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No. 159 MM 2017

IN THE SUPREME 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 PENNSYLVANIA SENATE; MICHAEL C. TURZAI, IN HIS CAPACITY AS SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES; JOSEPH B. SCARNATI III, IN HIS CAPACITY AS PENNSYLVANIA SENATE PRESIDENT PRO TEMPORE; ROBERT TORRES, IN HIS CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH; JONATHAN M. MARKS, IN HIS CAPACITY AS COMMISSOINER OF THE BUREAU OF COMMISSIONS, ELECTIONS, AND LEGISLATION OF THE PENNSYLVANIA DEPARTMENT OF STATE,

Respondents.

Review of the Recommended Findings of Fact and Conclusions of Law of the Commonwealth Court of Pennsylvania, No. 261 MD 2017

BRIEF FOR INTERVENORS

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January 10, 2018

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Intervenors Brian McCann, Daphne Goggins, Carl Edward Pfeifer, Jr., Michael Baker, Cynthia Ann Robbins, Ginny Steese Richardson, Carol Lynne Ryan, Joel Sears, Kurtes D. Smith, C. Arnold McClure, Karen C. Cahilly, Vicki Lightcap, Wayne Buckwalter, Ann Marshall Pilgreen, Ralph E. Wike, Martin C.D. Morgis, Richard J. Tems, James Taylor, Lisa V. Nancollas, Hugh H. Sides, Mark J. Harris, William P. Eggleston, Jacqueline D. Kulback, Timothy D. Cifelli, Ann M. Dugan, Patricia J. Felix, Scott Uehlinger, Brandon Robert Smith, Glen Beiler, Tegwyn Hughes, Thomas Whitehead, David Moylan, James R. Means, Jr., Barry O. Christenson, Kathleen Bowman, and Bryan Leib hereby file the following Brief for Intervenors for this review of the Commonwealth Court's Recommended Findings of Fact and Conclusions of Law filed December 29, 2017:

INTRODUCTION

Petitioners are not the only parties with rights at stake in this litigation. Equally at stake is whether political rights protected by the Pennsylvania Constitution—rights to vote, to express political opinions, to organize, to work to elect candidates of choice, to run for political office—have meaning for all Pennsylvania citizens who exercise their constitutional rights to participate in the political process. Since the 2011 reapportionment plan for Pennsylvania's congressional districts came into effect, the Intervenors—all of whom are

registered voters including candidates for office, county party committee chairpersons, and active Republicans—have worked to elect their preferred candidates to Congress. The Intervenors invest their time, effort, and money into candidates they believe in. They began to prepare for the 2018 elections as soon as the 2016 elections were over. They direct their efforts toward voters residing in established congressional districts. These activities are also being undertaken by Democrats who share similar roles and are pursuing these same rights.

Now, after three election cycles and nearly seven years after the 2011 reapportionment plan came into effect, a group of petitioners challenge the constitutionality of Pennsylvania's congressional districts. Petitioners assert that the 2011 plan was designed to prevent them from electing their preferred candidates for Congress. They ask this Honorable Court to establish, in the final quarter of the decade and on the very eve of the 2018 elections, a new redistricting plan before the next census and, in fact, weeks before the statutorily required nomination petition circulation period for the 2018 congressional elections. But the effectiveness of the Intervenors' exercise of their political rights depends on their justifiable reliance on the existence of the current congressional districts. The Intervenors cannot work to organize and advocate on behalf of a congressional candidate—and even all of Pennsylvania voters cannot know their choices for Congress—if they do not know into which district they could be reassigned.

If the existing congressional districts are replaced for the 2018 elections, the Intervenors—candidates and activists—will need to start over and direct their activities toward new voters, rendering meaningless all or a significant portion of their protected activities up to that date. These are fundamental Pennsylvania constitutional rights of free expression and association.

The Intervenors do not exercise their political rights protected by the Pennsylvania Constitution in a vacuum. A court order at this very last minute could wipe out the Intervenors' efforts to date and undo the value of the personal time and effort they have invested, as well as their personal expenditures in support of the 2018 Congressional elections. Thus, this Honorable Court should deny the Petition for Review, or, in the alternative, not implement relief to take effect before the 2018 congressional elections.

COUNTERSTATEMENT OF THE SCOPE AND STANDARD OF REVIEW

When the Pennsylvania Supreme Court exercises plenary jurisdiction, its review is *de novo*. *Erfer v. Commonwealth*, 794 A.2d 325, 329 (Pa. 2002). Although findings of fact are not binding on this Honorable Court, they are afforded "due consideration, as the jurist who presided over the hearings was in the best position to determine the facts." *Id.* (internal quotation marks omitted) (quoting *Annenberg v. Commonwealth*, 757 A.2d 338, 343 (Pa. 2000)).

This case concerns the constitutionality of legislation establishing

Pennsylvania's congressional districts. Acts of the General Assembly are presumed constitutional and "all doubt is to be resolved in favor of sustaining the legislation." *Singer v. Sheppard*, 346 A.2d 897, 900 (Pa. 1975) (internal quotation marks omitted) (quoting *Milk Control Com. v. Battista*, 198 A.2d 840, 843 (Pa. 1964)). "As with any constitutional challenge to legislation, the challenger bears the heavy burden of demonstrating that the statute 'clearly, plainly, and palpably violates the Constitution,' as we presume that our sister branches act in conformity with the Constitution." *Pa. Envtl. Def. Found. v. Commonwealth*, 161 A.3d 911, 929 (Pa. 2017) (quoting *Stilp v. Commonwealth*, 905 A.2d 918, 939 (Pa. 2006)).

COUNTERSTATEMENT OF THE QUESTIONS INVOLVED

1. Whether the Commonwealth Court correctly recommended that Petitioners had not met their burden of demonstrating that the 2011 Plan clearly, plainly, and palpably violated the Pennsylvania Constitution.

2. Whether Petitioners' requested relief "can practically be effectuated" in time for the 2018 congressional elections, given that Petitioners waited three election cycles and almost seven years to file an action challenging Pennsylvania's congressional districts, the 2018 congressional elections are already well underway, and Intervenors have engaged in activities protected by the Pennsylvania Constitution in reliance on the existing districts.

COUNTERSTATEMENT OF THE CASE

I. Reliance on the 2011 Plan Prior to Commencement of the Action

On December 22, 2011, then-Governor Corbett signed Senate Bill 1249 into law. Recommended Findings of Fact ("Findings") ¶ 121. Senate Bill 1249

provided the 2011 Plan, which establishes Pennsylvania's congressional districts. Findings ¶¶ 122, 129. The 2011 Plan has now been in effect for three election cycles, and remains in effect today. Findings ¶¶ 123, 469.

Intervenors are registered Republican voters residing in each of Pennsylvania's eighteen congressional districts. Findings ¶ 45. They include announced or potential candidates for Congress, county party committee chairpersons, and active Republicans. Findings ¶ 45. Intervenors have been actively involved in election activities intended to benefit Republican congressional candidates in the 2018 elections. Findings ¶¶ 471, 473.

Campaigns for members of the United States Congress start far in advance of the year of the election. Findings ¶ 469. In fact, campaigns start as soon as the last campaign for Congress ends. Ex. I-16 (Whitehead Aff.) ¶ 5; Ex. I-17 (Ryan Aff.) ¶ 6. As Chair of the Monroe County Republican Committee, Intervenor Thomas Whitehead has been performing his duties and responsibilities in connection with the 2018 congressional election since November 2016. Finding ¶ 470. As an active Republican, Intervenor Carol Lynne Ryan attended her first election activity for the 2018 congressional elections, a statewide planning conference, in December 2016. Finding ¶ 473.

