Received 1/5/2018 2:49:18 PM Supreme Court Middle District

Filed 1/5/2018 2:49:00 PM Supreme Court Middle District
159 MM 2017

IN THE SUPREME COURT OF PENNSYLVANIA

No. 159 MM 2017

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

Petitioners,

v.

THE COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Respondents.

Review of the Recommended Findings of Fact and Conclusions of Law of the Commonwealth Court of Pennsylvania, entered on December 29, 2017, at No. 261 M.D. 2017

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA IN SUPPORT OF PETITIONERS

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Dated: January 5, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Constitutional Provisions

STATEMENT OF INTEREST OF AMICI CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, non-partisan organization with approximately 1.6 million members. The ACLU is dedicated to the principles of liberty and equality embodied in the U.S. Constitution and our nation's civil rights laws, including the right to free speech, expression, and association, and laws protecting the right to cast a meaningful vote. The ACLU litigates cases aimed at preserving these rights and has regularly appeared before courts throughout this country to vindicate these rights, including before the U.S. Supreme Court in *Reynolds v. Sims*, 377 U.S. 533 (1964); and *Gill v. Whitford*, No. 16-1161 (U.S. argued on Oct. 3, 2017) (*amici curiae*). The ACLU of Pennsylvania is a statewide affiliate of the national ACLU, dedicated to these same principles, and has approximately 56,000 members throughout Pennsylvania. The ACLU of Pennsylvania has regularly appeared before this Court in cases involving free expression and electoral democracy, including *Applewhite v. Commonwealth*, 54 A.3d 1 (Pa. 2012); *In re Stevenson*, 40 A.3d 1212 (Pa. 2012); and *Pap's A.M. v. City of Erie* (*Pap's II*), 812 A.2d 591 (Pa.

2002). No one other than *amici curiae* and their counsel paid in any part for or authored any part of this brief.

INTRODUCTION

Voting and party association are at the core of the inherent expression and associational rights protected under the Pennsylvania Constitution. Broader in its protections of free expression, the Pennsylvania Constitution, like the U.S. Constitution, protects meaningful political participation by the citizens of the Commonwealth from viewpoint-based interference. While the government may speak on its own behalf as a participant in the marketplace of ideas, it cannot manipulate the marketplace to ensure that its own ideas prevail. The government must be neutral when regulating that marketplace. Where the Commonwealth discriminates against voters based on the content of their political expression and political association, the Pennsylvania Constitution demands that such actions be subject to strict scrutiny—a rigor of review that surpasses that required under the First Amendment to the U.S. Constitution and a test the Commonwealth fails.

In drawing the 2011 congressional map, the General Assembly sought to entrench the governing political party by discriminating against voters who choose to associate with the party disfavored by the governing coalition and burdening their core political speech and expressive conduct on these same grounds. This is much the same thing as if the legislature had waited until after all the ballots were cast in an election and then drawn district lines in a way to dictate the preferred partisan composition of the newly elected legislative body—an obvious offense to the integrity of the election process that is fundamental to a functioning democracy. In both cases, the government has discriminated against citizens based on the content of their expression and impermissibly burdened citizens' rights to cast a meaningful ballot and to associate for the advancement of their political beliefs.

While the Commonwealth's failure to articulate even a legitimate basis for imposing this penalty on voters who have associated with the non-majority governing party in the drawing of the 2011 congressional map clearly renders the map void under the Pennsylvania Constitution, this same defect would invalidate the map even under a less protective

First Amendment test. For these reasons, and those laid out in the Petitioners' brief, the Court should find that the map violates the Pennsylvania Constitution.

ARGUMENT

I. The Speech and Association Clauses in the Pennsylvania Constitution Obligate the Commonwealth to Function as a Neutral Referee in Administering Elections.

"Competition in ideas and government policies is at the core of our electoral process and of the First Amendment." *Williams v. Rhodes*, 393 U.S. 23, 32 (1968). States have broad authority to regulate elections to ensure that they are "fair and honest." *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). But a state's broad power to regulate the time, place, and manner of elections "does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens." *Id.* at 222 (citation omitted).

Despite lingering uncertainty in the relevant law, the U.S. Supreme Court has repeatedly rejected regulations that have violated the government's duty to remain neutral in managing the electoral system. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978) (rejecting Massachusetts law that prohibited corporations from

engaging in certain speech related to referendum elections as "an impermissible legislative prohibition of [electoral] speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues"); *Carrington v. Rash*, 380 U.S. 89, 94 (1965) (striking down a Texas constitutional provision prohibiting stationed members of the military from voting because "'[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible"); *Williams*, 393 U.S. at 32 (rejecting an Ohio system that imposed barriers to third party ballot access as "favor[ing] two particular parties . . . and in effect tends to give them a complete monopoly . . . on the right to have people vote for or against them").

