 4, 2017. As a matter of judicial economy, this Court's disposition of the *Agre* action may moot the instant action entirely, or at minimum, one of Plaintiffs' three claims (i.e. the Elections Clause claim). Additionally, in order to effectuate plaintiffs' goal in all three actions to invalidate the 2011 Plan in advance of the 2018 Congressional elections, plaintiffs in all three actions seek incredibly expedited schedules—as it presently stands, Legislative Defendants have to conduct back-to-back trials, the first of which to begin in fewer than 14 days, and would have to then conduct a trial the following week (starting December 18) if Plaintiffs are afforded their desired expedited schedule. Given the many parties, the complex legal issues in play, and the high stakes of the case, it is simply not possible for the parties, including Legislative Defendants, to fairly and effectively

[1] Briefing is closed, and the U.S. Supreme Court heard oral argument in *Whitford* on October 3, 2017. The U.S. Supreme Court will issue its decision by June 30, 2018 at the latest, although, of course, the Supreme Court could issue its decision much earlier.

litigate these issues at such a breakneck pace. Thus, a stay of the instant action will not only serve the interests of judicial economy, but also Legislative Defendant's due process rights to a fair defense.

Finally, this Court should also abstain from considering the instant case, because the Pennsylvania Action is a materially identical suit that seeks the same relief, invalidation of Pennsylvania's 2011 Plan. Because the United States Supreme Court has reasoned that state legislatures and state courts are better suited to decide in the first instance legislative redistricting claims, the Supreme Court has instructed federal courts to abstain from adjudicating redistricting matters when state courts are actively addressing similar challenges. *See Growe v. Emison*, 507 U.S. 25, 33 (1993).

II. FACTUAL BACKGROUND

A. Plaintiffs' Present Action

On November 3, 2017, Barbara Diamond, Steven Diamond, Nancy Chiswick, William Cole, Ronald Fairman, Colleen Guiney, Gillian Kratzer, Deborah Noel, Margaret Swoboda, Susan Wood, and Pamela Zidik (collectively, "Plaintiffs") filed a Motion to Intervene as Plaintiffs together with a proposed Complaint in Intervention in the related *Agre* action. On November 7, 2017, after oral argument on Plaintiffs' Motion to Intervene as Plaintiffs, the three-judge panel presiding over the *Agre* action denied that motion.[2]

[2] The panel entered the Order denying Plaintiffs' Motion to Intervene on November 9, 2017. Order re: Motion to Intervene as Plaintiffs, *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa. Nov. 9, 2017).

Following the denial of their intervention motion in the *Agre* action, Plaintiffs filed this independent Complaint on November 9, 2017 (ECF No. 1). Unlike the plaintiffs in *Agre*, however, Plaintiffs here bring legal claims not only under 42 U.S.C. § 1983 and the Elections Clause of the United States Constitution, Article I, Section 4, but also independent claims under the Equal Protection Clause of the Fourteenth Amendment and under the First Amendment of the United States Constitution, i.e. identical claims to those advanced in *Whitford*.[3] (Compl. ¶ 1.)

Specifically, Plaintiffs allege that the 2011 Plan "purposefully maximized the power and influence of . . . Republican-affiliated voters and minimized the power and influence . . . Democratic-affiliated voters" by "packing" some Democratic-affiliated voters into certain heavily Democrat-leaning districts to dilute their voting power and "cracking" other Democratic-affiliated voters among Republican-leaning districts "to deny them a realistic opportunity to elect candidates of their choice".[4] (*Id.* ¶ 2.)

In Count I, Plaintiffs allege that by continuing to implement the 2011 Plan, Defendants—who are officials holding office in Pennsylvania's executive branch—have deprived Plaintiffs of the "equal protection of the laws as [the 2011 Plan] has the purpose and effect of discriminating against an identifiable political group [Democratic-affiliated voters] . . . and singles out this group for disparate and unfavorable treatment" in contravention of the Equal Protection Clause of the

[3] As explained in further detail below, *Agre* plaintiffs have also asserted an ill-defined hybrid claim based on a confusing combination of the Elections Clause and the First Amendment. *See infra* note 5.

[4] As Plaintiffs explain in their Complaint, "packing" involves placing "supporters of the disfavored party into a small number of districts that candidates of the disfavored party win by overwhelming margins." (Compl. ¶ 39.) "Cracking" involves "spreading [supporters of the disfavored party] among the remaining districts such that candidates from favored party win by narrower but still comfortable margins." (*Id.*)

Fourteenth Amendment. (*Id.* ¶¶ 58-59.) In Count II, Plaintiffs allege that the "2011 Plan purposely burdens, penalizes, and retaliates against [the same] identifiable group of voters based upon their past participation in the political process, their voting history, their association with a political party, and their expression of their political views" in violation of the First Amendment. (*Id.* ¶ 62.) Finally, Count III alleges that in the "Pennsylvania General Assembly exceeded its constitutional authority in [enacting] the 2011 Plan by gerrymandering Pennsylvania's eighteen Congressional districts" in contravention of the Elections Clause, which "does not include the power to dictate or control . . . electoral outcomes . . . or favor or disfavor a class of candidates." (*Id.* ¶¶ 67-68.) Plaintiffs seek to permanently enjoin Defendants "from administering, preparing for, or moving forward with any future primary or general elections of Pennsylvania's U.S. House members using the 2011 Plan". (*Id.* at pg. 21.)

B. The *Agre* Action

Over a month prior to the filing of the instant action, on October 2, 2017, plaintiffs Louis Agre, William Ewing, Floyd Montgomery, Joy Montgomery, and Rayman Solomon filed a three-count Complaint seeking declaratory and injunctive relief based *inter alia* on the claim that the 2011 Plan is unconstitutional under 42 U.S.C. § 1983 and the Elections Clause of the United States Constitution, Article I, Section 4. (Compl. ¶ 1, *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa. Oct. 2, 2017.) By Order dated and filed November 7, 2017, the Court dismissed all but Count One of *Agre* plaintiffs' Complaint and granted leave to amend the Complaint to add one plaintiff from each of Pennsylvania's 18 Congressional districts and to re-plead Count Three, which had asserted an ill-defined hybrid claim based on a novel combination of the Elections Clause and the First

Amendment. *See* Order re: Motion to Dismiss Complaint, *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa. Nov. 7, 2017); *see also* Statement of Reasons for the Court's Decision on the Motion to Dismiss (ECF 45, Exh. 1) at 3-4, *id.* (E.D. Pa. Nov. 16, 2017). On November 17, 2017, *Agre* plaintiffs filed their First Amended Complaint, adding 21 additional plaintiffs and re-pleading their hybrid Elections Clause-First Amendment claim as Count Two.[5] *See generally* First Amended Complaint, *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa. Nov. 17, 2017).

The *Agre* action is set for trial on December 4, 2017—just 63 days after *Agre* plaintiffs filed their Complaint. Order, *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa. Oct. 25, 2017). In advance of that trial, the Court has set the deadline for all motions in limine on November 20, 2017, Order, *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa. Nov. 13, 2017), and Defendants' expert reports on November 22, 2017, Order, *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa. Oct. 25, 2017).

C. The Pennsylvania Action

Nearly five months prior to the filing of the present action, on June 15, 2017, the League of Women Voters of Pennsylvania and a number of other petitioners (the "Petitioners") filed a

[5] *Agre* plaintiffs' original complaint included two hybrid claims based on apparent combinations of the Elections Clause in conjunction with the Equal Protection Clause of the Fourteenth Amendment and the Elections Clause in conjunction with the First Amendment. *See* Complaint ¶¶ 1, 7-8, 41-52, *Agre v. Wolf*, no. 2:17-cv-4392 (E.D. Pa. Oct. 2, 2017). This Court dismissed those two claims, because it determined *Agre* plaintiffs failed to identify clear relationships between the Elections Clause and the First and Fourteenth Amendments, but permitted *Agre* plaintiffs leave to amend their hybrid First Amendment claim. Statement of Reasons for the Court's Decision on the Motion to Dismiss (ECF 45, Exh. 1) at 2-4, *Agre v. Wolf*, no. 2:17-cv-4392 (E.D. Pa. Nov. 16, 2017). On November 17, 2017, *Agre* plaintiffs filed their First Amended Complaint, which *inter alia* re-pleaded their hybrid Elections Clause-First Amendment claim. *See* First Amended Complaint ¶¶ 64-80, *Agre v. Wolf*, no. 2:17-cv-4392 (E.D. Pa. Nov. 17, 2017). For the reasons to be addressed in Applicants' forthcoming motion to dismiss that amended complaint, *Agre* plaintiffs have again failed to plead a cognizable claim based on their confusing and undefined mishmash of the Elections Clause and First Amendment.

Petition for Review (the "Petition") of the 2011 Plan in the Pennsylvania Commonwealth Court,[6] alleging that the 2011 Plan was devised to impermissibly maximize the number of Republican Congressional representatives by "packing" Democrat leaning jurisdictions and "cracking" Democrat leaning jurisdictions into multiple Republican leaning jurisdictions.[7] (*See* Petition ¶¶ 42-49, 61-66, 73-74.) Thus, Petitioners claim that the 2011 Plan violates Pennsylvania's Free Speech and Expression Clause and the Freedom of Association Clause codified at Art. I, §§ 7, 20 of the Constitution of the Commonwealth of Pennsylvania and the equal protection provisions in Pennsylvania's Constitution, codified at Art. I, §§ 1 and 26, and Art. I, §5 (the "Pennsylvania Equal Protection Clause"). (*See id.* ¶¶ 99-112, 116-17.)

On October 16, 2017, the Commonwealth Court partially stayed the Pennsylvania Action pending the U.S. Supreme Court's decision in *Whitford*. Order, *League of Women Voters of Pennsylvania, et al. v. Commonwealth, et al.*, No. 261 MD 2017 (Pa. Commw. Ct. Oct. 16, 2017). However, on November 9, 2017, the Pennsylvania Supreme Court vacated that stay and directed the Commonwealth Court to conduct all necessary proceedings and file findings of fact and conclusions of law by December 31, 2017. Order, *League of Women Voters of Pennsylvania, et al. v. Commonwealth, et al.*, No. 159 MM 2017 (Pa. Nov. 9, 2017). Trial in the Pennsylvania Action is scheduled to commence on December 11, 2017. Order, *League of Women Voters of Pennsylvania, et al. v. Commonwealth*, *et al.,* No. 261 MD 2017 (Pa. Commw. Ct. Nov. 13, 2017).

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6 A copy of the Petition for Review in the Pennsylvania Action is attached hereto as **Exhibit A**.

7 *See supra* note 4.

For all of the reasons detailed below, the Court should (1) stay this action pending the U.S. Supreme Court's decision in *Whitford* and/or abstain from considering this action in light of the pendency of the Pennsylvania Action.

III. ARGUMENT

A. A Stay of This Action is Warranted

Courts have broad discretion to stay proceedings. *In re Chickie's & Pete's Wage & Hour Litig.*, No. Civ. A. 12-6820, 2013 U.S. Dist. LEXIS 78573, *5 (E.D. Pa. June 4, 2013) (citing *Landis v. North American Co.*, 299 U.S. 248 (1936)). A court's "power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Clientron Corp. v. Devon IT, Inc.*, No. Civ.A. 13-05634, 2014 U.S. Dist. LEXIS 31086 (E.D. Pa. 2014). Accordingly, a court may "[i]n the exercise of its sound discretion . . . hold one lawsuit in abeyance to abide the outcome of another which may substantially affect it or be dispositive of the issues." *Id.* (citing *Bechtel Corp. v. Local 215*, 544 F.2d 1207, 1215 (3d Cir. 1976)); *see also Rodgers v. U.S. Steel Corp.*, 508 F.2d 152, 162 (3d Cir. 1975) ("The district court had inherent discretionary authority to stay proceedings pending litigation in another court."). Decisions to stay call "for the exercise of the court's judgment in 'weigh[ing] competing interests and maintain[ing] an even balance.'" *In re Chickie's & Pete's Wage & Hour Litig.*, 2013 U.S. Dist. LEXIS 78573 at *5 (citing *Infinity Computer Prods. Inc. v. Brother Int'l Corp.*, 909 F. Supp. 2d 415 (E.D. Pa. 2012)). In determining whether to grant a stay, this Court must balance the competing interests as well as whether the

grant of a stay may harm one of the parties. *See Dimensional Music Publ'g, LLC v. Kersey,* 448 F. Supp. 2d 643, 655 (E.D. Pa. 2006).

There are numerous reasons why the Court should stay this matter: (1) the United States Supreme Court's forthcoming decision in *Whitford* will dictate if and how this litigation should proceed; (2) this Court's imminent disposition of the related *Agre* action may moot the present action entirely or, at minimum, one of Plaintiffs' three claims; (3) as a practical matter, it is simply not possible, nor consistent with due process, for Legislative Defendants to prepare an effective defense in all three actions concurrently under the existing (and sought) expedited schedules; (4) there is absolutely no need to rush this case to judgment as it is already far too late to impact the 2018 election cycle; and finally, (5) the balance of equities weighs in favor of granting a stay.

1. This Court Should Stay This Matter Pending The U.S. Supreme Court's Resolution Of *Whitford*, Which Will Dictate If And How This Litigation Should Proceed

Critically—unlike plaintiffs in the related *Agre* action or Petitioners in the Pennsylvania Action—Plaintiffs in the present action do not attempt to distinguish their legal claims from the claims pending in *Whitford*.[8] Indeed, with the exception of Plaintiffs' Elections Clause claim, Plaintiffs' constitutional claims *are identical* to the constitutional claims asserted in *Whitford*.[9]

[8] *Compare e.g.*, Complaint ¶ 5 and *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa. Oct 2, 2017) ("Plaintiffs recognize that *Gill, et al. v. Whitford, et al.* (16-1161) is now pending before the United States Supreme Court. The present action raises a different type of legal claim not at issue in *Whitford*. . . . None of the three counts set out below duplicates the particular issue pending before the Court in *Whitford*.").

[9] A copy of plaintiffs' Complaint in *Gill v. Whitford*, 218 F. Supp. 3d 837 (W.D. Wisc. 2016) is attached as **Exhibit B**. As mentioned earlier, while Count III, asserting a claim under the Elections Clause, is not asserted in the *Whitford* case, it is being presently litigated in the more-advanced related action *Agre v. Wolf*.

First, Plaintiffs here—like the plaintiffs in *Whitford*—claim that their state's redistricting plan violates the Equal Protection Clause of the Fourteenth Amendment, because it

> fails to provide Pennsylvania voters with equal protection of the laws as [the 2011 Plan] has the purpose and effect of discriminating against an identifiable political group . . . those who registered to vote as Democrats, who lived in neighborhoods that supported Democratic candidates in the past, and who are anticipated to support Democratic candidates in the future . . . and singles out this group for disparate and unfavorable treatment.

(Compl. ¶¶ 58-59; *compare with Whitford v. Gill*, No. 15-0421 (W.D. Wis. July 8, 2015) (three-judge court) (Compl. ¶¶ 2, 31, 35, 82, 89) (ECF No. 1) ("*Whitford* Compl.") (alleging that Wisconsin's plan violates the Fourteenth Amendment's Equal Protection Clause by treating voters unequally and intentionally discriminating against Democratic voters).)

Second, Plaintiffs—as in *Whitford*—claim that their state's redistricting plan violates the First Amendment, because it "purposely burdens, penalizes, and retaliates against an identifiable group of voters based upon their past participation in the political process, their voting history, their association with a political party, and their expression of their political views." (Compl. ¶ 62; *compare with Whitford* Compl. ¶¶ 2, 91-94 (alleging that Wisconsin's plan violates the First Amendment by intentionally and unreasonably burdening Democratic voters' rights of association and free speech on the basis of their voting choices, their political views, and their political affiliation).)

And Plaintiffs here—like the plaintiffs in *Whitford*—allege that this discriminatory plan was effectuated by the "cracking" and "packing" of Democratic-affiliated voters, diluting the power of their vote and making it more likely to elect Republicans to Congress. (*See* Compl. ¶¶ 2-3, 5, 39-44, 58-59, 62-63; *compare with Whitford* Compl. ¶¶ 15, 31, 35, 57-58, 82, 91-94) (alleging

that Wisconsin's plan "packed" and "cracked" Democratic voters, "wasting" their votes in an effort to benefit Republicans and disadvantage Democrats).)

Because Plaintiffs' Equal Protection Clause claim and First Amendment claim are identical to the claims advanced in *Whitford*, the U.S. Supreme Court's decision in that case will directly determine if and how this litigation should proceed: If the U.S. Supreme Court rules that partisan gerrymandering claims under the Equal Protection Clause or the First Amendment are non-justiciable, that will be dispositive of at least two of Plaintiffs' three claims. Moreover, if the U.S. Supreme Court decides the merits of *Whitford*, then it will announce standards to adjudicate partisan gerrymandering claims that will determine how discovery and trial in this case should proceed. *Burlington*, No. 09-1908, 2011 U.S. Dist. LEXIS 1988 at *4-6. A stay of this matter pending the outcome of *Whitford* makes particularly good sense given that the *Whitford* appeal has already been fully briefed and argued and the Supreme Court may issue its ruling any day, and at the latest will do so by June 30, 2018.

2. This Court Should At The Very Least Stay This Case Pending Its Imminent Disposition Of The Related Case Of *Agre v. Wolf*, Because Its Decision May Moot, At Minimum, One Of Plaintiffs' Three Claims

In the alternative, this Court should stay this case pending its decision in the related *Agre* action. As previously mentioned, both of these actions seek the exact same relief—a declaration that the 2011 Plan is unconstitutional and an injunction precluding Pennsylvania from using the Plan for the 2018 Congressional elections—and both of these actions appear to advance the exact same claim arising from the Elections Clause. The Court's imminent decision in the *Agre* case will either moot the present action entirely or will dispose of one-third of the present action. If

the Court should decide in favor of the *Agre* plaintiffs, declare Pennsylvania's 2011 Plan unconstitutional, and direct the Pennsylvania General Assembly to draw a new Congressional district map, the present action, which seeks the same relief, will be mooted entirely. If, on the other hand, the Court should decide against *Agre* plaintiffs on their claims arising from the Elections Clause, that decision will dispose of Plaintiffs' identical Elections Clause claim. Given that trial in the *Agre* action is presently scheduled for December 4, 2017, less than fourteen days from now, there is little reason for the Court not to grant, at minimum, this modest stay.

3. The Court Should Stay This Matter, Because It Is Not Possible, Nor Consistent with Due Process, For Legislative Defendants To Prepare An Effective Defense In All Three Actions Concurrently Under Expedited Schedules

Moreover, a stay pending this Court's decision in *Agre* is necessary, because as a practical matter, it is simply not possible for the parties to fairly and effectively litigate all three actions concurrently under the requested expedited schedules.

At present, these cases involve 55 different individual plaintiffs, but it is possible that the number of individual plaintiffs could very soon rise to 62, if Plaintiffs in the instant case attempt to amend their Complaint to add a plaintiff from each of Pennsylvania's 18 Congressional districts. *See* Statement of Reasons for the Court's Decision on the Motion to Dismiss (ECF 45, Exh. 1, *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa. Nov. 16, 2017) (suggesting that, by adding a voter from each Congressional district, *Agre* plaintiffs will have standing). Each group of plaintiffs will also presumably be retaining its own set of experts for trial. *Agre* plaintiffs have designated five experts in total. Legislative Defendants in the *Agre* action are likely to designate three or four experts in rebuttal. Assuming Plaintiffs in the instant action and the Pennsylvania

Action plaintiffs also designate a comparable number of experts (three to five), there will be a *minimum* of *fourteen experts* across the three actions.

Meanwhile, the parties are confronting back-to-back trials beginning on December 4, 2017: The *Agre* action is scheduled for December 4, 2017. Order, *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa. Oct. 25, 2017). The Pennsylvania Action is scheduled for trial on December 11, 2017. *See* Order, *League of Women Voters of Pennsylvania, et al. v. Commonwealth*, *et al.,* No. 261 MD 2017 (Pa. Commw. Ct. Nov. 13, 2017). Finally, Plaintiffs in the instant action have requested a trial date of December 18, 2017. (*See* ECF No. 2, at 1.)

