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

RICHARD VIETH, et al., Plaintiffs, v. THE COMMONWEALTH OF PENNSYLVANIA, et al., Defendants.	)	No. 1: CV 01-2439 Judge Nygaard, Judge Rambo, Judge Yohn

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Forced to defend a grossly biased congressional districting map, Defendants raise a number of legal arguments in an effort to have this case dismissed before this Court can examine the underlying facts. As we explain below, however, Plaintiffs clearly have standing to challenge the constitutionality of the districting plan, and the claims set forth in the Amended Complaint amply satisfy the applicable federal legal standards.

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO CHALLENGE THE CONSTITUTIONALITY OF ACT 1.

A. Plaintiffs Have Standing to Bring a Partisan Gerrymandering Claim

As Democratic voters in the Commonwealth of Pennsylvania, Plaintiffs clearly have standing to bring a partisan gerrymandering claim. *See Warth v. Seldin*, 422 U.S. 490, 508 (1975) (describing the requirements for standing). The violation of the right to fair and effective representation constitutes an injury in fact, which is both concrete and particularized among Democratic voters in Pennsylvania. As the start of the 2002 congressional process draws closer, that injury becomes increasingly imminent.

A partisan gerrymandering challenge to a congressional redistricting plan is necessarily a statewide claim, *Davis v. Bandemer*, 478 U.S. 109, 130 (1986) (plurality opinion). Claims that districting plans discriminate against a political party involve

> instances of individual districting within the State which [plaintiffs] believe exemplify this discrimination, but the . . . claim . . . is that Democratic voters over the State as a whole, not Democratic voters in particular districts, have been subjected to unconstitutional discrimination.

Id. at 127. Unlike racial gerrymandering cases, which involve only specific harm to residents of a particular district, partisan gerrymandering claims allege harms to individual voters who are members of a statewide group. Any other conception of "particularized" harm would be incoherent, given the nature of the injury that the Supreme Court described in *Bandemer* – a point illustrated by the fact that the plaintiffs in *Bandemer* were seven individual Democratic voters, rather than, for example, the Democratic Party. *See Bandemer v. Davis*, 603 F. Supp. 1479, 82 (S.D. Ind. 1984) (three-judge court), *rev'd on other grounds*, 478 U.S. 109 (1986). Plaintiffs also satisfy the remaining requirements for constitutional standing. There can be no question that Act 1, which created the illegal districts, is the cause of Plaintiffs' injury, and that injury would be redressed by a favorable decision that forced the creation of new, legal districts.

B. Plaintiffs Have Standing to Bring Claims I, III, IV, and V

Plaintiffs have standing to challenge Act 1 on the basis that it violates the one-person, one-vote rule of Article I, section 2. Plaintiff Susan Furey is a resident of a district that is overpopulated under Act 1's districting plan. *See* Am. Compl. ¶¶ 4, 29. She suffers an injury in fact in the form of deprivation of the right to fair and effective representation, which is directly caused by Defendants' unconstitutional districting map, and which would be redressed by a favorable court decision.

Finally, Plaintiffs have standing to challenge Act 1 as an abridgment of the privileges or immunities of citizenship guaranteed by the Fourteenth Amendment and the rights guaranteed to them under the First Amendment. Plaintiffs have alleged that Act 1 deprives them of rights made available to other voters in

Pennsylvania, and that it interferes with their rights of speech and association by depriving them of the ability to cast a meaningful vote with other Democratic voters in congressional elections. These allegations satisfy the requirements for Article III standing.

Because standing is present for Plaintiffs' claims, Plaintiffs also have standing to assert the derivative § 1983 claim in Claim V.