To date, Intervenors have undertaken many election activities in connection with the 2018 congressional elections. County party committee chairs have a

number of duties and responsibilities, including recruiting candidates. Findings ¶ 470 (citing Ex. I-16 ¶¶ 5–9). As a county party committee chair, Whitehead has already been communicating with candidates and their committee representatives, generating support for the candidates, and reviewing and identifying issues that could affect the campaign. Finding ¶ 471 (citing Ex. I-16 ¶ 20). As an active Republican, Ryan has already been attending events in support of her candidate and recruiting donors and volunteers for her candidate's campaign. Finding ¶ 473 (citing Ex. I-17 ¶¶ 5, 8–9, 23).

Intervenors work to elect their preferred candidates to the United States Congress in reliance on the existing congressional districts. Finding ¶ 469. Congressional district boundaries affect election activities such as: recruiting candidates, volunteers, and donors; organizing grassroots activities; creating public political communications in support of congressional candidates; and allocating campaigning activities and county committee resources amongst other candidates on the ballot. Ex. I-16 ¶ 17; Ex. I-17 ¶ 9.

Republicans are not the only Pennsylvanians who have already invested their time, effort, and money in the 2018 congressional elections. Democrats have also been actively involved in the 2018 congressional elections in Republican-held seats, showing their competitiveness. For example, five Democratic candidates have registered with the Federal Election Commission to run in the 7th

Congressional District race in 2018. Findings ¶ 462. Four Democratic candidates have registered with the Federal Election Commission to run in the 12th Congressional District race in 2018. Findings ¶ 463. Democratic candidate Chrissy Houlahan has already raised $810,649.55 in her campaign for the 6th Congressional District in 2018. Findings ¶ 464. According to the Federal Election Commission, one Democratic candidate has raised over $100,000 to challenge an incumbent in the 16th Congressional District in 2018. Findings ¶ 465.

II. Counterstatement of the Form of Action and Brief Procedural History

Before the filing of the Petition for Review at issue in this case, Intervenors had no reason to expect that the existing congressional districts would change between the 2016 and 2018 elections. Findings ¶ 469. After all, each state is responsible for drawing its congressional districts based upon how many districts the United States Department of Commerce assigns the state relative to such state's population following the national census that is mandated every ten years. Findings ¶ 83. These decennial redistricting plans remain in effect for five election cycles—ten years—until the next Census is conducted.

After enactment, the 2011 Plan was not challenged in any manner for three election cycles and approximately seven years. Ex. P-179 (Vitali Dep.) at 115:17–116:5 (explaining that a lawsuit was prepared after enactment of the 2011 Plan but never filed). Notably, Petitioners did not file any type of challenge pertaining to

the 2011 Plan prior to the filing of their Petition. Findings ¶ 21; *see also, e.g.*, Ex. P-170 (Isaacs Dep.) at 39:1–40:3 (explaining that Petitioner Isaacs believed that redistricting was "part of a national strategy to amplify and support Republican candidates" as early as a 2012 school board meeting). Petitioners commenced this action by filing a Petition for Review addressed to the Commonwealth Court's original jurisdiction on June 15, 2017. Findings at 1. Petitioners even delayed in seeking relief in this Honorable Court. Only after receiving an unfavorable hearing in the Commonwealth Court did the Petitioners file their "Application for Extraordinary Relief Under 42 Pa.C.S. § 726 and Pa. R.A.P. 3309" on October 11, 2017. Findings at 4. After this Honorable Court granted Petitioners' application, the Commonwealth Court granted the Intervenors' Application for Leave to Intervene on November 13, 2017. Order, *League of Women Voters of Pa. et al. v. Commonwealth et al.*, No. 261 MD 2017 (Pa. Commw. Nov. 13, 2017) ¶ 1.

III. The 2018 Elections Schedule

Now, not only have Intervenors invested their time, effort, and money into the 2018 congressional elections in their justifiable reliance on the existing districts, but we are on the very eve of the first deadlines in the 2018 election calendar. *See* Ex. I-16 ¶ 18; Ex. I-17 ¶ 9. The first statutory deadline of the 2018 elections is February 13, 2018, the first day to circulate and file nomination petitions. Findings ¶ 423 (citing 25 Pa. C.S. § 2868). Nomination petitions must

be filed by March 6, 2018. Findings ¶ 424. Candidates of both parties have already declared their candidacies and have been actively campaigning in the Districts. *See, e.g.*, Findings ¶¶ 462–65, 470–73.

In his Affidavit, the Commissioner of the Bureau of Commissions, Elections and Legislation (the "Bureau"), Jonathan Marks, offers several alternatives to the statutorily required deadlines to the 2018 elections. Ex. EBD-2 (Marks Aff.). But none can be accomplished without significant adverse consequences to the integrity of the already proceeding election process. The Bureau takes three weeks to prepare for the circulation of nomination petitions. Findings ¶ 453; Ex. EBD-2 ¶¶ 12, 19. The Bureau could shorten its preparation to two weeks, but would require an addition of staff and increased hours. Findings ¶ 453; Ex. EBD-2 ¶ 20. This does not even take into account the impact on County Boards of Elections. *See* 25 Pa. C.S. § 2642 (providing powers and duties of county boards of elections).

Pennsylvania citizens involved in congressional campaigns would also be adversely affected. Local political parties begin recruiting and training volunteers in January 2018 to circulate nomination petitions for congressional candidates. Ex. I-16 ¶ 16. The county parties hold events to circulate nomination petitions in February of an election year. Ex. I-17 ¶ 15.

Changing congressional districts before or after the nomination petition

circulation period could confuse voters. Ex. I-17 ¶ 17. Intervenor Ryan believes that changing congressional districts during the nomination petition circulation period could cause a higher risk that a voter may sign a nomination petition for the wrong district. Ex. I-17 ¶ 18. She believes that there is not enough time to inform voters of a change in congressional districts before nomination petitions begin circulation. Ex. I-17 ¶ 21. She likens a change in congressional districts to changes in a voter's polling place: it would take time to educate voters of a change in the political and election process, similar to efforts to inform voters when their polling place changes at or near an election. Ex. I-17 ¶ 19.

The nomination petition circulation period could also impact the special election for the 18th Congressional District. Governor Wolf issued a writ to hold a special election for the vacancy in the 18th Congressional District on March 13, 2018. Findings ¶ 466. The special election will be held a mere twenty-eight days after petitions begin to circulate for the election for the 18th Congressional District in November 2018. Findings ¶ 467. Thus, the special election campaign will take place during the circulation of nomination petitions for the primary election, yet the districts may not be the same.

The Pennsylvania Election Code sets Pennsylvania's 2018 primary election for May 15, 2018. Findings ¶ 422 (citing 25 Pa. C.S. § 2753(a)). Postponement of the primary in any manner would result in significant logistical challenges and

financial costs for county election administrators. Findings ¶ 457; Ex. EBD-2 ¶ 25. The cost of holding a single primary for all offices in 2018 would be approximately $20 million. Findings ¶ 459; Ex. EBD-2 ¶ 27. If the primary for congressional elections is postponed and a second primary is held, each primary will cost approximately $20 million. Findings ¶ 459; Ex. EBD-2 ¶ 27.

For each primary, Pennsylvania's sixty-seven counties will be reimbursed only a small portion of the costs associated with mailing absentee ballots to certain military and overseas civilian voters and bedridden or hospitalized veterans. Ex. EBD-2 ¶ 28. All other costs of the primary are paid by the counties. Ex. EBD-2 ¶ 28. Scheduling a separate primary date in 2018 would add significant costs and impediments to participate in the election process, including the sending of a second set of voter communications instead of one set that would include candidates for all offices. Ex. I-16 ¶ 22; Ex. I-17 ¶ 25.