Thus, as it stands, Legislative Defendants have fewer than 14 days (8 business days) before that first trial. Just in terms of coordinating, scheduling, and conducting depositions alone, Legislative Defendants will need to depose potentially 62 plaintiffs—the majority of whom live in far-flung Congressional districts—and between 14 and 19 experts among the three cases. Currently, just in the *Agre* action, even though the parties have been working with each other diligently and in good faith, it has already proven difficult to coordinate and schedule the depositions of the 5 original *Agre* plaintiffs—in fact, Legislative Defendants have not even been able to complete those depositions even after several weeks due to *Agre* plaintiffs' inability to promptly appear for deposition. Additionally, Legislative Defendants will also have to schedule the depositions of the 18 plaintiffs in the Pennsylvania Action.[10] It will be impossible for the

[10] Although the Pennsylvania Action was filed in June, it is not significantly advanced. In fact, the Commonwealth Court originally stayed the case pending the U.S. Supreme Court's decision in *Whitford*, and the Pennsylvania Supreme Court only vacated that stay 12 days ago. *See* Order, *League of Women Voters of Pennsylvania, et al. v. Commonwealth, et al.*, No. 159 MM 2017 (Pa. Nov. 9, 2017). Indeed, Respondents just filed their Answer to Petition for Review on Friday, November 17, 2017.

parties to also coordinate and schedule the depositions of the 11 current Plaintiffs in the present suit, all within the next 8 business days. Of course, even if the parties could schedule the depositions of the 11 Plaintiffs, there is simply not enough time to properly prepare, travel, and conduct full depositions, or even half-length depositions, of each of the Plaintiffs in the next 8 business days.

With respect to expert witnesses, the current expedited schedule in the *Agre* action alone has caused significant difficulties. For example, motions in limine in the *Agre* action are due on November 20, 2017. Order, *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa. Nov. 13, 2017). Again, despite the parties working together diligently and in good faith to accommodate each other's schedules, the parties will not be able to depose each other's experts until *after* the deadline to challenge those experts has expired. These types of issues will only be multiplied and magnified if the already compressed schedule is required to also accommodate the demands of the instant action. Indeed, Legislative Defendants are not even aware of whom Plaintiffs in the instant action may call as expert witnesses. At present, Legislative Defendants will need to, in the next 8 business days, identify and hire rebuttal experts and have them prepare rebuttal expert reports completely in the dark, and all while taking and defending the aforementioned party and expert depositions.

The above calculus does not even factor in the various discovery disputes and dispositive motions that will need to be filed and resolved in advance of trial in each of these three matters, including just in the instant case, Legislative Defendants' motions to intervene, to stay and/or abstain, and to dismiss. There is simply no way that Legislative Defendants can concurrently comply with expedited schedules in all three matters and also provide effective representation.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Forcing Legislative Defendants to meet impossible deadlines precludes them from preparing and presenting an effective and meaningful defense. *Cf. Marshall Durbin Farms, Inc. v. Nat'l Farmers Org., Inc.*, 446 F.2d 353, 356-57 (5th Cir. 1971) (reversing grant of preliminary injunction where defendants were placed in "impossible position insofar as both preparing and presenting an effective response"); *Anderson v. Sheppard*, 856 F.2d 741, 748 (6th Cir. 1988) (reversing jury verdict where trial judge refused to grant plaintiff reasonable time to obtain counsel and reasoning "[w]hile the matter of continuance is traditionally within the discretion of the trial judge, a myopic insistence upon expeditiousness in the face of justifiable request for delay can render the right to defend with counsel an empty formality") (internal quotations and corrections omitted); *Hardin v. Wal-Mart, Inc.*, 89 F.R.D. 449, 451-52 (E.D. Ark. 1981), *aff'd* 676 F.2d 702 (8th Cir. 1981) (dismissing plaintiff's complaint where plaintiff failed to adequately disclose witnesses and anticipated testimony in advance of trial and where defendants argued they would be prejudiced by their inability to interview or ascertain material facts from plaintiff's witnesses).

In the interest of Legislative Defendants' due process rights and in the interests of the Court, the parties, and the public that this important case be fairly and effectively litigated, the Court should grant a stay in the instant action.

4. This Case Should Be Stayed Because It Is Already Far Too Late For Disposition Of This Case to Have Any Impact on the 2018 Election Cycle

Plaintiffs oppose Legislative Defendants' Motion for a Stay and "seek the most expeditious possible trial schedule in order to enable the Court to order relief in time for the 2018 Congressional elections." (Motion for Expedited Pretrial Scheduling Order at 1, ECF No. 2; *see also* Compl. ¶ 6.) But, the forthcoming 2018 elections should not factor into the Court's stay analysis for two reasons.

a. <u>Plaintiffs Had Six Years To Challenge the 2011 Plan and Should Not Be Afforded Extraordinary Relief Based on an Alleged Crisis of their Own Creation.</u>

Plaintiffs should not be permitted to benefit through any purported emergency caused by their own delay in filing suit. The current Congressional map went into effect nearly *six years ago*. And nothing has occurred since that time that has suddenly provided Plaintiffs with the ability to assert the claims they allege now. The *only* thing that has changed since 2011 is that last year—for the first time in more than a generation—a three judge panel found that partisan gerrymander claims were justiciable and ordered a state legislative map to be redrawn. *Whitford v. Gill*, 218 F. Supp. 3d 837, 837-965 (W.D. Wisc. 2016). Following that ruling, multiple lawsuits, including this one and the related *Agre* and Pennsylvania Action, were filed alleging similar—and in this case, identical—partisan gerrymandering claims. However, in this case, Plaintiffs waited until November 9, 2017—nearly a year after the district court's decision in *Whitford*, over four months after Petitioners in the Pennsylvania Action and over a month after plaintiffs in *Agre* filed their suits, and just a few short months before the primary election cycle officially begins in February

2018—to assert claims they could have asserted years, or at least months, ago.[11] Plaintiffs should not be rewarded for their delay with the extraordinary relief being sought.

b. The Outcome of This Case Could Not Realistically Affect the 2018 Congressional Elections

As Legislative Defendants argued in *Agre*, even with an extraordinarily accelerated scheduling order (63 days from Complaint to trial on December 4, 2017), it was impossible for the outcome of that case to affect the 2018 election cycle. For those same reasons—amplified by the fact that the present action is over a month behind the *Agre* action (and the Legislative Defendants have not even been permitted to intervene yet)—there is simply no way that this case could affect the 2018 election cycle.[12] Specifically, for any new redistricting legislation to be enacted in time to impact the 2018 election, at a bare minimum, the following events would have to occur:

1. This Court would have to adjudicate all pretrial motions, including the Legislative Defendants' Motion to Intervene and the attendant Motions to Dismiss and Stay, as well as all future discovery disputes;

2. Plaintiffs must prevail at trial;

3. The Court would have to enter an Order and Opinion detailing how the 2011 Plan must be replaced with a Congressional map that meets whatever standards the Court imposes;

4. A new Congressional map would then need to be created that complies with the Court's Order;

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[11] Legislative Defendants are, of course, aware that this Court declined to dismiss the *Agre* action on the basis of *Agre* plaintiffs' laches. *See* Statement of Reasons for the Court's Decision on the Motion to Dismiss (ECF 45, Exh. 1), *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa. Nov. 16, 2017). However, the question here is not whether Plaintiffs are permitted to bring suit but rather whether Plaintiffs' unexplained and unreasonable delay (even as compared with plaintiffs in the *Agre* action and Pennsylvania Action) should entitle them to an extremely expedited schedule that will be highly prejudicial to Legislative Defendants.

[12] Again, this assumes that the parties would even be able to effectively litigate all three related actions. *See supra*, pgs. 12-16.

5. Both chambers of the General Assembly would need to consider and separately pass the bill;

6. The Governor would need to sign the bill; and

7. The Commissioner of Elections would need sufficient time to prepare for the 2018 primaries based on the newly-formed districts either formed by legislation or by order of this Court.

As detailed below, it is unrealistic for each of these events to be completed in time to impact the 2018 elections.[13]

During the October 10, 2017 pretrial conference held before Judge Baylson in the related *Agre* action, counsel for Defendants, including the Commissioner of Pennsylvania's Elections Bureau, explained that Pennsylvania's Bureau of Elections needs a significant amount of time to prepare in advance of the 2018 elections. (*See* Excerpts from Oct. 10, 2017 Conference Tr. at 17:22-25; 18:1-22, attached as **Exhibit C**.) Counsel for the Commissioner of the Elections submitted a document entitled "2018 Pennsylvania Elections Important Dates to Remember [the Official Schedule]."[14]

The Official Schedule sets forth events that must occur prior to congressional elections. The first event on the Official Schedule will occur on February 13, 2018, and that deadline is followed by seventeen other events leading up to the election on November 6, 2018. As counsel for Defendants explained, the Official Schedule is "very compressed" and "there is not a lot of

[13] All of this, of course, presupposes that Defendants and/or Legislative Defendants do not seek and secure a stay from the U.S. Supreme Court with regard to any decision in Plaintiffs' favor—just as occurred in *Whitford*. *See Gill v. Whitford*, 137 S. Ct. 2289 (2017).

[14] The Official Schedule is attached hereto as **Exhibit D**.

room [to adjust the dates]." *See id.* Counsel also made clear that, the Elections Bureau needs*, at an absolute minimum, three weeks* to prepare for the elections prior to the first events listed in the schedule.[15] *Id*. Thus, the Elections Bureau must have the final redistricting plan for the 2018 election, at the very latest, on or before January 23, 2018.

Giving Plaintiffs the benefit of every possible doubt, it is unreasonable to believe that a new plan could be enacted into law by January 23, 2018. This case is in its infancy. The Court and parties have yet to confer and set a schedule, including a trial date, for this action. However, as Plaintiffs note, "[g]iven the *Agre v. Wolf* trial taking place during the week of December [4], and in light of the Court's prior indications that it is not available during the week of December 11", the earliest that trial could be held is during the week of December 18, 2017. Assuming that trial could be scheduled for December 18, 2017[16] and assuming that it will take a comparable amount of time for the parties in this action to present their respective cases at trial (four to eight days in *Agre*), the last day of trial will be between December 21 and December 28. (*See* **Exhibit C**, Oct. 10, 2017 Conference Tr. at 26:3-11.) If this matter is adjudicated in between that range in only six days, the last day of trial would be December 26, 2017.

Assuming *arguendo* the Court rules in favor of Plaintiffs, it will then need to draft an Opinion and Order that provides the General Assembly with specific guidance as to how a new

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[15] Counsel noted that Defendants would actually prefer to have at least five weeks.

[16] Such a schedule would leave the parties with less than 29 days before trial, not taking into account trial in the *Agre* action.

redistricting plan must be drafted.[17] Because of the complexity of the factual issues raised in this case and the compressed time frame required to comply with such an Order, any such decision will require a great deal of specificity. By way of comparison, in the *Whitford* case, which addressed the exact same issues as here, the District Court issued two separate opinions, the first addressing the constitutionality of the Wisconsin plan and the second addressing the appropriate relief. *See Whitford,* 218 F. Supp. 3d, at 837-965*; Whitford v. Gill*, 2017 WL 383360 (W.D. Wisc. Jan. 1, 2017). Collectively, the opinions were *over 125 pages* and were not issued until *over five months* and *over seven months* after the trial was completed, respectively. *Id.* In addition, the *Whitford* opinions were issued only after the Court resolved numerous post-trial motions and disputes. It is hard to imagine any scenario where the trial in this matter concludes on December 26, 2017; all post-trial motions are adjudicated; a final Order and Opinion is issued;[18] a new Congressional map is created consistent with the Court's Order and passed by both chambers of the General Assembly and signed by the Governor (or a map is imposed by the Court after a reasonable process if the Commonwealth is unable to adopt new legislation)—all before the January 23, 2018 deadline described by the Commissioner of Elections.

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[17] Of course, depending on the outcome of the related *Agre* actions, the Court may need to draft *two* harmonized Opinions and Orders in the same abbreviated time frame.

[18] And this does not even account for the fact that any ruling overturning the 2011 Plan would almost certainly be appealed to the U.S. Supreme Court, which could stay implementation of any remedial order, just as it did in nearly identical circumstances in *Whitford*. 137 S. Ct. 2289; *see also Abbott v. Perez,* No. 17A225, 2017 U.S. LEXIS 4434 (U.S. Sept. 12, 2017) (in which the U.S. Supreme Court recently issued a stay of a liability determination seven months before a primary election).

Nor does it account for the necessity of having to harmonize any such Order and Opinion with the Court's decision in the *Agre* action.

This conclusion is not just a theoretical possibility but a near mathematical certainty. Assuming trial concludes on December 26, 2017 and the Court issues an Order and Opinion by the end of the year (in 3 business days), there would be only 23 days for new maps to be created and then passed into law. By comparison, following the release of the 2010 and 2000 census results, it took 6 months and 8 months, respectively, for new plans to be created.[19]

Moreover, even after a new plan is created, it would be extremely difficult to pass new legislation through both chambers of the General Assembly prior to January 23, 2018. Any new plan would need to be submitted to the Senate, which requires at least three session days to consider and pass any bill (assuming that the Senate engages in limited debate and that there are no amendments).[20] Similarly, the bill would also need to be submitted to the House, which requires at least three session days of consideration (again assuming there are no debates or amendments).[21]

Session days for the House and Senate are pre-scheduled on a very limited number of days

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[19] After the 2010 census, redistricting data was released on March 24, 2011, and the initial version of the 2011 Plan was not submitted to the General Assembly until September 14, 2011. *See* Legislative History of the 2011 Plan *available at* http://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?syear=2011&sind=0&body=S&type=B&bn=1249 2010 Census Data Products *available at* https://www.census.gov/population/www/cen2010/glance/ Similarly, following the 2000 census, redistricting data was released between March 7 and March 30, 2001, and the initial version of the 2002 redistricting plan was not submitted to the General Assembly until November 16, 2001. *See* Legislative History of the 2001 redistricting plan *available at* http://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?syear=2011&sind=0&body=S&type=B&bn=1249

[20] Session days are days that the Pennsylvania Senate or House of Representatives are in session and can take legislative action.

[21] *See* PA. CONST. ART. III § A(4) (requiring 3 days of consideration of bills in each house of the General Assembly).

each month.[22] However, because the last Senate session day this year is December 20, 2017, this process *could not even begin* until January 2018. Moreover, because the General Assembly generally does not schedule many session days in January,[23] this process could not possibly be completed—and then the Plan signed into law by the Governor—before the Election Commissioner's January 23, 2018 deadline. And this assumes that the Commonwealth's political branches are able to reach an agreement by January 23, 2018. If they are unable to do so, it would be incumbent on this Court to impose a map that complies with all applicable federal and state constitution and statutory requirements and permit the Commissioner of Elections a reasonable time to implement such a map.

Accordingly, even with Plaintiff's proposed "most expeditious possible trial schedule" of 39 days from Complaint to trial—and even if Plaintiffs prevail at trial and are given the benefit of every doubt regarding timing— there is no way that a new Plan could possibly be enacted into law in time to impact the 2018 elections.

5. The Balance Of The Equities Weighs In Favor Of Granting A Stay

A denial of this stay *will* necessarily cause harm to Legislative Defendants. Not only would denying the stay require Legislative Defendants to expend taxpayer dollars conducting extensive discovery, but as argued in detail earlier, it is simply not possible for Legislative Defendants to litigate effectively all three actions at the same time.

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[22] *See* Senate Session day schedule, *available at* http://www.pasen.gov/session.cfm; House Session Day Schedule, *available at* http://www.house.state.pa.us/session.cfm?sess_yr=2011&sess_ind=0&body=H&SessID=20110H&outputType=list

[23] Indeed, although the 2018 session day schedule has not been released, the House and Senate only held one session day prior to January 23, 2017.

Furthermore, proceeding with this case—which asserts identical claims to those presently being considered by the U.S. Supreme Court—makes little sense. If the U.S. Supreme Court rules that partisan gerrymandering claims are non-justiciable, then taxpayer resources will have been completely wasted. Alternatively, if the Supreme Court promulgates a new standard, then briefing and discovery governed by those new standards will be needed. Therefore, to preserve both taxpayer and judicial resources, this Court should grant a stay until the Supreme Court issues its ruling in *Whitford*.

Plaintiffs will face, at most, minimal harm if forced to wait a mere seven months—at most—for the U.S. Supreme Court to rule in *Whitford*. They already let six years and three elections pass before filing this lawsuit the day before *Whitford* was argued. By choosing to sit on their alleged rights *for years*, any alleged "emergency" or need for urgency is of Plaintiffs' own making, and should not be credited by this Court in considering this Motion. *See Am. Int'l Grp., Inc. v. Am. Int'l Airways, Inc.*, 726 F. Supp. 1470, 1481 (E.D. Pa. 1989) (stating that "delay in seeking injunctive relief may justify denial of preliminary injunction on grounds of lack of irreparable harm.") (citing *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985)). This Court should therefore find that the balance of the equities tips in Legislative Defendants' favor and grant the stay.

B. This Court Should "Stay Its Hand" Under *Growe* Abstention Because The Pennsylvania Supreme Court Is Currently Addressing The Highly Political Task Of Redistricting

When there are parallel state proceedings addressing legislative reapportionment, a district court's "decision to refrain from hearing the litigant's claims should be the routine course."

See Rice v. Smith, 988 F. Supp. 1437, 1439 (M.D. Ala. 1997). Courts within this very District have recognized that this rule protects the inherently greater interest a state has in legislative reapportionment. *See, e.g.*, *Pileggi v. Aichele*, 843 F. Supp. 2d 584, 592 (E.D. Pa. Feb. 8, 2012) (Surrick, J.) ("[T]he 'Constitution leaves with the States [the] primary responsibility for apportionment of their federal congressional and state legislative districts.'") (citing *Growe v. Emison*, 507 U.S. 25, 34 (1993); U.S. Cons., Art. I, § 2)). Indeed, "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Id.* at 593 (citing *Chapman v. Meier*, 420 U.S. 1, 27 (1975)); *see also Scott v. Germano*, 381 U.S. 407, 409 (1965) (noting the preference to have state legislatures and state courts, rather than federal courts, address reapportionment).

The U.S. Supreme Court has therefore held that federal judges are "**required** . . . to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself." *Growe*, 507 U.S. at 33 (emphasis added). In fact, federal judges are to "prefer[] *both* state branches to federal courts as agents of apportionment." *Id*. at 34 (emphasis in original). The U.S. Supreme Court has relied on principles of federalism and explained that it has "required deferral, causing a federal court to 'stay its hands,' when a constitutional issue in the federal action will be mooted or presented in a different posture following conclusion of the state-court case." *Id*. at 32.[24] The Supreme Court has mandated that "[a]bsent evidence that these state branches will fail timely to perform [their] duty, a federal court

[24] Notably, what mattered in *Growe* was that the two complaints asked for the same relief, the reapportionment of districts. *Id*. at 35. A state can only have one set of districts, and the primacy of the state in drawing those districts "compels a federal court to defer." *Id*.

must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Id.* at 34.

Here, as described above, an essentially identical constitutional challenge to the 2011 Plan is currently pending in the Pennsylvania Action. Indeed, not only does the Pennsylvania Action seek the same relief as the instant action, it also asserts substantially the same legal claims. Although the Pennsylvania Action relies exclusively on the Equal Protection and Free Speech and Expression provisions of the Pennsylvania Constitution, the Pennsylvania Supreme Court has held that the Pennsylvania Equal Protection Clause is co-extensive with the Fourteenth Amendment's Equal Protection Clause. *See, e.g.*, *Erfer v. Commonwealth*, 794 A.2d 325, 332 (Pa. 2002). And the Supreme Court of Pennsylvania "ordinarily" and "often" follows U.S. Supreme Court First Amendment jurisprudence when interpreting Pennsylvania's Free Speech and Expression Clause under Article I, § 7. *See Pap's A.M. v. City of Erie*, 812 A.2d 591, 611 (Pa. 2002).[25]

Moreover, at present, the Pennsylvania Action is scheduled for trial on December 11, 2017, and pursuant to an Order of the Pennsylvania Supreme Court dated November 9, 2017, findings of fact and conclusion of law must be issued by December 31, 2017. Given that federal courts are *required* to defer adjudication of a redistricting matter that a state legislative or judicial branch is

[25] The Pennsylvania Supreme Court has also followed the lead of the U.S. Supreme Court in addressing partisan gerrymandering claims. *See, e.g.*, *In re 1991 Pa. Legislative Reapportionment Comm'n*, 609 A.2d 132, 141-42 (Pa. 1992) ("This Court is persuaded by the holding of the Supreme Court of the United States [in *Bandemer*] with regard to the elements of a prima facie case of political gerrymandering.").

already considering, this Court should abstain from proceeding with this case pending the Pennsylvania Commonwealth Court's imminent decision.[26]

IV. CONCLUSION

In the event that the Court does not dismiss Plaintiffs' Complaint in its entirety for all of the reasons set forth in Legislative Defendants' separately filed Motion to Dismiss and Memorandum of Law, Legislative Defendants respectfully request that the Court stay and/or abstain from hearing this case until identical claims are decided by the U.S. Supreme Court, or

[26] For the same reasons, this Court should also stay the instant action under the *Colorado River* abstention doctrine. *See Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). The *Colorado River* doctrine allows a federal court to abstain from exercising jurisdiction when a parallel ongoing proceeding is pending in state court. *Golden Gate Nat'l Senior Care, LLC v. Beavens*, 123 F. Supp. 3d 619, 629 (E.D. Pa. 2015). The instant action and the Pennsylvania Action involve substantially equivalent claims, substantially the same parties, and seek the exact same relief. If the Court does not stay and/or abstain from hearing the instant action, the significant overlap between the instant action and the Pennsylvania case creates a serious risk of duplicative—or worse, inconsistent—rulings and judgments.

substantively identical claims are decided by this Court in *Agre v. Wolf* and by the Pennsylvania Supreme Court in *League of Women Voters v. Commonwealth*.

