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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.

PETITIONERS' REPLY BRIEF (PUBLIC VERSION)

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page(s)**

CONSTITUTIONAL PROVISION

INTRODUCTION

The 2011 map is the worst partisan gerrymander in Pennsylvania's history and among the worst in American history. It rigs the outcome of elections and denies voters a fair say. Faced with damning and incontrovertible proof of the map's unparalleled partisan intent and effects, Legislative Respondents essentially duck. They make no attempt to explain the map's multitude of extraordinary anomalies, its unprecedented division of Pennsylvania's communities, and its surgical packing and cracking of Democratic voters to diminish those voters' voice in the political process. Their brief essentially pretends that the map does not exist.

Rather, Legislative Respondents say that such invidious discrimination is okay because mapmakers have always invidiously discriminated. They urge this Court to throw up its hands and declare a grandfather exception for viewpoint discrimination in redistricting. Their vision of unchecked manipulation of district boundaries for partisan gain is a dim, destructive view of representative democracy. And it is contrary to the freedoms enshrined in Pennsylvania's Constitution.

Make no mistake: Legislative Respondents' position is a thinly veiled rejection of *any* constitutional limitation on partisan discrimination in redistricting. Their theory that voters in gerrymandered districts suffer no harm because they still get to cast a ballot reflects willful blindness to reality and ignores settled free

speech jurisprudence and decades of redistricting precedents recognizing the opposite. It is an invitation to judicial abdication and political abuse. If this Court does not strike down this map on this record, it is hard to imagine when any court would ever act.

It does not have to be this way. Pennsylvania law provides judicially manageable standards to evaluate challenges to partisan gerrymandering, and the 2011 map violates those standards by a wide margin. Under the Free Expression and Association Clauses, any viewpoint discrimination is too much, and at minimum an attempt to gain partisan advantage must not subordinate traditional districting criteria, as clearly occurred in the creation of the 2011 map. And under Pennsylvania's equal protection guarantees, intentional discrimination against Democratic voters goes too far when it flips a congressional seat to Republicans.

The problem here is not that Democrats lack the ability to "persuade" enough voters to support their candidates, as Legislative Respondents claim. The problem is that Republicans in the General Assembly manipulated district boundaries to make it all but impossible for Democrats to win in 13 districts. The U.S. Supreme Court's failure to act has led to increasingly egregious gerrymanders that are destroying our democracy. We have a federal system for a reason. This Court should declare that the 2011 map violates the Pennsylvania Constitution irrespective of federal law.

ARGUMENT

I. The Map Is Among the Worst Partisan Gerrymanders in U.S. History

Legislative Respondents offer no positive defense of the 2011 map, nor do they claim that the map's many bizarre features and skewed results actually resulted from the mapmakers' use of any non-partisan criteria. Instead, Legislative Respondents merely hypothesize a series of non-partisan factors that a mapmaker theoretically could consider, without any evidence that those factors were considered here, and in the face of overwhelming evidence that they were not.

First, Pennsylvania's "political geography" cannot explain the map's extreme Republican bias. Legislative Resps. Br. ("Opp.") 18-19. Drs. Chen and Pegden designed their methodologies specifically to account for political geography, and each concluded that geography cannot plausibly explain the map. Petrs. Br. 27-28, 31. Legislative Respondents do not address, much less dispute, either these experts' methodologies or conclusions on this point. Legislative Respondents assert falsely that Dr. Warshaw did not consider political geography, Opp. 19; in fact he expressly addressed it in his report, PX35 at 27, and testified that Pennsylvania's political geography cannot explain the dramatic increases in the Efficiency Gap under the 2011 map, Tr.878:10-886:5-23, 982:17-984:11.[1]

[1] Petitioners do not seek to constitutionalize either the efficiency gap or any other single methodology, as Legislative Respondents suggest. Opp. 50 n.10. Rather, each statistical measure employed by Petitioners' experts provides *evidence* to

Second, there is no evidence that the Voting Rights Act was a consideration at all in drawing the 2011 map. *Cf.* Opp. 16-19. The only two districts with sizable African-American voting age populations became *less* African-American. PX13, 14; Tr.238:1-241:13. Legislative Respondents conducted no analysis of the *Gingles* factors, as required to determine whether the VRA requires a majority-minority district. Tr.1281:11-1282:9, 1283:2-24, 1284:20-23. Regardless, any hypothetical racial goal could not explain the 2011 map's extreme partisan bias. Of Dr. Chen's 1,000 simulated plans, 534 contain a district with an African-American voting age population over 50%. PX21, 23; Tr.242:13-250:18. None produces a 13-5 Republican advantage. *Id.* And several of Dr. Pedgen's runs froze the 2nd District (the only majority-minority district), without changing his conclusion that the map is an extreme partisan outlier. PX117 at 3, 7-8.