IV. Pennsylvania Voting Patterns Since Enactment of the 2011 Plan

Pennsylvania's voting patterns have also changed since the enactment of the 2011 Plan. By the November 2016 election, twenty-four Pennsylvania counties had more registered Democrats than registered Republicans, while forty-three Pennsylvania counties had more registered Republicans than registered Democrats. Findings ¶ 205. Although twenty-four Pennsylvania counties had more registered Democrats than registered Republicans, Democratic nominee Hillary Clinton won

only eleven Pennsylvania counties in the 2016 presidential election. Findings ¶ 208. Three Pennsylvania counties won by President Obama in 2012—Erie, Luzerne, and Northampton—each flipped to President Trump in 2016. Findings ¶ 209. Erie, Luzerne, and Northampton Counties voted for President Trump despite sizeable voter registration advantages for Democrats. Findings ¶¶ 210–212. In particular, Luzerne County voted 58.29% for President Trump versus 38.86% for Secretary Clinton, even though registered Democrats outnumbered registered Republicans 52.62% to 36.10%. Findings ¶ 212.

Indeed, in 2016, it is evident that not all registered Democrats in Pennsylvania voted straight Democratic. Findings ¶ 219. Several counties with some of the highest percentages of registered Democrats—such as Fayette, Greene, Cambria, and Beaver Counties—also voted comfortably, even overwhelmingly, for President Trump. Findings ¶¶ 214–217. There is also clear evidence of ticket-splitting. President Trump won Pennsylvania and Republican Pat Toomey was re-elected to the United States Senate, yet Democratic candidates swept the statewide races for Attorney General, Treasurer, and Auditor General. Findings ¶ 218. Obviously, a substantial number of voters voted Republican for President and United States Senate while voting Democratic for other offices. Findings ¶ 220.

V. Harm to Intervenors

On December 29, 2017, the Commonwealth Court issued its Recommended

Findings of Fact and Conclusions of Law in this case. The Commonwealth Court explained that it did not consider requests to change existing Pennsylvania precedent, "adhering instead to what the Court understands is the current state of Pennsylvania law." Findings at 11. The Commonwealth Court applied the *Bandemer* plurality test as adopted by *Erfer* "[a]s *Erfer* is the only Pennsylvania authority that has been developed to evaluate whether a specific congressional redistricting plan is an unconstitutional partisan gerrymander under the Equal Protection Clause of the Pennsylvania Constitution." Recommended Conclusions of Law ("Conclusions") ¶ 49. The Commonwealth Court noted, however, that "[i]n *Vieth*, a majority of the United States Supreme Court Justices concluded that the test developed by the *Bandemer* plurality was misguided and unworkable." Conclusions ¶ 48. Even under *Erfer*, the Commonwealth Court concluded, "Petitioners . . . have failed to meet their burden of proving that the 2011 Plan, as a piece of legislation, clearly, plainly, and palpably violates the Pennsylvania Constitution. For the judiciary, this should be the end of the inquiry." Conclusions ¶ 64.

The harm to the Intervenors and their constitutional rights, as testified to in their affidavits and stipulated facts, would be immense, if the relief petitioners request were applied to the current election cycle. Intervenor Whitehead "believes that he will be harmed if the congressional district boundaries are changed before

the 2018 election because it could negate all of the activities that he has undertaken in connection with the 2018 congressional elections." Findings ¶ 472 (citing Ex. I-16 ¶¶ 18, 20). Intervenor Ryan "believes that at least some of her efforts will be lost if the congressional district boundaries are changed before the 2018 elections." Findings ¶ 473 (citing Ex. I-17 ¶¶ 5, 8–9, 23). Ryan also testified that she believes "that changing the Congressional Districts before or after the nomination petition circulation period would cause confusion among voters." Ex. I-17 ¶ 17. She believes "that there is not enough time to inform voters of a change in Congressional Districts before nomination petitions begin circulation." Ex. I-17 ¶ 21.

SUMMARY OF ARGUMENT

If relief is available for Petitioners' claims, it nonetheless cannot be granted immediately. Congressional campaigns start earlier than ever—often as soon as the day of the last congressional election—and congressional campaigns for 2018 are already well underway. Instead of challenging the 2011 Plan after it became law, Petitioners inexplicably waited three election cycles and almost seven years to bring their claims, even though the same information was available at the time the plan was enacted.

Now, Petitioners' requested relief cannot be granted without harming other Pennsylvania citizens. The Intervenors have already invested time, money, and

effort into the 2018 congressional campaigns in reliance on the existing districts. They have engaged in political activities protected by rights to free expression and association under the Pennsylvania Constitution. These rights grow in importance as the election cycle progresses. Granting Petitioners' requested relief by changing congressional districts at this point would wipe out Intervenors' protected activities to date and render meaningless their rights under the Pennsylvania Constitution.

This Court must follow the standard for relief in reapportionment cases in *Butcher v. Bloom*, 203 A.2d 556, 564 (Pa. 1964) ("Butcher I"). Petitioners have made no effort to show that their requested relief "can practically be effectuated" in time for the 2018 congressional elections. *Id.* Indeed, their requested relief cannot be granted in time. First, the General Assembly must be given a "reasonable" and "adequate" opportunity to correct an unconstitutional reapportionment plan, due to the separation-of-powers doctrine. Second, ordering new congressional districts would cause a "[s]erious disruption" in the 2018 elections. *Id.* at 568–69. No alternative to the statutorily required election schedule can be accomplished without imposing significant costs and logistical challenges on the Commonwealth—and more especially the counties—or risking voter confusion. Third, Petitioners' requested relief cannot be granted in time for the 2018 elections without harming the Intervenors' own free expression and association rights protected by the Pennsylvania Constitution. Finally, these

significant challenges to granting Petitioners' requested relief lend support for the proposition that Petitioners have not shown that this partisan gerrymandering claim under the Pennsylvania Constitution is justiciable. Thus, this Honorable Court should deny Petitioners' requested relief.

ARGUMENT

In reapportionment challenges, the Pennsylvania Supreme Court must determine whether Petitioners' relief "can practically be effectuated" in time for the next congressional election. *Id.* at 564.[1] The Intervenors have been working on the 2018 congressional elections since the day after the last congressional election held in November 2016. Because congressional terms are only two years in length, by necessity, the campaigns for Congress begin as soon as the last election occurs.

In contemplating a remedy in a reapportionment challenge, the Court must consider the "imminence" of the upcoming elections and the need to give the General Assembly "an opportunity to fashion a constitutionally valid reapportionment plan." *Id.* (internal quotation marks omitted) (quoting *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 655 (1964)). The Pennsylvania Supreme Court will

[1] Although *Butcher v. Bloom* concerns state legislative reapportionment, it was decided prior to the enactment of the 1968 Constitution. The 1968 Constitution vested the power to determine state legislative reapportionment in the Legislative Reapportionment Commission. Pa. Const. art. II, § 17. Thus, *Butcher* applies to congressional reapportionment today with as much force as it applied to state legislative reapportionment at the time it was decided.

not order a new reapportionment plan before the next election where "[s]erious disruption of orderly state election processes and basic governmental functions would result from immediate action by any judicial tribunal restraining or interfering with the normal operation of the election machinery at this date." *Id.* at 568–69.