Dated: November 20, 2017

Respectfully submitted,

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, CARMEN FEBO SAN MIGUEL, JAMES SOLOMON, JOHN GREINER, JOHN CAPOWSKI, GRETCHEN BRANDT, THOMAS RENTSCHLER, MARY ELIZABETH LAWN, LISA ISAACS, DON LANCASTER, JORDI COMAS, ROBERT SMITH, WILLIAM MARX, RICHARD MANTELL, PRISCILLA MCNULTY, THOMAS ULRICH, ROBERT MCKINSTRY, MARK LICHTY, LORRAINE PETROSKY,

Petitioners,

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; PEDRO A. CORTÉS, IN HIS CAPACITY AS 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.

No.

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within thirty (30) days, or within the time set by order of the court, after this petition for review and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claims or relief requested by the plaintiff. You may lose money or property or other rights important to you.

You should take this paper to your lawyer at once. If you do not have a lawyer or cannot afford one, go to or telephone the office set forth below to find out where you can get legal help.

Dauphin County Bar Association
Lawyer Referral Service
213 North Front Street
Harrisburg, PA 17101
(717) 232-7536

AVISO

Le han demandado a usted en la corte. Si usted quiere defenderse de estas demandas expuestas en las paginas siguientes, usted treinta (30) dias de plazo al partir de la fecha de la demanda y la notificacion. Hace falta asentar una comparencia escrita o en persona o con un abogado y entregar a la corte en forma escrita sus defensas o sus objections a las demandas en contra de su persona. Sea avisado que si usted no se defiende, la corte tomara medidas y puede continuar la demanda en contra suya sin previo aviso o notification. Ademas, la corte puede decider a favor del demandante y require que usted cumpla con todas las provisiones de esta demanda. Usted puede perer dinero o sus propiedades u otros derechos importantes para usted.

Lleva esta demanda a un abogado immediatamente. Si no tiene abogado o si no tiene el dinero suficiente de pagar tal sevicio. Vaya en persona o llame por telefono a la oficina cuya direccion se encuentra escrita abajo para averiguar donde se puede consequir alstencia legal.

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, CARMEN FEBO SAN MIGUEL, JAMES SOLOMON, JOHN GREINER, JOHN CAPOWSKI, GRETCHEN BRANDT, THOMAS RENTSCHLER, MARY ELIZABETH LAWN, LISA ISAACS, DON LANCASTER, JORDI COMAS, ROBERT SMITH, WILLIAM MARX, RICHARD MANTELL, PRISCILLA MCNULTY, THOMAS ULRICH, ROBERT MCKINSTRY, MARK LICHTY, LORRAINE PETROSKY,

Petitioners,

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; PEDRO A. CORTÉS, IN HIS CAPACITY AS 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.

No.

TO:

Commonwealth of Pennsylvania
Pennsylvania Office of Attorney General
16th Floor, Strawberry Square
Harrisburg, PA 17120

Pennsylvania General Assembly
c/o Senator Joseph B. Scarnati III
Senate President Pro Tempore
Senate Box 203025
Harrisburg, PA 17120-3025
Room: 292 Main Capitol Building
c/o Representative Michael C. Turzai
Speaker of the House
139 Main Capitol Building
PO Box 202028
Harrisburg, PA 17120-2028

Governor Thomas W. Wolf
Office of the Governor
508 Main Capitol Building
Harrisburg, PA 17120

Lieutenant Governor Michael J. Stack III
President of the Senate
200 Main Capitol Building
Harrisburg, Pennsylvania 17120

Representative Michael C. Turzai
Speaker of the House
139 Main Capitol
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Secretary Pedro A. Cortés
Pennsylvania Department of State
Office of the Secretary
302 North Office Building
Harrisburg, PA 17120

Commissioner Jonathan M. Marks
Pennsylvania Department of State
Bureau of Commissions, Elections and Legislation
210 North Office Building, 401 North Street
Harrisburg, PA 17120

NOTICE TO PLEAD

You are hereby notified to file a written response to the enclosed Petition for Review within thirty (30) days from service hereof or a judgment may be entered against you.

BY: */s/ Mary M. McKenzie*

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, CARMEN FEBO SAN MIGUEL, JAMES SOLOMON, JOHN GREINER, JOHN CAPOWSKI, GRETCHEN BRANDT, THOMAS RENTSCHLER, MARY ELIZABETH LAWN, LISA ISAACS, DON LANCASTER, JORDI COMAS, ROBERT SMITH, WILLIAM MARX, RICHARD MANTELL, PRISCILLA MCNULTY, THOMAS ULRICH, ROBERT MCKINSTRY, MARK LICHTY, LORRAINE PETROSKY,

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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; PEDRO A. CORTÉS, IN HIS CAPACITY AS 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.

No.

PETITION FOR REVIEW
ADDRESSED TO THE COURT'S ORIGINAL JURISDICTION

INTRODUCTION

1. This case is about one of the greatest threats to American democracy today: partisan gerrymandering. A partisan gerrymander occurs when the political party in control of redistricting redraws congressional or state legislative districts to entrench that party in power and prevent voters affiliated with the minority party from electing candidates of their choice. The result is that general election outcomes are rigged—they are predetermined by partisan actors sitting behind a computer, not by the candidates, and not by the voters.

2. This practice is illegal and has been condemned by the Supreme Courts of the United States and the Commonwealth of Pennsylvania. The U.S. Supreme Court has explained that "[p]artisan gerrymanders . . . are incompatible with democratic principles." *Ariz. State Legis. v. Ariz. Indep. Redist. Comm'n*, 135 S. Ct. 2652, 2658 (2015) (alterations omitted). The Pennsylvania Supreme Court has written that a partisan gerrymander would violate the Pennsylvania Constitution when "there was intentional discrimination against an identifiable political group" that resulted in "an actual discriminatory effect on that group." *Erfer v. Commonwealth*, 794 A.2d 325, 332 (Pa. 2002). A partisan gerrymander "burdens rights of fair and effective representation" by enabling one political party to entrench itself in power while diluting the votes of citizens who affiliate with the

party out of power. *Vieth v. Jubelirer*, 541 U.S. 267, 312 (2004) (Kennedy, J., concurring in judgment).

3. While neither political party has a monopoly on the practice, this case challenges the partisan gerrymandering of the Commonwealth's current congressional districts by the Republican majority in the Pennsylvania General Assembly. Following the 2010 Census, Republican legislators dismantled Pennsylvania's existing congressional districts and stitched them back together with the goal of maximizing the political advantage of Republican voters and minimizing the representational rights of Democratic voters. According to the Brennan Center for Justice, the districting plan that resulted (the "2011 Plan"), which was signed into law by the Republican then-Governor, is one of the three most "extreme" gerrymanders in the nation.[1] Indeed, by some measures, Pennsylvania's gerrymander is the "worst offender" in the country.[2]

4. The 2011 Plan was the product of a national movement by the Republican Party to entrench its own representatives in power by utilizing the latest advances in mapmaking technologies and big data to gerrymander districts more effectively than ever before. Republican mapmakers used sophisticated

[1] Laura Royden & Michael Li, *Extreme Maps*, Brennan Center for Justice, at 1 (2017), *available at* https://www.brennancenter.org/publication/extreme-maps.

[2] *Id.* at 9.

computer modeling techniques, in Pennsylvania and elsewhere, to manipulate district boundaries with surgical precision to maximize the number of seats their party would win in future elections.

5. And their effort has been overwhelmingly successful. In 2012, Republican candidates won only 49% of the statewide congressional vote, but remarkably won 13 of 18—or 72%—of Pennsylvania's congressional seats. In 2014 and 2016, Republican candidates retained the same 72% share of Pennsylvania's seats, even while winning only 55% and 54% shares of the statewide vote.

6. The 2011 Plan achieved these lopsided results by "packing" Democratic voters into five districts that are overwhelmingly Democratic, and "cracking" the remaining Democratic voters by spreading them across the other 13 districts such that Republicans constitute a majority of voters in each of these 13 districts. The result is a districting plan that is utterly unresponsive to—and often flouts—the will of voters. For example, even though Democratic candidates won 6 points more in the statewide vote in 2012 compared to 2014, the number of Democrats elected was no different across the two elections.

7. The composition of the enacted districts reflects how the Republicans responsible for redistricting achieved this partisan result. For example, the city of Reading—a Democratic stronghold—was carved out of the 6th Congressional

District, where it would naturally reside, and placed into the 16th District, where Republicans made up the majority. Similarly, in the 17th District, the Democratic-leaning cities of Scranton (in Lackawanna County), Wilkes-Barre (in Luzerne County), and Easton (in Northampton County) were packed into a district that was already reliably Democratic, removing any risk that Wilkes-Barre voters (who would reside in the 11th District if county boundaries were respected) would tilt the 11th District to Democrats. And in the 7th District, portions of the city of Chester were carved out by packing these voters into the reliably Democratic 1st District.

8. As illustrated infra at Paragraphs 55-59, these decisions resulted in district lines that are absurd. Pennsylvania's 7th Congressional District has been described as "Goofy Kicking Donald Duck."[3] The 12th District could be mistaken for the boot of Italy. The 6th resembles the State of Florida, with perhaps a longer and more jagged Panhandle. These shapes lay bare the lengths that Republicans went to deny Petitioners and millions of other voters their constitutional rights and to lock in an artificial political advantage for Republicans.

[3] Aaron Blake, *Name That District Contest Winner: 'Goofy Kicking Donald Duck'*, Wash. Post, Dec. 29, 2011, https://www.washingtonpost.com/blogs/the-fix/post/name-that-district-contest-winner-goofy-kicking-donald-duck/2011/12/29/gIQA2Fa2OP_blog.html?utm_term=.a7863a1c4f3a.

9. While the districts are so bizarrely engineered that the only fair inference is that the Republican mapmakers made them so for partisan advantage, this partisan purpose is confirmed by an array of statistical techniques. Indeed, just as modern technology enabled Republicans to accomplish their gerrymander with more precision than ever before, it can be used to expose this discrimination for what it is. Computer modeling used by political scientists demonstrates that the Republican bias of the enacted plan could not have resulted from the use of traditional redistricting criteria such as contiguity and compactness, and cannot be explained by any natural clustering of voters in Pennsylvania. Rather, it is a statistical certainty that the Republican bias of the enacted plan could have resulted *only* from impermissible partisan intent.

10. Other statistical tests further confirm that the enacted plan reflects a deliberate and successful effort to disadvantage Democratic voters. The "efficiency gap," which a three-judge panel recently applied in striking down Wisconsin's state house districts, measures how many votes the enacted plan "wastes" for the disfavored party, relative to the favored party, through cracking and packing. *See generally Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), *jurisdictional statement filed* (U.S. Mar. 24, 2017) (No. 16-1161). In 2012, the efficiency gap of Pennsylvania's congressional districts was *the largest* in the nation. Another test for identifying political gerrymandering is the "mean-median

gap," which measures the gap between the average Democratic vote share across the Commonwealth and Democratic vote share in the median district, *i.e.*, the district either party would need to win to earn a majority of districts. Again, Pennsylvania's mean-median gap is one of the largest in the nation, reflecting the deliberate effort to maximize the number of seats Republicans win by packing Democrats into a few districts.

11. A variety of statistical modeling techniques and tests all lead to the same conclusion: the enacted plan could have resulted only from unconstitutional partisan intent, and the effect of that discrimination is significant and enduring.

12. Along with other forms of equitable relief, Petitioners seek a judicial declaration that the enacted plan, by discriminating against Democratic voters on the basis of their political expression and affiliation, violates the Pennsylvania Constitution.

PARTIES

A. Petitioners

13. The League of Women Voters of Pennsylvania ("LWVPA"), a nonpartisan political organization, encourages the informed and active participation of citizens in government, works to increase understanding of major public policy issues, and influences public policy through education and advocacy. The League supports full voting and representational rights for all eligible

Commonwealth citizens and opposes efforts to disadvantage or burden voters based on their political affiliation.

14. Petitioner Carmen Febo San Miguel is an Executive Director of a non-profit cultural organization and a former physician who resides in the 1st Congressional District in Philadelphia. Febo San Miguel is a registered Democrat who has consistently voted for Democratic candidates for Congress. Democrats have won every congressional election in the 1st District under the 2011 Plan with over 80% of the vote, at times with the Democratic candidate running unopposed.

15. Petitioner James Solomon is a retired federal employee who resides in Philadelphia in the 2nd Congressional District. Solomon is a registered Democrat who has consistently voted for Democratic candidates for Congress. Democrats have won every congressional election in the 2nd District since 2002 with over 85% of the vote.

16. Petitioner John Greiner is a software engineer who resides in the 3rd Congressional District, in Erie, Erie County. Greiner is a registered Democrat and has consistently voted for Democratic candidates for Congress. Before the 2011 Plan, the 3rd District was a competitive district: Republicans won in 2002, 2004, 2006, and 2010, while Democrats won in 2008. But the Republican representative, Mike Kelly, has comfortably won reelection in every election since the 2011 Plan, running unopposed in 2016.

17. Petitioner John Capowski is a law professor emeritus residing in Camp Hill, Cumberland County, in the 4th Congressional District. Capowski is a registered Democrat who has consistently voted for Democratic candidates for Congress. Prior to the 2011 Plan, the 4th District was a competitive district: Republicans won in 2002 and 2004, and Democrats won in 2006, 2008, and 2010. But the Republican representative, Scott Perry, has easily won reelection in every election since the 2011 Plan.

18. Petitioner Gretchen Brandt is a mother of two and a school board director residing in the 5th Congressional District, in State College, Centre County. Brandt is a registered Democrat who has consistently voted for Democratic candidates for Congress. Republicans have won every congressional election in the 5th District since 2002.

19. Petitioner Thomas Rentschler is a former school teacher and attorney who resides in Exeter Township, Berks County, which falls in the 6th Congressional District. Rentschler is a registered Democrat who has consistently voted for Democratic candidates for Congress. The 6th District had been an extremely competitive district under the prior congressional plan, with 4 of the 5 congressional elections decided by less than 5 points. But the 6th district has been far less competitive under the 2011 Plan, with the Republican representative winning each election by more than 12 points.

20. Petitioner Mary Elizabeth Lawn is a chaplain at a retirement community who lives in Chester, Delaware County. Lawn is a registered Democrat who has consistently voted for Democratic candidates for Congress. Prior to the 2011 Plan, Lawn's home fell in the 1st Congressional District, which has consistently elected Democrats. But under the 2011 Plan, Lawn was moved to the 7th Congressional District, which has voted for Republicans by comfortable margins in every election since the redistricting.

21. Petitioner Lisa Isaacs is an attorney who resides in the 8th Congressional District in Morrisville, Bucks County. Isaacs is a registered Democrat who has consistently voted for Democratic candidates for Congress. Prior to the 2011 Plan, the 8th District was a competitive district: Republicans won in 2002, 2004, and 2010, while Democrats won in 2006 and 2008. Under the 2011 Plan, however, Republican candidates have won by 8 points or more in each election.

22. Petitioner Don Lancaster is a retired teacher who resides in Indiana County, in the 9th Congressional District. Lancaster is a registered Democrat who has consistently voted for Democratic candidates for Congress. Republicans have won every congressional election in the 9th District since 2002 with more than 60% of the vote.

23. Petitioner Jordi Comas is an academic and chef residing in Lewisburg, Union County. Comas is a registered Democrat in Pennsylvania's 10th Congressional District who has consistently voted for Democratic candidates for Congress. Prior to the 2011 Plan, the 10th District was often a competitive district: Republicans won in 2002, 2004, and 2010, and Democrats won in 2006 and 2008. But the Republican representative, Tom Marino, easily won election in 2012 with over 65% of the vote and has been comfortably reelected ever since.

24. Petitioner Robert Smith, a retired health executive, resides in Bear Creek Village Borough, Luzerne County, in the 11th Congressional District. Smith is a registered Democrat who has consistently voted for Democratic candidates for Congress. Prior to the 2011 Plan, the 11th District was often a competitive district: Democrats won in 2002, 2004, 2006 and 2008, but were unseated in 2010 when a Republican, Lou Barletta, defeated the Democratic incumbent. Since the 2011 Plan, Lou Barletta has comfortably won reelection with about 60% of the vote.

25. Petitioner William Marx is a high school civics teacher and Army Reservist residing in Delmont, Westmoreland County, which falls in the 12th Congressional District. Marx is a registered Democrat who has consistently voted for Democratic candidates for Congress. Prior to the 2011 Plan, Democrats won every congressional election in the 12th District since 2002, often winning over 60

percent of the vote. Since redistricting, Republicans have won every election, winning by more than 18 points in the last two elections.

26. Petitioner Richard Mantell is a retired school administrator residing in Jenkintown, Montgomery County, which sits in the 13th Congressional District. Mantell is a registered Democrat who has consistently voted for Democratic candidates for Congress. Prior to the 2011 Plan, elections in the 13th District were generally competitive, with Democrats winning each election but with less than 60% of the vote in three out of five elections. But after Democratic voters were packed into the district under the 2011 Plan, Democrats won easily in 2012 and 2014 and ran unopposed in the 2016 election.

27. Petitioner Priscilla McNulty is a manager at a non-profit who resides in the 14th Congressional District in Pittsburgh, Allegheny County. McNulty is a registered Democrat who has consistently voted for Democratic candidates for Congress. Democrats have easily won every congressional election in the 14th District since 2002.

28. Petitioner Thomas Ulrich is a retired school teacher who resides in Bethlehem, Lehigh County, falling in the 15th Congressional District. Ulrich is a registered Democrat who has consistently voted for Democratic candidates for Congress. Republicans have won every congressional election in the 15th District since 2002.

29. Petitioner Robert B. McKinstry, Jr. is an environmental attorney who resides in East Marlborough Township, Chester County, in the 16th Congressional District. McKinstry is a registered Democrat who has consistently voted for Democratic candidates for Congress. Republicans have won every congressional election in the 16th District since 2002.

30. Petitioner Mark Lichty is a retired attorney and manufacturer who resides in East Stroudsburg, Monroe County, in the 17th Congressional District. Lichty is a registered Democrat who has consistently voted for Democratic candidates for Congress. Democrats have won every congressional election in the 17th District since 2002.

31. Petitioner Lorraine Petrosky is a retired preschool teacher who resides in the 18th Congressional District in Latrobe, Westmoreland County. Petrosky is a registered Democrat who has consistently voted for Democratic candidates for Congress. Republicans have won every congressional election in the 18th District since 2002, almost always with more than 60% of the vote.

B. Respondents

32. Respondent the Commonwealth of Pennsylvania has its capital located in Harrisburg, Pennsylvania.

33. Respondent the Pennsylvania General Assembly is the state legislature for the Commonwealth of Pennsylvania and is comprised of the State

House and State Senate. The General Assembly convenes in the State Capitol building in Harrisburg, Pennsylvania.

34. In Pennsylvania, the boundaries for congressional districts are redrawn every ten years after the national census by legislative action in a bill that proceeds through both chambers of the General Assembly and is signed into law by the Governor. In 2011, Republicans controlled every step of that process. Most of the Respondents named below were not involved in drafting Pennsylvania's current plan. They are named in their official capacities as parties who would be responsible for implementing the relief Petitioners seek.

35. Respondent Thomas W. Wolf is Governor of the Commonwealth and is sued in his official capacity only. As Governor, Respondent Wolf is responsible for signing bills into law as well as the faithful execution of the 2011 Plan.

36. Respondent Pedro A. Cortés is the Secretary of the Commonwealth and is sued in his official capacity only. In that capacity, he is charged with the general supervision and administration of Pennsylvania's elections and election laws.

37. Respondent Jonathan Marks is the Commissioner of the Bureau of Commissions, Elections, and Legislation of the Pennsylvania Department of State and is sued in his official capacity only. In that capacity, he is charged with the

supervision and administration of the Commonwealth's elections and electoral process.

38. Respondent Michael J. Stack III, the Lieutenant Governor of the Commonwealth, serves as President of the Pennsylvania Senate and is sued in his official capacity only.

39. Respondent Michael C. Turzai is the Speaker of the Pennsylvania House of Representatives and is sued in his official capacity only.

40. Respondent Joseph B. Scarnati III is the Pennsylvania Senate President Pro Tempore and is sued in his official capacity only.