This Court has not shied from taking an "independent constitutional path" to provide greater protection for the important political rights of expression, association, petition, and suffrage than have the federal courts under the U.S. Constitution. Since relevant federal law is still unsettled, this Court should use First Amendment principles to inform its analysis, but ultimately apply the Pennsylvania

Constitution, and its more robust protections for political rights, to strike one of the most gerrymandered maps in the country.

A. The Government's Duty to Be Neutral Underlies the "Marketplace of Ideas" Theory of the First Amendment.

From its first iteration in Justice Holmes's canonical dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . that [ ] is the theory of our Constitution"), the marketplace of ideas has become a conceptual cornerstone of the First Amendment. *See, e.g.*, *Sorrell v. IMS Health*, 564 U.S. 552, 583 (2011) (noting "the constitutional importance of maintaining a free marketplace of ideas" and observing that "[w]ithout such a marketplace, the public could not freely choose a government pledged to implement policies that reflect the people's informed will").

This principle of governmental neutrality flows from black-letter law that the government may not discriminate against speech based on its content or against people based on their views. "Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010). The government may

not "grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views" or "select which issues are worth discussing or debating in public facilities." *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972) (holding that "[o]nce a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say"); *see also Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015); *Boos v. Barry*, 485 U.S. 312 (1988); *Niemotko v. Maryland*, 340 U.S. 268 (1950). The same imperative that government remain neutral in matters of expression and association applies to the administration of electoral processes.

B. The Government's Duty to be Neutral Acquires Special Force in Cases Involving Regulation of the Electoral Process.

More than just the process of selecting candidates, elections are a focal point for the competition that occurs in the marketplace of ideas. Protecting the exchange of ideas in the public forum would have little meaning if the state could burden the enactment of those ideas in the electoral forum. Because the electoral process is inextricably intertwined with the marketplace of ideas, the state must maintain

viewpoint neutrality in both "to ensure citizen participation in republican self-governance." *League of United Latin Am. Citizens v. Perry* (*LULAC*), 548 U.S. 399, 416 (2006). "The First Amendment is designed and intended to remove governmental restraints from the arena of public discussion . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1448 (2014) (citation and internal quotation marks omitted). This principle is "premised on mistrust of governmental power [and] stands against attempts to disfavor certain subjects or viewpoints." *Citizens United,* 558 U.S. at 340. "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a *precondition* to enlightened self-government and a necessary means to protect it." *Id.* at 339 (emphasis added); *accord Burson v. Freeman*, 504 U.S. 191, 196 (1992) ("speech concerning public affairs is more than self-expression; it is the essence of self-government") (citation and internal quotation marks omitted). If "an open marketplace where ideas, most especially political ideas, may compete without government interference" is a necessary *precondition* to self-government, *N.Y. State*

Bd. of Elections v. Lopez Torres, 552 U.S. 196, 208 (2008), then an electoral proving ground that also observes political neutrality is necessary for public debate to yield "enlightened self-government."

The U.S. Supreme Court's concern for the integrity of the electoral process has also guided its review of apportionment plans. The Court has warned states that the failure to define electoral boundaries in a neutral fashion may violate "the right to vote freely for the candidate of one's choice." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Likewise, the Court has been concerned with giving states "an open invitation to partisan gerrymandering," *id.* at 578-79, and suspicious of redistricting plans designed "to minimize or cancel out the voting strength of racial *or political* elements of the voting population." *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965) (emphasis added).

The Court's insistence on neutrality is well-founded. "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam); *see Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008) ("[P]ublic confidence in the integrity of the electoral process . . . encourages citizen participation in the democratic process").

Nothing could be more damaging to voter confidence or more discouraging to disfavored voters than having the state itself intentionally entrench its preferred candidates or parties in office. "Representatives are not to follow constituent orders, but can be expected to be cognizant of and responsive to those concerns." *McCutcheon,* 134 S. Ct. at 1462. By ensconcing the preferred party in office and "freez[ing] the political status quo," *Jenness v. Forston*, 403 U.S. 431, 438 (1971), partisan gerrymandering undermines the "responsiveness [that] is key to the very concept of self-governance through elected officials," *McCutcheon*, 134 S. Ct. at 1462, and substantially burdens representational rights protected by the First Amendment.