Third, "incumbency protection" does not explain, and could not justify, the 2011 map's extreme partisan bias. Opp. 29. None of the 500 simulated plans in Dr. Chen's Set 2—which avoided pairing 17 incumbents—produced 13 Republican seats; the vast majority produced 9 or 10. Petrs. Br. 27. Thus, even controlling for incumbency, "it is clear that the 2011 Plan was drawn through a process in which a particular partisan goal—the creation of 13 Republican districts—predominated." FOF ¶291. Any effort at incumbency protection,

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satisfy the applicable constitutional tests. *See Common Cause v. Rucho*, 2018 WL 341658, at *26-27 (M.D.N.C. Jan. 9, 2018).

moreover, was itself partisan. Legislative Respondents offer no non-partisan explanation for the pairing of Democrats Jason Altmire and Mark Critz. Petrs. Br. 18-19, 27. Every Republican incumbent was protected, including five freshmen Republicans who had been in office less than a year. *Id.*; JX25 at 2-3.

Legislative Respondents also ignore their *own* witnesses' testimony questioning the legitimacy of incumbency protection. Dr. McCarty testified that it is an "invitation to overt corruption," Tr.1591:2-1592:21, and Dr. Cho testified that incumbency protection "doesn't make sense" if the prior map was "arguably a gerrymander." Tr.1265:2-6. This Court found that the prior 2002 map—which paired six Democratic incumbents, Tr.1271:10-1272:4—was drawn with "discriminatory intent" to advantage Republicans. *Erfer v. Commonwealth*, 794 A.2d 325, 332 (Pa. 2002).

Fourth, Legislative Respondents did not and could not put on any evidence that the 2011 map reflects an attempt to "preserv[e] cores of existing districts." Opp. 36. Just look at the devolution of the 7th District, which is unrecognizable from any "core" that existed previously. Petrs. Br. 9-10. Erie County was the core of the 3rd District throughout Pennsylvania's modern history until the 2011 map split it. Petrs. Br. 14-15. If preserving district cores was a goal of the creators of

the 2011 map, they did a terrible job. *Agre v. Wolf*, ECF No. 213 at 126-39, No. 2:17-cv-04392 (E.D. Pa. Jan. 10, 2017) (Baylson, J., dissenting).[2]

Fifth, Legislative Respondents put on zero evidence that "voter turnout" or "candidate quality" explain the persistent 13-5 Republican advantage. LR. Br. 18, 37-38. Republicans won 13 of 18 seats even in 2012 when Democrats fielded strong enough candidates and turned out in large enough numbers to win a majority of the congressional votes statewide. Petrs. Br. 21. Further, the map itself negatively affects Democratic candidate quality and voter turnout—points that Legislative Respondents ignore. Petrs. Br. 35-36. And Dr. Warshaw's historical efficiency gap comparisons establish that candidate quality and turnout cannot explain the map's partisan bias. Tr:1007-1008; *Common Cause*, 2018 WL 341658, at *53. Legislative Respondents otherwise resort to vague claims that there are "other potentially impactful considerations" like unspecified "distinctive local issues" or "national trends." Opp. 38.

At bottom, Legislative Respondents do not offer any remotely plausible explanation for the map's extreme partisan bias. A "defendant cannot rebut statistical evidence by mere conjectures or assertions, without introducing evidence to support the contention that the missing factor can explain the disparities as a

[2] The decision of a federal three-judge panel this week rejecting an unrelated challenge to the 2011 map is irrelevant here. *Agre*, ECF Nos. 211-213. That challenge was brought exclusively under the U.S. Constitution's Elections Clause—not under Pennsylvania's Constitution. *Id.*

product of a legitimate, nondiscriminatory selection criterion." *Palmer v. Shultz*, 815 F.2d 84, 101 (D.C. Cir. 1987). The only explanation is the one the Commonwealth Court found: "intentional discrimination." COL ¶51.

II. The Map Violates the Pennsylvania Constitution's Free Expression and Free Association Clauses, Irrespective of Federal Law

The 2011 map constitutes impermissible viewpoint discrimination and retaliation in violation of Pennsylvania's Free Expression and Association Clauses.

A. The Map Constitutes Impermissible Viewpoint Discrimination

1. Legislative Respondents do not deny that voting for the candidate of one's choice is protected "expressive conduct" under this Court's precedents. Petrs. Br. 47-49. Nor do they dispute the bedrock constitutional principle that laws burdening protected expression on the basis of viewpoint are subject to strict scrutiny. Petrs. Br. 49. And Legislative Respondents do not contest that viewpoint discrimination is a judicially manageable standard that courts routinely apply. Petrs. Br. 55.

Under any normal conception of viewpoint discrimination, the 2011 map qualifies. Laws discriminate based on viewpoint when they target speech "based on the specific motivating ideology or the opinion or perspective of the speaker." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015). The government may not "subject[] a group of voters or their party to disfavored treatment by reason of their views." *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring).

The 2011 map does just that. By deliberately sorting Democratic voters into particular districts based on their political views to diminish those voters' electoral and political influence, the map "subordinate[s] adherents of one political party and entrench[es] a rival party in power." *Ariz. State Legislature v. Ariz. Ind. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015).

It is undisputed that Pennsylvania's Constitution provides broader protections for expressive conduct than the First Amendment. In *Pap's II*, this Court held that, under an *Edmunds* analysis, Pennsylvania law departs from the applicable federal standard in applying strict scrutiny to laws burdening expressive conduct. *Pap's A.M. v. City of Erie*, 812 A.2d 591, 611 (Pa. 2002). And in *DePaul v. Commonwealth*, 969 A.2d 536 (Pa. 2009)—a case Legislative Respondents ignore—the Court held that *Pap's II*'s "full-blown *Edmunds* analysis" applies equally to ensure broader Pennsylvania protection for protected expressive conduct *in the political arena*—in that case, political contributions. *Id.* at 546-47; *see also Commonwealth v. Tate*, 432 A.2d 1382, 1387-90 (Pa. 1981) (similar for political leafletting).