JURISDICTION

41. The Court has original jurisdiction over this Verified Petition for Review pursuant to 42 Pa. Cons. Stat. § 761(a).

FACTUAL ALLEGATIONS

A. National Republican Party Officials Target Pennsylvania For Partisan Gerrymandering

42. In the years leading up to the 2010 census, national Republicans leaders undertook a concerted effort to gain control of state governments in critical swing states such as Pennsylvania. The Republican State Leadership Committee (RSLC) codenamed their plan "the REDistricting Majority Project," or "REDMAP." REDMAP's goal was to "control[] the redistricting process in . . .

states [that] would have the greatest impact on determining how both state legislative and congressional district boundaries would be drawn."[4]

43. The RSLC intended that this project would "solidify conservative policymaking at the state level and maintain a Republican stronghold in the U.S. House of Representatives for the next decade."[5] The REDMAP homepage explains that "Republicans [had] an opportunity to create 20-25 new Republican Congressional Districts through the redistricting process. . . , solidifying a Republican House majority."[6]

44. Pennsylvania was a key REDMAP "target state." As the second most populous swing state in the nation, Pennsylvania currently holds 18 seats in the U.S. House of Representatives. Pennsylvania is also one of only a handful of states that has consistently lost seats in the U.S. House of Representatives every ten years through reapportionment, having lost at least one House seat every ten years since 1920. These features of Pennsylvania's political landscape make it a prime target for partisan gerrymandering.

[4] *2012 REDMAP Summary Report*, Redistricting Majority Project (Jan. 4, 2013), http://www.redistrictingmajorityproject.com/?p=646.

[5] *Id.*

[6] Redistricting Majority Project, http://www.redistrictingmajorityproject.com/ (last visited June 9, 2017).

45. Heading into the November 2010 election, Democrats held the Pennsylvania House by a slim margin. The RSLC focused its resources on Pennsylvania in the 2010 election, targeting and winning three key house races that would swing control of the Pennsylvania House to Republicans. During that same election, Republicans also won the governorship, while retaining control of the Pennsylvania Senate. Thus, after the 2010 election, Republicans had exclusive control over congressional redistricting in Pennsylvania. The Republicans quickly set to work to redraw the congressional map in a way that would entrench the Republican Party's dominance in Pennsylvania's delegation to the U.S. House for the next decade.

46. On information and belief, Republicans, including key members of the Pennsylvania Senate and House Committees on State Government, communicated with Republican leaders in Washington, D.C. and elsewhere to create a plan that would maximize the number of Republicans elected to the U.S. House.

47. Mapmakers seeking to create a partisan gerrymander do so primarily through two means—"cracking" and "packing" voters of the opposing political party into congressional districts that will dilute their political power. "Cracking" is achieved by dividing a party's supporters among multiple districts so that they fall short of a majority in each district. "Packing" involves concentrating one

party's backers in a few districts that they win by overwhelming margins to minimize the party's votes elsewhere. This cracking and packing results in "wasted" votes: votes cast either for a losing candidate (in the case of cracking) or for a winning candidate but in excess of what he or she needs to prevail (in the case of packing).

48. Republicans worked with highly skilled and partisan mapmakers to generate the most advantageous possible map for the Republican Party. Using sophisticated computer software and data such as voter registration information and election results, the Republicans' mapmakers created a plan that virtually guaranteed the Republican Party would win in the large majority of Pennsylvania's congressional districts. Their entire aim was to burden the representational rights of Democratic voters, making it nearly impossible for Democrats in cracked districts to elect representative of their choice, and wasting the votes of Democrats in packed districts.

49. Democrats were not involved in the drawing of the map. The Republican mapmakers created the 2011 Plan through a secret process to avoid scrutiny from Democrats and the general public.

C. Republicans Introduce Senate Bill 1249

50. On September 14, 2011, Republicans introduced their redistricting bill, Senate Bill 1249. The bill's primary sponsors were all Republicans: Majority

Floor Leader Dominic F. Pileggi, President Pro Tempore Joseph B. Scarnati III, and Senator Charles T. McIlhinney Jr. The Republican leadership went to extraordinary lengths to conceal their intent.

51. As introduced, Bill 1249 was simply an empty shell. It contained no map showing the proposed congressional districts. Each congressional district was described in the following fashion: "The [Number] District is composed of a portion of this Commonwealth." The same held true through the second reading of the bill. This was a deliberate effort on the part of the Republicans to prevent Democrats and the public from understanding the nature of the Republicans' redistricting plan.

52. Then, three months after they had introduced SB 1249, on the morning of December 14, 2011—the day of the vote on the bill—the Republicans suddenly amended the bill to add for the first time the actual descriptions of the congressional districts. Once the details of the plan were released, it became clear why the Republicans had kept it a secret.

53. As explained below, SB 1249 represented, by any measure, one of the most extreme partisan gerrymanders in American history. One of Pennsylvania's leading political scientists, Franklin & Marshall political science professor Terry Madonna, described it as "[t]he most gerrymandered map [he had] seen in the

modern history of our state."[7] Even Sean Trende, who testified in defense of Wisconsin's gerrymandered map in *Whitford v. Gill*, suggests that Pennsylvania's map might be "the Gerrymander of the Decade."[8]

54. To accomplish their gerrymander, Republicans "packed" Democrats into "a group of Rorschach-inkblot districts,"[9] and then "cracked" the rest into districts that would vote reliably Republican. Michael Barone and Chuck McCutcheon, writing for *The Almanac of American Politics*, described the plan as follows:

> The plan ruthlessly sewed the state, particular the Philadelphia suburbs, into a crazy quilt. Montgomery County, about the population of one district, was split five ways to boost the suburban Republican trio of Jim Gerlach, Mike Fitzpatrick, and Pat Meehan, who were happy to feed their trickiest inner suburbs to Philadelphia's Democrats. Mapmakers even awkwardly appended a portion of Amish Country to Meehan's 7th District. In the northeast, Republicans stuffed Blue Dog [Tim] Holden's 17th District with the liberal labor bastions of Scranton, Wilkes-Barre, and Easton to relieve pressure on freshman Republican Lou Barletta in the 11th District and Charlie Dent in the Lehigh Valley's 15th.
>
> In the west, Republicans split the city of Erie to shore up freshman Mike Kelly and carefully merged [Jason] Altmire and [Mark] Critz in such a way that neither Democrat could plausibly run elsewhere but

[7] Charles Thompson, *Congressional Redistricting Puts Pa. Congressmen at a Distance*, Harrisburg Patriot-News, Dec. 18, 2011, http://www.pennlive.com/midstate/index.ssf/2011/12/congressional_redistricting_pu.html.

[8] Sean Trende, *In Pennsylvania, the Gerrymander of the Decade?*, Real Clear Politics (Dec. 14, 2011), http://www.realclearpolitics.com/articles/2011/12/14/in_pennsylvania_the_gerrymander_of_the_decade_112404.html.

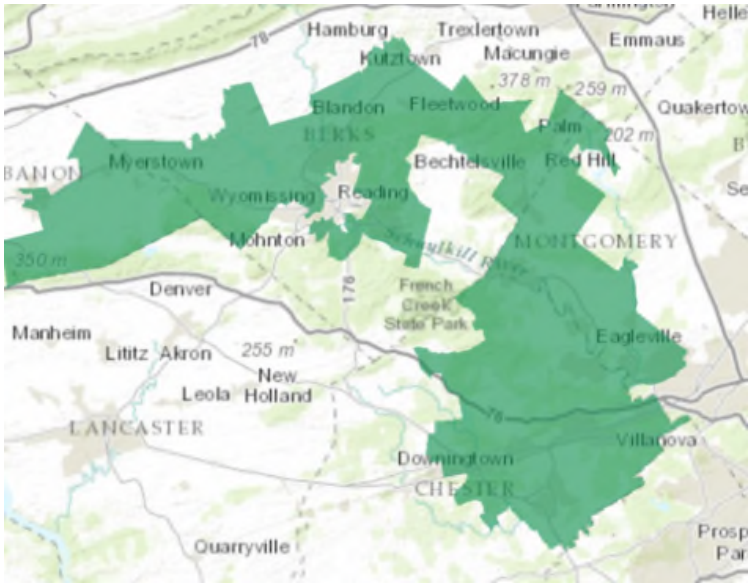
[9] *Id.*

> either would still be vulnerable in a general election. Sure enough, Critz defeated Altmire in a bitter primary and Republican Keith Rothfus defeated Critz in November. Back east, Holden lost his primary to a more liberal Democrat, and in November, Republicans held onto their other 12 seats without much of a fight.

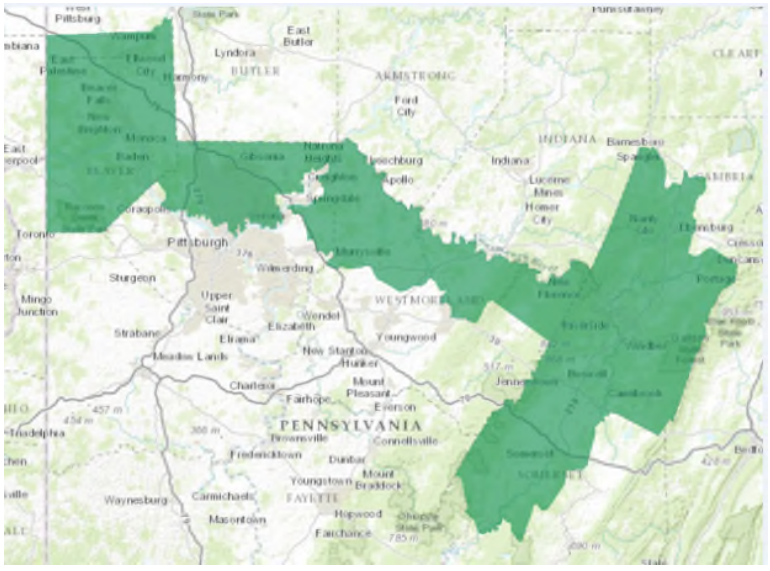
55. The "crazy quilt" that the Republicans devised ignores all traditional redistricting criteria and serves no legitimate purpose. It fractures local political subdivisions rather than keeping them intact. For example, enough voters live in Montgomery County for that county to have its own congressional district. But, as seen below, under SB 1249, Montgomery County is split among five districts.[10] Not a single one of those five Congressmen lives in Montgomery County. Other counties—such as Berks and Chester—are similarly divided.

[10] Dan Sokil, *Fair Districts PA Urges Residents to Spread the Word of Redistricting Reform Effort*, Times Herald, May 3, 2017, http://www.timesherald.com/article/JR/20170503/NEWS/170509919.

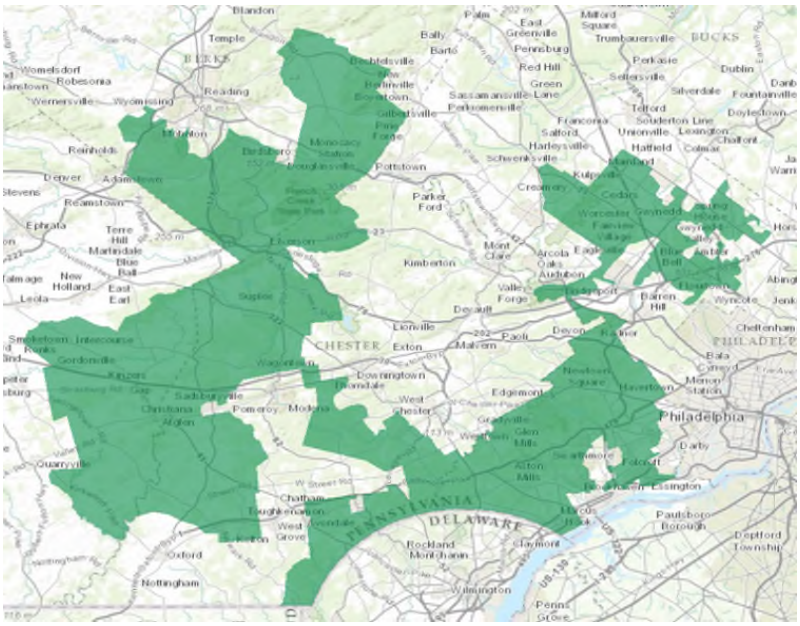
56. SB 1249 also resulted in district shapes that make the gerrymander obvious. For example, Pennsylvania's 6th District now looks like the State of Florida:



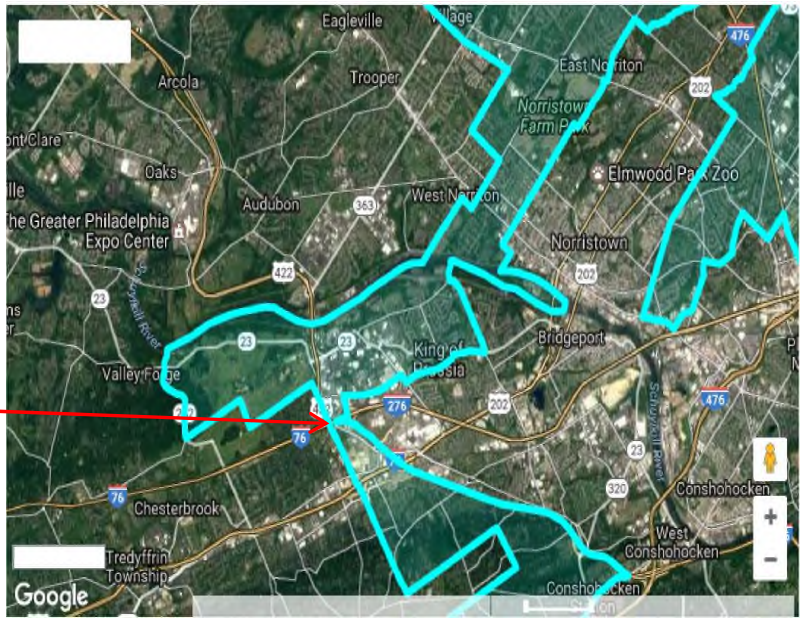
57. The 12th District looks like the boot of Italy:



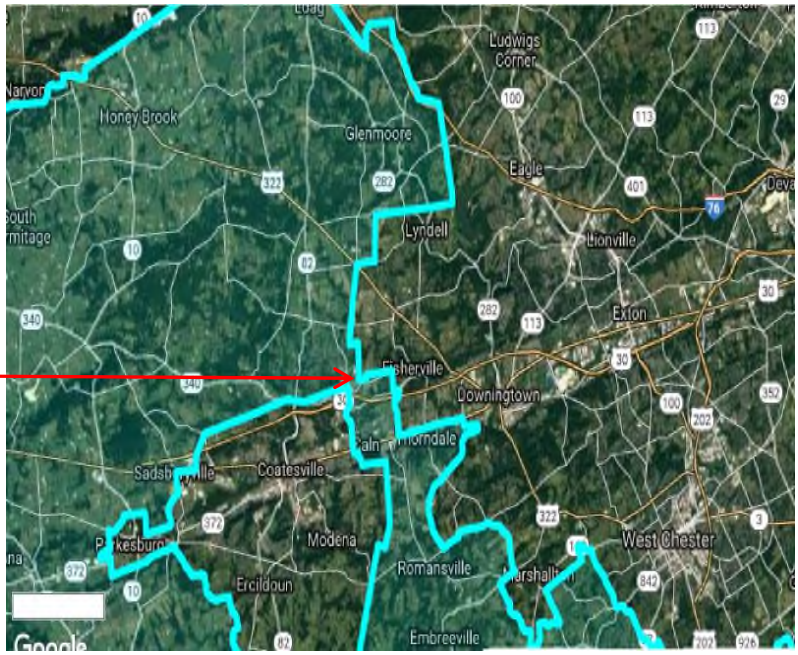
58. And Pennsylvania's notorious 7th District—"Goofy kicking Donald Duck"—is spread out among five counties. At one point in King of Prussia, the district is so narrow that it is held together only by a Creed's Seafood & Steaks. At another point in Coatesville, it is only a medical endoscopy center that connects one part of the district to another.



Creed's Seafood & Steaks

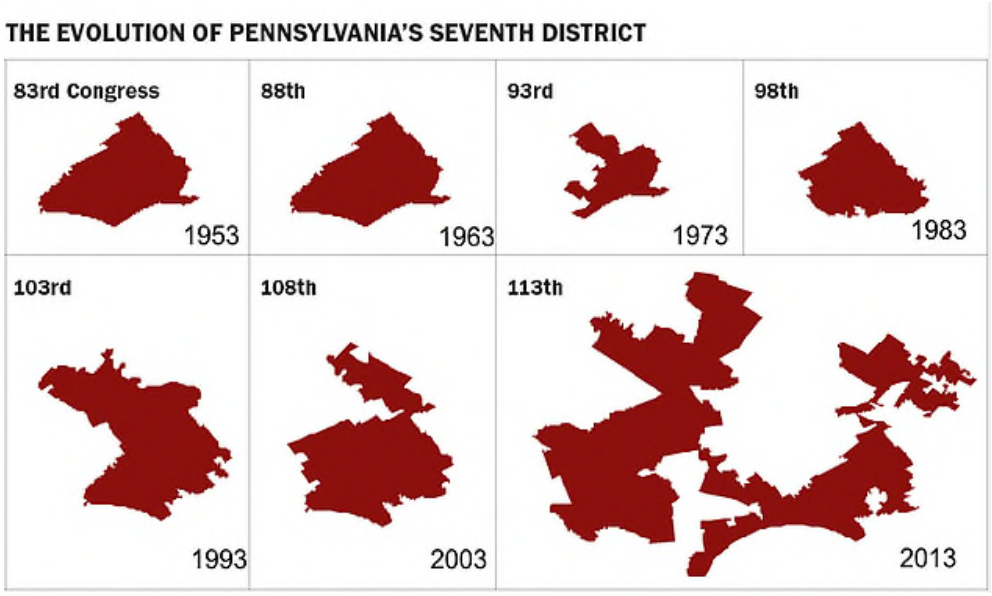


Brandywine GI Associates (endoscopy center)



59. There is no legitimate, constitutionally permissible reason for drawing districts in this manner. As depicted below, the evolution of the 7th District over

time lays bare the lengths to which Republicans have gone to construct the district to their advantage. [11]



60. The 2011 Plan for the entire state is shown in the appendix attached hereto.

61. Because of the way Republicans redrew district boundaries, members of entire communities are denied a right to cast a vote that has any meaning. For example, when Republicans redrew the 6th District, they carefully carved out the city of Reading to make the 6th "safe" for Republicans. They then forced Reading into the solidly Republican 16th district, where the votes of Democratic voters are virtually certain never to matter. As a result, Reading residents "really . . . don't

[11] Christopher Ingraham, *What 60 Years of Political Gerrymandering Looks Like*, Wash. Post, May 21, 2014, https://www.washingtonpost.com/news/wonk/wp/2014/05/21/what-60-years-of-political-gerrymandering-looks-like/?utm_term=.8fb7e83fcbba.

have true representation[;] [their] voice is really muted because of the gerrymandering that's taken place in Pennsylvania."[12]

62. Republicans used a similar technique in the 17th District, where they packed the Democratic-leaning cities of Scranton, Wilkes-Barre, and Easton into a district that was already reliably Democratic, and removed any risk that Wilkes-Barre voters (which would reside in the 11th District if county boundaries were respected) would tilt the 11th District to the Democrats.

63. In the 7th District, Republicans carved out many Democratic voters in the city of Chester, packing them into the reliably Democratic 1st District.

64. Republicans packed minority voters into the 1st and 2nd Districts to waste their votes. The 1st District now has 66% minority voters, while the 2nd District now has 71% minority voters. Since the 2011 Plan, both districts have reliably produced super-majority votes for Democratic candidates of over 80% of the vote. In the 2nd District, the Democratic representative has won over 87% of the vote in every election since the 2011 Plan.

65. Republicans consistently redrew district lines to their advantage across the Commonwealth, taking one competitive district after another and

[12] Lindsay Lazarski, *Dividing Lines: How Pennsylvania's Elections Really Are Rigged*, *Keystone Crossroads*, https://keystonecrossroads.atavist.com/dividing-lines-how-pennsylvanias-elections-really-are-rigged.

transforming it into a safe Republican district. For example, under the 2003 plan, in the 11th District, 57.5% of voters voted for Barack Obama in the 2008 presidential election. After redistricting, however, only 47.7% of voters were 2008 Obama voters, a 9.8% swing.

66. On the day the 2011 Plan was both revealed and voted upon in the Senate, Democratic Senators protested that the plan was partisan, that it was proposed with "extremely short notice," and that the process lacked any transparency. As Democratic Senator Anthony H. Williams explained, "[M]aybe if we had . . . transparency, openness, and most importantly, inclusion, we could have shared the responsibility of coming up with a[] . . . much more representative map. That is not what happened . . . . [W]e have a map that not one Democrat had anything to do with on this side of the aisle."