Per the evidence submitted, the Intervenors have already invested considerable time, effort, and money to prepare for the upcoming election deadlines. *See* Ex. I-16 ¶ 18; Ex. I-17 ¶ 9. Educating voters of a change in congressional districts in time for the first election deadline—circulation of nomination petitions on February 13, 2018—would be a monumental task. Moreover, if the existing Congressional Districts are reconfigured for the 2018 elections, these candidates and activists will need to start over and direct their activities toward new voters and demographics, rendering meaningless all or a significant portion of their protected activities up to that date. Some current candidates may no longer live in the district. A last minute change in the congressional district will impair the ability of new candidates to come forward as they would be facing a very truncated campaign period. *See* Ex. I-16 ¶¶ 14–15. Even an extension of the election deadlines at this late date would severely disrupt the election process, which is already in full swing.

Simply stated, Petitioners have no right to relief in time for the 2018

elections. *First,* the General Assembly must be given an "adequate" and "reasonable" opportunity to correct an unconstitutional reapportionment plan, due to the separation-of-powers doctrine.

Second, ordering new congressional districts would cause a "[s]erious disruption" in the 2018 elections. No alternative to the statutorily required election schedule can be accomplished without imposing significant costs and logistical challenges on the Commonwealth—and more especially the counties—or risking voter confusion. The Commonwealth and the counties must prepare ballots not only for Congress. They are also responsible for administering elections for the Pennsylvania House of Representatives, half of the Pennsylvania Senate, the Pennsylvania Governor, and United States Senator in 2018.

Third, Petitioners are not the only parties in this litigation with rights at stake. Petitioners' requested relief cannot be granted in time for the 2018 elections without harming the Intervenors' own free expression and association rights protected by the Pennsylvania Constitution.

Finally, these challenges in granting Petitioners' requested relief lend support for the proposition that Petitioners have not shown that partisan gerrymandering claims under the Pennsylvania Constitution should be justiciable. Thus, this Honorable Court should deny Petitioners' requested relief.

I. The General Assembly must be given the first opportunity to correct congressional districts.

The General Assembly must be given the first opportunity to correct unconstitutional congressional districts. *First*, ordering new districts without giving the General Assembly an opportunity to correct the current plan would raise separation-of-powers concerns. *Second*, Petitioners have offered no evidence that the General Assembly would be unwilling to draw new congressional districts, notwithstanding its defense of the current plan. *Finally*, the General Assembly must be given an "adequate" and "reasonable" opportunity to pass a new plan.

A. A new reapportionment plan by court order—without giving the General Assembly a chance to pass a new plan—raises separation-of-powers concerns.

The United States Constitution vests the power to determine Pennsylvania's congressional districts in the Pennsylvania General Assembly. *Erfer v. Commonwealth*, 794 A.2d 325, 330–31 (Pa. 2002) (citing U.S. Const. art. I § 4) ("It is true that the U.S. Constitution has granted our legislature the power to craft congressional reapportionment plans."). The *Erfer* Court recognized that "reapportionment is 'the most political of legislative functions,' one not amenable to judicial control or correction save for the most egregious abuses of that power." *Id.* at 334 (quoting *Davis v. Bandemer*, 478 U.S. 109, 143 (1986) (plurality op.)). Accordingly, Pennsylvania Supreme Court precedent as early as *Butcher* and as recent as *Holt* makes clear that the General Assembly must be given an opportunity to correct an unconstitutional reapportionment plan. *Holt v. 2011 Legis.*

Reapportionment Comm'n, 67 A.3d 1211, 1243 (Pa. 2013) ("*Holt II*"); *Butcher I*, 203 A.2d at 568.

In *Butcher I*, the Pennsylvania Supreme Court allowed the General Assembly an opportunity to pass a reapportionment plan after the U.S. Supreme Court's seminal opinion in *Reynolds v. Sims*. In *Reynolds*, the U.S. Supreme Court announced for the first time the legal requirement under the Equal Protection Clause that state legislative districts must be "substantially equal" in population. *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). At the time, Pennsylvania did not apportion its districts with substantial equality in population. *Butcher I*, 203 A.2d at 564–68 (detailing "gross disparities" in Pennsylvania House and Senate district populations). To recognize a partisan gerrymandering challenge in this case at such a late date,[2] the Pennsylvania Supreme Court must now pronounce factors that did not exist and which the General Assembly was not required to consider at the time the 2011 Plan was enacted.

Importantly, *Butcher* is the rule, not the exception. When a federal three-judge panel determined that that the 2001 congressional reapportionment plan did not create congressional districts substantially equal in population, it ordered the General Assembly and the Governor to enact a new plan. *Vieth v. Pennsylvania*,

[2] After the 2011 Plan was enacted, no legal challenge was lodged against the Plan. In fact, three congressional election cycles have occurred using this Plan without objection. Now, when the Plan is at the end of its lifecycle, Petitioners' file their claim of unconstitutionality for the first time in almost seven years. Petitioners waited seven months after November 8, 2016 election to file their claim, thus ensuring that any relief that they sought would disrupt the election process.

195 F. Supp. 2d 672, 678–79 (M.D. Pa. 2002) (quoting *White v. Weiser*, 412 U.S. 783, 794–95 (1973) ("[R]eapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.")). Likewise, when state legislative districts are held contrary to law, the Pennsylvania Constitution provides that the remedy is a remand to the Legislative Reapportionment Commission. *Holt v. 2011 Legis. Reapportionment Comm'n*, 38 A.3d 711, 721, 756 (Pa. 2012) ("*Holt I*") (citing *Albert v. 2001 Legis. Reapportionment Comm'n*, 790 A.2d 989, 991 (Pa. 2002)). In neither case did a court immediately issue its own remedy. To do so now would be unprecedented and a violation of the separation-of-powers doctrine.

B. Petitioners have offered no evidence that the General Assembly would be unwilling to draw new congressional districts.

The General Assembly's defense of the 2011 Plan does not divest it of its authority or the opportunity to correct the congressional districts. In *Butcher I*, the Pennsylvania Supreme Court allowed the General Assembly an opportunity to pass a new reapportionment plan, noting that the General Assembly had made an "earnest"—yet ultimately unconstitutional—attempt to reapportion itself one year before. *Butcher I*, 203 A.2d at 568.

Rather, the issue is whether the General Assembly has demonstrated a

repeated unwillingness to implement a remedy. *Id.* at 559 & nn.6–7 (quoting *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 716 n.3 (1964)). Although the General Assembly defended this case, it has not "repeatedly refused" to reapportion Pennsylvania's congressional districts, as in *Lucas* where the Colorado General Assembly repeatedly refused to apportion its legislature to comply with the Colorado Constitution. *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 716 n.3 (1964).

Importantly, Petitioners have presented no evidence that the General Assembly would not be willing to consider and enact a new redistricting plan. *Vieth v. Pennsylvania*, 195 F. Supp. 2d at 678. In *Vieth v. Pennsylvania*, the federal three-judge panel gave the General Assembly an opportunity to pass a new redistricting plan when Pennsylvania had a Democratic Governor, Ed Rendell, while Republicans controlled both houses of the General Assembly, as is the case here.

C. The General Assembly must have a "reasonable" and "adequate" opportunity to pass a new reapportionment plan.

Petitioners argue that the General Assembly should be given two weeks to pass a new redistricting plan. Pet'rs' Opening Br. 74. They cite no authority. Courts have *never* allowed such a short period to pass a new reapportionment plan.