II. PLAINTIFFS HAVE STATED A COGNIZABLE CLAIM THAT ACT 1 VIOLATES THE ONE-PERSON, ONE-VOTE PRINCIPLE.

Act 1 violates Article I, section 2 of the Constitution by deviating from equal population among congressional districts with no justification. Unlike state legislative districts, population in congressional districts must achieve "precise mathematical equality." *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969). As the Supreme Court emphasized in *Karcher v. Daggett*, 462 U.S. 725 (1983), "As between two standards – equality or something less than equality – only the former reflects the aspirations of Art. I, § 2." *Id.* at 732. Contrary to Defendants' assertion that the district populations established by Act 1 are equal as a matter of law, Def. Br. at 8, "there are no *de minimis* variations which could practically be avoided, but which nonetheless meet the standard of Art. I, § 2 without justification," *id.* at 734. Because Act 1 creates a 19-person deviation between districts, the Commonwealth must justify its failure to follow the one-person, one-vote principle. *See Nerch v. Mitchell*, No. CV-92-0095, slip op. at 31 (M.D. Pa. Aug. 13, 1992) (per curiam); *see also Anne Arundel County Republican Cent. Comm.*, 781 F. Supp. 394, 395-96 (D. Md. 1991) (requiring state to justify congressional districting plan's 10-person total population deviation).

By alleging that Act 1 does not establish precise mathematical equality between districts, Plaintiffs have alleged facts sufficient to make out a claim of unconstitutionality and shift the burden to the Commonwealth. Defendants' formalistic assertion that Plaintiffs were required to attach to their complaint a map showing less population deviation is possible, Def. Br. at 8-9, misreads the caselaw. While Plaintiffs are fully prepared to submit a map at trial,[1] the 19-person deviation between districts itself establishes that a smaller deviation is possible, as it is routine for congressional district maps to be drawn with substantially smaller deviations – often deviations of just one person.

But Plaintiffs' complaint goes further. Plaintiffs allege that Defendants cannot put forward any legitimate justification for Act 1's failure to conform to the one-person, one-vote rule, because no traditional districting criteria support the deviations. In *Mellow v. Mitchell*, 607 A.2d 204, 207 (Pa. 1992), the Pennsylvania Supreme Court identified factors that could warrant "extremely small deviations in district populations": avoiding splitting political subdivisions, providing adequate representation to a minority group, and preserving communities of interest. Plaintiffs have alleged that Act 1 protects none of these.

In contrast to Pennsylvania's 1990s congressional districts, in which population deviations could have been reduced only by splitting more municipalities, *see Nerch*, slip op. at 33-34, Act 1 splits 84 local governments – or more than three times the number of splits in the 1990s plan – including 25

[1] To the extent this Court believes that Plaintiffs were required to submit a map with their complaint that has a reduced population variance, it should allow Plaintiffs to amend their complaint rather than dismissing this action.

counties and 59 cities, boroughs, and townships.[2] Act 1 also divides communities of interest, as in the "Greenwood Gash" of District 8. Traditional justifications such as incumbent protection and constituent retention offer no support either, as Act 1 pits multiple incumbents against each other and divides representatives from the constituents they have long represented. *See* Am. Compl. ¶ 23.

These allegations are more than sufficient to establish a claim of unconstitutionality under Article I, section 2.

III. PLAINTIFFS HAVE STATED A COGNIZABLE CLAIM THAT ACT 1 IS AN UNCONSTITUTIONAL PARTISAN GERRYMANDER.

The Supreme Court conclusively established in *Davis v. Bandemer*, 478 U.S. 109 (1986), that partisan gerrymandering claims are justiciable. As the *Bandemer* Court recognized, the Court's long history of adjudicating cases of minority vote dilution compels such a conclusion; "that the claim is submitted by a political group, rather than a racial group, does not distinguish it in terms of justiciability." *Id.* at 125. Accordingly, the *Bandemer* Court held that a plaintiff who alleges "intentional discrimination against an identifiable political group and an actual discriminatory effect on that group" states a claim of unconstitutional political gerrymandering. *Id.* at 127 (plurality opinion).