67. Democratic Senator Jay Costa unsuccessfully introduced an amendment to the Republican plan that he believed would create 8 districts favorable to Republicans, 4 districts favorable to Democrats, and 6 swing districts.

68. The Republican majority in the Pennsylvania Senate set SB 1249 for a vote on the very same day that they first publicly disclosed the descriptions of the new districts. The bill passed in the Senate by a vote of 26-24. Not one Democratic Senator voted for the bill.

69. On December 15, 2011 and December 20, 2011, the Pennsylvania House of Representatives considered SB 1249. As in the Senate, Democratic representatives vociferously objected to the lack of transparency in adopting the plan and to its partisan nature.

70. Democratic representative Dan Frankel observed that the plan was clearly an effort to entrench Republicans in power: "[W]hat is taking place here today, in my view, is a very cynical attempt to institutionalize a Republican majority of congressional seats in Pennsylvania. . . . That is not good for our politics. . . . This is not the way we ought to be governing; to overreach, to go through contortions to create districts that are safe for a majority of Republican members of Congress is not good public policy. We ought to reject this. This is not good government; this is a very cynical way to do government."

71. Democratic Representative Frank Dermody similarly objected: "[T]he way our system is supposed to work is that the voters are supposed to pick the politicians. With this map, the politicians pick the voters. This map sets up districts that are gerrymandered beyond recognition."

72. Democratic Representative Robert Freeman added: "SB 1249 contains the worst case of gerrymandering in Pennsylvania in living memory. . . . A look at the configuration of the congressional district map of 1249 reveals twisted and

distorted districts that were drawn purely for political advantage, with no consideration for compactness of districts or communities of interest."

73. Democratic Representative Steve Samuelson protested about the lack of transparency: "When this bill had first reading, the Senate had no plan [i.e., the bill had no substantive content]. When this bill had second reading, the Senate had no plan. The map was not revealed until December 13. The details . . . were not available until 9 a.m. on December 14. . . . [T]he public had about 14 hours to see the details. Now, since the Senate came out with their plan on Wednesday, the public has had a grand total of 5 days."

74. Democratic Representative Babette Josephs similarly protested the extraordinary lack of transparency in what she called a "dreadful" plan, noting that she had never before "seen a hearing in this legislature on a blank bill." "You could not tell, looking at the bill or looking for a map, what . . . the Republicans had in mind."

75. Democratic Representative Michael Hanna offered an amendment to "create a fair redistricting map . . . [that] will minimize district splits in counties and municipalities and ensure equality of representation across the 18 congressional districts," but, as with Senator Costa's amendment, the House amendment failed.

76. Notwithstanding Democratic opposition, SB 1249 passed in the House on December 20, 2011 by a vote of 136-61. In the end, with passage of the bill a *fait accompli* because of the Republican majority, 36 Democrats voted for the bill. Pennsylvania's Republican Governor, Tom Corbett, signed the bill into law in time for the 2002 U.S. Congressional election. The 2011 Plan remains in effect today.

D. Senate Bill 1249 Burdened the Representational Rights of Democratic Voters

77. Senate Bill 1249 achieved exactly the effect REDMAP intended. In the 2012 election, each party's share of the two-party vote in the districts the party won were as follows:

District	Democratic Vote	Republican Vote
1	84.9%	
2	90.5%	
13	69.1%	
14	76.9%	
17	60.3%	
3		57.2%
4		63.4%
5		62.9%
6		57.1%
7		59.4%
8		56.6%
9		61.7%
10		65.6%
11		58.5%
12		51.7%
15		56.8%
16		58.4%
18		64.0%
Average in Districts	**77.0%**	**59.3%**
Statewide Vote Share	**50.8%**	**49.2%**

78. The chart demonstrates how Republicans were able to rig the system so that Democrats could win only 5 of 18 districts even though Democrats won a *majority*—50.8%—of statewide congressional votes in the 2012 election. The average winning percentage in districts Democrats won was an astronomical 77.3%, reflecting the packing of Democrats into five districts. *Not a single winning Republican candidate* earned this large a share of the vote in his district. Victorious Republican candidates all won by much smaller margins, winning between 51.7% and 65.6% of the vote, for an average winning percentage of only 59.3%. In other words, the 2011 Plan guaranteed that Democrats would win a small number of House seats by very large margins, while Republicans would win the lion's share of seats by much smaller, although still comfortable, margins.

79. Republican officials pointed out that the 2011 Plan enabled Republicans to win the Commonwealth's delegation even in years when Democrats outperformed them, boasting that Republicans had achieved a large majority of the congressional seats even as Democrats won the important state-wide races: "The impact of this investment at the state level in 2010 is evident when examining the results of the 2012 election: Pennsylvanians reelected a Democratic U.S. Senator by nearly 9 points and reelected President Obama by

more than 5 points, but at the same time they added to the Republican ranks in the State House and returned a 13-5 Republican majority to the U.S. House."[13]

80. In 2014, Republicans won 55.5% of the statewide congressional vote and remained at 13 of 18 seats. Although the percentage of seats Republicans won—72%—was still grossly disproportionate to their statewide vote share, it is nonetheless telling that Republicans won an extra 6 percentage points of the statewide congressional vote compared to 2012 but did not pick up any additional House seats. That is because the 2011 Plan is utterly unresponsive to the will of the voters. Democrats are locked into the 5 districts in which they are packed, and therefore do not lose—and cannot gain—seats with any normal swing in the statewide vote.

81. In 2016, the results were almost identical. Republicans won 53.9% of the statewide congressional vote and again won 13 of 18, or 72%, of the congressional seats.

82. In both the 2014 and 2016 elections, the margin of victory in districts Democrats won was far higher than the margin of victory in districts Republicans won; in 2014, the average vote share for successful Democratic candidates was 73.6%, as compared to 63.4% for successful Republicans candidates (excluding

[13] *2012 REDMAP Summary Report*, The Redistricting Majority Project, http://www.redistrictingmajorityproject.com/?cat=1 (last visited June 7, 2017).

uncontested elections), and for 2016 the average vote share was 74.2% for successful Democratic candidates and 61.1% for successful Republican candidates (excluding uncontested elections).

83. That the 2011 Plan is the product of naked partisan gerrymandering is confirmed by any number of other measures. In recent years, political scientists and mathematicians have developed a number of sophisticated modeling techniques and tests to identify political gerrymanders. These tests each independently demonstrate the magnitude of the 2011 Plan's Republican bias, the fact that this bias could have resulted only from an intentional effort to benefit Republicans and to disadvantage Democrats.

84. One recognized way to test whether the 2011 Plan is the product of partisan bias is to ask whether observing traditional redistricting criteria such as contiguity, compactness, equal population, and minimizing county splits could reasonably be expected to produce a plan that yields the results generated by the actual 2011 Plan. The answer is a resounding "no."

85. Political scientists can answer this question by using computer modeling to generate alternative plans that adhere to traditional redistricting

criteria but do not aim to advance partisan goals.[14] These alternative plans thus account for natural factors affecting the distribution of voters across the Commonwealth, such as any clustering of voters of a particular party into particular areas.

86. Performing this modeling for Pennsylvania congressional districts yields thousands of alternative plans that comply with traditional districting principles. But not one produces the partisan bias of the 2011 Plan. That is, using the *actual* voting results from past Pennsylvania statewide elections, and then interposing those voting results over the district boundaries in each alternative plan, not a single alternative plan produces a result in which Republicans would win a 13-5 advantage in Pennsylvania's congressional delegation. This modeling demonstrates, with statistical certainty, that the 13-5 Republican advantage under the 2011 Plan is not the result of neutral factors such as population clustering. Rather, the bias of the 2011 Plan is necessarily the result of an intentional effort to favor Republicans.

87. Mathematicians at Carnegie Mellon University and the University of Pittsburgh have developed an alternative modeling approach that also demonstrates

[14] *See, e.g.*, Jowei Chen, *The Impact of Political Geography on Wisconsin Redistricting*, 16 Election L.J. (forthcoming 2017), http://www.umich.edu/~jowei/Political_Geography_Wisconsin_Redistricting.pdf.

the partisan intent behind the 2011 Plan.[15] Using a modeling technique known as "Markov chain" analysis, these mathematicians take the enacted plan as a starting point and then make a series of random adjustments to the district boundaries by swapping precincts, while maintaining districts that are contiguous, of equal population, and as compact as the ones in the 2011 Plan. It can be proved mathematically using this approach that if the enacted plan were drawn without bias, these changes should not change the statistical properties of the plan. But the professors find that random changes to the 2011 Plan greatly diminish the Republican advantage. The professors conclude that the 2011 Plan has a Republican bias that cannot be the result of external factors such as the political geography of Pennsylvania.

88. Yet another statistical approach that measures partisan gerrymanders is the efficiency gap. This measure, which the three-judge panel in *Whitford* applied in striking down Wisconsin's state house districts, measures how efficiently a party's voters are distributed across districts. For each party, the efficiency gap calculates that party's number of "wasted" votes, defined as the number of votes cast for losing candidates of that party (as a measure of cracked

[15] Maria Chikinaa, Alan Friezeb & Wesley Pegden, *Assessing significance in a Markov chain without mixing*, 114 Proc. of Nat'l Acad. of Sci. 2860 (2017), *available with supplement at* https://www.math.cmu.edu/~af1p/Texfiles/outliers.pdf.

votes) plus the number of votes cast for winning candidates in excess of 50% (as a measure of packed votes). The lower each of these numbers, the fewer wasted votes and the more likely a party is to win additional seats. The efficiency gap equals the difference in the total wasted votes between the two parties, divided by the total number of votes cast in the election.

89. The efficiency gap for Pennsylvania's congressional districts is enormous. For example, in the 2012 election, Democrats wasted 2,442,621 votes, compared to Republicans who wasted only 1,093,328 votes. The resulting efficiency gap of 24.5% was *the highest in the nation* among states that have more than two congressional districts. These figures demonstrate the massive number of Democrats in cracked districts who were deprived of the ability to elect officials of their choice, and the massive number of Democrats packed into districts where their votes were diluted.

90. Another measure of partisan gerrymandering is the "mean-median gap." The measure looks at the Democratic vote share in each of Pennsylvania's 18 congressional districts and then calculates: (i) the average, or mean, of those 18 Democratic vote shares, which will be roughly equivalent to the Democratic vote share statewide; and (ii) the Democratic vote share in the district that was the middle-best in terms of Democratic performance, which because Pennsylvania has an even number of districts, is the average of Democrats' vote shares in the

districts where Democrats performed the ninth and tenth best out of the 18 districts. Gerrymandering does not impact the mean vote share, since that is a statewide figure. But it does affect the median vote share, since gerrymandering is designed to maximize the number of districts a party wins, and winning the median district means that party wins a majority of seats. If, as in 2012, the Democratic vote share in the median district is lower than the mean Democratic vote share statewide, that necessarily indicates there are a disproportionately large number of Democratic voters in a few, packed districts. And it indicates that it is more difficult for Democrats to win the median district and hence a majority of seats: the larger the mean-median gap, the greater the mean vote share across the state that Democrats need to bring their vote share in the median district above 50%.

91. As illustrated below, in the 2012 election, the mean Democratic vote share across all Pennsylvania districts was 50.46%, but the median Democratic vote share was just 42.81% (the average of the 6th and 3rd Districts, which were Democrats' ninth and tenth best districts). Accordingly, the mean-median gap was 7.65%, which was the fifth largest of all congressional slates in the country for the 2012 election. This gap shows the disproportionate percentage of the statewide vote that Democrats would need to win a majority of congressional seats. Democrats would have needed to win the 3rd District to win a majority of seats,

and Democrats would have needed to win an additional 7.2% of the vote there to win—even though Democrats already won over 50% of the vote statewide.

92. Indeed, it would be nearly as difficult for Democrats to win just *two additional seats*. In 2012, Democrats would have needed to flip the 8th District to win two additional seats (*i.e.*, to win their seventh best district), but Democrats received just 43.4% share of the vote in the 8th District. These figures show how Republicans skewed the districts to maximize the numbers of seats they would win and render these seats immune from normal swings in the statewide vote.

District	Democratic Vote Share
10	34.4%
18	36.0%
4	36.6%
5	37.1%
9	38.3%
7	40.6%
11	41.5%
16	41.6%
3	42.8%
6	42.9%
15	43.2%
8	43.4%
12	48.3%
17	60.3%
13	69.1%
14	76.9%
1	84.9%
2	90.5%
Mean	**50.5%**
Median	**42.8%**

93. The mean-median gaps for the 2014 and 2016 held steady at roughly the same levels. The mean-median gap was 7.46% for the 2014 election and 7.61% for the 2016 election, again showing the degree to which Democratic votes are packed and cracked.[16]

94. In short, a host of manageable tests, including the computer modeling and statistical tests described above, demonstrate that the 2011 Plan was

[16] These mean-median gaps were calculated by using actual vote totals from the 2014 and 2016 congressional elections, except in districts that were uncontested. Results in uncontested districts were imputed using a statistical regression model that predicts 2014 and 2016 election results based on each district's results in the 2012 congressional elections.

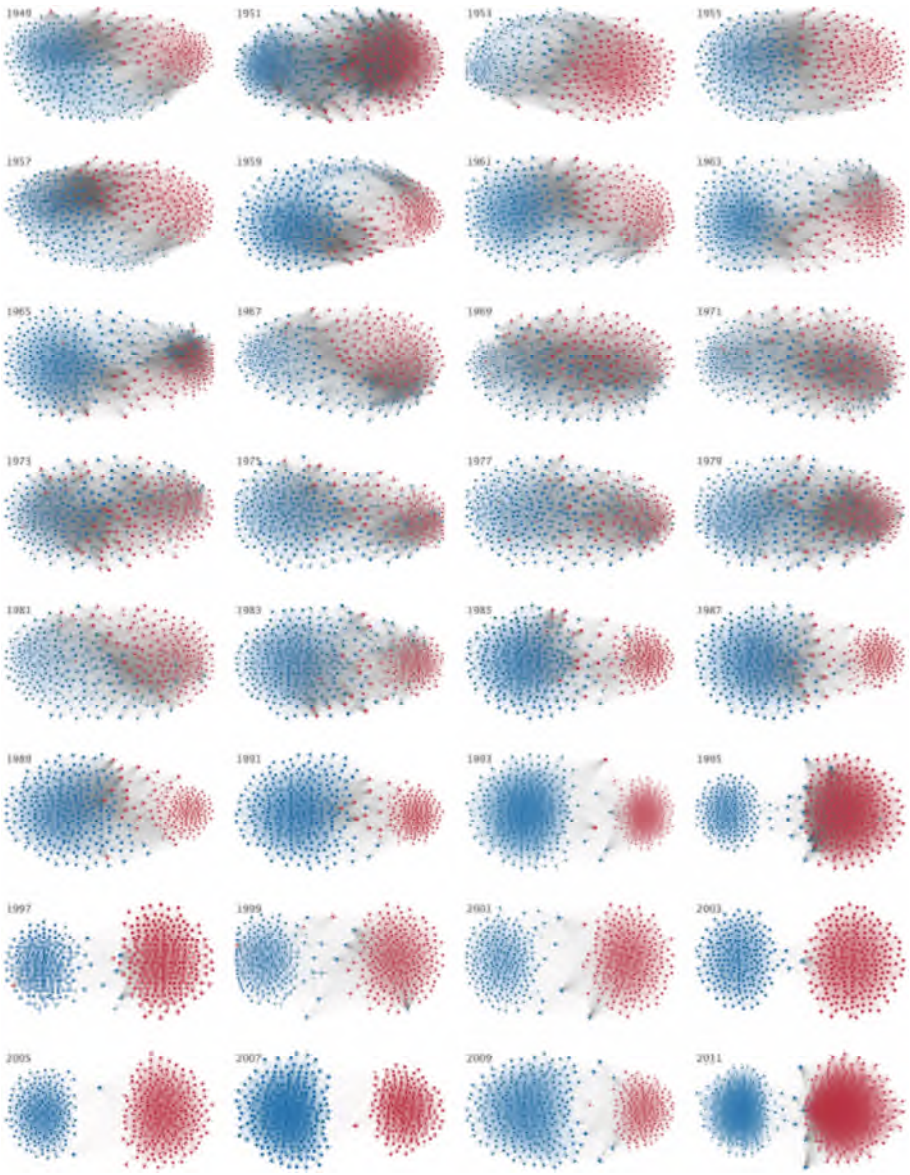
intentionally drawn to minimize the influence of Democratic voters, that it has had precisely that effect, and that it will continue to do so for the life of the plan.

95. The effects of the gerrymander go beyond election results. In today's Congress, representatives are simply not responsive to the views and interests of voters of the opposite party. Regardless of whether gerrymandering has *caused* this increased partisanship, such extreme partisanship magnifies the *effects* of partisan gerrymandering. When voters lose the ability to elect representatives of their party as a result of gerrymandering, those voters lose not only electoral power, but also the ability to influence legislative outcomes—because representatives pay no heed to the views and interests of voters of the opposite party once in office.

96. The increasing and extreme polarization of the U.S. House of Representatives is readily apparent. Numerous studies have documented this trend, including a 2015 article co-authored by Clio Andris from Pennsylvania State University.[17] Andris et al. gathered data for each Congress on the number of times each Member of Congress voted with every other Member. In the chart below, Andris et al. represent each Member with a red or blue dot and group the dots to show how often each pair of Members voted with one another; the closer two dots

[17] *See* Clio Andris et al., *The Rise of Partisanship and Super-Cooperators in the U.S. House of Representatives*, PLOS One (2015).

are to one another, or the thicker the line connecting them, the more often those two Members voted with each other. The trend over time is remarkable. It shows that, in recent years, Members have voted almost exclusively with Members of the same party and rarely, if ever, have joined with representatives from the opposing party to vote on a bipartisan basis.



97. The Members of Pennsylvania's Congressional delegation are no exception to this trend. As the chart below demonstrates, in the two Congresses following the 2011 Plan, these Members almost always voted with a majority of other members of the same party and rarely crossed over to vote with members of the other party.[18]

[18] Data are from the Washington Post's "U.S. Congress Votes Database," http://projects.washingtonpost.com/congress/114/house/members/ (last visited June 12, 2017).

			Voting with Majority of Same Party	
District	**Representative(s)**	**Party**	**112th Congress**	**113th Congress**
1	Bob Brady	D	94%	93%
2	Chaka Fattah	D	95%	96%
3	Mike Kelly	R	93%	96%
4	Jason Altmire	D	64%	N/A
4	Scott Perry	R	N/A	95%
5	Glenn Thompson	R	91%	93%
6	Jim Gerlach	R	86%	91%
7	Patrick Meehan	R	86%	92%
8	Mike Fitzpatrick	R	81%	85%
9	Bill Shuster	R	94%	96%
10	Tom Marino	R	95%	95%
11	Lou Barletta	R	92%	95%
12	Mark Critz	D	77%	N/A
12	Keith J. Rothfus	R	N/A	96%
13	Allyson Schwartz	D	94%	95%
14	Mike Doyle	D	93%	95%
15	Charles W. Dent	R	86%	91%
16	Joe Pitts	R	95%	95%
17	Tim Holden; Matt Cartwright	D	76%	96%
18	Tim Murphy	R	93%	96%

98. These figures illustrate that when voters artificially lose the ability to elect representatives of their party, they also lose any chance of having their views represented in Congress.

COUNT I
Violation of the Pennsylvania Constitution's
Free Expression and Association Clauses, Art. I, §§ 7, 20

99. Petitioners hereby incorporate Paragraphs 1 through 98 above as if they were fully set forth herein.

100. Article I, Section 7 of the Pennsylvania Constitution provides in relevant part: "The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty."

101. Article I, Section 20 provides: "The citizens have a right in a peaceable manner to assemble together for their common good . . . ."

102. Pennsylvania's constitution "provides protection for freedom of expression that is broader than the federal constitutional guarantee." *Pap's A.M. v. City of Erie*, 812 A.2d 591, 605 (Pa. 2002). This "broader protection[] of expression than the related First Amendment guarantee" applies "in a number of different contexts," including "political" contexts. *DePaul v. Commonwealth*, 969 A.2d 536, 546 (Pa. 2009) (citing *Commonwealth v. Tate*, 432 A.2d 1382, 1391 (Pa. 1981)).

103. Pennsylvania's Constitution protects the right of voters to participate in the political process, to express political views, to affiliate with or support a political party, and to cast a vote.

104. The 2011 Plan has the purpose and the effect of subjecting Petitioners and other Democratic voters to disfavored treatment by reason of their political views, their votes, and the party with which they choose to associate.

105. The Pennsylvania General Assembly expressly and deliberately considered the political views, voting histories, and party affiliations of Petitioners and other Democratic voters when it created the 2011 Plan.