Rather, the appropriate test is a "reasonable" and "adequate" opportunity to pass a new reapportionment plan. *Vieth v. Pennsylvania*, 195 F. Supp. 2d at 678

("adequate opportunity"); *Butcher I*, 203 A.2d at 569 ("The Legislature should not be denied a reasonable opportunity to enact new reapportionment legislation."). In *Butcher*, the Pennsylvania Supreme Court gave the General Assembly almost a full year—from its September 29, 1964 opinion until a September 1, 1965 deadline—to pass a new plan. *Butcher I*, 203 A.2d at 573. Only after the General Assembly could not create an acceptable plan, did the Pennsylvania Supreme Court take affirmative action to remedy the constitutional violations by ordering new districts for the next congressional elections. *Butcher v. Bloom*, 216 A.2d 457, 459 (Pa. 1965) ("*Butcher II*"). Similarly, in *Holt*, the Supreme Court issued its order on January 25, 2012, and approved a new plan on May 8, 2013. *Holt II*, 67 A.3d at 1243. Although the *Vieth v. Pennsylvania* federal three-judge panel allowed the General Assembly only three weeks to pass a new reapportionment plan, the issue in *Vieth* was merely equalization of the population between congressional districts which required only minor adjustments to the existing plan and was certainly much less intensive than redrawing all of the statewide congressional districts using newly required factors for the first time. *Vieth v. Pennsylvania*, 195 F. Supp. 2d at 679. The instant case is clearly more like *Butcher* which involved the drawing of all new districts using recently created constitutional requirements.

In sum, this case has presented absolutely no reason why the General Assembly should not be given an opportunity to correct its reapportionment plan if

this Court concludes the same is warranted. If this Court orders Petitioners' relief, it should also recognize that the nature of the Court's directive is more akin to *Butcher* than *Vieth v. Pennsylvania*, and should allow the General Assembly more than three weeks to pass a completely new plan.

II. Reapportionment would cause "serious disruption" of the 2018 elections.

Petitioners have no right to relief in time for a particular election—especially after three congressional elections have occurred under the 2011 Plan with no challenge. In a reapportionment challenge, the Pennsylvania Supreme Court considers "whether the imminence of . . . primary and general elections requires the utilization of the apportionment scheme" that had been deemed unconstitutional. *Butcher I*, 203 A.2d at 568 (quoting *Lucas*, 377 U.S. at 739). The imminence factor is not separate from the need to give the General Assembly an opportunity to correct its reapportionment plan. Rather, the Pennsylvania Supreme Court considers the imminence of upcoming elections together with the need to give the General Assembly "an opportunity to fashion a constitutionally valid apportionment plan." *Id.* (quoting *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 655 (1964)). The Pennsylvania Supreme Court will not order a new plan before the next election where "[s]erious disruption of orderly state election processes and basic governmental functions would result from immediate action by any judicial tribunal restraining or interfering with the normal operation of the election

machinery at this date." *Id.* at 568–69.

A. No alternative to the statutorily required election deadlines can be accomplished without significant cost and logistical challenges to the Commonwealth—and more especially to the counties—or risking voter confusion.

Commissioner Marks offers several alternatives to hold the 2018 elections under new congressional districts, but none can be accomplished without significant impact and substantial cost. None can be accomplished without interference with the normal operation of the election machinery, at best, or serious disruption of orderly state election processes, at worst.

Deadlines for the 2018 primary and general elections are rapidly approaching. By statute, the Pennsylvania Election Code specifies the dates on which nomination petitions, including for congressional candidates, can begin circulation and when they must be filed. 25 Pa. C.S. § 2868. For the 2018 elections, the first day to circulate and file nomination petitions for a candidate for Congress is February 13, 2018. J. Stip. ¶ 131. Nomination petitions must be filed by March 6, 2018. J. Stip. ¶ 132. Remote military-overseas absentee ballots must be mailed by March 26, 2018. J. Stip. ¶ 135 (citing 25 Pa. C.S. § 3508(b)(1)). The 2018 general primary election is scheduled for May 15, 2018. J. Stip. ¶ 130 (citing 25 Pa. C.S. § 2753(a)).

These dates also trigger responsibilities for the counties. County boards of elections are responsible for providing ballots for primary and general

elections. 25 Pa. C.S. § 2961. The county boards must prepare and print ballots in the form provided by the Election Code. *Id.* §§ 2962–64. No later than forty days before an election, the county boards of elections must notify the county committees of each political party when and where voting machines may be inspected. *Id.* § 3011(c). But no later than fifty days prior to a primary, county boards are responsible for mailing absentee ballots to remote military-overseas ballots—hence the March 26, 2018 deadline above. *Id.* § 3146.5(a). In addition, county boards of elections must receive absentee ballot applications no earlier than fifty days prior to an election and no later than the Tuesday prior to the election. *Id.* § 3146.2a(a). Until the Friday prior to the election, challenges may be made to the county board's approval of absentee ballot applications. *Id.* § 3146.2b(b). Meanwhile, county boards must display primary and general election ballots starting the Thursday prior to the election. *Id.* § 2968.

Additionally, Pennsylvania is already slated to hold a special election for the 18th Congressional District on March 13, 2018. Findings ¶ 466. The special election will be held twenty-eight days after petitions begin to circulate for the election for the 18th Congressional District in November 2018. Findings ¶ 467. The campaign will take place during the circulation of nomination petitions for the primary election, and if the district lines are redrawn, the confusion that this would create amongst voters during an ongoing special election with different District

lines is unfathomable.

Turning to the options offered by Commissioner Marks, the first option—proceeding under the statutory election deadlines by ordering a new apportionment plan by January 23, 2018, Ex. EBD-2 ¶ 13—disregards the need to give the General Assembly an opportunity to pass a new reapportionment plan. The Pennsylvania Supreme Court ordered the Commonwealth Court to file findings of fact and conclusions of law in this case no later than December 31, 2017, and the Commonwealth Court complied. Order, *League of Women Voters of Pa. v. Commonwealth*, No. 159 MM 2017 (Pa. filed Nov. 9, 2017). A briefing schedule has been issued, and oral argument is scheduled for January 17, 2018. Even if this Honorable Court grants Petitioners' relief within days of argument, the General Assembly will have approximately only three weeks to prepare a new reapportionment plan under newly declared and imposed factors than it did to correct minor population variances in *Vieth*. *Vieth v. Pennsylvania*, 195 F. Supp. 2d at 679.

The next option, ordering a new plan by February 20, 2018, requires moving and shortening the nomination petition circulation period. Ex. EBD-2 ¶¶ 14–21. The Bureau of Commissions, Elections and Legislation takes three weeks to prepare for the circulation of nomination petitions. Ex. EBD-2 ¶¶ 12, 19. Commissioner Marks estimates that the Bureau could complete its preparation

within two weeks, but that would require an addition of staff and increased staff hours. Ex. EBD-2 ¶ 20. However, this option fails to take into consideration that proper circulation of nomination petitions—the first event of the 2018 election calendar—takes significant effort by state and county government, candidates, and voters. Nomination petitions for Congress must include at least one thousand (1,000) valid signatures of registered and enrolled members of the proper party. 25 Pa. C.S. § 2872.1(12). Candidates are well advised to obtain a number of signatures well over the required number to reduce the potential for objections to nomination petitions. *See In re Vodvarka*, 140 A.3d 639, 640–41 (Pa. 2016) (noting number of signatures challenged). Also not considered is the fact that circulation of nomination petitions occur during Pennsylvania's winter, which at times prevents circulators from securing signatures or the cancelling of signature drives or events on certain days due to adverse and harsh weather conditions.