Contrary to Defendants' assertions, time and experience have not shown the standards for resolving partisan gerrymandering claims to be any less manageable

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[2] As this Court has recognized, "the avoidance of municipal splits [is] an important public policy of the Commonwealth." *Id.* at 33 (citing *Mellow*, 607 A.2d 204). The Pennsylvania Supreme Court in *Mellow* held the principle of avoiding municipal splits to be nearly on par with the one-person, one-vote principle, as the state court preferred a plan with minimal population deviation but 27 split local governments over a plan that achieved perfect population equality but split more local governments. See *Mellow*, 607 A.2d at 208.

than the standards for resolving racial gerrymandering cases. See id. at 125 (noting the absence of any indication that the standards laid out in *Bandemer* "are less manageable than the standards that have been developed for racial gerrymandering claims"). If anything, time and experience have served to sharpen *Bandemer*'s distinction between mere consideration of politics in redistricting – what Justice Powell called "gerrymandering in the 'loose' sense" – from "gerrymandering that amounts to unconstitutional discrimination." *Id.* at 165 (Powell, J., concurring in part and dissenting in part).

Since *Bandemer* was decided in 1986, the Supreme Court has issued two sets of decisions that help clarify the standard for identifying an unconstitutional partisan gerrymander. First, in the context of *congressional* redistricting, as opposed to state legislative redistricting, the Supreme Court's recent decisions describing the principles animating Article I of the U.S. Constitution clarified one limit to a state's authority to draw congressional districts: States may not use that authority to dictate electoral outcomes, to advantage one class of candidates over another, or otherwise to frustrate the will of the majority of voters in their state. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); *Cook v. Gralike*, 531 U.S. 510 (2001). Second, in two racial gerrymandering cases decided in the 1990s, *Shaw v. Reno*, 509 U.S. 630 (1993), and *Miller v. Johnson*, 515 U.S. 900 (1995), the Court established principles that are equally applicable to political gerrymandering claims under the Equal Protection Clause. The Court held that a redistricting plan is unconstitutional where it is based predominantly on race to the exclusion of traditional, neutral districting criteria – even though race is otherwise a permissible consideration in redistricting. Similarly, although politics, like race,

is a permissible consideration in redistricting, state legislatures are not authorized to jettison neutral districting criteria with the predominant aim of drawing districts that advantage or disadvantage a particular group of voters. Where, as here, one political party has created a districting plan predominantly for the purpose of shutting out its opponents, with the effect of depriving a majority of the state's voters of the opportunity to elect candidates of their choice, that districting plan deprives voters of their constitutional right to "fair and effective representation." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

A. Act 1 Is Inconsistent with Article I's Limitation of the States' Authority to Regulate Congressional Elections

One fundamental flaw of Defendants' motion to dismiss is that it presumes that the only limitation on partisan gerrymandering is the Equal Protection Clause as interpreted in *Bandemer*. But there is an even more fundamental limit that applies to congressional redistricting. In Article I of the Constitution, the Framers vested the legislative power of the United States in two chambers: the Senate, which was intended to represent the states, and the House of Representatives, which was intended to represent the people, and whose members were accordingly to be chosen "by the People of the several States." U.S. Const. art. I, § 2. Under the Article I framework, the right to choose congressional representatives "belongs not to the States, but to the people," since "the Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, not by the States, but by the people." *U.S. Term* Limits, 514 U.S. at 821.

The Supreme Court has held that the fundamental principle that the House of Representatives is to be chosen "by the People" forbids states from valuing one person's vote in a congressional election more than another's, *see Wesberry v. Sanders*, 376 U.S. 1 (1964); from excluding congressional candidates who have served more than two terms from appearing on state ballots, *see U.S. Term Limits*, 514 U.S. 779; and from noting on the ballots a congressional candidate's failure to support term limits, *see Cook v. Gralike*, 531 U.S. 510. Similarly, this principle forbids states from infringing the right of a majority of voters to choose whom they wish to represent them, by distorting district lines in order to favor the political party that happens to control the state legislature.

