Received 1/10/2018 2:23:44 PM Supreme Court Middle District

Filed 1/10/2018 2:23:00 PM Supreme Court Middle District
159 MM 2017

In the Supreme Court of Pennsylvania
Middle District

No. 159 MM 2017

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA *et al.*,
Petitioners/Appellants,

v.

THE COMMONWEALTH OF PENNSYLVANIA *et al.*,
Respondents/Appellees.

Review of Recommended Findings of Fact and Conclusions of Law from the Commonwealth Court No. 261 M.D. 2017

BRIEF OF RESPONDENTS/APPELLEES MICHAEL C. TURZAI, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, AND JOSEPH B. SCARNATI, III, IN HIS OFFICIAL CAPACITY AS PENNSYLVANIA SENATE PRESIDENT PRO TEMPORE

BLANK ROME LLP
Brian S. Paszamant, PA #78410
paszamant@blankrome.com
Jason A. Snyderman, PA #80239
snyderman@blankrome.com
John P. Wixted, PA #309033
jwixted@blankrome.com
One Logan Square
130 N. 18th Street
Philadelphia, Pennsylvania 19103

CIPRIANI & WERNER PC
Kathleen Gallagher, PA #37950
kgallagher@c-wlaw.com
Carolyn Batz McGee, PA #208815
cmcgee@c-wlaw.com
650 Washington Road, Suite 700
Pittsburgh, Pennsylvania 15228
Phone: 412-563-4978
Attorneys for Respondent/Appellee Representative Michael Turzai

Phone: 215-569-5791
Facsimile: 215-832-5791
Attorneys for Respondent/Appellee Senator Joseph Scarnati III

HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC
Jason Torchinsky (*pro hac vice*)
jtorchinsky@hvjt.law
Shawn Sheehy (*pro hac vice*)
ssheehy@hvjt.law
45 North Hill Drive, Suite 100
Warrenton, Virginia 20186
Phone: 540-341-8808
Facsimile: 540-341-8809
Attorneys for Respondents/Appellees Senator Joseph Scarnati III and Representative Michael Turzai

BAKER & HOSTETLER LLP
E. Mark Braden (*pro hac vice* to be filed)
mbraden@bakerlaw.com
1050 Connecticut Ave. NW
Washington, DC 20036
Phone: 202-861-1504

Patrick T. Lewis (*pro hac vice*)
plewis@bakerlaw.com
Key Tower
127 Public Square, Suite 2000
Cleveland, Ohio 44114
Phone: 216-621-0200

Robert J. Tucker (*pro hac vice*)
rtucker@bakerlaw.com
200 Civic Center Drive, Suite 1200
Columbus, Ohio 43215
Phone: 614-462-2680
Attorneys for Respondent/Appellee Representative Michael Turzai

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

SUMMARY OF ARGUMENT

The United States Constitution expressly delegates districting authority to state legislatures. *See Growe v. Emison*, 507 U.S. 25, 34 (1993); U.S. Const., Art. I, §§ 2, 4. Consequently, as this Court unanimously recognized only four years ago, districting is "inherently political" and "there is nothing in the Constitution to prevent" consideration of political factors. *Holt v. 2011 Legislative Reapportionment Comm'n*, 67 A.3d 1211, 1234, 1236 (Pa. 2013)[1]; *accord Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004); *id.* at 307 (Kennedy, J., concurring); *id.* at 344 (Souter, J. dissenting); *id.* at 358-60 (Breyer, J., dissenting); *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). In a democracy, it is "natural that one or another party might go further and seek to press a perceived partisan advantage." *Holt*, 67 A.3d at 1234.

Thus, the mere fact that "political considerations" may have influenced the crafting of a districting plan does not render it unconstitutional. As the Commonwealth Court correctly held in its Conclusions of Law, "[t]he question presented in a political gerrymandering case is not whether the General Assembly, in drawing congressional districts, may make decisions that favor one political party

[1] Although *Holt* involved a challenge to state legislative districts, its recognition of redistricting being a political process is instructive. *Holt* upheld a district plan performed by the Legislative Reapportionment Commission even though, unlike a Congressional district plan passed by the General Assembly, its plan is not afforded a presumption of constitutionality.

or even a particular incumbent; *rather, the question is how much partisan bias is too much.*" (CC Recommended Conclusions of Law ("COL") ¶ 15 (emphasis added)).

