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261 MD 2017

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

League of Women Voters of Pennsylvania, *et al.*, *Petitioners*, v. The Commonwealth of Pennsylvania, *et al.*, *Respondents*.	Civ. No. 261 MD 2017

ORDER

AND NOW, this day of , 2017, upon consideration of Respondents Pennsylvania General Assembly, Michael C. Turzai, and Joseph B. Scarnati III's Preliminary Objections to the Petition for Review, and any response thereto, it is hereby **ORDERED** that the Preliminary Objections are **SUSTAINED** and the Petition for Review is **DISMISSED**.

BY THE COURT:

_____

J.

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Petitioners are hereby notified to plead to the enclosed Preliminary Objections within 30 days from service hereof

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

League of Women Voters of Pennsylvania, *et al.*,

) Civ. No. 261 MD 2017

Petitioners,	)
	)
v.	)
	)
The Commonwealth of Pennsylvania,	)
	)
et al.,	)
Respondents.	)
	)

RESPONDENTS PENNSYLVANIA GENERAL ASSEMBLY, MICHAEL C. TURZAI, AND JOSEPH B. SCARNATI III'S PRELIMINARY OBJECTIONS

Respondents Pennsylvania General Assembly, Michael C. Turzai, and Joseph B. Scarnati III (collectively, "Objecting Respondents") file these Preliminary Objections to the Petition for Review filed by Petitioners League of Women Voters of Pennsylvania, *et al.* (collectively, "Petitioners").

PRELIMINARY STATEMENT

The ability of a party to advance a claim for partisan gerrymandering claim is tenuous, at best. Indeed, since the U.S. Supreme Court abandoned the plurality's standard in *Davis v. Bandemer*, 478 U.S. 109 (1986), the Supreme Court of Pennsylvania—which had previously adopted the analysis in *Bandemer*—has not addressed what standard (if any) should govern partisan gerrymandering claims.

Despite the tenuous and unknowable legal landscape, and after three election cycles under the plan that was designed in 2011 (the "2011 Plan"), Petitioners, 18 Democrat voters and the League of Women Voters of Pennsylvania, claim that each of Pennsylvania's 18 congressional districts constitutes an unconstitutional partisan gerrymander. Petitioners' claims include even those districts where the Democrat Petitioners were able to elect a Democratic Party member to Congress and those districts where Democrats have a voter registration advantage.

As set forth herein, Petitioners' partisan gerrymandering claims advanced under Art. I, §§ 7, 20 and Art. I, §§ 1 and 26, and Art. I, §5 of Pennsylvania's Constitution are fundamentally flawed, and this Court should sustain these Preliminary Objections for the following reasons:

First, partisan gerrymandering claims are non-justiciable political questions and therefore this Court should dismiss the Petition for Review for lack of jurisdiction.

Second, Petitioners cannot state a claim upon which relief can be granted because they do not plead facts that demonstrate they are shut out of the political process and that their elected congressional members entirely ignore their interests.

Third, Petitioners cannot sustain their free speech and association claims because those rights have not been violated. Petitioners are able to endorse candidates, campaign for candidates, and speak in favor of candidates. The map they are challenging does not violate any of the Petitioners' free speech or associational rights under the Pennsylvania Constitution.

Fourth, Petitioner League of Women Voters of Pennsylvania does not have standing. The right to vote is personal to each individual, not to an organization. Therefore, the League of Women Voters of Pennsylvania does not have a sufficient interest to remain a Petitioner in this lawsuit.

Fifth, even if certain Petitioners could advance a cause of action for partisan gerrymandering, those Petitioners who are Democratic Party supporters and live in districts that have a Democratic Party registration advantage cannot state a claim because they cannot establish that they have suffered any diminution of their political power, that they have been shut-out of the political process in any way, or that Republican representatives have "entirely ignored" Democratic constituents.