Because it is undisputed that voting constitutes protected expressive conduct, this case falls squarely under the rubric of *Pap's II* and *DePaul*. *See* Common Cause *Amicus* Br. 5-6; Pennsylvania AFL-CIO Amicus Br. 13-15; ACLU Amicus Br. 10-17. Legislative Respondents make no effort to explain how

a law targeting expressive conduct based on political viewpoint could survive these Pennsylvania free speech precedents. Legislative Respondents cite (at 27) some dicta about partisan advantage in *Holt v. 2011 Legislative Reapportionment Commission*, 67 A.3d 1211 (Pa. 2013), but that was not a partisan gerrymandering case and no free speech argument was presented.

Legislative Respondents' suggestion (at 22-23) that only laws "prohibit[ing]" speech trigger constitutional scrutiny is flat wrong. In a free speech challenge, "[i]t is of no moment that the [challenged law] does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 812 (2000). "Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011).

And laws can absolutely "render targeted speech 'less effective'"—*i.e.*, burden it—without actually restricting such speech, contrary to Legislative Respondents' claim. *Cf.* Opp. 23-24; *see Common Cause*, 2018 WL 341658, at *68; ACLU *Amicus* Br. 21. The buffer zone in *McCullen v. Coakley* burdened abortion protesters' speech not by restricting what they could say, but by forcing them to speak in a location where their speech was less effective. 134 S. Ct. 2518,

2535-37 (2014). The 2011 map likewise burdens protected expression by forcing Democrats to vote in gerrymandered districts where their votes are less effective.

Similarly, *Davis v. Federal Election Commission* invalidated a law that "diminishe[d] the effectiveness of [a candidate's] own speech" not by restricting his speech in any way, but by advantaging other candidates. 554 U.S. 724, 736-44 (2008). In *Sorrell v. IMS Health*, pharmaceutical manufacturers remained free to speak to physicians all they wanted, but the law unconstitutionally precluded them from obtaining information that enabled them to "communicat[e] with physicians in an effective … manner." 564 U.S. at 564. And this Court invalidated a law where speech was "not banned altogether," but rendered less effective. *Ins. Adjustment Bureau v. Ins. Comm'r for Commonwealth of Pa.*, 542 A.2d 1317, 1323-24 (Pa. 1988).

It is no answer to say that Democrats can still vote for the candidates of their choice, volunteer, donate, and otherwise "participate in the political process." *Cf.* Opp. 23-25; *see* Pittsburgh Foundation *Amicus* Br. 4. The 2011 map burdens Democrats' votes—their expressive conduct—by rendering those votes less effective. Petrs. Br. 52-54. And in uncontested districts, Democrats have no candidate to vote for at all. It is "harder for [Democrats] to elect candidates of their choice" not because they lack the power to "persuade" (Opp. 25), but because Legislative Respondents rigged the district boundaries.

And Legislative Respondents' you-can-still-vote argument proceeds as if the last sixty years of districting precedents did not exist. Cases like *Reynolds v. Sims*, 377 U.S. 533 (1964), *Wesberry v. Sanders*, 376 U.S. 1 (1964), and *Shaw v. Reno*, 509 U.S. 630 (1993), all recognize that making a vote less effective is a cognizable burden. Those cases reflect that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." *Shaw*, 509 U.S. at 640-41 (quotations omitted). In those cases, too, everyone got one vote. But a partisan gerrymander, just like a racial gerrymander or a map with unequal districts, is nonetheless a way to "give some voters a greater voice in choosing a Congressman than others." *Wesberry*, 376 U.S. at 14. Making a vote less effective is a cognizable burden on free expression.

Legislative Respondents assert that federal courts have "consistently concluded that redistricting plans do not violate voters' First Amendment rights." Opp. 26. They notably ignore more recent federal cases holding that redistricting plans did violate voters' First Amendment rights. *See Common Cause*, 2018 WL 341658; *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016). And no U.S. Supreme Court precedent rejects a free speech-based challenge to a partisan gerrymander. *Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015). In any event, Petitioners challenge the 2011 map exclusively under the Pennsylvania Constitution—not the First Amendment.

2. Petitioners do not argue that all "political considerations" are impermissible in redistricting. *Cf.* Opp. 27. There is a difference between "political considerations" and partisan intent to disadvantage a group of voters based on their protected expression. Petrs. Br. 56-57. For instance, politics is inherent both in identifying "communities of interest," *Shapiro v. McManus*, 203 F. Supp. 3d 579, 597 (D. Md. 2016), and in prioritizing among them. If a particularly powerful representative in the General Assembly, of either party, ensures that her hometown is not split under a districting plan, that is politics, not partisan viewpoint discrimination. Similarly, district continuity or "core retention" can be a permissible political consideration, so long as the prior map was not an intentional partisan gerrymander such that retaining district cores would only "perpetuate[]" the discrimination. *Common Cause*, 2018 WL 341658, at *42.