Petitioners failed to answer this fundamental question both at trial and before this Court. Instead, Petitioners advocate that the 2011 Congressional districting map ("2011 Plan") should be overturned under three novel—and unsupported—theories.

First, Petitioners argue that, under the Free Speech and Association provisions of Pennsylvania's Constitution, *any* consideration of political motives in districting is barred, "full stop," as unconstitutional "viewpoint discrimination," so it is immaterial to ask how much political motive is "too much." (Petrs. Br. 4, 55-56). This position is directly contradicted by decades of districting precedent from this Court and the U.S. Supreme Court consistently holding that redistricting is a political process that will and can involve political considerations.

Petitioners' viewpoint discrimination claim is also unsupported by the facts and applicable Free Speech and Association precedent. They claim the 2011 Plan impairs their free speech rights by making it "harder" for Petitioners to elect their chosen candidates. But 2011 Plan simply divides the Commonwealth's geography into 18 equipopulous districts. It does not burden Petitioners' free speech and association rights. Petitioners can and do fully participate in the political process, and their votes carry the same weight as any other Pennsylvania voter. In reality, Petitioners are claiming a free speech right to have a Congressional district

composed of a majority of people they perceive are easier to persuade to vote for their preferred candidate. But free speech rights do not include a right to political success; the speaker must still do the work of using his or her speech to persuade others.

Second, Petitioners argue the 2011 Plan is unconstitutional under the Free Speech and Association provisions because it is retaliatory. To prove such a claim, Petitioners must show a retaliatory motive: here, that the Pennsylvania legislature enacted the 2011 Plan to punish Petitioners for the exercise of Petitioners' right to vote. Petitioners offered no such proof. On the contrary, Petitioners' claims of retaliation are completely undermined by the fact that the 2011 Plan was passed on a bipartisan basis (and could not have been passed but for the votes of Democratic House representatives). Petitioners, nonetheless, contend that the 2011 Plan was intended to favor Republican candidates, but as the Commonwealth Court correctly recognized, an intent to favor one party's candidates should not be conflated with motive to retaliate against voters for voting for candidates of the opposing party.

Third, Petitioners advance an equal protection theory. This Court has established that to satisfy such a claim Petitioners are required to show that the 2011 Plan (1) was enacted with the intent to discriminate against an identifiable political group; *and* (2) resulted in an actual discriminatory effect. *Erfer v. Commonwealth*, 794 A.2d 325, 332 (Pa. 2002).

Petitioners do not satisfy these standards.

Specifically, Petitioners have not demonstrated that the 2011 Plan was enacted with the intent to discriminate against an identifiable group. They ignore the direct evidence of bipartisan support for the 2011 Plan that undermines any finding of discriminatory intent. Then, in an attempt to prove intentional discrimination, Petitioners rely exclusively on flawed computer models that fail to account for various non-partisan districting factors and, thus, merely compare apples to oranges. Further, as the Commonwealth Court properly found, Petitioners have failed to establish that "Democratic voters" are a sufficiently concrete and identifiable group.

In addition, Petitioners have not demonstrated that the 2011 Plan produced an actual discriminatory effect. Such a showing requires that Petitioners be shut out of the political process. But, Petitioners have not been prevented from voting or participating in the political process; they are (as a matter of law) fairly represented by their elected Congressmen—even if they did not vote for such Congressmen. And that Democrats hold five "safe" Congressional seats further undermines the notion that they are not represented in Congress. Under the very same circumstances, this Court found an earlier districting plan to be constitutional. *See Erfer*, 794 A.2d at 334.

Recognizing that they cannot meet this intentionally onerous standard, Petitioners request that it be reduced by removing of one of its essential

requirements—that the aggrieved party be, in effect, shut out of the political process. Yet Petitioners offer no principled reason why this requirement should be removed, suggesting that it should be jettisoned only because it is difficult to satisfy.