Because the power to elect representatives to Congress is a right that "aris[es] from the Constitution itself," any power states have to regulate congressional elections derives from, and is limited by, "the delegated powers of national sovereignty," *U.S. Terms Limits*, 514 U.S. at 805. Consistent with their vision of the House of Representatives as accountable to the people rather than to the states, the Framers limited the states' involvement in congressional elections to a tightly circumscribed power to set "[t]he Times, Places and Manner of holding Elections for Senators and Representatives" under the Elections Clause, U.S. Const. art. I, § 4, cl. 1. The Framers' limited delegation of authority to regulate the procedural decisions about the conduct of congressional elections reflects the Framers' "overriding concern" regarding "the potential for States' abuse of the power." *U.S. Term Limits*, 514 U.S. at 808-09. The Framers were particularly concerned about the possibility that factional control of state legislatures would

frustrate the will of the people in congressional elections. Discussing the Elections Clause at the Constitutional Convention, Madison noted:

> It was impossible to foresee all the abuses that might be made of the discretionary power. . . . Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed. Besides, the inequality of the Representation in the Legislatures of particular States, would produce a like inequality in the Natl. Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter.

2 *Records of the Federal Convention* 239. Madison's fear that a faction in power in a state legislature might abuse its authority to override majority rule was echoed throughout the ratifying conventions. In Massachusetts, one delegate worried that state legislatures,

> when faction and party spirit run high, would introduce such regulations as would render the rights of the people insecure and of little value. They might make an unequal and partial division of the states into districts for the election of representatives, or they might even disqualify one third of the electors.

2 *Elliot's Debates* 22-35 (Parsons). Another delegate noted that "the intention of the Convention was to set Congress on a different ground; that a part should proceed directly from the people, and not from their substitutes, the legislatures; therefore the legislature ought not to control the elections." He worried that, as in Great Britain and Rhode Island, "the [state] legislature may have a power to counteract the will of a majority of the people." 2 *id.* (Dana). In North Carolina, a delegate explained the necessity of reserving the ultimate power over congressional elections in the federal government, so as "to secure a

representation from every part, and prevent any improper regulations, calculated to answer party purposes only." 1 *Annals of Congress* 768-73 (Ames).

The Elections Clause was thus drafted as a limited delegation of authority to the states, not as a plenary grant of power, confined to matters such as "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns" – that is, "the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley v. Holm*, 285 U.S. 355, 367 (1932). As the Court made clear in *U.S. Term Limits*, "[t]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." 514 U.S. at 833-34.

The Supreme Court has made clear that judicial review of state regulation of election procedure to determine whether it meets these principles is more searching in the context of congressional redistricting than is similar review of state legislative redistricting under the Equal Protection Clause. In *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Supreme Court held that Article I's command that the House of Representatives be elected "by the People" rather than by the states meant "that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Id.* at 7-8; *see also Karcher v. Daggett*, 462 U.S. 725, 732-33 (1983) While the Equal Protection Clause requires similar adherence to the one-person, one-vote principle in the context of state legislative redistricting, *see Reynolds v. Sims*, 377 U.S. 533 (1964), it affords more flexibility

to states to deviate from absolute population equality in pursuit of legitimate state policies. Accordingly, while the Supreme Court has held that the Equal Protection Clause will tolerate population deviations as large as ten percent in the context of state redistricting, *see Brown v. Thompson*, 462 U.S. 835 (1983), Article I will not tolerate even *de minimis* population deviations below one percent without adequate justification, *see Karcher*, 462 U.S. at 731-32.