And barring the legislature from sorting voters into districts based on their political viewpoints does not render "every effort to protect an incumbent" unconstitutional, as Legislative Respondents suggest. Opp. 29. If the prior map was not gerrymandered, and incumbency protection is not being used as a proxy for partisanship, it is not unconstitutional to avoid pairing "incumbents of all parties." *Shapiro*, 203 F. Supp. 3d at 597 (quotations omitted); *see also Common Cause*, 2018 WL 341658, at *59 n.35 (expressing "skepticism" that avoiding pairing incumbents is a legitimate interest where prior map was an unconstitutional

gerrymander). A non-partisan effort to avoid pairing incumbents would not target particular voters for disfavored treatment based on their views, so it is not a "free speech violation." *Cf.* Opp. 29. Petitioners are not asking for a "[p]olitically blind" computer to draw a districting map from scratch every ten years, Opp. 56, only that mapmakers stop discriminatorily sorting voters into particular districts based on their political views.

The 2011 map was not a non-partisan, or even "seniority"-focused, incumbency protection. Opp. 56. The mapmakers protected every single Republican incumbent, including five who had been in office for less than a year, while creating an unnatural district pairing third-term and second-term Democratic incumbents. *Supra* pp.4-5; JX25.

Nor are Petitioners claiming a "right to win elections" or "to be placed in congressional districts containing some desirable proportion of voters who agree with them." *Cf.* Opp. 29. Petitioners' claim is much different: *the government* may not enact laws that deliberately make it more difficult for certain voters to win elections based on disagreement with those voters' political views. The constitutional prohibition on viewpoint discrimination never entitles the disfavored speaker to *win* the argument. It rather prevents the government from putting its thumb on the scale. That is a "limiting principle." Opp. 29. Accordingly, "independent or third-party voters" could not challenge any map under which they

lose elections. *Id.* They would have no viable claim unless the government drew district boundaries deliberately to disadvantage them based on their political views.

In short, there is nothing unmanageable about barring viewpoint discrimination in redistricting. And there is no reason to create an exception to normal free speech principles to preserve it. The purported "positive elements" of partisan gerrymandering identified by Legislative Respondents (at 56) are incoherent. Promoting the "seniority" of Pennsylvania's congressional delegation does not require partisan gerrymandering. Opp. 56. Allowing the General Assembly to "establish districts in their own chosen manner," *id.*, is not "positive" where the chosen manner is discriminatory. These are hardly reasons to grant the General Assembly free rein to engage in viewpoint discrimination in redistricting.[3]

In any event, even if this Court were disinclined to bar any viewpoint discrimination in redistricting, at minimum Pennsylvania's constitutional guarantees of free expression and association bar mapmakers from *subordinating* traditional districting criteria in an effort to disadvantage one party's voters based on their political beliefs, as the 2011 map clearly does. Petrs. Br. 58-59. Legislative Respondents do not deny that this is a manageable standard.

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[3] Legislative Respondents also hypothesize that partisan gerrymandering isn't so bad because the disfavored party might have a chance to "retaliat[e]" after the next census. Opp. 57. This vision of perpetual, decade-by-decade seesaw discrimination offers a cynical view of representative democracy.

Nor do Legislative Respondents dispute that the map fails strict scrutiny, if such scrutiny applies. Petrs. Br. 54-55. Partisan gerrymandering is "incompatible with democratic principles," *Ariz. State Legislature*, 135 S. Ct. at 2658 (alterations and quotations omitted), and cannot conceivably satisfy strict scrutiny, or any scrutiny.

B. The Map Constitutes Impermissible Retaliation

On the intent element of a free-speech retaliation claim, Legislative Respondents profess confusion about how any legislature could possibly go about targeting voters of a particular party, despite the evidence they did that here. And as for the injury and causation elements, they do not contest that several Petitioners currently in Republican districts would be in Democratic districts but-for the gerrymander. Instead, Legislative Respondents contend that these injuries don't count.

1. Legislative Respondents assert that there is no "specific evidence" that they intentionally targeted Democratic voters based on their voting histories. Opp. 31. But they ignore the evidence Petitioners cited to establish this specific intent. Petrs. Br. 9-31, 60. If the mapmakers didn't use voting histories to identify Democratic voters, why do the district lines in the red-blue maps in Dr. Kennedy's report carefully track Democratic and Republican votes in the 2010 U.S. Senate election? Petrs. Br. 11-20. Why can Dr. Chen use 2008-2010 election results to

perfectly predict the outcome of 54 out of 54 congressional elections in Pennsylvania under the 2011 map? FOF ¶¶266-67. Why does Dr. Pegden's analysis prove to a mathematical certainty that the map was crafted to maximize Republican advantage as measured by the 2010 U.S. Senate election? FOF ¶¶348, 359. How did they do it?

Legislative Respondents go further, claiming that "it is hard to see how the legislature could identify with any precision the 'Democratic voters' against whom they intended to retaliate." Opp. 32. Dr. Chen's analysis of the files produced by Speaker Turzai in the federal *Agre* case conclusively establishes that the General Assembly did "identify" Democratic voters, and they did so with pinpoint "precision"—down to the precinct level. Petrs. Br. 7-8, 60, 63-64. This technique is well known. Political Science Professors *Amicus* Br. 3-14.

