Received 1/10/2018 2:56:20 PM Supreme Court Middle District

Filed 1/10/2018 2:56:00 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.

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

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

Thomas P. Howell, Deputy General Counsel (ID No. 079527)
Office of General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17101
Tel: (717) 783-6563

Timothy E. Gates,
Chief Counsel (ID No. 202305)
Kathleen M. Kotula, Deputy Chief Counsel (ID No. 318947)
Ian B. Everhart, Assistant Counsel (ID No. 318947)
Pennsylvania Department of State
Office of Chief Counsel
306 North Office Building
Harrisburg, PA 17120
Tel: (717) 783-0736

Mark A. Aronchick (ID No. 20261)
Michele D. Hangley (ID No. 82779)
Claudia De Palma (ID No. 320136)
Ashton R. Lattimore (*pro hac vice*)
HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER
One Logan Square, 27th Floor
Philadelphia, PA 19103
(215) 568-6200

Counsel for Respondents

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INTRODUCTION

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

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

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

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

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

SUMMARY OF ARGUMENT

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

> Some unanswered questions that arise based on Petitioners' presentation include: (1) what is a constitutionally permissible efficiency gap; (2) how many districts must be competitive in order for a plan to pass constitutional muster (realizing that a competitive district would result in a skewed efficiency gap); (3) how is a "competitive" district defined; (4) how is a "fair" district defined; and (5) must a plan guarantee a minimum number of congressional seats in favor of one party or another to be constitutional.

(COL ¶61 n.24.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Petitioners' Injuries Establish Concrete Harms

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

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

II. The Remedy

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

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

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

A. The 2018 Election Schedule

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

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

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

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

B. The Process for Creating a New Plan

If this Court finds that the 2011 Plan is unconstitutional, the Court has the authority to issue deadlines by which the General Assembly must enact a new congressional redistricting plan conforming to the criteria set forth by the Court, the Governor must sign that plan, and the General Assembly must submit the new plan to the Court for review and approval. *See, e.g., Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 679 (M.D. Pa. 2002).

The Executive Branch Respondents submit that it would be reasonable to allow the General Assembly and the Governor three weeks to accomplish these tasks. See, *e.g., Vieth v. Pennsylvania*, 241 F. Supp. 2d 478, 480 (M.D. Pa. 2003), *aff'd sub nom. Vieth v. Jubelirer*, 541 U.S. 267 (2004) (noting the General Assembly's successful enactment of a revised congressional districting plan within 10 days of the court's order to remedy the existing map).

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

In the course of enacting a new Plan, the General Assembly may also amend the Pennsylvania Election Code to make any necessary changes to the current election schedule, including those changes discussed above. *See* Pa. Const. Art. II, § 1 and Art. III. In the alternative, the Court has the power to order changes to the current election schedule, without the General Assembly's involvement. *See, e.g., Holt*, 38 A.3d at 761; *In re 1991 Pennsylvania Legislative Reapportionment Comm'n*, 609 A.2d 132, 134 (Pa. 1992).

If the General Assembly fails to pass a plan that the Governor can sign and submit to the Court by the Court's deadline, or if the Court finds that the submitted plan is unconstitutional, the Court, upon consideration of evidence submitted by the parties, should assume the responsibility for drafting a new plan. *See, e.g., League of Women Voters of Florida v. Detzner*, 179 So. 3d 258 (Fla. 2015). At any point, the Court may appoint a special master to assist the Court by, *inter alia*, helping the Court evaluate any plan enacted by the General Assembly, proposing alternative plans, and otherwise providing recommendations and guidance. *See, e.g., In re 2012 Legislative Districting*, 80 A.3d 1073 (Md. 2013).

CONCLUSION

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

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

Respectfully submitted,

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER

Dated: January 10, 2018

Mark A. Aronchick (ID No. 20261)
Michele D. Hangley (ID No. 82779)
Claudia De Palma (ID No. 320136)
Ashton R. Lattimore (*pro hac vice*)
One Logan Square, 27th Floor
Philadelphia, PA 19103
Tel: (215) 568-6200
Fax: (215) 568-0300
maa@hangley.com
mdh@hangley.com
cdp@hangley.com
arl@hangley.com

Attorneys for Respondents Governor Thomas W. Wolf, Acting Secretary of the Commonwealth Robert Torres, and Commissioner Jonathan Marks

Thomas P. Howell (ID No. 079527)
Office of General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17101
Tel: (717) 783-6563
Fax: (717) 787-1788
thowell@pa.gov
Attorney for Governor Wolf

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

Respectfully submitted,

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER

Dated: January 10, 2018

/s/ Mark A. Aronchick
Mark A. Aronchick (ID No. 20261)
Michele D. Hangley (ID No. 82779)
Claudia De Palma (ID No. 320136)
Ashton R. Lattimore (*pro hac vice*)
One Logan Square, 27th Floor
Philadelphia, PA 19103
Tel: (215) 568-6200
Fax: (215) 568-0300
maa@hangley.com
mdh@hangley.com
cdp@hangley.com
arl@hangley.com
Attorneys for Respondents Governor Thomas W. Wolf, Acting Secretary of the Commonwealth Robert Torres, and Commissioner Jonathan Marks