106. The General Assembly drew the 2011 Plan with the intent to burden and disfavor those voters, including Petitioners, by reason of conduct protected by Article I, Sections 7 and 20, and with the intent to burden forms of expression that are protected by those provisions.

107. The Plan has had the effect of burdening and disfavoring Democratic voters in Pennsylvania, including Petitioners, by reason of their constitutionally-protected conduct. The Plan has prevented Democratic voters from electing the representatives of their choice and from influencing the legislative process, and the Plan has the effect of suppressing the political views and expression of Democratic voters. By contrast, the Plan favors Republican voters, by ensuring that they will be able to associate with fellow Republican voters to elect the representatives of their choice and to influence the electoral, and thus political, process.

108. The Plan also violates the Pennsylvania Constitution's prohibition against retaliation against individuals who exercise their rights under Article I,

Section 7, and Article I, Section 20. Republicans "penalize[d] [Petitioners] for expressing certain preferences, while, at the same time, rewarding other voters for expressing the opposite preferences." *Shapiro v. McManus*, 203 F. Supp. 3d 579, 595 (D. Md. 2016).

109. For instance, Petitioner Mary Elizabeth Lawn has resided at the same home in Chester since 2004, but her congressional district was changed under the 2011 Plan. Lawn previously was in the 1st Congressional District, which has consistently elected Democrats, but under the 2011 Plan, Lawn was moved to the 7th Congressional District, which has voted for Republicans by comfortable margins in every election since the redistricting.

110. Petitioner John Greiner's District, the 3rd Congressional District, was subject to cracking under the 2011 Plan. The 3rd District previously was a competitive district: Republicans won in 2002, 2004, 2006, and 2010, while Democrats won in 2008. But since the 2011 Plan, the district is no longer competitive. The Republican representative, Mike Kelly, comfortably won reelection in 2014 and 2016, and the district is so skewed that Kelly was able to run unopposed in 2016.

111. Like Greiner, Petitioner Robert Smith was also subject to cracking. Smith resides in Pennsylvania's 11th Congressional District. Prior to the 2011 Plan, the 11th District was a competitive district: the Democratic candidate won by

a mere 3% in 2008, and the Republican candidate won the seat in 2010. But since the 2011 Plan, the Republican Representative, Lou Barletta, has won every election by more than 17%.

112. With respect to each of these Petitioners and others, Republicans "expressly and deliberately considered [their] protected . . . conduct, including their voting histories and political party affiliations, when it redrew the lines of" their districts. *Shapiro*, 203 F. Supp. 3d at 595. And Republicans "did so with an intent to disfavor and punish [Petitioners] by reason of their constitutionally protected conduct." *Id.* This intentional retaliation had an "actual effect" that would not have occurred but-for the retaliation. *Id.* Petitioners such as Lawn, Greiner, and Smith are no longer able to elect representatives of their choice or to influence the political process.

113. The 2011 Plan cannot be explained or justified by reference to Pennsylvania's geography or other legitimate redistricting criteria.

COUNT II
Violation of the Pennsylvania Constitution's
Equal Protection Guarantees, Art. I, §§ 1 and 26, and Free and Equal Clause, Art. I, § 5,

114. Petitioners hereby incorporate Paragraphs 1 through 113 above as if they were fully set forth herein.

115. The General Assembly is not "free to construct political gerrymanders with impunity." *Erfer*, 794 A.2d at 334. On the contrary, a congressional

redistricting plan violates the Pennsylvania Constitution's equal protection guarantees if (1) the plan reflects "intentional discrimination against an identifiable political group"; and (2) "there was an actual discriminatory effect on that group." *Id.* at 332; *see also Whitford*, 218 F. Supp. 3d 837 (finding equal protection violation in Wisconsin redistricting where there was both discriminatory purpose and effects).

116. Here, the enacted plan reflects intentional discrimination against an identifiable political group—that is, Petitioners and other Democratic voters. Pennsylvania's congressional districts were drawn as part of a nationwide movement to use redistricting to maximize Republican seats in Congress and entrench these Republican members in power. Analyses such as the computer modeling of districts that would observe traditional districting criteria, the Markov Chain analysis, and the efficiency and mean-median gaps leave no room for doubt on this score. They conclusively demonstrate that the 2011 Plan could not have resulted "legitimate legislative objective[s]," *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in judgment), but could have resulted only from discriminatory partisan intent.

117. The enacted plan also works an actual discriminatory effect. A plan works such an effect when (1) "the identifiable group has been, or is projected to be, disadvantaged at the polls"; and (2) "by being disadvantaged at the polls, the

identifiable group will lack political power and be denied fair representation." *Erfer*, 794 A.2d at 332. Here, the enacted plan disadvantages Petitioners and other Democratic voters at the polls and severely burdens their representational rights.

118. Statewide, the computer modeling and statistical tests demonstrate that Democrats receive far fewer congressional seats than they would absent the gerrymander, and that Republicans' advantage is nearly impossible to overcome. Indeed, one need look only at the results of the 2012 election to see the effects of the gerrymander: Democrats won only 28% of Pennsylvania's seats despite winning a majority of the statewide congressional vote.

119. The effects are likewise significant for individual voters. For Petitioners such as James Greiner and Robert Smith who live in cracked districts, these voters are "essentially shut out of the political process." *Erfer*, 794 A.2d at 333 (citation and quotation marks omitted). They are artificially denied any realistic opportunity to elect representatives of their choice, with the demographics of their districts skewed to ensure Republican victories. And given the extreme partisanship of their representatives, these voters have no meaningful opportunity to influence legislative outcomes. Their representatives simply do not weigh Democratic voters' interests and policy preferences in deciding how to act.

120. For Petitioners such as Carmen Febo San Miguel and James Solomon who live in packed Democratic districts, the "weight" of their votes has been

substantially diluted. *See Reynolds v. Sims*, 377 U.S. 533, 563 (1964). Their votes have no marginal impact on election outcomes, and representatives will be less responsive to their individual interests or policy preferences.

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully request that this Honorable Court enter judgment in their favor and against Respondents, and:

a. Declare that the 2011 Plan is unconstitutional and invalid because it violates the rights of Petitioners and all Democratic voters in Pennsylvania under the Pennsylvania Constitution's Free Expression and Association Clauses, Art. I, §§ 7, 20; Equal Protection Guarantees, Art. I, §§ 1 and 26, and Free and Equal Clause, Art. I, § 5.

b. Enjoin Respondents, their agents, officers, and employees from administering, preparing for, or moving forward with any future primary or general elections of Pennsylvania's U.S. house members using the 2011 Plan;

c. Establish a new congressional districting plan that complies with the Pennsylvania Constitution, if Respondents fail to enact a new congressional districting plan comporting with the Pennsylvania Constitution in a timely manner;

d. Enjoin the Pennsylvania General Assembly from creating any future congressional districts with the purpose or effect of burdening or penalizing an identifiable group, a political party, or individual voters based on their political beliefs, political party membership, registration, affiliations or political activities, or voting histories;

e. Enjoin the Pennsylvania General Assembly from using data regarding a voter's political party membership, registration, affiliation, political activities, or voting history in any future redistricting process of congressional districts, where such use burdens or penalizes an identifiable group, a political party, or individual voters based on their political beliefs, political-party membership, registration, affiliations or political activities, or voting histories.

Dated: June 15, 2017

Respectfully submitted,

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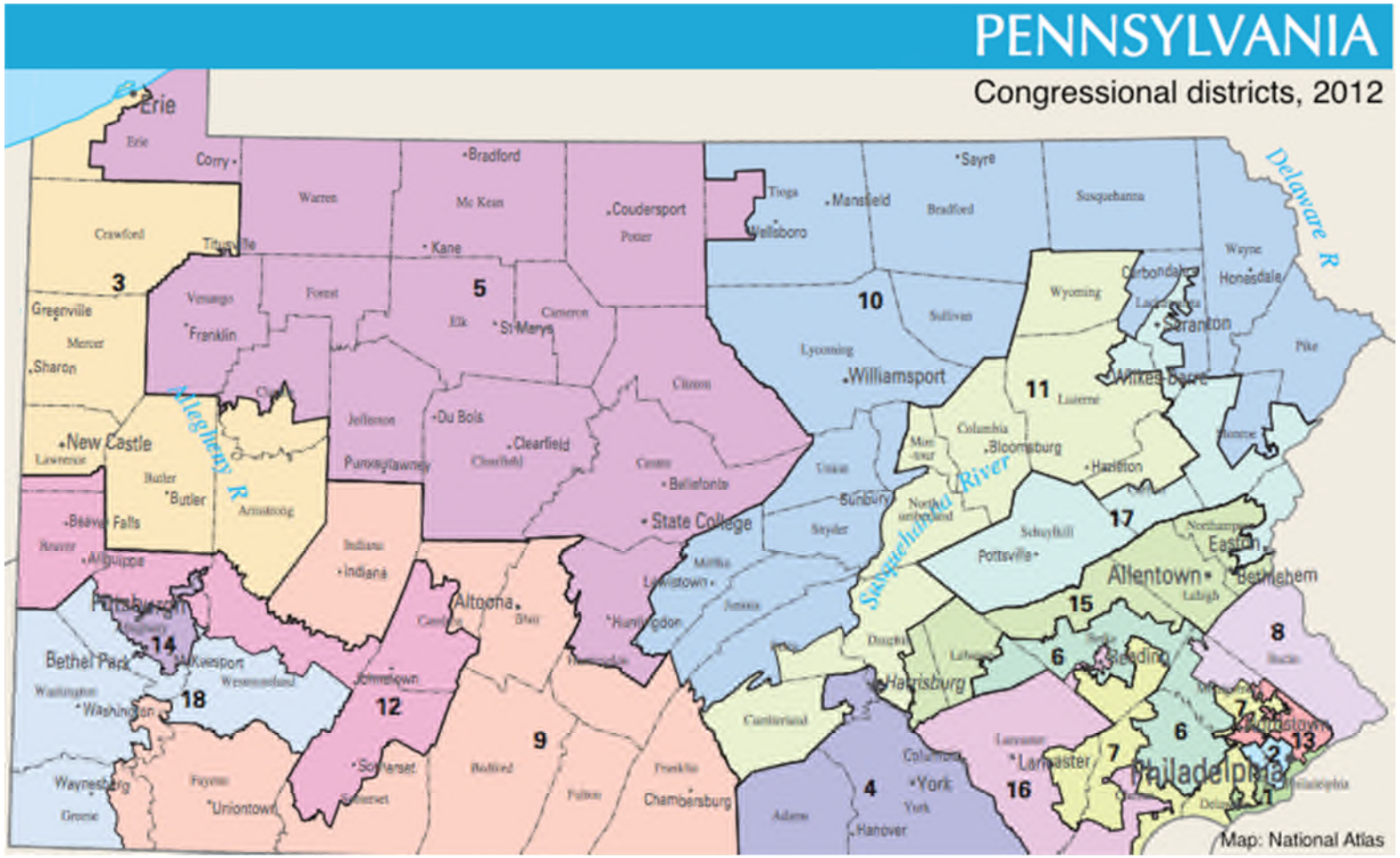
Counsel for Petitioners

Appendix


PENNSYLVANIA
Congressional districts, 2012
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Coudersport
Sayre
Tioga
Mansfield
Wellsboro
Bradford
Susquehanna
Wayne
Honesdale
Delaware R
Crawford
Titusville
Warren
Mc Kean
Kane
Potter
Greenville
Mercer
Sharon
Venango
Franklin
Forest
Elk
St Marys
Cameron
Clinton
Lycoming
Williamsport
Sullivan
Wyoming
Carbondale
Scranton
Pike
Jefferson
Du Bois
Clearfield
Punxsutawney
Bellefonte
State College
Sunbury
Columbia
Bloomsburg
Hazleton
Wilkes-Barre
Luzerne
Allegheny R
New Castle
Butler
Armstrong
Beaver Falls
Ambridge
Indiana
Altoona
Lewistown
Huntingdon
Susquehanna River
Schuylkill
Pottsville
Allentown
Bethlehem
Easton
Lehigh
Pittsburgh
Bethel Park
Washington
Waynesburg
Monessen
Johnstown
Somerset
Uniontown
Cumberland
Harrisburg
Reading
Lancaster
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Hanover
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Philadelphia
Media
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1
Map: National Atlas

VERIFICATION

I, Suzanne Almeida, on behalf of the League of Women Voters of Pennsylvania, hereby state:

1. I am a petitioner in this action;
2. I verify that the statements made in the foregoing Petition for Review are true and correct to the best of my knowledge, information, and belief; and
3. I understand that the statements in said Petition for Review are subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Signed: Suzanne Almeida

Dated: June 14, 2017

EXHIBIT "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WILLIAM WHITFORD, ROGER ANCLAM, EMILY BUNTING, MARY LYNNE DONOHUE, HELEN HARRIS, WAYNE JENSEN, WENDY SUE JOHNSON, JANET MITCHELL, ALLISON SEATON, JAMES SEATON, JEROME WALLACE, and DONALD WINTER, Plaintiffs, v. GERALD C. NICHOL, THOMAS BARLAND, JOHN FRANKE, HAROLD V. FROEHLICH, KEVIN J. KENNEDY, ELSA LAMELAS, and TIMOTHY VOCKE, Defendants.	)	No. Three Judge Panel Requested 28 U.S.C. 2284(a)

NOW COME Plaintiffs William Whitford, Roger Anclam, Emily Bunting, Mary Lynne Donohue, Helen Harris, Wayne Jensen, Wendy Sue Johnson, Janet Mitchell, Allison Seaton, James Seaton, Jerome Wallace, and Donald Winter, by their undersigned attorneys, and complain of Defendants Gerald C. Nichol, Thomas Barland, John Franke, Harold V. Froehlich, Elsa Lamelas, Kevin J. Kennedy, and Timothy Vocke, not personally, but solely in their official capacities as members of the Wisconsin Government Accountability Board, as follows:

INTRODUCTION

1. Plaintiffs seek both a declaratory judgment that the Wisconsin State Assembly district plan adopted in 2012 by Wisconsin Act 43 (the "Current Plan") violates the First and Fourteenth Amendments of the United States Constitution and an order permanently enjoining the implementation of the Current Plan in the 2016 election. As explained in greater detail below, the Current Plan is, by any measure, one of the worst partisan gerrymanders in modern

American history. In the first election in which it was in force in 2012, the Current Plan enabled Republican candidates to win sixty of the Assembly's ninety-nine seats even though Democratic candidates won a ***majority*** of the statewide Assembly vote. The evidence is overwhelming that the Current Plan was adopted to achieve precisely that result: indeed, before submitting the map for approval, the Republican leadership retained an expert (at State expense) who predicted the partisan performance of each proposed district—as it turned out, with remarkable accuracy.

2. This kind of partisan gerrymandering is both unconstitutional and profoundly undemocratic. It is unconstitutional because it treats voters unequally, diluting their voting power based on their political beliefs, in violation of the Fourteenth Amendment's guarantee of equal protection, and because it unreasonably burdens their First Amendment rights of association and free speech. Extreme partisan gerrymandering is also contrary to core democratic values because it enables a political party to win more legislative districts—and thus more legislative power—than is warranted by that party's popular support. By distorting the relationship between votes and assembly seats, it causes policies to be enacted that do not accurately reflect the public will. In the end, a political minority is able to rule the majority and to entrench itself in power by periodically manipulating election boundaries.

3. Partisan gerrymandering has increased throughout the United States in recent years as a result of both a rising tide of partisanship and greater technological sophistication, which enables maps to be drawn in ways that are likely to enable the party in power to remain in power even if it no longer represents the views of the majority of voters. This nationwide trend threatens a "'core principle of republican government,' namely, 'that the voters should choose their representatives, not the other way around.'" *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, No. 13-1314 (U.S. June 29, 2015), slip op. at 35.

4. The United States Supreme Court has recognized that partisan gerrymandering can be unconstitutional. Nevertheless, a constitutional challenge has yet to succeed on that ground because plaintiffs have been unable to offer a workable standard to distinguish between permissible political line-drawing and unconstitutional partisan gerrymandering. In this case, plaintiffs propose a new test that ***is*** workable, based on the concept of partisan symmetry—the idea that a district plan should treat the major parties symmetrically with respect to the conversion of votes to seats and that neither party should have a systematic advantage in how efficiently its popular support translates into legislative power.

5. One way to measure a district plan's performance in terms of partisan symmetry is to determine whether there is an "efficiency gap" between the performances of the two major parties and, if so, to compare the magnitude of that gap to comparable district plans in the modern era nationwide. The efficiency gap captures in a single number all of a district plan's ***cracking*** and ***packing***—the two fundamental ways in which partisan gerrymanders are constructed. Cracking means dividing a party's supporters among multiple districts so that they fall short of a majority in each one. Packing means concentrating one party's backers in a few districts that they win by overwhelming margins. Both cracking and packing result in "wasted" votes: votes cast either for a losing candidate (in the case of cracking) or for a winning candidate but in excess of what he or she needed to prevail (in the case of packing). The efficiency gap is the difference between the parties' respective wasted votes in an election, divided by the total number of votes cast.

6. When the efficiency gap is relatively small and roughly equivalent to the efficiency gaps that have traditionally existed, the map should not be deemed unconstitutional. In such cases, there may be no intent to treat voters unequally; in any event, the effects of any

gerrymandering are likely to be redressable through the political process. But where the efficiency gap is large and much greater than the historical norm, there should be a presumption of unconstitutionality. In such a case, an intent to systematically disadvantage voters based on their political beliefs can be inferred from the severity of the gerrymander alone. And because such severe gerrymanders are likely to be extremely durable as well, it is unlikely that the disadvantaged party's adherents will be able to protect themselves through the political process. Where partisan gerrymandering is extreme, the process itself is broken: current legislators have no incentive to alter it, and adherents of the disadvantaged party are unable to do so because their votes have been unfairly diluted.

7. Wisconsin's Current Plan is presumptively unconstitutional under this analysis. In the 2012 election, the Current Plan resulted in an efficiency gap of roughly 13% in favor of Republican candidates. Between 1972 and 2014, fewer than ***four percent*** of all state house plans in the country benefited a party to that extent. In the 2014 election, the efficiency gap remained extremely high at 10%. Between 1972 and 2010, not a ***single*** plan anywhere in the United States had an efficiency gap as high as the Current Plan in the first two elections after redistricting. A district plan this lopsided is also highly unlikely ever to become neutral over its ten-year lifespan. Indeed, we can predict with nearly 100% confidence that, absent this Court's intervention, Wisconsin's Current Plan will continue to unfairly favor Republican voters and candidates—and unfairly disadvantage Democratic voters and candidates—throughout the remainder of the decade.

8. There are three additional facts that reinforce the conclusion that the Current Plan is unconstitutional. First, the Current Plan was not the result of an ordinary political process, where a bill is formulated through a give-and-take between political adversaries and subject to

open debate. Instead, it was drawn up in secret by the Legislature's Republican leadership, without consultation with Democratic leaders or rank-and-file members of either party, with the purpose and intent of altering what was already a favorable map to maximize the Republican Party's partisan advantage. Then the proposal was rammed through the Assembly, without any opportunity for real debate.

9. Second, the Current Plan is also an outlier by another measure of partisan symmetry—partisan bias. Partisan bias is the difference in the share of seats that each party would win if they tied statewide, each receiving 50% of the vote. In 2012, there was a 13% bias in favor of Republicans; in a tied election, Republicans would have won 63% of the Assembly seats, with Democrats winning only 37%. In 2014, there was a 12% bias in favor of Republicans.

10. Third, the Current Plan's extreme partisan skew was entirely unnecessary. Plaintiffs have designed a Demonstration Plan that complies at least as well as the Current Plan with every legal requirement—equal population, the Voting Rights Act, compactness, and respect for political subdivisions—but that is almost perfectly balanced in its partisan consequences. Thus, defendants cannot salvage the Current Plan on the theory that adherence to redistricting criteria or the State's underlying political geography made an unfair plan unavoidable.

11. To be clear, plaintiffs do not seek to replace a pro-Republican gerrymander with a plan that is gerrymandered to be pro-Democratic. Rather, plaintiffs seek as a remedy the creation of a neutral plan that is not gerrymandered to give either side an unfair partisan advantage.

JURISDICTION AND VENUE

12. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343(a)(3) and (4), and 2284. It also has jurisdiction under 28 U.S.C. §§ 2201 and 2202, the Declaratory Judgments Act, to grant the declaratory relief requested.

13. Pursuant to 28 U.S.C. § 2284(a), a three-judge panel should be convened to hear this case.

14. Venue is proper in this judicial district under 28 U.S.C. § 1391(b). At least one of the Defendants resides in the Western District of Wisconsin. In addition, at least six of the plaintiffs reside and vote in this judicial district.