Sixth, Petitioners do not have standing to bring a challenge to the map on a statewide basis. Under the U.S. Supreme Court's racial gerrymandering jurisprudence, to have standing, plaintiffs must reside in the

district that the plaintiff claims is unconstitutional. The rule for partisan gerrymandering claims should be no less stringent.

I. FACTUAL BACKGROUND

A. The Pennsylvania General Assembly Passes Senate Bill 1249 and Creates New Boundaries for the Commonwealth's Eighteen Congressional Districts.

1. According to the facts alleged in the Petition, Republican Senators in the Pennsylvania Senate introduced Senate Bill 1249 on September 14, 2011. (Pet. ¶ 50).[1]

2. The purpose of Senate Bill 1249 was to establish new boundaries for the Commonwealth's eighteen congressional voting districts (the 2011 Plan). (*Id.* ¶¶ 51-52).

3. After Senate Bill 1249 was passed in the Senate on December 14, 2011, (*id.* ¶¶ 52, 68), the House of Representatives—including thirty-six Democrats—voted to pass the Bill on December 20, 2011. (*Id.* ¶¶ 76).

4. Senate Bill 1249 was thereafter signed into law by Governor Tom Corbett, and it went into effect prior to the 2012 elections. (*Id.* ¶¶ 76).

[1] Objecting Respondents accept the allegations of the Petition as true only for purposes of these Preliminary Objections.

B. Petitioners Commence the Present Action Claiming That The 2011 Plan Violates Their Constitutional Rights

5. Petitioners consist primarily of registered Democrats from each of the eighteen Congressional Districts in Pennsylvania. (Pet. ¶¶ 14-31).

6. They allege that the 2011 Plan was devised to maximize impermissibly the number of Republican congressional representatives. (Pet. ¶¶ 42-49).

7. Petitioners allege that the Senate sponsors of the 2011 Plan accomplished this goal by "packing" Democrat leaning jurisdictions and "cracking" Democrat leaning jurisdictions into multiple Republican leaning jurisdictions. (Pet. ¶¶ 61-66, 73-74).

8. According to Petitioners, "cracking" is accomplished "by dividing a party's supporters among multiple districts so that they fall short of a majority in each district," while "packing" consists of "concentrating one party's backers in a few districts that they win by overwhelming margins to minimize the party's votes elsewhere." (Pet. ¶ 47).

9. Petitioners allege that "[t]his cracking and packing results in 'wasted' votes: votes cast either for a losing candidate (in the case of cracking) or for a winning candidate but in excess of what he or she needs to prevail (in the case of packing)." (*Id.*).

C. Petitioners Advance Two Claims for Relief

10. Petitioners have advanced two claims for relief.

11. First, Petitioners contend that the 2011 Plan violates Pennsylvania's Free Speech and Expression Clause and the Freedom of Association Clause codified at Art. I, §§ 7, 20 of the Constitution of the Commonwealth of Pennsylvania.

12. According to Petitioners, the 2011 Plan violates these provisions because, among other things, it prevents Democratic voters from electing the representatives of their choice and from influencing the legislative process, and suppresses their political views. (Pet. ¶¶ 99-112).

13. Second, Petitioners contend that the 2011 Plan violates the equal protection provisions in Pennsylvania Constitution, codified at Art. I, §§ 1 and 26, and Art. I, §5 (the "Pennsylvania Equal Protection Clause"), because the 2011 Plan was enacted with discriminatory intent and has had a discriminatory effect. (Pet. ¶¶ 116-17).

14. Petitioners allege that Democrats, as an identifiable group, are disadvantaged at the polls, which consequently denies Democrats fair representation. (Pet. ¶ 117).

15. Due to Democrats' statewide voting numbers, Petitioners assert, Democrats should have more congressional seats, but the alleged

gerrymander has allotted Petitioners far fewer seats than Democrats should win. (Pet. ¶ 118).

16. Under Petitioners' theory, this has the effect of preventing Democrat voters from participating in the political process and from having a meaningful opportunity to influence legislative outcomes. (Pet. ¶¶ 119-20).