Legislative Respondents pretend not to know "whether and how such data was used, who used it, or in what manner." Opp. 37. Everyone knows. Speaker Turzai produced this data in response to a court order requiring production of the "facts and data considered in creating the 2011 Plan." Order ¶2, *Agre*, ECF No. 76 (E.D. Pa. Nov. 9, 2017). In an email that the Commonwealth Court erroneously excluded, Speaker Turzai's counsel wrote that the production contained the "facts and data considered in creating the 2011 Plan." Tr.1072:2-19 (discussing PX33); Tr.4, *Agre*, ECF No. 195 (E.D. Pa. Dec. 4, 2017). And Dr. Chen explained how

such data is used based on his extensive redistricting experience. Tr.299:10-309:21; Tr.316:1-318:1; PX1 at 33-41.

Even though they did identify Democratic voters, Legislative Respondents argue that it would be difficult to do so because of "split-ticket" voting. Opp. 32, 38-39. But they introduced no evidence to establish that their examples of such voting are anything but random and isolated. Indeed, split-ticket voting is in a "well-documented" *decline*, Political Science Professors *Amicus* Br. 8-9; Campaign Legal Center *Amicus* Br. 23-24, and Dr. Chen established that there is a 90-95% statistical correlation in votes for Democratic candidates in Pennsylvania across 10 years of election results, Petrs. Br. 65-66. Respondents put on no contrary evidence.

In any event, the Turzai files show that the mapmakers accounted for any split-ticket voting by looking at results from a range of pre-2011 federal and state elections. Those files calculated seven different partisan indices based on seven different pre-2011 federal and state elections, including multiple races for 2008 and 2010, and two other partisan indices that averaged different combinations of state and federal elections. PX1 at 39-40; Tr.302:20-310:1. All of this was done to identify voters likely to vote for Democratic congressional candidates based on actual votes cast in recent elections.

Legislative Respondents also argue that "intent to favor one party's candidates … should not be conflated with motive to retaliate against voters casting their votes for a particular candidate in a prior election." Opp. 31 (quoting COL ¶36). But the way that Legislative Respondents "favored" Republican candidates was by sorting Democratic voters based on their voting histories. Legislative Respondents similarly invoke the Commonwealth Court's statement that "there is no way to assign 'a singular and dastardly motive to a branch of government made up of 253 individual[s].'" Opp. 31 (quoting COL ¶36). By that logic, however, courts could never make a finding of legislative intent, because every piece of legislation is passed by "a branch of government made up of" many individuals.

It makes no difference that 36 Pennsylvania House Democrats, all from packed districts, voted for the 2011 map. *Cf.* Opp. 31-32. This Court found the 2002 map to be intentionally discriminatory, though 42 House Democrats voted for it and the map would not have passed without their votes. *Erfer*, 794 A.2d at 332, 348. Nor does it matter that several Democratic Senators voted to advance a shell version of SB 1249 through committee. *Cf.* Opp. 12. After Republicans unveiled the actual map, only one Democratic Senator voted to advance the bill further, and she—along with every other Democratic Senator—opposed it on final passage. Petrs. Br. 6-7; Opp. 12-13.

2. With respect to the injury and causation elements, Legislative Respondents do not dispute that, as a factual matter, individual Petitioners have suffered the specific injuries described in Petitioners' opening brief (at 60-61), and that the gerrymander was the but-for cause of these injuries. For example, Legislative Respondents do not dispute that four Petitioners currently in Republican districts—Lisa Isaacs, Thomas Ulrich, Beth Lawn, and Robert Smith—would have Democratic representatives but-for the intentional effort to advantage Republican candidates. Petrs. Br. 28, 60-61.

Legislative Respondents argue instead that Petitioners' injuries are not cognizable for purposes of a retaliation claim. Opp. 32-34. In a footnote, Legislative Respondents acknowledge the cases holding that there is no need to show "chilling" of speech where an individual has suffered other harm due to the retaliation, but claim that these cases "each involved tangible injuries," purportedly unlike Petitioners' injuries. Opp. 32-34 & n.4. According to Legislative Respondents, "the effect of political gerrymandering" on Petitioners is "*de minimis*." *Id.* This is absurd. The U.S. House of Representatives votes on issues that affect every aspect of Pennsylvanians' lives, from health care to taxes to sending troops into combat. The harm that results from being artificially denied a representative who shares their views and will represent their interests is plenty "tangible."

In any event, Petitioners have shown chilling caused by the gerrymander. Several Petitioners have been unable to cast a vote for a Democratic congressional candidate, because Democrats have not fielded candidates in several cracked districts under the 2011 map. Petrs. Br. 35-36. Petitioners presented other evidence of chilling as well. When Petitioner Bill Marx's high school seniors look at the 2011 map, they ask: "[W]hy should we vote? Why does this matter? I'm not going to make a difference." Tr.124:15-125:3; *see also* Petrs. Br. 63 (additional citations).

III. The Map Violates the Pennsylvania Constitution's Equal Protection Guarantees and Free and Equal Clause

The 2011 map violates Pennsylvania's equal protection guarantees under any standard; it is an extreme and "egregious abuse[]" of the reapportionment power. *Erfer*, 794 A.2d at 334.