Similarly, while the Constitution may tolerate somewhat larger departures from absolute neutrality in state legislative redistricting, Article I strictly constrains the legislature's authority to dictate the composition of Pennsylvania's congressional delegation at the expense of the right of "the people [to] choose whom they please to govern them." *U.S. Term Limits*, 514 U.S. at 793 (citation and internal quotation marks omitted). This constraint does not preclude a state legislature from considering politics in congressional redistricting. It does, however, preclude the political faction that happens to control the state legislature at the right moment in the ten-year congressional redistricting cycle from deliberately acting to ensure that it will continue to control the state's congressional delegation even if it fails to receive a majority of the votes.[3]

Act 1 exceeds those limits on a state's authority to regulate congressional elections. It is designed precisely to "dictate electoral outcomes" and to "disfavor a class of candidates" by drawing congressional districts that dispense with all

[3] It is, of course, rare that a political party will be able to act in such a manner. It can only occur when one political party controls both houses of the legislature and the governorship, and yet the state is evenly enough balanced politically in federal voting that the party in control at the state level must violate neutral redistricting criteria to ensure its control of the state's congressional delegation.

neutral, traditional districting criteria in favor of advancing a single goal: ensuring that the Republican Party wins at least 13 of 19 seats in Pennsylvania's congressional delegation, even if Republicans garner less than half the cast statewide. *See* Am. Compl. ¶ 28.

Act 1 is thus much more than a mere procedural regulation. In both purpose and effect, it disfavors Democratic candidates and voters, and virtually guarantees a minority party's victory. Indeed, it not only enshrines a minority party in control – it facilitates that party's control of a supermajority of seats, seats in more than two-thirds of Pennsylvania's congressional districts. As such, it is an abuse of the Pennsylvania Legislature's power under the Elections Clause, and must be struck down as unconstitutional.

B. Act 1 Violates Democratic Voters' Equal Protection Rights

Pennsylvania's current congressional districting plan also "evade[s] important constitutional restraints," *U.S. Term Limits*, 514 U.S. at 833-34, imposed by the Equal Protection Clause of the Fourteenth Amendment. Act 1 baldly classifies voters on the basis of party affiliation for the purpose of favoring one class and diluting the voting strength of another. Such gross distortions of federal election procedure are an impermissible abuse of Pennsylvania's authority to regulate elections.

1. **The Legal Standard**

Davis v. Bandemer represents the Supreme Court's first attempt to define the boundary between permissible uses of political considerations in redistricting and unconstitutional partisan gerrymandering – that is, "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes." *Kirkpatrick v. Preisler*, 394 U.S. 526, 538 (1969) (Fortas, J., concurring). While absolute partisan neutrality in redistricting is not required, *Bandemer* indicates that too great a departure from the principle of neutrality constitutes a violation of the Equal Protection Clause. Under *Bandemer*, a plaintiff who alleges "intentional discrimination against an identifiable political group and an actual discriminatory effect on that group" states a claim of unconstitutional political gerrymandering. *Bandemer*, 478 U.S. at 127.

In *Shaw v. Reno*, 509 U.S. 630 (1993), the Supreme Court further clarified the boundary between constitutional uses of otherwise permissible districting criteria – such as race or party affiliation – and unconstitutional discrimination. In evaluating a claim of race-based redistricting, the *Shaw* Court held that a state legislature may not jettison neutral districting principles with the predominant purpose of advantaging or disadvantaging a particular group of voters. The Court determined that consideration of race – which is unquestionably a legitimate consideration in redistricting decisions, *cf.* Voting Rights Act of 1965, §§ 2, 5, 42 U.S.C. §§ 1973, 1973c – is illegitimate when it is employed to the exclusion of other "sound districting principles" such as "compactness, contiguity, and respect for political subdivisions." *Shaw*, 509 U.S. at 647. The Court's holding was

based in part on its concern for the expressive harms that stem from government classification of voters on the basis of their race, and in part on its concern that

> when a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.

Shaw, 509 U.S. at 648.

The problem the Supreme Court identified is, if anything, more acute in cases of political gerrymandering. When district lines are drawn solely to maximize the number of voters likely to vote for a candidate of a particular party, the legislature sends an unmistakable message to the representative of that district that he or she need only respond to the concerns of that party's voters.