C. The Pennsylvania Constitution Provides Greater Protection Than Does the U.S. Constitution for Rights of Expression, Association and Suffrage.

"This Court . . . has long recognized that freedom of expression has special meaning in Pennsylvania given the unique history of this Commonwealth." *Pap's A.M. v. City of Erie* (*Pap's II*), 812 A.2d 591, 604 (Pa. 2002). Pennsylvania's unique history as an early pioneer in maximizing citizens' liberties, the distinctive text of the

Commonwealth's Constitution, and its case law point to enhanced protection for all political rights, including communication, petition, assembly and voting. The importance of these rights is not happenstance, but the product of an intentional effort to make Pennsylvania "a haven for personal liberties protected by operation of law" as established by William Penn's "The Frame of Government." Frederick D. Rapone, Jr., *Article I, Section 7 of the Pennsylvania Constitution and the Public Expression of Unpopular Ideas*, 74 Temple L. Rev. 655, 659-60 (2001).

In 1776, the Pennsylvania Constitution—which led with its Declaration of Rights as the Commonwealth's Constitution still does today—"identified rights of speech, press, assembly, and petition in two of its provisions, while the Frame of Government added that '[t]he printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of government.'" Seth F. Kreimer, *Protection of Free Expression*, at 250-51, The Pennsylvania Constitution: A Treatise on Rights and Liberties (Ken Gormley ed. 2004). Such protections were mirrored in contemporaneous constitutions of other states, but Pennsylvania's was the first to protect

"freedom of speech and of writing." Seth F. Kreimer, *The Pennsylvania Constitution's Protection of Free Expression*, 5 U. Pa. J. Const. L. 12, 15 (2002). And during its Constitutional Convention of 1790, Pennsylvania consolidated these provisions into their current form with the addition of the declaration that these "essential principles" would "for ever remain inviolate." *Id.* at 17-18.

Unsurprisingly, therefore, this Court has "repeatedly determined that [Article I, § 7] affords greater protection for speech and conduct than does the First Amendment." *Pap's II*, 812 A.2d at 603; *see also DePaul v. Commonwealth*, 969 A.2d 536, 546 (Pa. 2009). "At this mature date in Pennsylvania constitutional history, it cannot be denied . . . that Article I, § 7 'provides protection for freedom of expression that is broader than the federal constitutional guarantee.'" *Pap's II*, 812 A.2d at 605 (citations omitted).

The enhanced protection under the Commonwealth's Constitution, extends beyond free expression to the other political rights. As "a purely textual matter, Article I, § 7 is broader than the First Amendment, because, as this Court has noted, "'Communication' obviously is broader than 'speech.'" *Id.* at 603.

Nearly a century ago, this Court recognized the importance of the other political rights, equating the rights to "free communication of thoughts and opinions," petition, and assembly with the "voting franchise." *Spayd v. Ringing Rock Lodge*, 113 A.70, 71-73 (Pa. 1921).[1] The Court vindicated the freedom to petition by reinstating union membership to a man who had signed a petition to the legislature in defiance of an organizational rule that prohibited using "influence to defeat any action taken by the national legislative representative . . . ." *Id.* at 71. The Court equated the importance of petition with the right to vote, and acknowledged the seminal role the two rights played in promoting peaceful democratic change:

> The right here involved, *and the voting franchise*, are the only means by which peaceful changes in our laws and institutions may be sought or brought about, and they cannot, with safety to the state, or the whole body of the people, be gathered into the hands of the few for any purpose whatsoever; therefore, on principle, the law will not sanction their delegation.

Id. at 73 (emphasis added).

Pennsylvania's recognition of the importance of the franchise is also unsurprising, because unlike the federal Constitution, the

[1] This Court cited *Spayd* favorably in *Pap's II*. 812 A.2d at 604.

Commonwealth's Constitution expressly protects the right to vote, through explicit protections of free elections and the free exercise of the right of suffrage. The right to vote itself is safeguarded by the terms of Article I, Section 5, which states that "[e]lections shall be free and equal," and that "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Pa. Const. Art. I, § 5. This Court has recognized that, "the right of suffrage is the most treasured prerogative of citizenship. . . . [It] may not be impaired or infringed upon in any way except through fault of the voter himself." *Norwood Election Contest Case*, 116 A.2d 552, 553 (Pa. 1955). The breadth of this protection has been a "cornerstone" of the Commonwealth since its first Constitution. Amy Elizabeth McCall, *Elections*, 215, The Pennsylvania Constitution: A Treatise on Rights and Liberties (Ken Gormley ed. 2004).