Moreover, ordering new congressional districts before or around the nomination petition circulation period would cause confusion among voters. Ex. I-17 ¶ 17. Local political parties hold events to circulate nomination petitioners in February of an election year. Ex. I-17 ¶ 15. Voters have become familiar with congressional district boundaries and their congresspersons over the past three election cycles under the 2011 Plan. Ex. I-17 ¶ 20. It would take substantial amount of time to educate voters of a change in political and election process, such

as a change in congressional districts, similar to efforts to inform voters when their polling place changes at or near an election. Ex. I-17 ¶ 19. Changing congressional districts during the nomination petition circulation period could cause a higher risk that voters may sign a nomination petition for the wrong district. Ex. I-17 ¶ 18. A voter may sign a nomination petition for only one candidate per office. 25 Pa. C.S. § 2868. Thus, if a voter is moved to a new congressional district and signs a nomination petition for her old district, not only is her signature invalid, but she cannot sign a second petition in her new district either, thereby effectively eliminating her rights. This could increase the number of objections to nomination petitions, thus increasing the burden on the courts and further delaying the identity of candidates for the primary election ballots. An "'election' shall mean any general, municipal, special or primary election unless specified otherwise." *Id.* § 2602(f). We are on the very eve of a primary election.

Marks indicated that the third option would be for the Court to order new maps as late as April 2018, but the statutorily required primary election date must also be moved. Ex. EBD-2 ¶¶ 23–24; *see* 25 Pa. C.S. § 2753(a). Postponement of the primary in any manner would result in significant logistical challenges for county election administrators. Ex. EBD-2 ¶ 25.

More importantly, the cost would be doubled. According to Marks, a single primary in 2018 will cost approximately $20 million. If the Pennsylvania Supreme

Court orders a separate congressional primary, *each* statewide primary election will cost about $20 million. Ex. EBD-2 ¶ 27. For each primary, Pennsylvania's sixty-seven counties are only reimbursed a small portion of the costs which are associated with mailing absentee ballots to certain military and overseas civilian voters and bedridden or hospitalized veterans. Ex. EBD-2 ¶ 28. All other costs of the primary are shouldered by the counties. Ex. EBD-2 ¶ 28. These added costs and logistical challenges borne by state and county government constitute serious disruption of orderly state election processes and an inordinate expense for the individual taxpayer who ultimately carries the burden. Petitioners fail to acknowledge the above-mentioned real impacts, but instead look solely and mechanically at dates on a calendar in defending their requested relief.

Of course, the special election in the 18th Congressional District will also impose additional significant costs on the affected counties. Yet changing the congressional district lines before the nomination petition circulation period would cause disruption and chaos for the subsequent special election under the current district lines. The disruption and chaos would not only impact the candidates campaigning in the current 18th District, but also totally confuse voters already considering their candidates during the nomination petition circulation period in a new 18th District.

Petitioners argue that *Butcher*—even though it unmistakably provides the

rules for a remedy in a reapportionment case—is inapposite because it was decided later in an election cycle. Pet'rs' Mem. of Law in Supp. of Mot. in Limine to Exclude Intervenor Witness Testimony ("Pet'rs' Mot. in Limine") 7 n.1. As previously noted, Pennsylvania law defines "election" to include primary elections. 25 Pa. C.S. § 2602(f). A primary election is no less an election under Pennsylvania law. We are on the eve of the 2018 primary election, as *Butcher I* was decided on the eve of the 1964 general election.

More recently, *Holt I* was decided January 25, 2012, similar to this case in this election cycle. Without knowing when the Legislative Reapportionment Commission would adopt a new state legislative reapportionment plan, the Court recognized the need for the previous decade's unconstitutional reapportionment plan to remain in effect for the 2012 elections to avoid a disruption of the voting process. *Holt I*, 38 A.2d at 721. In fact, the Pennsylvania Supreme Court's opinion never considered disrupting the state election processes or interfering with the normal operation of election machinery as an option.

More importantly, even though *Butcher I* was decided later in the cycle for a general election, the Pennsylvania Supreme Court nevertheless allowed the General Assembly nearly a full calendar year to adopt a new reapportionment plan to comply with the newly announced requirement of substantial equality in population. *Butcher I*, 203 A.2d at 573. That deadline pushed a new

reapportionment plan well past the next scheduled election, and the same amount of time in this case would also push a new reapportionment plan past the 2018 election. In exercising its authority to determine congressional districts, the General Assembly may need to hold hearings to inform a new reapportionment plan based on new requirements as a result of this case. *See* J. Stip. ¶ 38 (noting three reapportionment hearings over thirty-three days).

B. An outdated map may be used for the next congressional election.

At various points, Petitioners have also argued that Intervenors have no right to delay a remedy for a constitutional violation. They have argued, for example, that *Pap's A.M. v. City of Erie* stands for the proposition that "the fundamental rights guaranteed by the Pennsylvania Declaration of Rights 'cannot be lawfully infringed, even momentarily.'" *E.g.*, Pet'rs' Br. in Opp. to Application to Stay Case Pending the U.S. Supreme Court's Ruling in *Gill v. Whitford* 3–4 (internal quotation marks omitted) (quoting *Pap's A.M. v. City of Erie*, 812 A.2d 591, 607 (Pa. 2002)).

But a reapportionment challenge is different. In response to challenges that the *Holt I* Court committed an Equal Protection violation by using the previous reapportionment plan for the 2012 elections, courts have repeatedly held that "no constitutional violation exists when an outdated legislative map is used, so long as the defendants comply with a reasonably conceived plan for periodic

reapportionment." *Garcia v. 2011 Legis. Reapportionment Comm'n*, 938 F. Supp. 2d 542, 550 (E.D. Pa. 2013) (quoting *Reynolds v. Sims*, 377 U.S. at 583–84); *see also Pileggi v. Aichele*, 843 F. Supp. 2d 584, 592–95 (E.D. Pa. 2012) (denying injunction against use of 2001 plan for the 2012 elections).

Nor does delaying implementation of a new reapportionment plan mean that "no relief from unconstitutional districts – even because of unequal population or racial discrimination – would ever be available." Pet'rs' Mot. in Limine 8–9. Petitioners mischaracterize Intervenors' position. If the Pennsylvania Supreme Court finds that constitutional violations exist, but a remedy would disrupt the orderly state election process, Intervenors do not contend that a remedy cannot be implemented—only that the remedy should be implemented for the next election cycle. When the *Butcher* Court held that the 1964 elections must continue under unconstitutional districts, it added, "Under no circumstances . . . may the 1966 election of members of the Pennsylvania Legislature be conducted pursuant to a constitutionally invalid plan." *Butcher I*, 203 A.2d at 569. Likewise, in *Holt*, the Pennsylvania Supreme Court ultimately approved a new plan on May 8, 2013, "which shall hereby have the force of law, beginning with the 2014 election cycle." *Holt II*, 67 A.3d at 1243.

For 2018, however, implementing a new congressional map will cause voter confusion, force election administrators to act outside statutorily required

deadlines, and impose added costs to state and county government and ultimately the taxpayers. In other words, a new reapportionment plan will disrupt orderly state election processes and interfere with the normal operation of the election machinery. Thus, the Pennsylvania Supreme Court should end the uncertainty caused by this litigation and allow the 2018 elections to proceed under the existing reapportionment plan.

III. Petitioners' requested relief cannot be granted without harming the Intervenors.

Petitioners are not the only parties with rights at stake in this litigation. Intervenors—candidates for office, County Committee Chairs and members, and active volunteers, all of whom are consistent Pennsylvania voters—sought intervention in this case to protect their legally enforceable interests. Their rights to vote, to express political opinions, to work to elect candidates of choice, and to run for political office are core free expression and free assembly rights—like the free speech and free association rights claimed by Petitioners in this case. Pa. Const. art. I §§ 7, 20; *see also Working Families Party v. Commonwealth*, 169 A.3d 1247, 1261 (Pa. Commw. 2017) (quoting *In re Street*, 451 A.2d 427, 432 (Pa. 1982) (internal quotation marks omitted) (emphasis added) ("While *the right to associate for the advancement of political beliefs includes the right to advance a candidate who represents those interests*, . . . the right of association does not encompass the right to nominate as a candidate a particular individual who fails to

meet reasonable eligibility requirements . . . ."). For that reason, the Commonwealth Court granted intervention. Order (Nov. 13, 2017) ¶ 1.