Finally, Petitioners make no effort to articulate any alternative judicially-manageable standard to evaluate partisan gerrymandering claims. In the absence of an alternative, judicially-manageable standard, and because Petitioners cannot meet the existing standard, their equal protection claim fails. Should this Court look to adopt a different standard, it should follow its own precedent, look to the controlling federal law, *Vieth*, 541 U.S. 267, and find that such claims are all but non-justiciable. It should avoid the temptation to adopt a new standard from whole cloth especially when the U.S. Supreme Court is reviewing these same issues under federal law.

At bottom, Petitioners are attempting to achieve through the courthouse what they could not through voting booths. No political party is engrafted into Pennsylvania's constitutional structure as meriting seats proportional to statewide votes. And there is no free-speech or equal-protection right for any individual or group to elect its preferred candidates. For that reason, the principle that redistricting is "inherently political" can continue to coexist with Pennsylvania's Constitution, as it always has. And if Petitioners and other Pennsylvania voters are sufficiently troubled by partisanship in districting, they can pursue relief through legislation or Constitutional amendment as other states have done.

There being no basis to depart from decades of precedent rejecting claims exactly like this one, the Court should adopt the Commonwealth Court's thoughtful and well-reasoned conclusions.

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

1. Whether Petitioners have proven a violation of any free-speech principle.
2. Whether Petitioners have proven a violation of any equal-protection principle.
3. Whether a dramatic change of the legal standards governing partisan redistricting claims under the Commonwealth's Constitution comports with the U.S. Constitution's Elections Clause's delegation of redistricting authority to legislative processes.

Suggested Answers: No.

COUNTER-STATEMENT OF THE CASE

I. LEGAL BACKGROUND

Before 1962, efforts challenging legislative districting decisions in court met "a long line of judicial refusals to enter the political thicket of reapportionment." ROBERT G. DIXON, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS, 99 (1968). At the federal-court level, the result was an "impressive body of rulings" in "dozens of cases" rejecting "judicial intervention in the essentially political conflict" of redistricting. *Baker v. Carr*, 369 U.S. 186, 266-67 (1962) (Frankfurter, J., dissenting); *see also id.* at 278 (discussing cases).

Beginning in the 1960s, the U.S. Supreme Court altered that legal landscape. The Court applied the Fourteenth Amendment to strike down racially motivated legislation that did not amount to "an ordinary geographic redistricting measure even within familiar abuses of gerrymandering." *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960); *see, e.g.*, *Miller v. Johnson*, 515 U.S. 900 (1995). The Court held that Section 2 of the Voting Rights Act of 1965 requires the creation and maintenance of districts with high percentages of minority voters where there is racially polarized voting, a history of discrimination, repeated defeats of minority-preferred candidates, and other requisite conditions. *See Thornburg v. Gingles*, 478 U.S. 30, 59-52 (1986). And the Court found that Article I, Section 2 of the U.S. Constitution requires exact equality of population in Congressional districts. *Wesberry v. Sanders*, 376 U.S. 1 (1964).

Notwithstanding these developments, the U.S. Supreme Court continued to insist that redistricting is "primarily the duty and responsibility of the State through its legislature or other body." *Chapman v. Meier*, 420 U.S. 1, 27 (1975). It also insisted that redistricting is "essentially political;" it is both "obvious" and "unavoidable" that "the location and shape of districts may well determine the political complexion of the area," and it would "assume that those who redistrict and reapportion work with both political and census data." *Gaffney*, 412 U.S. at 754. The Court, however, left open the possibility that a districting plan could be "vulnerable"

to a constitutional challenge if "political groups have been fenced out of the political process …." *Id*. At what point that would occur remained unclear.

This Court had already offered its own answer: never. This Court observed that, "as far as is known," "gerrymandering per se" does not "raise any cognizable federal constitutional claim" and found that nothing "in Pennsylvania's present Constitution or laws" forbids gerrymandering, unless there is a "departure from explicit constitutional or statutory requirements." *Newbold v. Osser*, 230 A.2d 54, 59-60 (Pa. 1967).