This Court has long leaned on the Pennsylvania Constitution, when appropriate, to enforce enhanced protections, especially "with respect to individual rights and criminal procedure." *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991). While First Amendment and other U.S. constitutional doctrines "remain[] instructive" to

Pennsylvania courts in their analysis of restrictions on these rights, *id.*; *DePaul*, 969 A.2d at 547, this Court's jurisprudence regarding the scope of speech, associational, and voting rights under the Pennsylvania Constitution is an "independent constitutional path" from that of the U.S. Supreme Court interpreting the U.S. Constitution. *Id.* at 606. These rights were an essential part of Pennsylvania's identity long before the enactment of their federal counterpart in 1791. Indeed, the Bill of Rights "borrowed heavily from the Declarations of Rights contained in the constitutions of Pennsylvania and other colonies," with the Declaration of Rights serving as "the 'direct precursor' of the freedom of speech and press." *Edmunds*, 586 A.2d at 896. This Court frequently interpreted Article I, Section 7 before the Fourteenth Amendment extended First Amendment protection to the states, "*i.e.*, before there was an applicable federal interpretation to follow or diverge from," *Pap's II*, 812 A.2d at 605-06.

Consequently, the Declaration of Rights have their "own rich, independent history," distinct from the First Amendment, *id.* at 596. Commonwealth courts thus can and have found government enactments to violate the Declaration of Rights irrespective of whether

those laws also violate the U.S. Constitution. *Edmunds*, 586 A.2d at 894. This Court simply is "not bound by the decisions of the [U.S.] Supreme Court which interpret similar (yet distinct) federal constitutional provisions." *Id.* And "this Court has not been hesitant to act to ensure these fundamental rights." *Pap's II*, 812 A.2d at 605. Indeed, this Court has invalidated government enactments under the Pennsylvania Constitution, even when such similar restrictions were found not to violate corresponding U.S. constitutional guarantees. *See, e.g.*, *id.* at 606-08; *DePaul*, 969 A.2d at 546.

For purposes of this case, the "independent constitutional path" already taken by this Court, particularly adoption of the "unitary analysis" under Article I, Section 7, *Pap's II,* 812 A.2d at 602, materially affects the analysis of the Commonwealth's obligation to ensure neutrality in the administration of elections. The trial in this case has exposed the legislature's gerrymandering of the 2011 congressional map to be obvious and extreme and, thus, likely to violate even the First Amendment. But given that relevant federal law is still unsettled, and because the issues directly affect the very essence of Pennsylvania's

republican form of government, *amici* urge this Court once again to take the "independent constitutional path."

II. Partisan Gerrymandering that Substantially Burdens Fundamental Rights Triggers Strict Scrutiny in Pennsylvania, a Level of Review the Commonwealth Fails to Meet.

In partisan gerrymandering, the government manipulates the electoral marketplace to award a legislative "monopoly" to its preferred party. *Williams*, 393 U.S. at 32. By entrenching the state's preferred political party, the state burdens voters' rights on the basis of their viewpoint, an interference with core expressive conduct that must satisfy strict scrutiny in order to pass muster under the Pennsylvania Constitution. The 2011 congressional map does not meet that test.

A. Partisan Gerrymandering Burdens the Right to Cast a Meaningful Vote and the Right to Associate.

Casting a meaningful vote for the candidate of one's choice sits at the core of protected political expression. It is this expression that structures the polity in which all other expression takes place. This Court has concluded that making campaign donations to the candidate of one's choice constitutes expressive conduct protected by Article I, Section 7. *DePaul*, 969 A.2d at 547. As this Court held, there is "no

doubt" that such protected expression was implicated by the government regulation at issue even though the act of donating was a "non-verbal" and "indirect" form of expression. *Id* at 548. So too must the actual act of voting for the candidate of one's choice—an act even more closely tied to "express[ing] . . . support for [a] candidate and his views" than providing monetary support, *id.* at 547 —be protected. And this Court has observed, "[t]he act of voting is a personal expression of favor or disfavor for particular policies, personalities, or laws." *Commonwealth v. Cobbs*, 305 A.2d 25, 27 (Pa. 1973).