II. PRELIMINARY OBJECTIONS

17. Pursuant to Pennsylvania Rule of Civil Procedure 1028(a), "[p]reliminary objections may be filed by any party to any pleading" based upon grounds including the "lack of jurisdiction over the subject matter of the action or the person" and "insufficient specificity in a pleading." Pa. R.C.P. 1028(a)(2)-(3).

18. The Rules also provide that the preliminary objections "shall state specifically the grounds relied upon and may be inconsistent. Two or more preliminary objections may be raised in one pleading." Pa. R.C.P. 1028(b).

A. First Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(1): Petitioners' Claims Are Non-Justiciable Political Questions

1. Relevant Law Governing Justiciability

19. Questions concerning justiciability, including the political question doctrine, are "threshold" questions "generally resolved before addressing the merits of the parties' dispute." *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 917 (Pa. 2013) (citing *Council 13, Am. Fed. of State, Cnty. & Mun. Emps., AFL-CIO v. Commonwealth*, 986 A.2d 63, 74 n.10 (Pa. 2009)).

20. Justiciability questions are properly raised in preliminary objections "to a petition for review filed in the original jurisdiction of the Commonwealth Court . . . ." *Id*.

21. The political question doctrine secures the separation of powers doctrine, *id*. at 926-27, and is implicated when there is a "textually demonstrable constitutional commitment" to a political branch and where there is "a lack of judicially discoverable and manageable standards for resolving the disputed issue." *Id*. at 928 (citing and relying on *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

22. Judicial action, however, is governed by standards and rules. *See Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality op.).

23. Here, as discussed below, no judicially manageable standards exist to guide this Court in determining whether a constitutional violation has occurred.

2. Because No Judicially Manageable Standard Exists for Assessing Partisan Gerrymandering Actions, Petitioners' Claims Must Be Dismissed as Non-Justiciable Political Questions

a. The U.S. Supreme Court Decision Upon Which the Pennsylvania Supreme Court Relied in Assessing Partisan Gerrymandering Claims Has Been Abandoned

24. In assessing partisan gerrymandering claims, the Supreme Court of Pennsylvania previously adopted the plurality's test set forth by the U.S. Supreme Court in *Davis v. Bandemer*, 478 U.S. 109, 127-37 (1986). *See In re 1991 Pa. Legislative Reapportionment Comm'n*, 609 A.2d 132, 141-142 (Pa. 1992) ("This Court is persuaded by the holding of the Supreme Court of the United States [in *Bandemer*] with regard to the elements of a prima facie case of political gerrymandering.").

25. That test mandates that for a plaintiff to plead and prove a partisan gerrymandering claim, the plaintiff must "prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Bandemer*, 478 U.S. at 127.

26. But the Supreme Court subsequently expressly abandoned the *Bandemer* test. *See Vieth*, 541 U.S. at 283-84 (plurality opinion); *id*. at 308 (Kennedy, J., concurring); *id*. at 318 (Stevens, J., dissenting); *id*. at 346 (Souter and Ginsburg, JJ., dissenting); *id*. at 355-56 (Breyer, J., dissenting).

27. The *Vieth* plurality noted that the *Bandemer* plurality's test provided nothing more than "one long record of puzzlement and consternation," *id*. at 282, and that "eighteen years of essentially pointless litigation have persuaded us that *Bandemer* is incapable of principled application." *Id*. at 306.

28. As such, because the Pennsylvania Supreme Court relied upon *Bandemer* in crafting its standard for assessing partisan gerrymandering claims—and because *Bandemer* has been abandoned by the U.S. Supreme Court—the present standard (if any) governing such claims in Pennsylvania is unknown.

b. The U.S. Supreme Court Has Not Established Any Standard for Assessing Partisan Gerrymandering Claims

29. In *Vieth*, the U.S. Supreme Court produced four splintered opinions that articulated several different standards to determine an equal protection violation due to partisan gerrymandering. *Vieth*, 541 U.S. at 292 (noting that the four dissenters proposed three different standards to

determine a partisan gerrymandering claim that were different from the two proposed standards in *Bandemer* and the one proposed by the *Vieth* appellants).