A. The Map Intentionally Discriminates Against Democratic Voters

Legislative Respondents ignore the Commonwealth Court's finding that the evidence "established intentional discrimination." COL ¶51. Drs. Kennedy, Chen, and Pegden presented overwhelming evidence of intent. Petrs. Br. 9-30. Legislative Respondents offer no non-partisan explanation for the district shapes and multitude of other anomalies. Petrs. Br. 9-21. That certain Democratic House members voted for the bill does not "undercut[]" intent, Opp. 36. *See Erfer*, 794 A.2d at 332, 348.

Legislative Respondents also ignore draft maps produced by Speaker Turzai [redacted]. Petrs. Br. 8. And they do not contest that the Commonwealth Court erred in excluding those draft maps. Petrs. Br. 8 n.2, 64 n.7.

B. Democratic Voters Are an Identifiable Political Group

Legislative Respondents ignore all of the evidence establishing that Democratic voters are an identifiable political group, including the independent analyses of two different experts. Petrs. Br. 65-66; Opp. 38-39. Their sole response is to point to anecdotal evidence of split-ticket voting, Opp. 38-39; *see* Int. Br. 11-12, an argument conspicuously not endorsed even by their own political science experts, and for good reason. *Supra* p.17. Legislative Respondents also ignore an entire *amicus* brief describing the consensus among political scientists that it is easy to identify a party's voters. Political Science Professors *Amicus* Br. 1-31. Nor do Legislative Respondents reconcile their legal position with the fact that they *did* identify Democratic voters in creating the 2011 map. Petrs. Br. 66.

C. The 2011 Map Has an Actual Discriminatory Effect

Legislative Respondents do not dispute, nor could they, that the 2011 map satisfies the first part of *Erfer*'s effects test. Petrs. Br. 67-68. Nor do they dispute that the discriminatory effect is durable. Petrs. Br. 34, 68.

The Court should reject or clarify the "essentially shut out" aspect of the *Erfer* test. *Davis v. Bandemer* simply did not hold that proof that a group had "essentially been shut out of the political process" was the *only way* to establish "lack of political power and the denial of fair representation." 478 U.S. 109, 139-40 (1986). *Bandemer* certainly did not suggest that the existence of a safe seat disposed of any claim. Legislative Respondents assert that the "essentially shut out" test vindicates "important equal-protection principles," Opp. 46, but what principles are they talking about? They do not say. In no other equal protection context must plaintiffs prove that they were completely "ignored" or "shut out." Petrs. Br. 71. Because the Free and Equal Clause requires the General Assembly to make all votes "equally potent," *Patterson v. Barlow*, 60 Pa. 54, 75 (1869), it cannot be that partisan gerrymandering is permissible unless it entirely shuts out a party's voters.

Jettisoning (or clarifying) the "shut out" requirement does not mandate "proportional representation." Opp. 46-47. An equal protection challenge requires *intent*, not just *effect*, and thus a mere lack of proportionality will not suffice absent a showing of intentional discrimination. Petrs. Br. 68. Moreover, Petitioners do not argue that a "lack of proportionate results … [will] suffice" to satisfy the effects prong. Opp. 47. As Dr. Chen established, Democrats may not receive strictly proportionate representation under a non-partisan map, because

Republicans enjoy a small natural advantage due to political geography. Tr.255:6-11. Rather, to show discriminatory effects, there needs to be proof that intentional discrimination caused a seat to flip as compared to a non-partisan map. Petrs. Br. 68. Petitioners do not ask this Court to mandate proportional or any other fixed concept of representation; only to stop the General Assembly from discriminating against voters based on their political beliefs.

Legislative Respondents alternatively argue that, if this Court departs from *Erfer*, it "is compelled to follow" the *Vieth* plurality. Opp.47-54. This Court is not "compelled" to follow federal law at all. And no court "is compelled to follow" a plurality opinion, particularly where five Justices in *Vieth* disagreed with the plurality's conclusion that partisan gerrymandering claims are non-justiciable. *Vieth*, 541 U.S. at 309-10, 317, 346, 356. In any event, as *amici* detail, there are compelling historical reasons to interpret Pennsylvania's equal protection guarantees more broadly than the federal guarantee in the context of voting and civil rights. Pennsylvania AFL-CIO *Amicus* Br. 18-32. Those reasons justify a departure under *Edmunds*; indeed, Legislative Respondents do not address any of Petitioners' or *amici*'s textual arguments. *Id.*; *see* Petrs. Br. 68.[4] None of Legislative Respondents' "policy arguments" justify allowing unchecked partisan

[4] Legislative Respondents claim that the "overwhelming majority" of state high courts reject equal protection partisan gerrymandering claims. Opp. 54. They identify two, and neither had equal protection provisions similar to Pennsylvania's.

gerrymandering, which would be the result of Legislative Respondents' proposal. *Supra* p.14. And their bald assertion (at 57) that the problem of gerrymandering is "muted" in Pennsylvania compared to other states is laughable in light of the unrebutted evidence that Pennsylvania's current map is both nationally and historically extreme.

Edmunds aside, Legislative Respondents' description of *Vieth* as producing "five splintered opinions that articulated several different standards," Opp. 48, is as good a reason as any why this Court should untie its equal protection jurisprudence from federal redistricting law. And if the "standard under federal law may be a moving target," Opp. 48, that is another reason to depart under *Pap's II*. Petrs. Br. 73-74. For that same reason—that Pennsylvania's voters should not have to wait for equal protection "while the U.S. Supreme Court struggles to articulate a standard," *Pap's II*, 812 A.2d at 611—this Court should reject Legislative Respondents' proposal to wait for *Whitford* or *Benisek*. Opp. 52-53. The concerns that have led federal courts to avoid adjudicating partisan gerrymandering claims do not apply. Brennan Center *Amicus* Br. 17-22.