Notably, the rights of expression and association are specifically described as rights of the "citizen," not the mere individual, in the Pennsylvania Constitution. As this Court has observed with respect to both Article I, Section 7 and Article I, Section 20:

> The right in question is a fundamental one, expressly recognized in the organic law of our state as belonging to "citizens." In other words, it is possessed by members of the state, or "citizens" to work out the public weal, rather than by individuals, to protect their persons or property or serve private ends. The Constitution does not confer the right, but guarantees its free exercise, without let or hindrance from those in authority, at all times, under any and all circumstances; and, when this is kept in view, it is apparent that such a prerogative can neither be denied by others nor surrendered by the citizen himself.

Pap's II, 812 A.2d at 604 (internal citations omitted) (regarding Article I, § 7); *Spayd,* 113 A. at 71 (regarding Article I, § 20). Casting a meaningful vote for the candidate of one's choice and associating with others to organize and structure the public weal are bedrock acts of expression and association—even more so than the political donations protected in *DePaul*—that fall within the core of these rights.

Moreover, the U.S. Supreme Court has been clear that "'the entrenchment of one or a few parties to the exclusion of others' . . . 'is a very effective impediment to the associational and speech freedoms which are essential to a meaningful system of democratic government.'" *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 70 (1990) (internal citation omitted). Thus, partisan gerrymandering, including the 2011 congressional map, burdens voters' freedom of association based on viewpoint. "Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000). Voters have the right to associate with parties and with other voters. *Anderson v. Celebrezze*, 460 U.S. 780, 787-88 (1983). And it is

through association that the act of voting has resonance in the political system. *Id.* at 794.

The U.S. Supreme Court has found substantial burdens on the right to associate where the legislature hampered voters' ability to band together with "like-minded voters to gather in pursuit of common political ends . . . [and] to express their . . . political preferences." *Norman v. Reed*, 502 U.S. 279, 288-89 (1992). Partisan gerrymandering limits the ability of "independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group." *Anderson*, 460 U.S. at 794. Such burdens on associational rights are substantial because they "threaten to reduce diversity and competition in the marketplace of ideas." *Id.*

In *Williams v. Rhodes*, the U.S. Supreme Court found that laws governing the electoral process effectively created a state-sanctioned monopoly on political contests where "a vote may be cast only for one of two parties." *Williams*, 393 U.S. at 30-31. Here, Pennsylvania has similarly interfered with the electoral marketplace by ensuring that voters cannot upset its decision to give its preferred party a monopoly.

By entrenching the governing party against meaningful accountability to the electorate, partisan gerrymandering substantially burdens the fundamental rights (1) to "cast a meaningful vote," *Burdick v. Takushi*, 504 U.S. 428, 445 (1992) (Kennedy, J, dissenting); and (2) "to associate for the advancement of political beliefs," *Anderson*, 460 U.S. at 787 (quoting *Williams*, 393 U.S. at 30-31). An individual's vote is not meaningful if cast under circumstances where the government has compromised the integrity of the election process to entrench its preferred viewpoint. When a voter enters the polls knowing the state has designed the electoral system to reach its preferred outcome, the voter would properly conclude that the state has compromised the integrity of the election. By so constricting freedom of electoral choice, the state debases the right to cast a meaningful ballot. "The right to vote *freely* for the candidate of one's choice is of the essence of a democratic society, and . . . the right of suffrage can be denied by a debasement . . . of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555. And the Pennsylvania Constitution explicitly protects not just the

right to vote, but "the *free* exercise of the right of suffrage." Pa. Const. Art. 1, § 5 (emphasis added).

B. Constitutionally Impermissible Partisan Gerrymandering Occurs When a Apportionment Plan Is Drawn to Deliberately Entrench the Legislature's Preferred Party.

A doctrinal difficulty for the U.S. Supreme Court has been to identify when partisan gerrymandering is of sufficient magnitude to violate the federal Constitution. A state acts with an intent to entrench when it draws an apportionment plan deliberately to ensure that the partisan composition of the legislature will not be responsive to changes in voter preferences under the likely range of electoral scenarios. An intent to entrench entails more than the mere *consideration* of politics. *See Vieth v. Jubelirer*, 541 U.S. 267, 315 (2004) (Kennedy, J., concurring in the judgment) ("The inquiry is not whether political classifications were used," but "whether political classifications were used to burden a group's representational rights."). Thus, unconstitutional partisan gerrymandering is distinct from the inevitable incidental political considerations and partisan effects that may occur even when the state acts as a neutral administrator of the electoral process. An impermissible intent to *entrench* exists where, as here, the

Commonwealth draws lines for the purpose of *locking in* partisan advantage regardless of the voters' likely choices. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) ("[P]artisan gerrymandering [is] the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power" which is "incompatible with democracy").