PARTIES

15. Plaintiffs are qualified, registered voters in the State of Wisconsin, who reside in various counties and legislative districts. Plaintiffs are all supporters of the public policies espoused by the Democratic Party and of Democratic Party candidates. Together with other Democratic voters, plaintiffs have been harmed by the Current Plan's unlawful partisan gerrymandering because it treats Democrats unequally based on their political beliefs and impermissibly burdens their First Amendment right of association. Some of the plaintiffs have been packed into districts with other Democratic voters, while others live in districts that have been cracked by the Current Plan to disadvantage Democratic candidates in close races. Either way, the purpose and effect of the Current Plan is to dilute their voting strength because of their political affiliations.

16. Regardless of where they reside in Wisconsin and whether they themselves reside in a district that has been packed or cracked, all of the plaintiffs have been harmed by the manipulation of district boundaries in the Current Plan to dilute Democratic voting strength. As

a result of the statewide partisan gerrymandering, Democrats do not have the same opportunity provided to Republicans to elect representatives of their choice to the Assembly. As a result, the electoral influence of plaintiffs and other Democratic voters statewide has been unfairly, disproportionately, and undemocratically reduced.

17. Plaintiff William Whitford, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter in the 76th Assembly District in Madison in Dane County, Wisconsin.

18. Plaintiff Roger Anclam, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter in the 31st Assembly District in Beloit in Rock County, Wisconsin.

19. Plaintiff Emily Bunting, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter in the 49th Assembly District in Richland County, Wisconsin.

20. Plaintiff Mary Lynne Donohue, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter in the 26th Assembly District in Sheboygan in Sheboygan County, Wisconsin. In addition to the injury suffered by all Democrats in Wisconsin, Ms. Donohue was harmed when the City of Sheboygan was split into Districts 26 and 27 and District 26 was cracked and converted from a Democratic to a Republican district. *See infra* ¶¶ 63-65.

21. Plaintiff Helen Harris, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter in the 22nd Assembly District in Milwaukee, in Milwaukee County, Wisconsin.

22. Plaintiff Wayne Jensen, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter in the 63rd Assembly District in Rochester, in Racine County, Wisconsin.

23. Plaintiff Wendy Sue Johnson, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter in the 91st Assembly District in Eau Claire, in Eau Claire County, Wisconsin. In addition to the injury suffered by all Democrats in Wisconsin, Ms. Johnson was harmed when Democratic voters were packed into District 91, wasting their votes and diluting the influence of Ms. Johnson's vote, as part of a gerrymander that reduced the number of Democratic seats in her region. *See infra* ¶¶ 69-71.

24. Plaintiff Janet Mitchell, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter in the 66th Assembly District in Racine, in Racine County, Wisconsin. In addition to the injury suffered by all Democrats in Wisconsin, Ms. Mitchell was harmed when Democratic voters were packed into District 66, wasting their votes and diluting the influence of Ms. Mitchell's vote, as part of a gerrymander that reduced the number of Democratic seats in her region. *See infra* ¶¶ 66-68.

25. Plaintiffs James and Allison Seaton, citizens of the United States and of the State of Wisconsin, are residents and registered voters in the 42nd Assembly District in Lodi, in Columbia County, Wisconsin.

26. Plaintiff Jerome Wallace, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter in the 23rd Assembly District, in Fox Point, in Milwaukee County, Wisconsin. In addition to the injury suffered by all Democrats in Wisconsin, Mr. Wallace was harmed when Democrats in District 22 were cracked so that his previously Democratic district is now a Republican district. *See infra* ¶¶ 60-62.

27. Plaintiff Don Winter, a citizen of the United States and of the State of Wisconsin, is a resident and registered voter in the 55th Assembly District in Neenah, in Winnebago County, Wisconsin.

28. Defendant Gerald C. Nichol is the Chair of the Wisconsin Government Accountability Board ("G.A.B.") and is named solely in his official capacity as such. The G.A.B. is a state agency under Wis. Stat. § 15.60, which has "general authority" over and "responsibility for the administration of . . . [the State's] laws relating to elections and election campaigns," Wis. Stat. § 5.05(1), including the election every two years of Wisconsin's representatives in the Assembly.

29. Defendants Thomas Barland, John Franke, Harold V. Froehlich, Elsa Lamelas, and Timothy Vocke are all members of the G.A.B. and are named solely in their official capacities as such.

30. Defendant Kevin J. Kennedy is the Director and General Counsel of the G.A.B. and is named solely in his official capacity as such.

BACKGROUND

The Current Plan Was Intended To Discriminate Against Democrats

31. The Current Plan was drafted and enacted with the specific intent to maximize the electoral advantage of Republicans and harm Democrats to the greatest possible extent, by packing and cracking Democratic voters and thus wasting as many Democratic votes as possible. Indeed, after a trial in prior litigation, a three-judge court characterized claims by the Current Plan's drafters that they had not been influenced by partisan factors as "almost laughable" and concluded that "partisan motivation. . .clearly lay behind Act 43." *Baldus v. Wisconsin Government Accountability Board*, 849 F.Supp.2d 840, 851 (E.D. Wis. 2012).

32. The Current Plan was drafted via a secret process run solely by Republicans in the State Assembly and their agents, entirely excluding from participation all Democratic members of the Assembly as well as the public, and preventing public knowledge of and deliberation about the parameters of the Plan.

33. In January 2011, Scott Fitzgerald, Republican member of the Wisconsin State Senate and Wisconsin Senate Majority Leader, and Jeff Fitzgerald, Republican member of the Wisconsin State Assembly and Speaker of the Assembly, hired attorney Eric McLeod ("McLeod") and the law firm of Michael, Best & Friedrich, LLP ("Michael Best"), ostensibly to represent the entire Wisconsin State Senate and Wisconsin State Assembly in connection with the reapportionment of the state legislative districts after the 2010 Census. In fact, McLeod and Michael Best were retained to assist the Republican leadership in the Legislature in designing a pro-Republican partisan gerrymander.

34. To accomplish this goal, McLeod and Michael Best supervised the work of the legislative aide to the Republican Speaker of the Assembly, Adam Foltz, and the legislative aide to the Republican Majority Leader of the Senate, Tad Ottman, in planning, drafting, negotiating, and gaining the favorable vote commitments of a majority of Republican legislators sufficient to obtain passage of the Current Plan through Wisconsin Act 43.

35. In creating the Current Plan, McLeod, Michael Best, Foltz, and Ottman used past election results to measure the partisanship of the electorate and to design districts, through packing and cracking, that would maximize the number of districts that would elect a Republican and minimize the number of districts that would elect a Democrat. Thus, they intentionally diluted the electoral influence of Democrats, including that of plaintiffs, and discriminated against Democrats, including plaintiffs, because of their political views.

36. McLeod, Michael Best, Foltz, and Ottman were assisted in their work by Dr. Ronald Keith Gaddie, a professor of political science at the University of Oklahoma. Dr. Gaddie created a model that analyzed the expected partisan performance of all of the districts established by Act 43. Dr. Gaddie's model forecast that the Assembly plan would have a pro-Republican efficiency gap of 12%. When a common methodology is used to ensure an apples-to-apples comparison, this is almost exactly the efficiency gap that the Assembly plan actually exhibited in the 2012 election.

37. Preparation of the Current Plan was done in complete secrecy, excluding Democrats and the public from any part of the process. Indeed, even Republican state legislators were prevented from receiving any information that would allow public discussion or deliberation about the plan. All redistricting work was done in Michael Best's office and the "map room" was located there. A formal written policy provided that only the Senate Majority Leader, the Speaker of the House and their aides Ottman and Foltz, and McLeod and legal staff designated by McLeod would have unlimited access to the map room.

38. The access policy provided for limited access by rank-and-file legislators: "Legislators will be allowed into the office for the sole purpose of looking at and discussing their district. They are only to be present when an All Access member is present. No statewide or regional printouts will be on display while they are present (with the exception of existing districts). They will be asked at each visit to sign an agreement that the meeting they are attending is confidential and they are not to discuss it." But only Republican legislators were allowed even this limited access. After signing the secrecy agreements contemplated by the policy, Republican legislators were allowed to see only small portions of the map: how their own

districts would be affected and details of the partisan performance of voters in their districts in the past, showing that they would be reliable Republican districts.

39. Under the direction and supervision of McLeod, Ottman met with 17 Republican members of the Wisconsin State Senate, identified in Ex. 4 hereto. Each of them signed a secrecy agreement entitled "Confidentiality and Nondisclosure Related to Reapportionment" before being allowed to review and discuss the plan that Michael Best had been hired to develop. The secrecy agreement said that McLeod had "instructed" Ottman to meet with certain members of the Senate to discuss the reapportionment process and characterized such conversations as privileged communications pursuant to the attorney-client and attorney work product privileges —even though the assertion of the privilege was a part of an elaborate "charade" designed "to cover up a process that should have been public from the outset." *Baldus v. Wisconsin Government Accountability Board*, 843 F.Supp.2d 955, 958-61 (E.D. Wis. 2012).

40. Under the direction and supervision of McLeod, Foltz met with 58 Republican members of the Wisconsin State Assembly, identified in Ex. 4 hereto. Each of them signed the same secrecy agreement entitled "Confidentiality and Nondisclosure Related to Reapportionment" before being allowed to review and discuss the plan that Michael Best had been hired to develop, which also improperly described their conversations as privileged.

41. On July 11, 2011, the plan was introduced by the Committee on Senate Organization without any Democratic members of the Legislature having previously seen their districts or the plan as a whole. As noted above, all Republican members of the Legislature had previously seen their individual districts along with visual aids demonstrating the partisan performance of these districts, but had not seen the overall map.

42. Act 43 was passed in extraordinarily rushed proceedings with little opportunity for input by the public. A public hearing was held on July 13, 2011. The bill was then passed by the Senate on July 19, 2011, and by the Assembly the next day on July 20, 2011. Act 43 was published on August 23, 2011.

43. McLeod and Michael Best were paid $431,000 in State taxpayer funds for their work on the plan, even though they worked solely for Republican leaders of the Legislature and for the benefit of Republicans, and even though they provided no services to Democrats, entirely excluded them from the process, and concealed their work from the public, preventing any public deliberation about the plan.

The Current Plan Has The Effect of Discriminating Against Democrats

The Efficiency Gap Reliably Measures Partisan Gerrymandering

44. The Supreme Court has unanimously agreed that partisan gerrymandering can rise to the level of a constitutional violation. See *Vieth v. Jubelirer*, 541 U.S. 267, 293 (2004) ("[A]n ***excessive*** injection of politics is ***un***lawful") (emphasis added). To date, though, partisan gerrymandering plaintiffs have failed to propose a judicially manageable standard for deciding what constitutes an "excessive" injection of politics into the redistricting process.

45. In the Court's most recent gerrymandering case, *LULAC v. Perry*, 548 U.S. 399 (2006), a majority of the Justices expressed support for a test based on the concept of partisan symmetry. Partisan symmetry is a "require[ment] that the electoral system treat similarly-situated parties equally." *Id.* at 466 (Stevens, J., concurring in part and dissenting in part). In other words, a map is symmetrical when it creates a level playing field, giving neither major party a systematic advantage over its opponent in the conversion of electoral votes into legislative seats.

46. In *LULAC*, the Court considered one particular measure of partisan symmetry, called partisan bias. As described above, partisan bias refers to the divergence in the share of seats that each party would win given the same share (typically 50%) of the statewide vote. *See id.* at 419-20 (opinion of Kennedy, J.); *id.* at 466 (Stevens, J., concurring in part and dissenting in part).

47. Partisan bias is not the only measure of partisan symmetry. In the last few years, political scientists and legal academics have developed a new symmetry metric, called the efficiency gap, which improves on partisan bias in several respects. *See* Eric M. McGhee, *Measuring Partisan Bias in Single-Member District Electoral Systems*, 39 Legis Stud. Q. 55 (2014); Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 101 (2015); Expert Report of Prof. Kenneth R. Mayer (July 3, 2015) ("Mayer Report"), attached hereto as Ex. 2; Expert Report of Prof. Simon D. Jackman (July 7, 2015) ("Jackman Report") attached hereto as Ex. 3.

48. The efficiency gap is rooted in the insight that, in a legal regime in which each district must have an approximately equal population, there are only two ways to implement a partisan gerrymander. First, a party's supporters can be cracked among a large number of districts so that they fall somewhat short of a majority in each one. These voters' preferred candidates then predictably lose each race. Second, a party's backers can be packed into a small number of districts in which they make up enormous majorities. These voters' preferred candidates then prevail by overwhelming margins. All partisan gerrymandering is accomplished through cracking and packing, which enables the party controlling the map to manipulate vote margins in its favor.

49. Both cracking and packing produce so-called "wasted" votes—that is, votes that do not directly contribute to a candidate's election. When voters are cracked, their votes are wasted because they are cast for losing candidates. Similarly, when voters are packed, their votes are wasted to the extent they exceed the 50%-plus-one threshold required for victory (in a two-candidate race). Partisan gerrymandering also can be understood as the manipulation of wasted votes in favor of the gerrymandering party, so that it wastes fewer votes than its adversary.

50. The efficiency gap is the difference between the parties' respective wasted votes in an election, divided by the total number of votes cast. Suppose, for example, that there are five districts in a plan with 100 voters each. Suppose also that Party A wins three of the districts by a margin of 60 votes to 40, and that Party B wins two of them by a margin of 80 votes to 20. Then Party A wastes 10 votes in each of the three districts it wins and 20 votes in each of the two districts it loses, adding up to 70 wasted votes. Likewise, Party B wastes 30 votes in each of the two districts it wins and 40 votes in each of the three districts it loses, adding up to 180 wasted votes. The difference between the parties' respective wasted votes is 110, which, when divided by 500 total votes, yields an efficiency gap of 22% in favor of Party A.

51. The efficiency gap is ***not*** based on the principle that parties have a right to proportional representation based on their share of the statewide vote, nor does it measure the deviation from seat-vote proportionality. Instead, by aggregating all of a plan's cracking and packing into a single number, the efficiency gap measures a party's ***undeserved*** seat share: the proportion of seats a party receives that it would ***not*** have received under a balanced plan in which both sides had approximately equal wasted votes. In the above example, for instance, the 22% efficiency gap in favor of Party A means that it won 22% more seats—in this example, 1 more seat out of 5—than it would have under a balanced plan.

52. Over the 1972-2014 period—since the end of the reapportionment revolution of the 1960s— the distribution of state house plans' efficiency gaps has been normal and has had a median of almost exactly zero. *See* Jackman Report at 61; Stephanopoulos & McGhee, *supra*, at 140-42. This indicates that neither party has enjoyed an overall advantage in state legislative redistricting during the modern era.

53. However, recently the average absolute efficiency gap (*i.e.*, the mean of the absolute values of all plans' efficiency gaps in a given year) has increased sharply. This metric stayed roughly constant from 1972 to 2010. But in the current cycle, fueled by rising partisanship and greater technological sophistication, it spiked to the highest level recorded in the modern era: over 6% for state house plans. *See* Jackman Report at 47; Stephanopoulos & McGhee, *supra*, at 142-45. This means that the severity of today's partisan gerrymandering is historically unprecedented—as is the need for judicial intervention.

Wisconsin's Current Plan Is an Outlier

54. Between 1972 and the present, the efficiency gaps of Wisconsin's Assembly plans became steadily larger and more pro-Republican. The Current Plan represents the culmination of this trend, exhibiting the largest and most pro-Republican efficiency gap ever recorded in modern Wisconsin history. In the 1970s, the Assembly plan had an average efficiency gap close to zero. In both the 1980s and the 1990s, it had an average pro-Republican gap of 2%. The Republican advantage deepened in the 2000s to an average gap of 8%. And it then surged, thanks to the Current Plan, to an average gap of ***11%*** in 2012 and 2014. *See* Jackman Report at 34; Stephanopoulos & McGhee, *supra*, at 154-56.

55. More specifically, using the same methodology as for all other states, the Current Plan produced a pro-Republican efficiency gap of 13% in 2012 and 10% in 2014. The 2012

figure represents the 28th-worst score in modern American history (out of nearly 800 total plans), placing the Current Plan in the worst 4% of this distribution, more than two standard deviations from the mean. Based on this historical data, there is close to a zero percent chance that the Current Plan's efficiency gap will ever switch signs and favor the Democrats during the remainder of the decade. Furthermore, prior to the current cycle, not a ***single*** plan in the country had efficiency gaps as high as the Current Plan's in the first two elections after redistricting. *See* Jackman Report at 63.

56. Using a more detailed methodology available only for Wisconsin, the Current Plan produced a pro-Republican efficiency gap of 12% in 2012. This is a figure nearly identical to the one calculated using the national data. Using the Wisconsin-specific methodology as well as data compiled prior to 2012 by Dr. Gaddie, the expert retained by the Legislature's Republican leadership to assist them in drafting the Current Plan, that Plan was ***forecast*** to produce an efficiency gap of 12%. This figure also is nearly identical, and shows that the Current Plan performed precisely as its authors hoped and expected. *See* Mayer Report at 46.

57. This extraordinary level of partisan unfairness was achieved through the rampant cracking and packing of Wisconsin's Democratic voters, which resulted in their votes being disproportionately wasted. The Mayer Report shows that Democratic voters were cracked so that Republican candidates were far more likely to prevail in close races (where the winner had 60% or less of the vote): Republicans were likely to win 42 such districts, while Democrats would win only 17.[1] Democrats were also packed into a number of districts where they would win overwhelmingly (by getting 80% or more of the vote): there were eight districts where

[1] In making this analysis, the Mayer Report used 2012 election results and further assumed that all districts had been contested and no incumbents had run. These are both standard assumptions made by political scientists to determine a plan's underlying partisanship.

Democrats would win by this margin, compared to ***zero*** districts where Republicans would win such a lopsided victory. Thus, through gerrymandering, Republican votes were used more efficiently than Democratic votes to elect representatives, producing an undemocratic result that does not accurately reflect the preferences of the Wisconsin electorate. *See* Mayer Report at 38-41.

58. The forecasts of Dr. Gaddie, the Republican consultant, prior to the 2012 election confirm that the Current Plan was expected and intended to crack and pack Wisconsin's Democratic voters to this extent. Dr. Gaddie predicted that Republicans would win 46 Assembly districts by a margin smaller than 60%-40%, compared to just 20 such victories for Democrats. He also predicted that Democrats would prevail in seven districts by a margin greater than 80%-20%, compared to zero such wins for Republicans. *See* Mayer Report at 38-41. These figures are nearly identical to plaintiffs' estimates, and further demonstrate that the Current Plan was intended to disadvantage Democrats and waste Democratic votes to the maximum extent possible.

Examples of Cracking and Packing in the Current Plan

59. These plan-level statistics are the product of innumerable local cracking and packing decisions. Across Wisconsin, the Current Plan systematically alters prior district configurations to waste larger numbers of Democratic votes and smaller numbers of Republican votes. The following regional examples (depicted in map form in Exhibit 1 hereto) show how the Current Plan deliberately allocates Democratic voters less efficiently and Republican voters more efficiently. These are only illustrative examples; they do not show ***all*** of the ways in which Wisconsin's current pro-Republican gerrymander was achieved. In addition, the examples focus on: (1) the 2012 election because it was the first one held after this cycle's redistricting; (2) the

2008 election because it was the most comparable prior election, featuring a similar share of the statewide Assembly vote for each party (53.9% Democratic in 2008, 51.4% Democratic in 2012) and also coinciding with a presidential election; and (3) Plaintiffs' Demonstration Plan, because it reveals the fair results that could have been, but were not, attained in 2012.

Milwaukee, Ozaukee, Washington, and Waukesha Counties:

60. Under the prior Assembly plan that was in force from 2002-2010 (the "Prior Plan"), District 22 included part of northeastern Milwaukee County; District 23 included part of northern Milwaukee County (home to Plaintiff Wallace) and part of southern Ozaukee County; and District 24 included part of Washington and Waukesha Counties. In the 2008 election, a Democratic candidate won District 22, and Republican candidates won Districts 23 and 24. Under the Demonstration Plan, a Democratic candidate would win District 22, and Republican candidates would win Districts 23 and 24.

61. As a result of the Current Plan, Democratic voters who were in the old District 22 were cracked into the new Districts 23 and 24. Due to these changes, Districts 22, 23, and 24 were won by Republican candidates in 2012.

62. The shift from one Democratic seat and two Republican seats in the Prior Plan and the Demonstration Plan in Milwaukee, Ozaukee, Washington, and Waukesha Counties, to zero Democratic seats and three Republican seats in the Current Plan, contributed to Wisconsin's current pro-Republican efficiency gap. This gerrymandering and its results are shown in the maps attached hereto as Ex. 1.