Two decades later, however, the U.S. Supreme Court decided *Davis v. Bandemer*, maintaining that partisan redistricting may be a justiciable violation of equal protection. 478 U.S. 109 (1986). A plurality concluded that this would occur only where an identifiable group is "denied its chance to effectively influence the political process;" a showing that the scheme "makes it more difficult for a particular group" to win was insufficient. *Id*. at 131-33. *Bandemer* rejected the challenge to Indiana's districting plans, even though they resulted in large Republican majorities in elections where most votes went to Democratic candidates. *See id.* at 115-16.

In 1992, this Court adopted the *Bandemer* plurality's position as the standard to be applied under Pennsylvania's Free and Equal Elections Clause. *See In re 1991 Pennsylvania Legislative Reapportionment Comm'n*, 609 A.2d 132, 142 (Pa. 1992). As in *Bandemer*, this Court rejected the claim before it. *Id.* at 147. So too did every

court in every reported decision following *Bandemer*. *See Vieth*, 541 U.S. at 281 n.6 (collecting cases). So while courts repeatedly entertained the *possibility* that political groups might be unconstitutionally cut out of the process, judicial experience showed that, even without the majorities they desired, the Republican and Democratic Parties remained "potent" in each state such that "it is unnecessary for the judiciary to intervene." *See Badham v. March Fong Eu*, 694 F. Supp. 664, 672 (N.D. Cal. 1988), *sum. aff'd*, 488 U.S. 1024 (1989).

Pennsylvania was and is no different. In 2000, census data revealed a relative population deficiency resulting in the loss of two Pennsylvania Congressional seats. This loss set the stage for a highly contentious, nationally observed redistricting by a majority-Republican General Assembly. Democratic leaders claimed to have "no input" in that plan (which was passed along party lines) and alleged that the plan "fragmented numerous governmental units," "forced unnecessary Democratic incumbent contests," and ignored traditional redistricting criteria. Timothy P. Brennan, *Cleaning Out the Augean Stables: Pennsylvania's Most Recent Redistricting and a Call to Clean Up This Messy Process*, 13 WIDENER L.J. 235, 278 (2003).

Democrats challenged the plan under the Pennsylvania Constitution. *See Erfer,* 794 A.2d 325. The Commonwealth Court found, and this Court agreed, "that roughly two-thirds of the districts would probably be won by Republicans, and that

the legislature took the information it gleaned from analyzing voting trends and deliberately drew the congressional districts so as to grant an advantage to the Republican party." *Id.* at 328. But, applying the *Bandemer* standard, the unanimous Court upheld the plan because: (1) there was no evidence "that a winning Republican congressional candidate will entirely ignore the interests" of those who voted for Democratic candidates, and (2) the evidence showed that "at least five of the districts are 'safe seats' for Democratic candidates, thus further undermining Petitioners' claim that Democrats have been entirely shut out of the political process." *Id.* at 334.

A second challenge subsequently proceeded in federal court and eventually came before the U.S. Supreme Court—which also upheld the plan. *See Vieth,* 541 U.S. 267. Four members of the Court concluded that plaintiffs' virtually guaranteed failure under *Bandemer* justified ending the political-gerrymandering experiment altogether and that the entire field is non-justiciable. *Id. at* 281(plurality op.). Justice Kennedy concurred in the result, observing that the plurality's views "may prevail in the long run," *id.* at 309, but declining to rule out the possibility that in "some" extreme circumstance, a claim could be viable. *Id.* at 306. His concurring opinion expressly identified a sufficient basis to dispose of the case at hand "under the governing Fourteenth Amendment standard" because the challengers failed to show a "burden" on "their representational rights," and their allegation "that the legislature adopted political classifications" stated "no constitutional flaw." *Id.*

at 313. Thus, a five-member majority of the U.S. Supreme Court affirmed the 2001 Pennsylvania Congressional plan.

II. PROCEDURAL HISTORY

For over five years and three election cycles, the 2011 Plan remained in effect, without challenge. On June 15, 2017, Petitioners commenced this action. (*See generally* Pet.).