30. More standards were again submitted to the Court and ultimately rejected in *League of United Latin Am. Citizens v. Perry,* 548 U.S. 399, 514 (2006) (hereinafter "LULAC"); *see also id*. at 417-19 (rejecting plaintiffs' proposed test to prove partisan gerrymandering); *see also id*. at 471-72 (Stevens, J., and Breyer, J., concurring in part and dissenting in part) (stating that plaintiffs proved a partisan gerrymander under proposed test); *see also id*. at 492 (Roberts, C.J., and Alito, J., concurring in judgment in part and dissenting in part) (rejecting plaintiffs' proposed standing to prove partisan gerrymandering); *see id*. at 512 (Scalia, J., and Thomas, J., concurring in judgment in part and dissenting) ("[W]e again dispose of this claim in a way that provides no guidance to lower court judges and perpetuates a cause of action with no discernible content.").

31. From the four opinions in *Bandemer,* to the five opinions in *Vieth*, to the six opinions in *LULAC*, the U.S. Supreme Court has produced fifteen opinions, none of which produced a judicially manageable rule or standard to determine if an unconstitutional partisan gerrymander occurred.

32. Thus, confusion persists, placing courts in an untenable position "of evaluating political gerrymandering claims without any definitive standards." *Radogno v. Ill. State Bd. of Elections*, No. 11-4884, 2011 U.S. Dist. LEXIS 122053, *14 (N.D. Ill. Oct. 21, 2011) (three-judge court).

33. Further complicating this analysis is the fact that both the U.S. Supreme Court and the Supreme Court of Pennsylvania have recognized that politics and political considerations are inevitable in redistricting, so much so that redistricting is "intended to have substantial political consequences." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973); *Erfer v. Commonwealth*, 794 A.2d 325, 332 (Pa. 2002).

34. Additionally, it is difficult to adjudicate partisan gerrymandering claims because political party affiliation is an inherently mutable characteristic as voters often vote for different parties in both different elections *and* in the same election. *See Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring); *Vieth*, 541 U.S. at 287 ("***Political affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line***.") (emphasis added).

35. In sum, because the Pennsylvania Supreme Court in *Erfer* relied upon *Bandemer* to assess partisan gerrymandering claims—and

because *Bandemer* has been abandoned by the U.S. Supreme Court—the holding in *Erfer* is no longer tenable, and no judicially manageable standard exists to govern Petitioners' claims in this action.

36. This Court should therefore sustain Objecting Respondents' Preliminary Objections and dismiss Petitioners' claims as non-justiciable political questions.

B. Second Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(4): Petitioners' Claims Are Legally Insufficient Because They Have Failed to Adequately Plead That Democrats' Electoral Power Is Unconstitutionally Diminished

1. The *Bandemer* Test Relied Upon By The Pennsylvania Supreme Court Requires Parties in Partisan Gerrymandering Actions to Demonstrate That They Have Been Shut Out of the Political Process

37. Even if the *Bandemer* test still applies in Pennsylvania, Petitioners must plead and prove that the Democratic Party and its members have "essentially been shut out of the political process." *Erfer*, 794 A.2d at 333 (quoting *Bandemer*, 478 U.S. at 139).

38. The test is intentionally "onerous" because the *Bandemer* Court was wary about creating a test that would permit courts to routinely interfere with a State's sovereign function of drawing district boundaries. *Erfer*, 794 A.2d. at 333-34; *see also O'Lear v. Miller*, 222 F. Supp. 2d 850, 855 (E.D. Mich. 2002) ("[A] redistricting plan may be drawn with the specific

intention of disadvantaging one political party's election prospects, and may cause election results that are unfair because they are disproportional to the percentage of the population voting for that party on a state-wide basis, and yet not violate the Constitution.") (citing and quoting *Bandemer*, 478 U.S. at 132, 139)).