The principles of *Shaw* apply to political gerrymandering claims for another reason as well. Just as classifications based on race are of particular concern under the Equal Protection Clause, so are government classifications based on partisan affiliation or political views. Such classifications are barred by the First and Fourteenth Amendments, absent a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate." *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)); *see also Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972) (noting that the rights guaranteed by the First and Fourteenth Amendments are "closely intertwined" when governments classify citizens based on ideology). The state's burden of justifying laws that discriminate on the basis of political views is indeed a heavy one, since, as the Supreme Court has held, "there are some reasons upon

which the government may not rely," *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), and a citizen's political belief structure is first among them. *See, e.g.*, *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 717 (1996); *Elrod v. Burns*, 427 U.S. 347, 372-73 (1976).

To be sure, a legislature may consider politics in drawing district lines. *See Bandemer*, 478 U.S. at 128. But when a political party in control of a state legislature and governorship acts with the predominant purpose of diluting the electoral strength of its opponents and succeeds in doing so by establishing conditions under which a minority can consistently control a two-to-one or three-to-one majority in the state's congressional delegation, it has violated the Equal Protection Clause.

2. Plaintiffs' Allegations Meet the Legal Standard

Plaintiffs have clearly alleged sufficient facts to show that Defendants intended a dramatic deviation from neutral districting principles when they created Pennsylvania's redistricting plan. As the Amended Complaint explains, Republican leaders shut Democrats out of the redistricting process, both in order to maximize the number of districts that would send Republican candidates to the House of Representatives and in order to exact revenge on the Democratic Party for thwarting Republican attempts to establish control of the House of Representatives by similarly distorting congressional districting in other states. *See* Am. Compl. ¶ 18. These allegations are more than sufficient to establish the discriminatory intent necessary to make out a claim of unconstitutional partisan gerrymandering. *See Bandemer*, 478 U.S. at 129 ("As long is redistricting is done

by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.").

Defendants argue that Plaintiffs' allegations do not meet even this minimal threshold. But their contention that direct evidence of legislative intent is irrelevant, Def. Br. at 16, is simply wrong in the redistricting context. *See Miller v. Johnson*, 515 U.S. 900, 917-18 (1995) (relying on pressures on legislature as evidence of legislature's motivation, as well as testimony of staffer who drew the map and statement from a state official); *Bush v. Vera*, 517 U.S. 952, 969 (1996) (relying on testimony of state officials in assessing purpose of plan). Moreover, Plaintiffs have alleged much more than simply an intent to discriminate. They have also alleged that Defendants jettisoned all neutral, traditional districting criteria when they created Pennsylvania's districting plan, motivated solely by the desire to advance the goals of the Republican Party. The product is a districting plan so extremely irregular on its face that it can rationally be viewed only as an effort to classify voters on the basis of their political party affiliation, without regard to traditional districting principles.[4] Am Compl. ¶ 22. *See Bandemer*, 478 U.S. at 128 (suggesting disregard of political boundaries and shape of districts is evidence of partisan intent); *Shaw*, 509 U.S. at 644 (district "so bizarre on its face"

[4] Contrary to Defendants' contention, Def. Br. at 15, Plaintiffs' specific factual allegations regarding county breaks, communities of interest, and the shape of the districts (Am. Compl. ¶¶ 21-23) are not the sort of "bald assertions" sometimes deemed insufficient to survive a motion to dismiss. Dismissal for failure to state a claim is improper "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which will entitle him to relief." *Johnsrud v. Carter*, 620 F.2d 29, 33 (3d Cir. 1980). That is manifestly not the case here. Moreover, to the extent Defendants' argument turns on the fact that Plaintiffs did not submit a copy of the map, Def. Br. at 15, this Court can take judicial notice of the map enacted by the legislature, or, alternatively, allow Plaintiffs to amend their complaint and attach a map.

as to be unexplainable on grounds other than race); *Miller v. Johnson*, 515 U.S. at 913 (bizarre-shaped districts are "persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines").