On November 9, 2017, this Court granted Petitioners' application for extraordinary relief and instructed a commissioned judge of the Commonwealth Court "to conduct all necessary and appropriate discovery, pre-trial, and trial proceedings so as to create an evidentiary record on which Petitioners' claims may be decided" and to file its findings of fact and conclusions of law on or before December 31. (Nov. 9, 2017 Order).

The Commonwealth Court (the Honorable P. Kevin Brobson presiding) expedited discovery, affording Legislative Respondents' experts only seven days to prepare their reports, and conducted a five-day trial commencing on December 11. On December 29, the Commonwealth Court filed Recommended Findings of Fact and Conclusions of Law, concluding that Petitioners "failed to meet their burden of proving that the 2011 Plan, as a piece of legislation, clearly, plainly, and palpably violates the Pennsylvania Constitution. For the judiciary, this should be the end of the inquiry." (COL ¶¶ 63-64).

III. THE EVIDENCE

A. The Background and Enactment of the Bipartisan 2011 Plan.

In 2010, the decennial census data revealed that Pennsylvania would lose a Congressional seat and that the state's population had shifted, requiring another districting plan. Congressional districting plans are ordinary legislation passed by the legislature and signed by the Governor. (CC Recommended Findings of Fact ("FOF") ¶ 88). The 2011 Plan was no different.

The plan was introduced in the Pennsylvania Senate on September 14, 2011, as SB 1249. (FOF ¶ 98). On December 7, the Senate State Government Committee, which has oversight over redistricting, unanimously (*i.e.* with Democratic support) voted SB 1249 out of committee, a necessary step towards passage. The Senate's first consideration of SB 1249 took place later that same day, and its second occurred on December 12. (FOF ¶¶ 100, 102).

On December 14, 2011, the Senate State Government Committee amended SB 1249 and voted again on referral to the Senate. (FOF ¶ 104; *see also* Petrs. Ex. 178 at 60:9-61:7). Democratic Senator Tina Tartaglione of Philadelphia voted to report SB 1249 out of the Committee to "help" the Philadelphia Democratic Congressional delegation. (Petrs. Ex. 178 at 61:8-16, 62:9-63:4). Her vote was necessary for SB 1249 to proceed because of *Republican* opposition in the Committee. (Petrs. Ex. 178 at 63:5-7).

On December 14, 2011, SB 1249 was referred to the Senate Appropriations Committee. (FOF ¶ 105). Meanwhile, the Senate Democratic Caucus was preparing a competing plan. (Petrs. Ex. 178 at 50:4-15). Democratic Senator Jay Costa introduced the Senate Democratic Caucus's redistricting plan as an amendment to SB 1249, claiming that such plan would create eight districts favorable to Republicans, four districts favorable to Democrats, and six swing districts. The amendment failed. (FOF ¶ 108; Petrs. Ex. 178 at 67:3-17, 68:24-69:3; *see also* Trial Tr., Vol. V at 1625:20-22; LR Ex. 19).

On December 14, 2011, SB 1249 passed the Senate by a vote of 26-24. (FOF ¶ 109). And on the same day, SB 1249 was referred to the State Government Committee of the Pennsylvania House of Representatives. (FOF ¶ 112). The House gave SB 1249 first consideration on December 15, 2011 and second consideration on December 19, 2011. (FOF ¶¶ 113-114). After six days of consideration, on December 20, SB 1249 passed the House by a vote of 136-61. (FOF ¶ 117). 36 Pennsylvania House Democrats voted for SB 1249. (FOF ¶ 118; Petrs. Ex. 179 at 47:10-12, 50:3-8, 106:4-107:8). SB 1249 could not have passed the House without Democratic support. (Petrs. Ex. 179 at 107:9-23; COL ¶ 37).

The Governor signed SB 1249 into law on December 22. (FOF ¶ 121). It is not uncommon for the content of Pennsylvania legislation to be introduced and passed in a compressed timeframe. (Petrs. Ex. 179 at 109:15-112:9, 113:21-114:5).