39. The Supreme Court of Pennsylvania has previously rejected partisan gerrymandering claims where petitioners failed to plead and prove that Republican lawmakers "will entirely ignore the interests of those citizens within his district who voted for the Democratic candidate." *See Erfer*, 794 A.2d at 334 (internal quotation marks omitted).

40. Finally, alleged disproportionate election results do not lead to a lack of political power or denial of fair representation. *Id.*

2. Petitioners Have Failed to Allege That They Have Been Shut Out of the Political Process

41. Here, the Petition for Review is completely devoid of any allegations that would satisfy the high standard adopted by the Pennsylvania Supreme Court in *Erfer*.

42. For example, Petitioners James Greiner and Robert Smith allege in a conclusory fashion that they have no "meaningful opportunity to influence legislative outcomes" because they live in gerrymandered districts. (Pet. ¶ 119).

43. Similarly, Petitioners Carmen Febo San Miguel and James Solomon allege that because they live in purportedly "packed" districts that elect Democratic Party members to Congress, their elected officials are less responsive to their individual interests or policy preferences. (Pet. ¶ 120).

44. The Petition similarly contains the conclusory allegation that Petitioners are not able to "influence the legislative process," or elect representative of their choice. (Pet. ¶ 107).

45. But the constitution does not guarantee electoral success. *See Badham v. Eu*, 694 F. Supp. 664, 675 (N.D. Cal. 1988) *sum. aff'd.* 488 U.S. 1024 (1989).[2]

46. Moreover, since the 2011 Plan was implemented, several districts have failed even to nominate a Democratic candidate.[3]

47. Petitioners from these districts therefore cannot claim that they were somehow prejudiced by a partisan gerrymander.

48. In sum, because the Petition for Review fails to allege any

[2] Further undermining Petitioners' allegation that they have been shut out of the political process is the fact that one of Pennsylvania's Senators is a Democrat, and that Pennsylvania's Governor, Attorney General, and Secretary of State are all Democrats.

[3] http://www.electionreturns.pa.gov/General/OfficeResults?OfficeID=11&ElectionID=41&ElectionType=G&IsActive=0 and http://www.electionreturns.pa.gov/General/OfficeResults?OfficeID=11&ElectionID=54&ElectionType=G&IsActive=0 (demonstrating that the Fifteenth Congressional District and the Third Congressional District failed to nominate a candidate in 2014 and 2016, respectively, and that Democrats in the Eighteenth Congressional District failed to nominate a candidate in 2014 and 2016); (*see also* Pet. ¶ 16).

instance in which legislators "entirely ignored" Petitioners' requests, calls, letters, or emails, Objecting Respondents' Preliminary Objections should be sustained, and the Petition should be dismissed.

C. Third Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(4): Petitioners' Count I Fails to State a Claim Upon Which Relief Can Be Granted

1. Relevant Law Governing Alleged Free Speech and Association Violations in the Context of Partisan Gerrymandering Claims

49. Courts have recognized that there is no violation of First Amendment free speech or association rights without an equal protection violation. *See Whitford v. Gill*, 218 F. Supp. 3d 837, 884 (W.D. Wis. 2016) (stating that elements to prove an unconstitutional partisan gerrymander under the First Amendment or the Equal Protection Clause are the same); *see also Republican Party v. Martin*, 980 F.2d 943, 959 n.28 (4th Cir. 1992) ("This court has held that in voting rights cases no viable First Amendment claim exists in the absence of a Fourteenth Amendment claim.").[4]

50. Another district court rejected a First Amendment challenge to a redistricting plan because plaintiffs failed to show that the plan prevented plaintiffs from speaking, "endorsing and campaigning for a candidate,

[4] While the U.S. Supreme Court has opined that a First Amendment challenge to a redistricting plan is at least plausible, *see Shapiro v. McManus*, 136 S. Ct. 450 (2015), neither it, nor any other court, has ever found such a violation.

contributing to a candidate, or voting for a candidate." *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 575 (N.D. Ill. 2011).