That some House Democrats (and no Senate Democrats) joined all of the House Republicans in supporting Act 1, Def. Br. at 16, hardly undercuts the clear evidence of the partisan purpose of Act 1 that is provided by the plan itself, as well as by the Republican pressure that gave rise to proposal of that plan. This is especially so because those Democrats who voted for the plan did so not because they believed the plan was nonpartisan, but because of a combination of coercion and self-interest. In any event, this is an issue for trial; it is hardly one that can be resolved on a motion to dismiss. Plaintiffs' allegations plainly are sufficient on their face to establish an intent to discriminate.

There can also be no doubt that Plaintiffs have alleged discrimination against an "identifiable political group." Defendants' bizarre suggestion that Democratic voters are not an identifiable political group is belied by *Bandemer* itself, in which the Court entertained a claim of gerrymandering brought by seven individual Democratic voters (although it found the evidence of gerrymandering insufficient). The fact that not all registered Democrats always vote for Democratic candidates, Def. Br. at 14-15, does not mean that Plaintiffs are not an identifiable political group. *Cf. Republican Party of North Carolina v. Martin*, 980 F.2d 943, 956 n.23 (4th Cir. 1993) (holding that registered Republicans *and Democrats* who allege that they "have and will continue to vote for Republican candidates" have alleged "a sufficient degree of cohesiveness . . . in order to

withstand a motion to dismiss"). And the fact that Democrats are not a minority party, Def. Br. at 15, is irrelevant given that one of the express purposes of adjudicating political gerrymandering claims is to ensure "that majorities are not consigned to minority status" in keeping with "our general majoritarian ethic." *Bandemer*, 478 U.S. at 125 n.9.

Plaintiffs also have made allegations sufficient to establish Act 1's discriminatory effects. *See Bandemer*, 478 U.S. at 132, 139. Plaintiffs have alleged that extremely disproportionate results are projected to obtain under Act 1: Although a slight majority of Pennsylvania voters have favored Democratic candidates in recent federal elections, Act 1 is likely to produce a congressional delegation that consists of 13 or 14 Republicans and only 5 or 6 Democrats. *See* Am. Compl. ¶ 28. Moreover, Act 1 will make it more difficult for the Democratic Party to recruit viable candidates, raise funds, and encourage voter turnout, dramatically affecting the ability of Democratic voters to influence the political process. *See* Am. Compl. ¶ 35. Finally, Act 1 carries precisely the type of dangers the Court identified in *Shaw*. In passing Act 1, the Commonwealth has conveyed to voters the message that voting strength is to depend on party affiliation alone; it has also conveyed to representatives that their sole duty is to represent members of their political party, and not members of the disfavored party.

To be sure, to establish the discriminatory effects of a partisan gerrymander requires a showing of "more than a *de minimis*" effect on the plaintiffs, since "[d]istrict-based elections hardly ever produce a perfect fit between votes and representation," and "[i]nviting attack on minor departures from a supposed norm

would too much embroil the judiciary in second-guessing" legislative plans. *Bandemer*, 478 U.S. at 133-34. But here, the predictable effect of Act 1's discrimination against members of the Democratic Party could not possibly be considered a "minor departure" from what might be considered a rough fit between votes and representation. The level of partisan skew in this case contrasts dramatically with the facts present in *Bandemer*, where the evidence had indicated that Democrats, with 51.9% of the votes statewide, received 43% of the seats in the House, and 48% of the seats in the Senate. 478 U.S. at 134. Moreover, in *Bandemer*, "the District Court [had] declined to hold that the 1982 election results were the predictable consequence[] of the 1981 Act." *Id.* at 135. Here, despite the fact that Democrats, by any measure, constitute at least half of Pennsylvania voters, *see* Am. Compl. ¶¶ 25-27, the predictable result of Act 1 is that Democrats will win less than one-third of the seats in Pennsylvania's congressional delegation, *see* Am. Compl. ¶ 28. Republicans are likely to win not just a majority, but a supermajority. Plaintiffs have thus alleged facts sufficient to make out a political gerrymandering claim under *Bandemer*: Act 1 will achieve its intended effect and produce extremely disproportionate results, and the Pennsylvania electoral system will be "arranged in a manner that will consistently degrade . . . a group of voters' influence on the political process as a whole." *Bandemer*, 478 U.S. at 132.[5] Certainly, when *Bandemer* is read in light of *Shaw*,