Any legislative redistricting plan drawn will certainly be created with knowledge of the political distribution of voters. A legislature, however, cannot draw lines with the purpose of shielding its current majority from changes in the associational choices of the citizenry. This deviation from neutrality disables the competitive mechanism that undergirds the democratic process, discriminates on the basis of viewpoint, and thus substantially burdens voters' rights to participate in a fair election. *See Williams*, 393 U.S. 31-32; *see Vieth*, 541 U.S. at 314 (Kennedy, J, concurring).

Courts can then determine whether the government has been entrenched its preferred party by evaluating whether the map significantly deviates from the state's normal range of partisan balance

in favor of the state's preferred party in a way that will endure any likely electoral outcome. The constitutional inquiry is not whether a map results in one-party rule or fails to achieve proportional representation, but whether the state has substantially deviated from sound districting principles in order to render its electoral system non-responsive to changes in voter preferences, or to "freeze the political status quo." *Jenness*, 403 U.S. at 438. This standard is manageable, especially given new and improved methods of measuring partisan gerrymandering that have received the imprimatur of "consensus among social scientists." Brief of Bernard Grofman and Ronald Keith Gaddie as Amici Curiae in Support of Neither Party, at 10-12, *Gill v. Whitford*, No. 16-1161. If a map preserves a partisan imbalance throughout the normal range of voter behavior based on contemporaneous and historical voting data, the state's preferred party will remain in power absent extraordinary circumstances and will be unresponsive to changing voter choice. This "lack of responsiveness" has long been held to be a critical element of unconstitutional denial of a meaningful right to vote. *See Thornburg v. Gingles,* 478 U.S. 30, 36-37 & n.4 (1986).

Once this has been demonstrated, the government must then establish, under the First Amendment, that the redistricting plan was at least necessary to meet legitimate state interests. *See Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979) ("[A] State may not choose means that unnecessarily restrict constitutionally protected liberty.") (quoting *Kusper v. Pontikes,* 414 U.S. 51, 58–59 (1973)); *see also Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment) (partisan gerrymandering may violate the Constitution when political classifications are "applied in an invidious manner or in a way unrelated to any legitimate legislative objective"). Even operating among the competing lines of First Amendment doctrine, what is clear is that at a minimum such a map must meet heightened scrutiny. *See Anderson*, 460 U.S. at 788-89.

C. The General Assembly's Deliberate Effort to Discriminate Against Minority-Party Voters Triggers Strict Scrutiny.

While the Pennsylvania Constitution provides greater protection, *see supra* I.C, relevant First Amendment jurisprudence is instructive as a comparative floor. The constitutional issue in partisan gerrymandering is whether the state has placed a heavy thumb on the

scale to "freeze the political status quo," and *entrench* the state's preferred party. *Jenness*, 403 U.S. at 438. As districting "inevitably affects . . . the individual's right to vote and his right to associate with others for political ends," *Anderson*, 460 U.S. at 788, the constitutionality of such conduct must survive at least heightened scrutiny, *id.* at 788-89; *see also Williams*, 393 U.S. at 30-31.

Where, as here, there is a threshold showing that fundamental rights of expression, association, and to cast a meaningful ballot are substantially burdened based on viewpoint, the First Amendment requires that courts apply heightened scrutiny. Content-neutral enactments regulating the election processes must be necessary to meet legitimate interests. *Anderson*, 460 U.S. at 806. Content-based enactments, meanwhile, "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226.

A third competing standard employed by the U.S. Supreme Court in instances of mixed speech and conduct is laid out in *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). This test requires that an enactment: (1) "furthers an important or substantial governmental

interest"; (2) the "interest is unrelated to the suppression of free expression"; and (3) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.*

Each of these doctrines might be applied to assess the 2011 congressional map. That map plainly governs the conduct of elections, and on that axis alone, the Commonwealth must show the map is necessary to further a legitimate government interest, *Anderson*, 460 U.S. at 789, though that test typically applies to content-neutral regulations. Petitioners have also demonstrated that the particular map at issue discriminates against certain voters based upon their viewpoint, and thus, under the ordinary doctrine regarding content-based regulations, should only survive if "narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226. Finally, casting a ballot mixes both speech and conduct, and thus the congressional map could also be reviewed under *O'Brien*, 391 U.S. at 376-77.