51. Even the allegation that the redistricting plan makes it more difficult for a political party to succeed is insufficient to show a First Amendment violation because the First Amendment "does not ensure that all points of view are equally likely to prevail." *See id*. (quoting *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1101 (10th Cir. 2006)); *see also League of Women Voters v. Quinn*, No. 1:11-cv-5569, 2011 U.S. Dist. LEXIS 125531 *12-13 (N.D. Ill. Oct. 27, 2011) (three-judge court) (stating that the redistricting plan did not impede plaintiffs' ability to speak freely, endorse candidates, or campaign for candidates); *Washington v. Finlay*, 664 F.2d 913, 927-28 (4th Cir. 1981) ("The first amendment's protection of the freedom of association and of the rights to run for office, have one's name on the ballot, and present one's views to the electorate do not also include entitlement to success in those endeavors.").

2. Petitioners' Claim Under Article I, §§ 7, 20 of the Pennsylvania Constitution Must be Dismissed Because Petitioners Have Failed to Allege Any Infringement Upon Their Right to Speak or Associate

52. Here, Petitioners allege that the 2011 Plan violates Pennsylvania's Free Speech and Expression Clause and the Freedom of Association Clause codified at Art. I, §§ 7, 20 of the Constitution of the Commonwealth of Pennsylvania.

53. According to Petitioners, the 2011 Plan violates these provisions because, among other things, it prevents Democratic voters from electing the representatives of their choice and from influencing the legislative process, and suppresses their political views. (Pet. ¶¶ 99-112).[5]

54. Notably absent from the Petition, however, is any allegation that Petitioners were actually silenced and prevented from speaking, endorsing a candidate, or campaigning for a candidate because of the 2011 Plan. *See, e.g.*, *League of Women Voters*, No. 1:11-cv-5569, 2011 U.S. Dist. LEXIS 125531 at *12-13; *Badham*, 694 F. Supp. at 675 ("Plaintiffs here are

[5] It does not appear that any Pennsylvania court has addressed a partisan gerrymandering claim brought pursuant to Article I, §§ 7, 20 of the Pennsylvania Constitution. That said, the Pennsylvania Supreme Court has relied upon U.S. Supreme Court First Amendment precedent to interpret its own constitutional free speech and freedom of association provisions. *See Pap's A.M. v. City of Erie*, 812 A.2d 591, 611 (Pa. 2002) ("[T]his Court has often followed the lead of the U.S. Supreme Court in matters of free expression under Article I, § 7[.]"). As such, law interpreting the First Amendment to the U.S. Constitution is instructive in this analysis.

not prevented from fielding candidates or from voting for the candidate of their choice. The First Amendment guarantees the right to participate in the political process; it does not guarantee political success.").[6]

55. Rather, Petitioners have merely alleged that "representatives pay no heed to the views and interests of voters of the opposite party once in office." (Pet. ¶ 95).

56. This allegation, however, is insufficient to establish a violation of Petitioners' right to free speech and expression. *See Badham*, 694 F. Supp. 675 (finding that Democrats "need [not] attend to the views of fragmented and submerged Republican minorities in their districts" and rejecting the partisan gerrymandering claim).

57. Furthermore, *Bandemer* held that elected officials adequately represent the interests of those who did not vote for the official and that these voters have as much "opportunity to influence that candidate as other voters in the district." *Bandemer*, 478 U.S. at 132.

58. Finally, even under Petitioners' own "retaliation test" for assessing a free speech and expression violation,[7] Petitioners fail to state a

[6] In fact, as discussed above, five Pennsylvania districts are represented by Democrats, one of Pennsylvania's Senators is a Democrat, and Pennsylvania's Governor, Attorney General, and Secretary of State are all Democrats. This undermines the notion that Democrats have somehow been silenced in Pennsylvania.

claim because they do not allege sufficient facts demonstrating that Respondents targeted Democrats with the intent to punish them for their political views.