Calumet, Fond du Lac, Manitowoc and Sheboygan Counties:

63. Under the Prior Plan, District 26 centered on the City of Sheboygan in the central eastern part of Wisconsin (home to Plaintiff Donohue) and District 27 consisted of the northern

part of Sheboygan County as well as parts of Fond du Lac, Calumet, and Manitowoc Counties. In the 2008 election, a Democratic candidate won District 26 and a Republican candidate won District 27. Under the Demonstration Plan, a Democratic candidate would win District 26, and a Republican candidate would win District 27.

64. As a result of the Current Plan, Democratic voters who were in District 26 were cracked so that roughly half of that district was distributed to District 27 and additional voters from south of Sheboygan County were added to District 26. Due to these changes, Districts 26 and 27 were won by Republican candidates in 2012.

65. The shift from one Democratic seat and one Republican seat in the Prior Plan and the Demonstration Plan in Sheboygan County and southern Fond du Lac, Manitowoc and Calumet Counties, to zero Democratic seats and two Republican seats in the Current Plan, contributed to Wisconsin's current pro-Republican efficiency gap. This gerrymandering and its results are shown in the maps attached hereto as Ex. 1.

Racine and Kenosha Counties:

66. Under the Prior Plan, Districts 61, 62, 63, 64, 65, and 66 were almost entirely within Racine and Kenosha Counties in the southeastern edge of Wisconsin (the City of Racine is home to Plaintiff Mitchell). Districts 61 and 62 centered on the City of Racine, with District 63 covering the western side of Racine County. Districts 64 and 65 centered on the City of Kenosha, with District 66 covering the western edge of Kenosha County. In the 2008 election, Democratic candidates won Districts 61, 62, 64, and 65, while Republican candidates won Districts 63 and 66. Under the Demonstration Plan, Democratic candidates would win Districts 62, 63, 64, and 66, while Republican candidates would win Districts 61 and 65.

67. As a result of the Current Plan, Democratic voters who were in the old Districts 61 and 62 were packed into the new District 66, thus wasting more Democratic votes in the region. Due to these changes, Districts 64, 65, and 66 were won by Democratic candidates in 2012, while Districts 61, 62, and 63 were won by Republican candidates.

68. The shift from four Democratic seats and two Republican seats in the Prior Plan and the Demonstration Plan in Racine and Kenosha Counties, to three Democratic seats and three Republican seats in the Current Plan, contributed to Wisconsin's current pro-Republican efficiency gap. This gerrymandering and its results are shown in the maps attached hereto as Ex. 1.

Buffalo, Chippewa, Eau Claire, Jackson, La Crosse, Pepin, Pierce, St. Croix, and Trempealeau Counties:

69. Under the Prior Plan, most of seven Districts (67, 68, 91, 92, 93, 94, and 95) were spread across Buffalo, Chippewa, Eau Claire, Jackson, La Crosse, Pepin, Pierce, St. Croix, and Trempealeau Counties in northwestern Wisconsin (Eau Claire is home to Plaintiff Johnson). In the 2008 election, Democratic candidates won five of the seven Districts (68, 91, 92, 93, and 95), and Republicans won two of them (67 and 94). The district numbers in the Demonstration Plan are slightly different; instead of District 68, District 69 is in Eau Claire County. Under the Demonstration Plan, Democratic candidates would win six of seven Districts (67, 69, 91, 92, 94, and 95) and a Republican candidate would win one of them (93).

70. As a result of the Current Plan, Democratic voters who were in the old District 68 were packed into the new District 91, and Democrats in the rest of old District 68 as well as old Districts 91 and 93 were cracked into the new Districts 68, 92, and 93. Due to these changes, Democratic candidates won only four of the seven districts in 2012 (91, 92, 94, and 95), and Republican candidates won three of them (67, 68, and 93).

71. The shift from five or six Democratic seats, in the Prior Plan and Demonstration Plan respectively, and two or one Republican seats in the Prior Plan and Demonstration Plan respectively, to four Democratic seats and three Republican seats in the Current Plan, in Buffalo, Chippewa, Eau Claire, Jackson, La Crosse, Pepin, Pierce, St. Croix, and Trempealeau Counties, contributed to Wisconsin's current pro-Republican efficiency gap. This gerrymandering and its results are shown in the maps attached hereto as Ex. 1.

Adams, Columbia, Marathon, Marquette, Portage, and Wood Counties:

72. Under the Prior Plan, most of eight Districts (42, 47, 69, 70, 71, 72, 85, and 86) were spread across Adams, Columbia, Marathon, Marquette, Portage, and Wood counties in central Wisconsin (Columbia County is home to Plaintiffs Allison and James Seaton). In the 2008 election, Democratic candidates won five of the eight Districts (42, 70, 71, 72, and 85), and Republicans won three Districts (47, 69, and 86). In the Demonstration Plan the district numbers are different (5, 40, 41, 42, 71, 72, 86, and 87), but of these eight Districts, Democratic candidates would win five (71, 86, 40, 41, and 42), and Republican candidates would win three (5, 72, and 87).

73. As a result of the Current Plan, Democratic voters who were in the old Districts 42, 70, and 72 were cracked, and the new Districts 41, 42, 69, 70, 71, 72, 85, and 86 were created in areas of Adams, Columbia, Marathon, Marquette, Portage, and Wood Counties. Due to these changes, Democratic candidates won only three of the eight Districts (70, 71, and 85) in 2012, and Republican candidates won five of them (41, 42, 69, 72, and 86).

74. The shift from five Democratic seats and three Republican seats in the Prior Plan and the Demonstration Plan in Adams, Columbia, Marathon, Marquette, Portage, and Wood Counties, to three Democratic seats and five Republican seats in the Current Plan, contributed to

Wisconsin's current pro-Republican efficiency gap. This gerrymandering and its results are shown in the maps attached hereto as Ex. 1.

Brown and Manitowoc Counties:

75. Under the Prior Plan, Brown and Manitowoc Counties were split to include parts of Districts 1, 2, 4, 5, 25, 88, 89, and 90 in the Green Bay area of Wisconsin. In the 2008 election, Democratic candidates won Districts 2, 5, 25, and 88, and Republican candidates won Districts 1, 4, 89, and 90. Under the Demonstration Plan, Brown and Manitowoc Counties would include Districts 1, 2, 3, 25, 26, 88, 89, and 90. Under the Demonstration Plan, Democrats would win Districts 2 and 88, and Republicans would win the remaining six districts.

76. As a result of the Current Plan, Democratic voters who were in the old Districts 2, 5 and 25 were cracked into the new Districts 2, 5, 25, and 88. Due to these changes, seven of the eight districts in the Brown and Manitowoc County area (1, 2, 4, 5, 25, 88, and 89) were won by Republican candidates in 2012, and one District (90) was won by a Democratic candidate in 2012.

77. The shift from four or two Democratic seats in the Prior Plan and the Demonstration Plan, respectively, and four or six Republican seats in the Prior Plan and the Demonstration Plan, respectively, to one Democratic seat and seven Republican seats in the Current Plan, in Brown and Manitowoc Counties, contributed to Wisconsin's current pro-Republican efficiency gap. This gerrymandering and its results are shown in the maps attached hereto as Ex.1.

Wisconsin Does Not Need to Have a Gerrymandered Plan

78. Not only did the Current Plan exhibit extremely large efficiency gaps in 2012 and 2014, but this poor performance was entirely unnecessary and served no legitimate purpose. It

would have been possible for Wisconsin to enact an Assembly plan that treated both parties symmetrically and did not disproportionately waste Democratic votes. To prove this point, plaintiffs' expert has designed a Demonstration Plan that would have had an efficiency gap of just ***2%*** in 2012 (assuming all contested districts and no incumbents). *See* Mayer Report at 46. This far better score is attributable to plaintiffs' efforts ***not*** to crack and pack Democratic voters, and instead to enable both parties to convert their popular support into legislative seats with equal ease.

79. Plaintiffs' Demonstration Plan performs at least as well as the Current Plan on every other relevant metric. Both plans have total population deviations of less than 1%—far below the courts' 10% threshold for presumptive constitutionality. Both plans have six African American opportunity districts and one Hispanic opportunity district, and so are identical for Voting Rights Act purposes. The Demonstration Plan splits one fewer municipal boundary than the Current Plan (119 versus 120), and so is superior in that regard. And the Demonstration Plan's districts are substantially more compact than the Current Plan's (average compactness of 0.41 versus 0.28). *See* Mayer Report at 37.

80. The Demonstration Plan proves that the Current Plan's extreme pro-Republican tilt cannot be blamed on either an effort to comply with legitimate redistricting criteria or Wisconsin's underlying political geography. Both of those factors were perfectly compatible with a neutral map.

COUNT I – FOURTEENTH AMENDMENT VIOLATION

81. Plaintiffs incorporate and re-allege paragraphs 1-80 of this Complaint as paragraphs 1-80 of this Count I.

82. The Current Plan is a partisan gerrymander so extreme that it violates Plaintiffs' Fourteenth Amendment right to equal protection of the laws. The Current Plan intentionally and severely packs and cracks Democratic voters, thus disproportionately wasting their votes, even though a neutral map could have been drawn instead. Accordingly, Wisconsin's Act 43 deprives plaintiffs of their civil rights under color of state law in violation of 42 U.S.C. §§ 1983 and 1988.

83. The efficiency gap provides a workable test to identify unconstitutional partisan gerrymandering similar to the two-part approach applied to state legislative reapportionment claims. In a reapportionment challenge, the first issue is whether a district plan's total population deviation exceeds 10%. If so, the plan is presumptively unconstitutional, and if not, it is presumptively valid. The second issue, which is reached only if the total population deviation is greater than 10%, is whether the malapportionment is necessary to achieve a legitimate state goal. The state bears the burden at this stage of rebutting the presumption of unconstitutionality. *See Voinovich v. Quilter*, 507 U.S. 146, 161-62 (1993); *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983); *Connor v. Finch*, 431 U.S. 407, 418 (1977).

84. The same two-part approach should be applied to partisan gerrymandering claims, only with the efficiency gap substituted for total population deviation. The first step in the analysis is whether a plan's efficiency gap exceeds a certain numerical threshold. If so, the plan is presumptively unconstitutional, and if not, it is presumptively valid. The second step, which is reached only if the efficiency gap is sufficiently large, is whether the plan's severe partisan unfairness is the necessary result of a legitimate state policy, or inevitable given the state's underlying political geography. The state would bear the burden at this stage of rebutting the presumption of unconstitutionality.

85. The Current Plan is plainly unlawful under this two-part test. First, it was ***forecast*** to produce, and then ***did*** produce, an efficiency gap of approximately 13% in the 2012 election. This is an extraordinarily high level of partisan unfairness, more than two standard deviations from the mean: as noted above, the 2012 figure represents the 28th-worst score in modern American history (out of nearly 800 total plans), placing the Current Plan in the worst 4% of this distribution. This is also not a temporary or transient gerrymander. The Current Plan's efficiency gap means that there is close to a zero percent chance that the Plan will ever favor Democrats during its lifespan. *See* Jackman Report at 60. Given its severity and predicted durability, the Current Plan's efficiency gap far exceeds any plausible threshold for presumptive unconstitutionality.

86. Indeed, even a 7% efficiency gap should be presumptively unconstitutional. A 7% efficiency gap is at the edges of the overall distribution of all state house plans in the modern era, making it indicative of uncommonly severe gerrymandering. See Jackman Report at 61. Historical analysis shows that with a 7% efficiency gap, the gerrymandering is also likely to be unusually durable—over its lifespan, a plan with an efficiency gap of that magnitude is unlikely ever to favor the opposing party. See Jackman Report at 61. However, this Court need not decide at what point an efficiency gap is large enough to trigger a presumption of unconstitutionality. In the state legislative reapportionment context, the applicable cutoff (10%) emerged over a series of cases, in which extreme population deviations (of 34%, then 26%, then 20%) were struck down and deviations of 8% and 10% were upheld before the 10% threshold was adopted. Here too the Current Plan's extreme efficiency gap should be deemed presumptively unconstitutional, without the need to decide what the cut-off should be.

87. Second, the State cannot rebut the presumption that the Current Plan is unlawful. Plaintiffs' Demonstration Plan would have had an efficiency gap of just 2% in 2012 while complying with all federal and state criteria at least as well as the Current Plan. *See* Mayer Report at 46. Accordingly, neither an attempt to achieve legitimate redistricting goals nor Wisconsin's underlying political geography could have necessitated the Current Plan's partisan imbalance.

88. In addition to its extreme efficiency gap, the Current Plan exhibits a severe partisan bias. The Current Plan produced a partisan bias of 13% in 2012 and 12% in 2014—scores that in and of themselves demonstrate the unconstitutional effects produced by the Current Plan.

89. Finally, there is no doubt that the Current Plan was specifically intended and indeed designed to benefit Republican candidates, and to disadvantage Democratic candidates, to the greatest possible extent. Thus, the Current Plan had both the purpose and effect of subordinating the adherents of one political party and entrenching a rival party in power, in violation of their right to equal protection under the law.

COUNT II—FIRST AMENDMENT VIOLATION

90. Plaintiffs incorporate and re-allege paragraphs 1-89 of this Complaint as paragraphs 1-89 of this Count II.

91. Plaintiffs and other Democratic voters in the state of Wisconsin have a First Amendment right to freely associate with each other without discrimination by the State based on that association; to participate in the political process and vote in favor of Democratic candidates without discrimination by the State because of the way they vote; and to express their political views without discrimination by the State because of the expression of those views or the content of their expression.

92. Wisconsin Act 43 violates the First and Fourteenth Amendments because it intentionally uses voters' partisan affiliation to affect the weight of their votes. By taking the actions described above, the drafters of the Current Plan deliberately discriminated against plaintiffs and other Democratic voters because they are Democrats and have voted for and will vote for Democratic candidates and because of the positions they have expressed and will take on public affairs — that is, because of their views and the content of their expression.

93. By excessively and unreasonably cracking and packing groups of Democratic voters to intentionally weaken their voting power, the State of Wisconsin discriminated against Democratic voters, including the plaintiffs, on the basis of their voting choices, their political views, and the content of their expression.

94. The unusual extent of the partisan gerrymandering in this case, as shown by the extremely high efficiency gap and the factors described above, indicates that the gerrymandering in this case is so high that the Current Plan denies to plaintiffs and other Democratic voters in Wisconsin their rights to free association and freedom of expression guaranteed by the First and Fourteenth Amendments.

95. For these reasons, and because Act 43 and the Current Plan have the purpose and effect of subjecting Democrats to disfavored treatment by reason of their views, Act 43 and the Current Plan are subject to strict scrutiny and cannot be upheld absent a compelling government interest, which is not present in this case.

96. Accordingly, Wisconsin's Act 43 deprives plaintiffs of their civil rights under color of state law in violation of 42 U.S.C. §§ 1983 and 1988.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that this Court:

97. Declare Wisconsin's 99 State Assembly Districts, established by Act 43, unconstitutional and invalid, and the maintenance of these districts for any primary, general, special, or recall election a violation of plaintiffs' constitutional rights;

98. Enjoin Defendants and the G.A.B.'s employees and agents, including the county clerks in each of Wisconsin's 72 counties, from administering, preparing for, and in any way permitting the nomination or election of members of the State Assembly from the unconstitutional districts that now exist;

99. In the absence of a state law establishing a constitutional district plan for the Assembly districts, adopted by the Legislature and signed by the Governor in a timely fashion, establish a redistricting plan that meets the requirements of the U.S. Constitution and federal statutes and the Wisconsin Constitution and state statutes;

100. Award plaintiffs their reasonable attorneys' fees, costs, and litigation expenses incurred in bringing this action; and

101. Grant such further relief as the Court deems just and proper.

By: */s/ Peter G. Earle*
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EXHIBIT "C"

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

- - -

LOUIS AGRE, et al., Plaintiff : CIVIL NO. 17-4392

v.

THOMAS W. WOLF, et al., Defendant : Philadelphia, Pennsylvania
October 10th, 2017
10:04 a.m.

- - -

TRANSCRIPT OF PRETRIAL HEARING
BEFORE THE HONORABLE MICHAEL M. BAYLSON
UNITED STATES DISTRICT JUDGE

- - -

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- - -

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Transcribed By: Michael T. Keating

- - -

Proceedings recorded by electronic sound recording; transcript produced by computer-aided transcription service.

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there are several defendants, but because Kennedy did not rule at all on the merits, I don't think anybody can say that the Vieth case has any substantive precedential value for this case. But it does a little bit for me in terms of the case management. It confirms my belief that this case should move ahead quickly and promptly. And I want to be fair to everybody, but I'm telling you really on the first day of our getting together that that's my intention. And I'm going to also set some dates for document production and objections and things like that, so if there are going to be some pretrial discovery, we will have it done promptly.

Okay. Now --

MS. HANGLEY: Your Honor, may I --

THE COURT: -- Ms. Ballard, let me -- yes, Ms. Hangley?

MS. HANGLEY: So the defendants -- I want to raise a very practical point.

THE COURT: Yes. Pull the microphone closer to you, please.

MS. HANGLEY: Practical, but very important, and that's the timing.

THE COURT: Yes, please.

MS. HANGLEY: I have here, if you'd like to

see it, a calendar of the election dates for 2018. The first day to file nomination petitions is February 13th of 2018. The Commonwealth, the Department of State needs five or six weeks before that to update the databases, to set the lines, to tell everyone where they're going to be circulating the nomination petitions.

THE COURT: Did you say February 15th?

MS. HANGLEY: February 13th is the day when the nomination petitions get circulated.

THE COURT: Okay.

MS. HANGLEY: The Commonwealth needs a firm, certain map by the beginning of January to get the process started. If we don't have that by the beginning of January, then there will be a lot of chaos. So it's odd, as a defendant, to be telling the Court that your very expedited schedule is actually too long, but the dates that you've mentioned, it's hard to understand how we can have a map in place by the beginning of January --

THE COURT: Right.

MS. HANGLEY: -- that everyone can rely on.

THE COURT: Well, I appreciate your telling me that. All right, Ms. Ballard, what's -- is there anything else you wanted to say on behalf of your

to know exactly what they're doing so that they can set up the maps. But they can do it in three if --

THE COURT: Well, you know, without -- and I don't know to what extent the other two judges who get appointed to sit with me might have any different views, but if I was correct that it's possible that if the plaintiffs were to finish their case in two, three, or even four days, and the defendants had a similar amount of time, and we issued a decision before Christmas, that would seem to be fine as far as your clients are concerned.

MS. HANGLEY: It's quick, but it could work --

THE COURT: All right.

MS. HANGLEY: -- Your Honor.

THE COURT: Okay. All right, thank you.

MR. PASZAMANT: Your Honor, may we be heard on --

THE COURT: Yes, sure.

MR. PASZAMANT: -- this particular issue. Just a couple of things.

THE COURT: But I'm not going to rule on any of this right now.

MR. PASZAMANT: No.

THE COURT: But sure, go right ahead.

CERTIFICATION

I, Michael Keating, do hereby certify that the foregoing is a true and correct transcript from the electronic sound recordings of the proceedings in the above-captioned matter.

10/15/17

Date

Michael Keating

EXHIBIT "D"

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BUREAU OF COMMISSIONS, ELECTIONS AND LEGISLATION

2018 PENNSYLVANIA ELECTIONS IMPORTANT DATES TO REMEMBER

First day to circulate and file nomination petitions ... .February 13

Last day to circulate and file nomination petitions .....March 6

First day to circulate and file nomination papers.....March 7

Last day for withdrawal by candidates who filed nomination petitions .....March 21

First day to apply for a civilian absentee ballot.....March 26

Last day to REGISTER before the primary.....April 16

Last day to apply for a civilian absentee ballot.....May 8

Last day for County Board of Elections to receive voted civilian absentee ballots .....May 11

GENERAL PRIMARY .....May 15

First day to REGISTER after primary .....May 16

Last day for County Board of Elections to receive voted military and overseas absentee ballots (submitted for delivery no later than 11:59 P.M. on May 14) .....May 22

Last day to circulate and file nomination papers .....August 1

Last day for withdrawal by candidates nominated by nomination papers.....August 8

Last day for withdrawal by candidates nominated at the primary .....August 13

First day to apply for a civilian absentee ballot.....September 17

Last day to REGISTER before the November election.....October 9

Last day to apply for a civilian absentee ballot.....October 30

Last day for County Boards of Elections to receive voted civilian absentee ballots .....November 2

GENERAL ELECTION.....November 6

First day to REGISTER after November election .....November 7

Last day for County Board of Elections to receive voted military and overseas absentee ballots (submitted for delivery no later than 11:59 P.M. on November 5) .....November 13

Note: All dates in this calendar are subject to change without notice.

CERTIFICATE OF SERVICE

The undersigned certifies that on November 20, 2017, the foregoing was served upon the following Counsel of Record via the Court's ECF system:

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Dated: November 20, 2017 */s/ Brian S. Paszamant*