Petitioners' test—that intentional discrimination has resulted in flipping a seat—is straightforward and manageable. Legislative Respondents argue otherwise but do not explain why. Opp. 49-51. The equal protection approaches advocated by *amici* largely mirror this test. To the extent it matters, this

gerrymander is also highly durable. Petrs. Br. 68-69. It's not just that Republicans have won 13 of 18 seats in three straight elections. It is uncontested that Democrats in 2012 would have won just six seats even with an astounding 57% of the statewide vote. Petrs. Br. 22, 67. That is durability.

Even if the Court retains *Erfer*'s "essentially shut out" test, Petitioners meet it here. Legislative Respondents do not dispute that polarization in today's Congress is unprecedented, that representatives overwhelmingly if not exclusively vote along national lines, or that members of Pennsylvania's congressional delegation vote with their party a startling 93% of the time. Petrs. Br. 36-40, 71-73. Extensive evidence showed that Republican congressman entirely ignore the interests of Democratic constituents. *Id.* If all this is not enough to prove that Democratic voters artificially placed into Republican districts are "essentially" shut out of the political process, nothing is.

Legislative Respondents observe that there was no ideological overlap among Pennsylvania's representatives in 2002 when *Erfer* was decided (Opp. 42), but Petitioners never argued otherwise. Dr. Warshaw testified that there was ideological overlap *nationally* in 2002, Petrs. Br. 38, 72, meaning that in any given election there was at least the *possibility* of electing a moderate; that is no longer true. And while polarization in Pennsylvania is not a new trend, it is undisputed that the ideological gap between Republican and Democratic legislators in

Pennsylvania is larger today than at any prior point in Pennsylvania history. Tr.925-26; PX35 at 19-20; PX46. Legislative Respondents claim (at 42-43) that the ideological gap in the Pennsylvania delegation was larger in 2002 than in *2011*, but (1) this suit was brought in 2017, when the gap is larger than ever before; and (2) even the gap in 2002 should have sufficed if polarization evidence had been presented in *Erfer*. PX46. It is also uncontested that Pennsylvania's delegation votes together on issues facing the Commonwealth less today than in 2002, or than in any point in history for that matter. PX35 at 20.

There was no testimony about polarization at all in *Erfer*, and those petitioners did not even *allege* that a Republican congressman would "entirely ignore the interests" of Democratic constituents. 794 A.2d at 334. Legislative Respondents' own expert ended up *agreeing* with Dr. Warshaw about the effects of polarization on representation. Tr.1586:13-25.

Petitioners did not "acknowledge that they are able to contact their representative," Opp. 41; multiple petitioners testified that their representatives ignore all efforts at contact, Petrs. Br. 36-37, 40. Indeed, Legislative Respondents repeatedly mischaracterize the record. For example, as support for their assertion that "some Petitioners admit that they are well represented by their Congressperson," Legislative Respondents cite the testimony of John Greiner. Opp. 41. But he in fact said that "Mr. Kelly really does not provide adequate

representation for Northwestern Pennsylvania" and "will not hold a town hall meeting in the Erie area." PX168 at 30:19-41:11.

Legislative Respondents point to the five safe Democratic seats, Opp. 42, but creating safe seats is exactly how partisan gerrymandering works, Petrs. Br. 70. They do not explain how those safe seats eliminate the equal protection claims of the petitioners in the other 13 districts. Voting rights are "personal and individual." *Bergdoll v. Kane*, 731 A.2d 1261, 1269 (Pa. 1999) (quotations omitted). Legislative Respondents' argument is like telling a woman who has been denied a job on the basis of her gender that she shouldn't worry because five other women were hired. Courts have long rejected such arguments. *E.g.*, *Connecticut v. Teal*, 457 U.S. 440, 454-55 (1982).

Dr. Warshaw did not "concede" that "Democratic voters in districts represented by Republicans can have their interests represented by Democratic Congresspersons in other districts." Opp. 43-44. His testimony was the opposite: "No, I actually don't think they do." Tr.1023:20-1024:2. As Dr. Warshaw explained, Legislative Respondents' theory "contradicts common-sense conceptions of how representation actually works." Tr.1024:21-1025:9. The only thing he "conceded" was that there *are* Democratic congressmen from Pennsylvania. Tr.1025:10-13.

Under Legislative Respondents' alternative theory that every voter is conclusively assumed to be represented by her congressperson as a matter of law, Opp. 47, there would be no such thing as a partisan gerrymandering claim. That too contradicts common-sense conceptions of how representation actually works. The identities of our representatives matter.