D. Fourth Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(1): Petitioner League of Women Voters of Pennsylvania Does Not Have Standing

59. To establish standing, the plaintiff must "have a direct interest in the subject-matter of the particular litigation." *See Albert v. 2001 Legislative Reapportionment Comm'n*, 790 A.2d 989, 994-95 (Pa. 2002).

60. The subject-matter in redistricting cases is an "individual's right to vote and to have that vote counted." *See id.* at 994-95.

61. This is so because the right to vote "[i]s personal and the rights sought to be vindicated in a suit challenging an apportionment scheme are personal and individual." *Id*. at 995 (quoting *Reynolds v. Sims*, 377 U.S. 533, 554-55 (1964) (internal quotation marks omitted)).

62. Any organization, therefore, that does not have the right to vote lacks standing. *Id.*; *see id*. at n.6 (dismissing a local chapter of League of Women Voters).

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[7] Petitioners' proposed test to prevail on their free speech and expression claim requires that Petitioners demonstrate that when drawing districts, Respondents intentionally considered a district's partisan composition, including political party affiliation, with an intent to disfavor or punish Petitioners for their political affiliation, and the resulting districts had the actual effect of negatively impacting Petitioners. (Pet. ¶ 112).

63. The Pennsylvania Supreme Court has similarly ruled that the Democratic Committee does not have standing to bring partisan gerrymandering claims. *See Erfer*, 794 A.2d at 330.

64. This is true because the Democratic Party, or any political committee for that matter, does not have the right to vote. *Id.*

65. The League of Women Voters of Pennsylvania is an organization, and the Petition does not allege that the League of Women Voters of Pennsylvania is authorized to vote or that it is suing on behalf of its members.

66. Objecting Respondents therefore respectfully request that the Court sustain their Preliminary Objections, and dismiss the League of Women Voters from this action.

E. Fifth Preliminary Objection Pursuant To Pa. R. Civ. P. 1028(a)(4): Petitioners Who Live in Districts With Democratic Registration Advantages Fail to State a Claim That They Are Shut Out of the Political Process

67. As set forth above, the Petition for Review fails to state a claim upon which relief can be granted, and must be dismissed in its entirety.

68. That said, even if certain Petitioners could advance a cause of action for partisan gerrymandering, many Petitioners reside in districts where Democrats enjoy a registration advantage over Republicans, and would therefore still be unable to state a claim.

69. Specifically, in 2014, the Democratic Party held a registration advantage in the following 10 of Pennsylvania's 18 Congressional Districts:[8]

a. 336,887 to 73,941 registration advantage in the First Congressional District where a Democrat has won every election under the 2011 Plan. (Pet. ¶ 14);

b. 434,143 to 45,356 registration advantage in the Second Congressional District where a Democrat has won every election under the 2011 Plan. (Pet. ¶ 15);

c. 200,351 to 188,552 advantage in the Third Congressional District where the *Republican* candidate has "*comfortably*" won every election under the 2011 Plan and ran unopposed in 2016. (Pet. ¶ 16);

d. 204,191 to 199,827 registration advantage in the Eighth Congressional District where the *Republican* candidate has won every election by 8 points or more under the 2011 Plan. (Pet. ¶ 21);

e. 231,759 to 180,428 registration advantage in the Twelfth Congressional District where the *Republican* candidate has won every election by 18 points or more under the 2011 Plan. (Pet. ¶ 25);

f. 265,683 to 122,478 registration advantage in the Thirteenth Congressional District where a Democrat has won every election under the 2011 Plan, and ran unopposed in 2016. (Pet. ¶ 26);

g. 350,775 to 89,055 registration advantage in the Fourteenth Congressional District where a Democrat has won every election under the 2011 Plan. (Pet. ¶ 27);