It is unclear which of these tests should apply, and the U.S. Supreme Court may or may not reach consensus in *Gill* on a First

Amendment test in the case of partisan gerrymanders. [2] This uncertainty surrounding governing federal law is a powerful incentive for this Court to apply the Pennsylvania Constitution so that "the contours of [citizens'] fundamental rights under our charter [do not remain] uncertain, unknowable, or changeable . . . ." *Pap's II*, 812 A.2d at 611. The standard under Article I, Section 7 is clear and applicable regardless what the U.S. Supreme Court decides in *Gill*.

A series of cases, culminating in *DePaul*, led this Court to disclaim the "intermediate scrutiny" balancing tests proliferating under the First

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[2] In urging the Commonwealth Court to find the issue of whether the 2011 congressional map was an unconstitutional partisan gerrymander non-justiciable, the General Assembly noted that the U.S. Supreme Court expressed concerns that the First Amendment was a poor vehicle to address this question. Legis. Resps.' Proposed Findings of Fact & Conclusions of Law, ¶ 517. In the same morass of opinions to which the General Assembly cites, one Justice was explicit that the "First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering," as "these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring). The U.S. Supreme Court's jurisprudence surrounding partisan gerrymandering has been entirely "uncertain," *Pap's II*, 812 A.2d at 611. *See Vieth*, 541 U.S. 267 (2004) (plurality opinion reversing previous finding of justiciability after eighteen years of no guidance). This is precisely why this Court should act here under the Pennsylvania Constitution.

Amendment in favor of "unitary analysis," which is synonymous with strict scrutiny. *Pap's II*, 812 A.2d at 602. In *Insurance Adjustment Bureau v. Insurance Commissioner for Pennsylvania*, this Court reviewed and rejected as insufficiently protective of free speech the U.S. Supreme Court's four-part balancing test, *see, e.g.*, *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980), to analyze commercial speech restrictions. 542 A.2d 1317, 1319-24 (Pa. 1987). Instead, the Court adopted what has become known as the "less intrusive means analysis," whereby the Court, under Article I, Section 7, "will not allow the prior restraint or other restriction of commercial speech by any governmental agency where the legitimate, important interests of government may be accomplished practicably in another, less intrusive manner." *Id.* at 1324.

Thereafter, the *Pap's II* Court rejected the U.S. Supreme Court's erotic speech jurisprudence generally, and its decision in *City of Erie v. Pap's AM*, 529 U.S. 277 (2000), specifically. *Pap's II*, 812 A.2d. In so doing, this Court expressly rejected *O'Brien's* balancing test governing First Amendment analysis of expressive conduct. *Id.* at 609-12. Even though nude dancing is expressive conduct that does not involve

political speech, the Court opted to apply the "less intrusive means analysis." *Id.* at 612. The Court then equated "strict scrutiny" with "less intrusive means" analysis. *Id.* Both tests require the government to show that the restriction on expression is narrowly tailored to achieve a compelling government interest. *Id.* at 612-13.

Finally, the *DePaul* Court used the occasion of restrictions on political donations to clarify what was hinted at in *Pap's II*, namely, that under Article I, Section 7, "when protected expression is at issue, strict scrutiny is the appropriate measure of a governmental restriction." 969 A.2d at 590.

Consequently, regardless of the test applied under the First Amendment—now or when and if *Gill* clarifies it—the test for evaluating the 2011 congressional map under Article I, Section 7 is strict scrutiny. The Commonwealth Court's failure to apply this standard under Article I, Section 7 requires this Court to reject the proposed legal conclusions.

D. The Commonwealth Court's Failure to Apply Any Recognized Burden on the General Assembly, Much Less Strict Scrutiny, Is Plain Error.

The record below makes plain that the extreme partisan gerrymandering impacted Pennsylvanians based on their political viewpoint. Pennsylvania's 2011 congressional districting map burdens protected political expression and association by discriminating against voters who have associated with the political party disfavored by the governing coalition and burdening their core political speech and expressive conduct on these same grounds. The Commonwealth Court found credible each of the Petitioners' experts, Recommended Findings of Fact and Conclusions of Law, ¶¶ 308, 339, 360, 389 *League of Women Voters of Penn. v. Commonwealth*, No. 261 M.D. 2017 (Dec. 29, 2017), and likewise found that each of the Commonwealth's experts was not credible to the extent they challenged Petitioners' experts, *id.* ¶¶ 398, 409, 410. Among the conclusions credited by the Commonwealth Court was that the 2011 congressional map "created an extreme partisan outcome" that "can be explained only by a districting process that pursued a partisan goal by subordinating traditional districting criteria," *id.* ¶ 279, even when taking incumbency protection into

account, *id.* ¶ 291. The congressional map "could not have been the product of something other than the intentional pursuit of partisan advantage." *Id.* ¶ 305.