[5]Defendants' contention that Plaintiffs have not made out a claim under *Bandemer* because a party that wins 5 or 6 of 19 seats is not shut out of the political process, because Democratic voters may be effectively represented by Republicans, and because no one knows for sure the results of future elections, Def. Br. at 18-19, is incorrect. *Bandemer* is concerned that legislatures not consign majorities "to minority status." 478 U.S. at 126 n.9. What *Bandemer* therefore requires is a showing that a redistricting plan "substantially disadvantages certain voters" which can be "supported by evidence of continued frustration of the will of a majority of

Plaintiffs' allegations that Defendants abandoned all neutral redistricting criteria and deliberately drew district lines to ensure that Republican candidates would win more than two-thirds of Pennsylvania's districts – even with support from a minority of the electorate statewide – are sufficient to establish an Equal Protection violation.

C. Act 1 Denies Democratic Voters Privileges and Immunities Afforded to Republican Voters

By denying to Democratic voters what it grants to Republican voters, Act 1 violates the Privileges or Immunities Clause of section 1 of the Fourteenth Amendment, which provides that each citizen of a State has a right "to the same privileges and immunities enjoyed by other citizens of the same State." *Saenz v. Roe*, 526 U.S. 489, 502 (1999). Act 1 grants Republicans their right to be free of a district that does not impermissibly burden their rights to an undiluted vote, but it denies that right to Democrats. Because the State advances no legitimate justification for that distinction, it violates Plaintiffs' Fourteenth Amendment rights and must be struck down. *Id.* at 506.

D. Act 1 Violates Democratic Voters' Right to Free Speech and Association

Act 1 violates the First Amendment's longstanding prohibition on government classifications on the basis of political viewpoint, particularly in the context of voting rights. As discussed above, the Supreme Court has made clear that the First and Fourteenth Amendments, which are "closely intertwined" in this context, *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972), bar classifications on the basis of political views absent compelling justification. *See supra* at page 17.

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the voters." 478 U.S. at 132. Predictably consigning a majority of voters to less than one-third of congressional seats is just such evidence.

This prohibition applies no less in the context of voting rights than it does in the context of the government's provision of other benefits, such as government employment. In case after case, the Court has struck down state requirements that purport to require that voters have a sufficient interest in the election to cast an intelligent vote, but that actually – like Act 1 – require voters to have the "correct" interest in the election. *See Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969) (striking down a state law that allowed only property owners and parents of schoolchildren to vote in school district elections on the basis that the property ownership requirement was designed to limit the ballot to those who held the favored political beliefs); *Carrington v. Rash*, 380 U.S. 89 (1965) (rejecting a state's argument that it could deny the franchise to military servicemen, who lacked the necessary incentive to invest in the community); *see also* Emily M. Calhoun, *The First Amendment and Distributional Voting Rights Controversies*, 52 Tenn. L. Rev. 549, 558-67 (1985) (tracing First Amendment principles through voting rights cases). Similarly, Act 1 violates the First Amendment by creating a state-imposed requirement that voters be Republican in order to have a realistic opportunity to elect their candidates of choice.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be denied.

Respectfully submitted,

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Dated: February 5, 2002

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

RICHARD VIETH et al Plaintiffs,	:	
v.	:	No. 1: CV 01-2439 Judge Rambo
THE COMMONWEALTH OF PENNSYLVANIA; MARK S. SCHWEIKER, et al Defendants	:	

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2002, I caused a true and correct copy of the foregoing document to be served upon the following counsel of record by fax transmission and first class mail, postage prepaid:

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