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[8] *Saunders v. Commonwealth Dep't of Corr.*, 2016 Pa. Commw. Unpub. LEXIS 457, *1, 2016 WL 3570172 (Pa. Commw. Ct. June 30, 2016) ("[A] court may take judicial notice of public documents in ruling on a preliminary objection in the nature of a demurrer."). Registration statistics available at http://www.dos.pa.gov/VotingElections/OtherServicesEvents/VotingElectionStatistics/Documents/2016%20Election%20VR%20Stats.pdf (last visited Aug. 4, 2017).

h. 199,195 to 173,669 registration advantage in the Fifteenth Congressional District yet a *Republican* has won every election under the 2011 Plan. (Pet. ¶ 28);

i. 238,760 to 136,747 registration advantage in the Seventeenth Congressional District where a Democrat has won every election under the 2011 Plan. (Pet. ¶ 30);

j. 240,552 to 184,912 registration advantage in the Eighteenth Congressional District where the *Republican* candidate has won every election under the 2011 Plan "almost always with more than 60% of the vote." (Pet. ¶ 31).

k. In 2012, Democrats held a registration advantage in eleven congressional districts.[9]

70. Assuming that Pennsylvania even recognizes partisan gerrymandering claims now that *Bandemer* has been abandoned, Petitioners cannot prevail upon their claims unless they demonstrate that their elected representatives "entirely ignored" the interests of Democratic voters. *Erfer*, 794 A.2d at 334.

71. Plainly, Petitioners who reside in districts in which registered Democrats outnumber registered Republicans cannot claim that their elected officials entirely ignored their interests, when they themselves have the numerical advantage in electing those officials.

72. For all of the foregoing reasons, Objecting Respondents' Preliminary Objections should be sustained, and the claims advanced by

[9] All statistics cited in this paragraph can be found at www.electionreturns.pa.gov.

Petitioners from the First, Second, Third, Eighth, Twelfth, Thirteenth, Fourteenth, Fifteenth, Seventeenth, and Eighteenth Districts should be dismissed.

F. Sixth Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(1): Petitioners Do Not Have Standing to Challenge The 2011 Plan on a Statewide Basis.

73. For a party to have standing in Pennsylvania, the party must establish: "a substantial interest in the subject matter of the litigation; 2) the party's interest must be direct; and, 3) the interest must be immediate and not a remote consequence of the action." *See Erfer*, 794 A.2d at 329 (citations and quotations omitted).

74. Because standing requires a direct interest in the subject-matter of the lawsuit, a single Petitioner does not have standing to file a challenge to the map statewide; rather, a Petitioner may bring a challenge only to the Petitioners' specific district.

75. Regarding racial gerrymandering claims brought under the Fourteenth Amendment's Equal Protection Clause, the Supreme Court has ruled that these claims "[a]ppl[y] to the boundaries of individual districts. It applies district-by-district. It does not apply to a State considered as an undifferentiated 'whole.'" *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015).

76. The required injury is personal to the voter who lives in the racially gerrymandered district because that voter is personally subjected "to [a] racial classification." *Id*.

77. As such, that voter is forced to live in a district with an elected representative "who believes his primary obligation is to represent only the members of a particular racial group." *Id*. (internal quotation marks omitted).

78. Objecting Respondents acknowledge that the Supreme Court of Pennsylvania rejected the argument that a redistricting plaintiff is limited to bringing a challenge to the district where plaintiff resides. *See Erfer*, 794 A.2d at 329-30.

79. Based on the reasoning of the U.S. Supreme Court set forth above, however, Respondents respectfully request that the decision in *Erfer* be revisited or overruled, and that the Court sustain their Preliminary Objections on the basis that Petitioners lack standing to challenge the 2011 Plan on a statewide basis.

WHEREFORE, Respondents Pennsylvania General Assembly, Michael C. Turzai, and Joseph B. Scarnati III respectfully request that this Court sustain the Preliminary Objections to the Petition for Review, and dismiss the Petition for Review with prejudice as to Respondents

Pennsylvania General Assembly, Michael C. Turzai, and Joseph B. Scarnati III.

Dated: August 14, 2017

Respectfully Submitted,

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