A. *Butcher* does require balancing Petitioners' interests.

Through the *Butcher* case, the Pennsylvania Supreme Court has already balanced the rights at stake in a reapportionment challenge. In determining the timing of a remedy, the *Butcher* Court weighed several factors involving parties' rights and practical reality. On one hand, it considered the "imminence" of the upcoming elections and the need to give the Legislature "an opportunity to fashion a constitutionally valid reapportionment plan." *Butcher I*, 203 A.2d at 568 (internal quotation marks omitted) (quoting *WMCA*, 377 U.S. at 655). On the other hand, it weighed whether "appellants' right to cast adequately weighted votes for members of the State Legislature can practically be effectuated in 1964." *Id.* at 568 (internal quotation marks omitted) (quoting *Lucas*, 377 U.S. at 739).

Accordingly, Petitioners' right to relief is balanced against the practical reality of implementing relief. The Pennsylvania Supreme Court should include the impact of relief on the Intervenors' constitutional rights as it weighs whether to implement relief in time for the 2018 congressional elections. As explained above, Intervenors' election activities are core expression and assembly rights. Petitioners' relief cannot be granted without harming these rights—by wiping away their protected activities to date. Thus, the Pennsylvania Supreme Court can

and should consider the impact of Petitioners' relief on all Pennsylvanians.

Granting Petitioners' requested relief at this point in the 2018 election cycle would without question have a detrimental impact on the Intervenors. Campaigns for Congress begin as soon as the last campaign for that office ends. J. Stip. ¶ 199; Ex. I-16 ¶ 5; Ex. I-17 ¶ 6. Campaigns must start campaigning, fundraising, recruiting volunteers, and hiring a campaign team right away and not wait for the start of the election year, or else they face the possibility of being unprepared or less prepared than another candidate. Ex. I-16 ¶ 14 (explaining how a primary challenger "starts at a disadvantage because he must raise money and name identification and he does not have the advantage of incumbency"); Ex. I-17 ¶ 7. For example, Intervenor witness Thomas Whitehead has been performing his duties and responsibilities as Chair of the Monroe County Republican Committee in connection with the 2018 election since November 2016. Ex. I-16 ¶ 5. Intervenor witness Carol Lynne Ryan took part in her first campaign activity for the 2018 elections in December 2016. Ex. I-17 ¶ 8. Both have engaged in campaign activities regularly since then, including recruiting candidates, registering voters, planning and inviting candidates to events, fundraising, and recruiting donors and volunteers. Ex. I-16 ¶¶ 6, 8–10, 20; Ex. I-17 ¶ 9. These Intervenors have already invested time, money, and effort into congressional campaigns.

Pennsylvanians involved in campaigns for Congress engage in activities in reliance on congressional district boundaries. J. Stip. ¶ 201. Congressional district boundaries affect activities such as: recruiting candidates, volunteers, and donors; organizing grassroots activities; constructing public political communications in support of congressional candidates; and allocating campaigning activities and County Committee resources amongst other candidates on the ballot. Ex. I-16 ¶ 17; Ex-17 ¶ 9. A candidate decides whether to run for office based on whether she is demographically or geographically viable within a particular district. If the district changes, a candidate may no longer be viable. Ex. I-16 ¶ 15.

Granting Petitioners' relief would harm Pennsylvanians of all political parties who have already invested time, money, and effort into political campaigns in reliance on the existing districts. With one order, the Pennsylvania Supreme Court could render meaningless all the activities protected by the Free Expression and Free Assembly Clauses that Intervenors have engaged in to date. Ex. I-16 ¶ 18; Ex. I-17 ¶ 27. While relief would benefit the Petitioners, it would directly harm other Pennsylvanians. Intervenors certainly do not have rights to win elections or to delay relief indefinitely; however, the Pennsylvania Supreme Court also does not need to participate in Petitioners' fire drill and order relief immediately before the 2018 elections when the relief requested would clearly harm other Pennsylvanians.

B. The Intervenors' legally protected interests are relevant to this case.

Petitioners have also asserted that Intervenors have no relevant rights at stake in this litigation because "[i]t is the right to vote and the right to have one's vote counted that is the subject matter of a reapportionment challenge." Pet'rs' Mot. in Limine at 6; *see also Erfer*, 794 A.2d at 330; *Albert*, 790 A.2d at 994–95. Petitioners take the Pennsylvania Supreme Court's pronouncement, made in the context of associational standing, out of context. In *Erfer*, the Supreme Court held that the Pennsylvania State Democratic Committee lacked standing to pursue a reapportionment challenge because the Committee "does not have the right, in and of itself, to vote." *Erfer*, 794 A.2d at 330. Likewise, in *Albert*, the Supreme Court had previously denied standing to a number of organizations, not individuals: the Lehigh Valley Coalition for Fair Reapportionment, the Board of Commissioners of the Township of Lower Merion, the Chairs of the Lower Merion Republican and Democratic Committees in their *representative* capacities, the Neighborhood Club of Bala Cynwyd, the Board of Commissioners of Radnor Township and the League of Women Voters of Radnor Township, and the North Hills School District and the Township of Ross. *Albert*, 790 A.2d at 994. In no case have Pennsylvania courts denied standing to persons in their individual capacities who exercise their right to vote, as is the case for the Intervenors.

No party has challenged that the Intervenors are consistent Pennsylvania

voters—just like Petitioners. *Compare* Finding ¶ 45 *with* Finding ¶¶ 23–24. In fact, if the right to vote and the right to have one's vote counted are the only rights protected in a reapportionment challenge, then Petitioners themselves lack standing to bring their own claims. No Petitioner has been prevented from voting or has presented any evidence that his or her vote was not counted. Findings ¶¶ 22–26. Surely Petitioners' position on the Intervenors' interests is overbroad. If Petitioners were correct, there are no legally enforceable interests a party could assert in a reapportionment challenge if the party has not been denied outright the right to vote. Moreover, Petitioners also claim the same rights as the Intervenors. Petitioners make free speech and free association claims. These are the same legally enforceable interests claimed by the Intervenors.

Pennsylvania Democrats are already engaged in protected political activities to contest vigorously the same seats that Petitioners claim they cannot win. For example, five Democratic candidates have registered with the Federal Election Commission to run in the 7th District in 2018. Findings ¶ 462. Four Democratic candidates have registered with the Federal Election Commission to run in the 12th District. Findings ¶ 463. Similarly, Democratic candidate Chrissy Houlahan has raised $810,649.55 in her campaign for the 6th District in 2018. Findings ¶ 464. One Democratic candidate has raised over $100,000 to challenge an incumbent in the 16th District. Findings ¶ 465.

Petitioners are concerned about weighing their rights against the Intervenors. But Intervenors intervened only to protect their legally enforceable interests. Petitioners do not want this Honorable Court to consider the effect of their requested relief on other Pennsylvanians. By contrast, the Intervenors want everyone to be heard.

C. Petitioners have delayed in bringing their case.

Every ten years after the Census is conducted, Pennsylvanians are aware that new congressional districts may be drawn; however, once a Plan is enacted and no legal challenge ensues, Pennsylvanians have a valid expectation that the congressional districts will not be changed mid-Plan. With the 2018 election process already underway, Pennsylvanians had no reason to expect the congressional district lines would be redrawn between the 2016 and the 2018 elections. J. Stip. ¶ 202.