B. Petitioners' Testimony.

Petitioners presented no evidence that they have been shut out of the political process or denied fair representation. No Petitioner testified that (s)he has been prevented from voting for the candidate of his or her choice. (FOF ¶¶ 23-24; s*ee also* Legislative Respondents' Recommended Findings of Fact filed in Commonwealth Court on December 18, 2017 ("LR FOF") ¶ 61). No Petitioner has been prevented from registering to vote, (FOF ¶ 22), or from making political contributions as (s)he desired. (LR FOF ¶ 62).

No Petitioner has been prevented from campaigning or speaking publicly in support of or in opposition to any political candidate, including their Congressperson, as (s)he desired. (*See* FOF ¶ 25; *see also* LR FOF ¶¶ 63, 67). And no Petitioner has been told by any Congressional office that constituent services are provided or denied on the basis of partisan affiliations. (FOF ¶ 26).

No Petitioner has been prevented by the 2011 Plan from participating in any public protest, (LR FOF ¶ 64), or from engaging in civic activities, (LR FOF ¶ 65).

Many Petitioners' allegations of harm amount to little more than alleging that, in their view, they cannot elect or otherwise do not have a Congressperson that represents their political views. (LR FOF ¶ 69). Other Petitioners' allegations of harm relate only to the political composition of Congress or of Pennsylvania's

Congressional delegation as a whole, and of a desire for statewide proportional representation. (LR FOF ¶ 70). As Petitioner Solomon explained:

> [My Congressman Dwight Evans] represents my issues …. The problem is when his voice isn't heard by the other members, my voice isn't heard … because of the imbalance of the number of representatives from the other party…. Dwight Evans attempts to represent me, but there's no pressure … to compromise with him or representatives of the state because of the imbalance in the number of representatives based on party affiliation. So Dwight Evans tries to help me, but he can't be effective unless there's an equalizing in the number of representatives that he can partner with.

(Petrs. Ex. 169 at 15:23-16:12, 21:4-14). Similarly, Petitioner Rentschler testified that if "Democratic views, as they're expressed statewide, or Democrats across the state have more representation, I think our views would be more strongly advocated for in the United States Congress…. Pennsylvania should be able to have a Congress that represents its voters more accurately." (Trial Tr., Vol. II at 680:4-24).

Some Petitioners openly acknowledged that neither their Congressperson nor their district has harmed them. (LR FOF ¶ 71). Finally, some Petitioners allege that they have been harmed by the 2011 Plan only to the extent that it has contributed to *general* political polarization. (LR FOF ¶ 72).

C. Petitioners' Expert Testimony.

Petitioners called four expert witnesses at trial. But the Commonwealth Court found the opinions of Petitioners' experts had little utility because they did not

address this case's central question. (FOF ¶¶ 414, 419). At best, Petitioners' experts opined that there was a partisan bias in favor of Republicans in the 2011 Plan. But none provided any standard for evaluating how much partisan bias is too much or any test for evaluating when a legislature's use of partisan considerations results in an unconstitutional gerrymander. (COL ¶ 61). As the Commonwealth Court stated, "none of these experts opined as to where on their relative scales of partisanship, the line is between a constitutionally partisan map and an unconstitutionally partisan districting plan." (FOF ¶ 421).

The first, Dr. Jowei Chen analyzed the 2011 Plan using 1,000 computer-generated maps based on various inputs entered into an algorithm. (FOF ¶ 238). Dr. Chen opined that partisan bias in the 2011 Plan could not be explained by the traditional redistricting criteria he programmed into his algorithm. Importantly, however, he could not opine on whether the alleged bias resulted from any non-partisan criteria *not* entered into his algorithm. In fact, Dr. Chen intentionally excluded the criterion of "preserving the cores of prior districts," and conceded that, if he had, he would have produced hundreds of maps resembling the previous plan. (Trial Tr., Vol. II at 389:25-390:13; *see also id.* at 386:3-389:15). He also did not include a metric for identifying "communities of interest." (FOF ¶¶ 310-311.) Nor did Dr. Chen consider whether his simulated maps complied with the Voting Rights Act, (Trial Tr., Vol. V at 1703:21-1704:2), because he is not an expert on the VRA

and lacks competency to assess whether any of his maps would be legal under federal law. (Trial Tr., Vol. II at 486:16-487:13).