Additionally, analysis of the data files used by the majority party in drawing the 2011 congressional map demonstrated that the General Assembly used partisan preference scoring of every single precinct in the Commonwealth to maximize the advantage of voters who favored the majority party and to dilute the influence of voters who supported the party disfavored by the majority in the General Assembly. Tr. 299:10-309:15; *see* Jared Whalen, *Inside the Gerrymandering Data Top Pa. Republicans Fought to Keep Private*, The Inquirer and Daily News (Dec. 8, 2017), http://www.philly.com/philly/news/politics/pa-republicans-gerrymandering-data-trial-mike-turzai-20171208.html (publishing data). The Commonwealth Court declined to consider this portion of Petitioners' expert's testimony and analysis. Recommended Findings of Fact and Conclusions of Law, ¶ 307 *League of Women Voters of Penn. v. Commonwealth*, No. 261 M.D. 2017 (Dec. 29, 2017).

Despite the fulsome record, which included Petitioners' four experts who were credited by the judge, the Commonwealth Court

found little utility in Petitioners' consistent demonstration of extreme partisan bias and gross deviation from standard apportionment principles. *Id.* ¶ 414. In refusing to require the Commonwealth to present even a legitimate basis to justify the map, the Commonwealth Court failed to follow this Court's precedents, requiring courts to look to any "unmentioned purpose that directly impacts on the freedom of expression," *Pap's II*, 812 A.2d at 612. Even in the face of more than "obvious" and "common sense" demonstrations of the General Assembly's real purpose, *id.* at 611, the Commonwealth Court did not assess the 2011 congressional map under any recognized standard of constitutional review, much less the requisite strict scrutiny. Indeed, the Court effectively ruled that Petitioners failed to demonstrate the applicability of free-speech principles to the redistricting context. This is plain error under both the U.S. and, especially, the Pennsylvania Constitutions.

Even under the heightened (but not strict) scrutiny that the First Amendment extends to enactments that neutrally restrict the right to vote, the court "must identify and evaluate the precise *interests put forward by the State* as justifications for the burden imposed by its

rule." *Anderson*, 460 U.S. at 789 (emphasis added); *see also Crawford*, 553 U.S. at 190. And in First Amendment cases defendants carry the burden of proof and persuasion. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions") (citations omitted). In other words, once plaintiffs have shown a restraint on free expression, the burden shifts to the government agency to justify the restraint under the relevant First Amendment standard. *Phillips v. Borough of Keyport*, 107 F.3d 164, 172-73 (3rd Cir. 1997) (en banc), *cert. denied*, 522 U.S. 132 (1997). And under the "strict scrutiny" of Article I, Section 7, governmental defendants "must establish that the regulation be 'narrowly drawn to accomplish a compelling governmental interest.'" *Pap's II*, 812 A.2d at 612.

In this case, the General Assembly makes no effort to satisfy either the Commonwealth or the federal standard. They have offered no government interest, whether compelling, legitimate or otherwise, to support the 2011 congressional map's use of extreme partisanship. They have not even offered a non-partisan justification for the 2011

congressional map. They just insist the map does not reflect partisan bias. Facts are important, especially when the issue involves political rights, like expression, association, petition, and voting.

CONCLUSION

This Court has a longstanding commitment to carving out an "independent constitutional path" regarding the scope of speech and associational rights under the Pennsylvania Constitution. *Pap's II*, 812 A.2d at 605. Forging this independent path is particularly critical here where the "state of flux" and "uncertain teachings" of the U.S. Supreme Court "afford insufficient protection to fundamental rights guaranteed under Article I, § 7." *Id.* at 611. "As a matter of policy, Pennsylvania citizens should not have the contours of their fundamental rights under our charter rendered uncertain, unknowable, or changeable, while the U.S. Supreme Court struggles to articulate a standard to govern a similar federal question." *Id.*

For the foregoing reasons, and those laid out in the Petitioners' brief, the Court should find that the 2011 congressional map violates the Pennsylvania Constitution.

Dated: January 5, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Witold J. Walczak, do hereby certify pursuant to Pennsylvania Rules of Appellate Procedure 531(b)(3) and 2135(b), (d), that the foregoing brief complies with the required word court limits. Per the word processing system, Microsoft Word, the brief contains 6,754 words.