Thomas P. Howell (ID No. 079527)
Office of General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17101
Tel: (717) 783-6563
Fax: (717) 787-1788
thowell@pa.gov
Attorney for Governor Wolf

/s/ Timothy E. Gates

Timothy E. Gates (ID No. 202305)
Kathleen M. Kotula (ID No. 86321)
Ian B. Everhart (ID No. 318947)
Pennsylvania Department of State
Office of Chief Counsel
306 North Office Building
Harrisburg, PA 17120
Tel: (717) 783-0736
tgates@pa.gov
kkotula@pa.gov
ieverhart@pa.gov
Attorneys for Acting Secretary Torres and Commissioner Marks

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Respectfully submitted,

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER

Dated: January 10, 2018

/s/ Mark A. Aronchick

Mark A. Aronchick (ID No. 20261)
Michele D. Hangley (ID No. 82779)
Claudia De Palma (ID No. 320136)
Ashton R. Lattimore (*pro hac vice*)
One Logan Square, 27th Floor
Philadelphia, PA 19103
Tel: (215) 568-6200
Fax: (215) 568-0300
maa@hangley.com
mdh@hangley.com
cdp@hangley.com
arl@hangley.com

Attorneys for Respondents Governor Thomas W. Wolf, Acting Secretary of the Commonwealth Robert Torres, and Commissioner Jonathan Marks

Thomas P. Howell (ID No. 079527)
Office of General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17101
Tel: (717) 783-6563
Fax: (717) 787-1788
thowell@pa.gov
Attorney for Governor Wolf

Timothy E. Gates (ID No. 202305)
Kathleen M. Kotula (ID No. 86321)
Ian B. Everhart (ID No. 318947)

Pennsylvania Department of State
Office of Chief Counsel
306 North Office Building
Harrisburg, PA 17120
Tel: (717) 783-0736
tgates@pa.gov
kkotula@pa.gov
ieverhart@pa.gov
Attorneys for Acting Secretary Torres and Commissioner Marks

CERTIFICATION

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

Electronic version. The electronic version of this brief that has been provided to the Court in .pdf format in an electronic medium today is an accurate and complete representation of the paper original of the document that is being filed by Respondents Governor Thomas W. Wolf, Acting Secretary Robert Torres, and Commissioner Jonathan Marks.

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

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

Service. I am this day serving this Brief in the manner indicated below, which service satisfies the requirements of Pennsylvania Rule of Appellate Procedure 121:

VIA eService

Mary M. McKenzie
Michael Churchill
Benjamin D. Geffen
George A. Donnelly, IV
Daniel Urevick-Ackelsberg
THE PUBLIC INTEREST LAW CENTER
1709 Benjamin Franklin Parkway, 2nd Flr.
Philadelphia, PA 19103
Tel: (215) 627-7100
Email: mchurchill@pubintlaw.org;
bgeffen@pubintlaw.org;
mmckenzie@pubintlaw.org;
George.a.donnelly@gmail.com;
dackelsberg@pubintlaw.org
Counsel for Petitioners

Kathleen A. Gallagher
Carolyn Batz McGee
Russell D. Giancola
Jason R. McLean
CIPRIANI & WERNER, P.C.
650 Washington Road, Suite 700
Pittsburgh, PA 15228
Tel: (412) 563-2500
Fax: (412) 563-2080
Email: kgallagher@c-wlaw.com;
cmcgee@c-wlaw.com
rgiancola@c-wlaw.com
jrmclean@c-wlaw.com
Counsel for Michael C. Turzai

Michael R. Abbott
CIPRIANI & WERNER, P.C.
450 Sentry Pkwy, Suite 200
Blue Bell, PA 19422
Tel: (215) 518-1054
Email: Mabbott@c-wlaw.com
Counsel for Michael C. Turzai

Brian S. Paszamant
Michael D. Silberfarb
Jason A. Snyderman
John P. Wixted
BLANK ROME LLP
One Logan Square
130 North 18th Street
Philadelphia, PA 19103
Tel: (215) 569-5791
Fax: (215) 569-5555
Email: paszamant@blankrome.com;
snyderman@blankrome.com;
jwixted@blankrome.com;
msilberfarb@blankrome.com
Counsel for Joseph B. Scarnati, III

Alex M. Lacey
Clifford B. Levine
Alice B. Mitinger
COHEN & GRIGSBY, P.C.
625 Liberty Avenue, 5th Floor
Pittsburgh, PA 15222
Tel: (412) 297-4642
Fax: (412) 209-0672
Email: alacey@cohenlaw.com;
clevine@cohenlaw.com;
amitinger@cohenlaw.com
Counsel for Michael J. Stack III