Legislative Respondents finally claim that they do not understand what the phrase "interests of a Democratic voter" even means, that the Court cannot assess those interests on a mass scale, and that Petitioners "merely assume that all 'Democratic voters' interests are the same." Opp. 44. But these are attacks on the assumptions embedded in the *Erfer* test; if as Respondents suggest the "interests of a Democratic voter" are unknowable, that is a reason to jettison or clarify this aspect of the *Erfer* test. Again, however, Petitioners are not asking this Court to make any assumptions. The fact that Democratic and Republican legislators vote with their party 93% of the time establishes what is really common sense in the first place: party affiliation predicts positions on the issues. Moreover, multiple individual petitioners also testified that their Republican representatives did not represent their views on the issues they cared about—including life-and-death issues. Tr.142-43, 148; Petrs. Br. 40.

In sum, if this evidence does not establish that Democratic voters in Republican districts are "essentially" shut out, nothing will.[5]

IV. The Intervenors Have No Right to an Unconstitutional Advantage

Intervenors, 36 "active Republicans," seek to extend the 2011 map's pro-Republican discrimination for two more election cycles, at the expense of the constitutional rights of millions of Pennsylvania voters. No voter has a right to perpetuate unconstitutional congressional districts because they would prefer to vote under an unconstitutional map or because a constitutional map would disrupt political activities. Under Intervenors' theory that the Court should not remedy an unconstitutional map once campaigning has begun, there is never time to bring a redistricting challenge, since "campaigns start as soon as the last campaign for Congress ends." Int. Br. 5.

Butcher v. Bloom, 203 A.2d 556 (Pa. 1964), does not mean that "Petitioners' right to relief is balanced against" Intervenors' purported reliance interests. *Cf.* Int. Br. 35. *Butcher* just held that installing a new map was not actually feasible because the primary election had already been held. 203 A.2d at 568-69. Here, by contrast, a new map is feasible, as the Executive Branch officials responsible for

[5] Legislative Respondents do not dispute that the Commonwealth Court's legislative privilege ruling was erroneous and should be vacated, that the court's associated evidentiary rulings were erroneous, and that the court erred in dismissing the League of Women Voters as a petitioner. Petrs. Br. 8 & nn.1-2, 41-42 n.5, 64 n.7. This Court should treat these points as conceded.

running the elections have attested. Commissioner Marks, who has administered "more than 20 regularly scheduled elections and a number of special elections," has stated that even if a new congressional districting plan is not put into place until February 20, 2018, it would be possible to hold the primary election on the scheduled May 15, 2018 date "without compromising the election process in any way." FOF ¶¶35, 448-51.[6] And contrary to Intervenors' suggestion, Int. Br. 22, just a few days ago the North Carolina federal court ordered that state's legislature to redraw a map within two weeks. *Common Cause*, 2018 WL 341658, at *74-75.

V. This Court Has Authority to Require or Create a Constitutional Map

Nothing in the U.S. Constitution's Elections Clause (Art. 1, § 4) precludes this Court from invalidating the 2011 map or prescribing a remedy. *Cf.* Opp. 59-60. To the extent Legislative Respondents are arguing that this Court may not "adopt additional criteria not found in the Pennsylvania Constitution," Opp. 59, no one is asking the Court to do so; Petitioners seek a ruling that the map violates the Pennsylvania Constitution's free speech and equal protection provisions. Any remedy this Court orders would effectuate this Court's constitutional holdings.

To the extent Legislative Respondents are arguing that the Elections Clause bars state court review of the map (as the heading of Section III of their brief

[6] Contrary to Intervenors' assertion, laches is not a defense to a constitutional claim seeking forward-looking relief. *See Sprague v. Casey*, 550 A.2d 184, 188-89 (Pa. 1988). And none of the remedy cases cited by the Intervenors support the continued use of an unconstitutionally discriminatory map.

suggests), they are incorrect. This Court rejected this exact argument in *Erfer*, describing as "radical" the notion that "our Commonwealth's Constitution is nullified in challenges to congressional reapportionment plans." 794 A.2d at 331. The U.S. Supreme Court has likewise held that the Elections Clause does not "endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *Smiley v. Holm*, 285 U.S. 355, 367-68 (1932). In two follow-on cases, the Court confirmed that, under *Smiley*, state courts may remedy congressional districting maps that are invalid under the state constitution by imposing new maps. *Carroll v. Becker*, 285 U.S. 380, 403 (1932); *Koenig v. Flynn*, 285 U.S. 375, 379 (1932).

The General Assembly's "power to enact laws," *Smiley*, 285 U.S. at 368, is limited by the Pennsylvania Constitution, as interpreted by this Court, *Fillman v. Rendell*, 986 A.2d 63, 75 (Pa. 2009). Indeed, a state court's "issuance of its [own] plan (conditioned on the legislature's failure to enact a constitutionally acceptable plan [])" is "precisely the sort of state judicial supervision of redistricting [the Supreme Court] ha[s] encouraged." *Growe v. Emison*, 507 U.S. 25, 33-34 (1993). "State courts have a significant role in redistricting." *Id.* at 33; *accord, e.g.*, *Scott v. Germano*, 381 U.S. 407, 409 (1965). So does state constitutional law. *Branch v. Smith*, 538 U.S. 254, 274-78 (2003).

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CERTIFICATION OF WORD COUNT

Per Pa.R.A.P. 2135(a)(1), I hereby certify that this Brief contains 6,992 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

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CERTIFICATION OF COMPLIANCE WITH PUBLIC ACCESS POLICY

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

I certify that the Public Version of the Brief does not contain confidential information. An unredacted version of this Brief will be filed under seal.

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