Instead of challenging the 2011 Plan after it became law, Petitioners waited three election cycles and almost seven years to bring their claims. Ex. I-16 ¶ 23; Ex. I-17 ¶ 26. In other redistricting cases—*Erfer* and *Holt*, for example—plaintiffs filed actions before the first elections under the new plan were held. The Pennsylvania Supreme Court has criticized delay, which limits court review of a reapportionment plan before the next election. *Holt I*, 38 A.3d at 721–22.

Petitioners offer no reason for their delay. The 2011 Plan became law on

December 22, 2011. J. Stip. ¶ 60. Even their experts relied on data which existed and was available before the plan became law. For example, Dr. Chen used 2008 and 2010 election data in his simulations "because they were the statewide elections held in the two main election years . . . that were available to the General Assembly when it drew its 2011 map." Tr. 189:20–24.

Delay was also occasioned by the way Petitioners chose to bring their action. Petitioners chose to file a Petition for Review in Commonwealth Court on June 15, 2017. If they had wanted to accelerate the case, Petitioners had other choices. They could have filed for King's Bench directly with this Honorable Court with no case pending in the lower courts. *See Commonwealth v. Williams*, 129 A.3d 1199, 1206 (Pa. 2015) (citing 42 Pa. C.S. § 502). They could have filed a motion for summary relief on their pending Petition for Review before the Commonwealth Court. *See* Pa. R.A.P. 1532(b). However, Petitioners did not avail themselves of any of those expedited options. Instead, Petitioners waited until October 11, 2017 to file an Application for Extraordinary Review.

The Intervenors should not be punished by forfeiting their constitutional rights because Petitioners waited to bring their claims. The Intervenors have already invested time, money, and effort into the 2018 congressional elections, in reliance on the existing congressional districts, which are presumed to be constitutional. This Honorable Court cannot grant Petitioners' relief in time for the

2018 elections without substantially harming the Intervenors. Thus, relief should not take effect for the 2018 elections.

IV. The difficulties surrounding relief support a conclusion that Petitioners have not shown that this partisan gerrymandering claim is justiciable.

Granting relief in the middle of an election cycle and at the end of a Plan's lifecycle raises a number of concerns. Relief before the 2018 elections would (1) impose significant costs and logistical challenges on the Commonwealth, the counties, and the taxpayers; (2) confuse voters; and (3) harm Pennsylvanians who have already been working toward the 2018 congressional elections. These concerns add to the dangers of courts adjudicating partisan gerrymandering claims.

Erfer was the last partisan gerrymandering case challenging Pennsylvania's congressional districts decided by this Honorable Court. *Erfer*, decided in 2002, predates the U.S. Supreme Court's disposition of *Vieth v. Jubelirer*, 541 U.S. 267 (2004). In *Vieth v. Jubelirer*, a plurality of the U.S. Supreme Court concluded that *Bandemer* should be overruled and that partisan gerrymandering claims are nonjusticiable under federal law. *Vieth*, 541 U.S. at 306 (plurality op.). A majority of the justices agreed that the *Bandemer* standard was "misguided and unworkable." Conclusions ¶ 48 (citing *Vieth*, 541 U.S. at 283–84 (plurality op.); and *id.* at 307–08 (Kennedy, J., concurring)). No case has presented itself for this Honorable Court to address the impact of the *Vieth* plurality's criticism of

Bandemer on Pennsylvania's partisan gerrymandering jurisprudence. *See id.* at 282–84 (detailing criticism of *Bandemer*).

Like the *Vieth* plurality, this Honorable Court should conclude that Petitioners have not shown that partisan gerrymandering claims are justiciable. For partisan gerrymandering claims to be justiciable, there must be judicially discoverable and manageable standards. *Cf. William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414, 446 & n.46 (Pa. 2017) (quoting *Nixon v. United States*, 506 U.S. 224, 228–29 (1993)). The *Vieth* plurality concluded that standards for partisan gerrymandering claims are unmanageable. *Vieth*, 541 U.S. at 282 (plurality op.). Courts have struggled to interpret and apply an effects test in the specific context of partisan gerrymandering. *Id.* at 282–83. Indeed, the Commonwealth Court in this case concluded that, "[w]hile Petitioners characterize the level of partisanship evident in the 2011 Plan as 'excessive' and 'unfair,' Petitioners have not articulated a judicially manageable standard by which this Court can discern whether the 2011 Plan crosses the line between permissible partisan considerations and unconstitutional partisan gerrymandering under the Pennsylvania Constitution." Conclusions ¶ 61.

Accordingly, concerns remain that standards will not be applied consistently and partisan gerrymandering claims will be treated differently from case-to-case and judge-to-judge. This is especially so where a remedy will necessarily impact

other people. In this case, Petitioners' requested relief will harm the Intervenors.

In addition, the U.S. Supreme Court's consideration of *Gill v. Whitford* could also impact Pennsylvania jurisprudence. The interplay between state and federal constitutional requirements resulting from the *Gill* decision could impact this case in two ways. First, *Gill* could impose requirements as a matter of federal law that necessarily cabin what Pennsylvania partisan gerrymandering law can or cannot do. Second, because the *Bandemer* plurality offered persuasive value to this Honorable Court for the standard for a *prima facie* partisan gerrymandering claim, so too could this Honorable Court be persuaded by the rationales in *Vieth* and in *Gill.* If *Gill* holds that partisan gerrymandering claims are nonjusticiable under federal law, then this Honorable Court's reliance on *Bandemer* would be undermined. This Honorable Court would have to locate independent grounds in the Pennsylvania Constitution to provide relief for a partisan gerrymandering claim—a task made more difficult by the presence of standards for state legislative districts, which specifically do not cover congressional districts. *See* Pa. Const. art. II § 16. Thus, even if this Honorable Court ultimately maintains the *Bandemer* standard under independent Pennsylvania law, it must nevertheless address the *Gill* ruling.

If Pennsylvania courts grant Petitioners' requested relief before *Gill*, they face the possibility of ordering Pennsylvania's congressional districts be

redistricted not once but *twice*—first in light of Pennsylvania's existing law, and second to comply with new U.S. Supreme Court pronouncements in *Gill* which impact state law.

The possibility of multiple redistricting before the 2020 census is especially concerning to Intervenors, who need certainty in district boundaries to effectively carry out their political activities by directing those activities to the correct eligible voters. Multiple redistricting would result in the unbelievable and extremely burdensome need to prepare for the 2018 elections under a third iteration of maps. Uncertainty abounds. However, what is not uncertain is that interference with the current Plan at this stage, and with key cases pending before the United States Supreme Court, will wreak havoc upon the 2018 congressional elections and diminish—if not decimate—the rights of Intervenors.

Therefore, the Pennsylvania Supreme Court should conclude that Petitioners have not shown that this partisan gerrymandering claim is justiciable. If recourse is required, then the General Assembly should decide "'the most political of legislative functions,' one not amenable to judicial control or correction save for the most egregious abuses of that power." *Erfer*, 794 A.2d at 334 (quoting *Bandemer*, 478 U.S. at 143).

CONCLUSION AND RELIEF REQUESTED

WHEREFORE, Intervenors respectfully request that this Honorable Court

deny the Petition for Review, or, in the alternative, direct implementation of relief after the 2018 congressional elections.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD COUNT

The undersigned certifies that the preceding Brief contains 10,307 words and complies with the word count limitations set forth in Pa. R.A.P. 2135(a)(1) in that it does not exceed 14,000 words based on the word processing system used to prepare the brief.

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Date: January 10, 2018

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

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

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

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