Lawrence J. Tabas
Rebecca L. Warren
OBERMAYER REBMANN MAXWELL & HIPPEL LLP
Center Square West
1500 Market Street, Suite 3400
Philadelphia, PA 19102
Tel: (215) 665-3158
Fax: (215) 665-3165

Email: lawrence.tabas@obermayer.com;
rebecca.warren@obermayer.com;
timothy.ford@obermayer.com
Counsel for Republican Intervenors

Karl S. Myers
STRADLEY RONON STEVENS & YOUNG, LLP
2600 One Commerce Square
Philadelphia, PA 19103
Tel: (215) 564-8000
Fax: (215) 564-8120
Email: kmyers@stradley.com
Counsel for Pennsylvania General Assembly

Matthew H. Haverstick
Mark Seiberling
Joshua Voss
Kleinbard LLC
1650 Market. St., 46th Floor
Philadelphia, PA 19103
Tel: (215) 496-7225
Email: mhaverstick@kleinbard.com
mseiberling@kleinbard.com
jvoss@kleinbard.com
Counsel for Joseph B. Scarnati, III

VIA First-Class Mail, Postage Prepaid

Jason Torchinsky
Shawn Sheehy
Holtzman Vogel Josefiak Torchinsky Pllc
45 North Hill Drive, Suite 100
Warrenton, VA 20186
Tel: (540) 341-8808
Fax: (540) 341-8809
Email: jssheehy@hvjt.law
pgordon@hvjt.law
Counsel for Michael C. Turzai and Joseph B. Scarnati, III

John E. Hall
CIPRIANI & WERNER, P.C.
650 Washington Road, Suite 700
Pittsburgh, PA 15228
Tel: (412) 563-2500
Fax: (412) 563-2080
Email: jhall@c-wlaw.com
Counsel for Michael C. Turzai

Patrick T. Lewis
BAKER & HOSTETLER LLP
Key Tower, 127 Public Square

Lazar M. Palnick
1216 Heberton Street
Pittsburgh, PA 15206
Tel: (412) 661-3633
Email: lazarp@earthlink.net
Counsel for Michael J. Stack III

Jonathan F. Bloom
Kyle A. Jacobsen
STRADLEY RONON STEVENS & YOUNG, LLP
2600 One Commerce Square
Philadelphia, PA 19103
Tel: (215) 564-8000
Fax: (215) 564-8120
Email: jbloom@stradley.com
kjacobsen@stradley.com
Counsel for Pennsylvania General Assembly

Bruce M. Gorman
Daniel S. Morris
BLANK ROME LLP
301 Carnegie Center, 3rd Fl
Princeton, NJ 08540
Tel: (609) 750-2642
Fax: (609) 897-7283

Cleveland, OH 44114
Tel: (216) 861-7096
Fax: (216) 696-0740
Email: plewis@bakerlaw.com
Counsel for Michael C. Turzai

Robert J. Tucker
BAKER & HOSTETLER LLP
200 Civic Center Drive, Suite 1200
Columbus, OH 43215
Tel: (614) 462-2680
Fax: (614) 462-2616
Email: rtucker@bakerlaw.com
Counsel for Michael C. Turzai

David P. Gersch
John A. Freedman
R. Stanton Jones
Helen Mayer Clark
Daniel F. Jacobson
John Robinson
Elisabeth S. Theodore
Lindsey D. Carson
John D. Cella
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001-3743
Tel: (202) 942-5000
Fax: (202) 942-5999
Email: david.gersch@apks.com;
john.freedman@apks.com;
stanton.jones@apks.com;
helen.clark@apks.com;
daniel.jacobson@apks.com;
john.robinson@apks.com;
elisabeth.theodore@apks.com
lindsey.carson@apks.com
john.cella@apks.com
Counsel for Petitioners

Email: Gorman@blankrome.com;
morris-d@blankrome.com
Counsel for Joseph B. Scarnati, III

Huaou Yan
BLANK ROME LLP
One Logan Square
130 North 18th Street
Philadelphia, PA 19103
Tel: (215) 569-5449
Fax: (215) 569-5555
Email: HYan@blankrome.com
Counsel for Joseph B. Scarnati, III

Andrew D. Bergman
ARNOLD & PORTER KAYE SCHOLER LLP
700 Louisiana Street, Suite 4000
Houston, TX 77002
Tel: (713) 576-2430
Fax: (713) 576-2499
Email: andrew.bergman@apks.com
Counsel for Petitioners

Timothy J. Ford
OBERMAYER REBMANN MAXWELL & HIPPEL LLP
Center Square West
1500 Market Street, Suite 3400
Philadelphia, PA 19102
Tel: (215) 665-3158
Fax: (215) 665-3165
Email: timothy.ford@obermayer.com
Counsel for Republican Intervenors

/s/ Mark A. Aronchick
Mark A. Aronchick