Second, Petitioners called Dr. Wesley Pegden, who performed a similar analysis. He used a computer algorithm to analyze whether the 2011 Plan could be a consequence of non-partisan factors and whether it was an outlier when compared to his purported "bag of alternative districtings." (FOF ¶ 344, 347, 349). As with Dr. Chen, Dr. Pegden's analysis was limited to criteria entered into the algorithm, and many non-partisan goals were excluded. (FOF ¶ 361). Additionally, he compared the 2011 Plan, which was required to be drawn to *exact* population equality, with plans drawn at up to a 2% deviation—all constitutionally impermissible. (Petrs. Ex. 117 at 3; Trial Tr., Vol. III at 770:19-771:3). (The first iteration of Pennsylvania's 2001 Congressional plan was rejected because of a discrepancy of only 19 individuals. *See Vieth v. Pennsylvania*, 241 F. Supp. 2d 478, 481-83 (M.D. Pa. 2003).) Dr. Pegden also offered a legal conclusion that the 2011 Plan is unconstitutional—which the Commonwealth Court summarily ignored. (FOF ¶ 363).

Third, Petitioners called Dr. John Kennedy, who opined on whether the 2011 Plan impacted communities of interest. (FOF ¶ 315; Trial Tr., Vol. II at 578:10-17). Dr. Kennedy has never been involved in a redistricting, has not written any articles on redistricting, and considers himself an expert only in "looking at Pennsylvania's

communities of interest," so he was not offered as a redistricting expert. (Trial Tr., Vol. II at 578:19-22, 646:23-647:17). The Commonwealth Court found that Dr. Kennedy failed to address the intent behind the 2011 Plan, and to the extent that he offered an opinion on whether the 2011 Plan was unconstitutionally gerrymandered—an ultimate question of law—the Commonwealth Court disregarded such opinion. (FOF ¶ 341).

Finally, Petitioners called Dr. Christopher Warshaw, who purported to analyze the degree of the 2011 Plan's partisan bias through use of the so-called "efficiency gap." (FOF ¶ 366; Trial Tr., Vol III at 836:12-15; 852:15-853:19). Dr. Warshaw acknowledged that he is not aware of any court, legislature or independent redistricting commission that has used the "efficiency gap" to draw a Congressional plan. (Trial Tr., Vol. III at 974:22-975:25).

The Commonwealth Court found that the full meaning and effect of an efficiency gap in Pennsylvania is speculative and does not take into account other relevant considerations including political geography, candidate quality, incumbency advantage, and voter turnout. (FOF ¶ 389; *see also* Trial Tr., Vol. V at 1489:10-17 (opinion of Dr. Nolan McCarty rejecting use of the "efficiency gap" as a good measure of partisan bias)). Indeed, the Commonwealth Court was critical of using the efficiency gap because it "devalues competitive elections" and treats fair and competitive districts as unfair and possibly unconstitutionally gerrymandered.

(FOF ¶ 390). Moreover, it was critical of the notion of a "wasted vote" as "anathema to our democracy and courts should not embrace such a concept," further noting that the "notion of a wasted vote is particularly noxious in the context of a close election, where traditionally the American (and Pennsylvania) mantra is 'every vote counts.'" (FOF ¶ 418). The Commonwealth Court was also critical of Dr. Warshaw's comparison of the efficiency gap in Pennsylvania with those in other states, finding such analysis of limited value because Dr. Warshaw failed to take into account differences in states. (FOF ¶ 391).

Indeed, Dr. Warshaw acknowledged that partisan redistricting is not the only factor that contributes to a high "efficiency gap." He conceded that a number of factors other than partisanship can influence the calculated "efficiency gap," such as political geography and the Voting Rights Act. (Trial Tr., Vol. III at 990:25-991:13). Yet Dr. Warshaw's analysis curiously failed to consider political geography, the Voting Rights Act, or incumbency protection. (*Id.* at 982:10-16; 990:25-991:13; 1004:1-1005:23; 1008:20-24).

D. The Changing Dynamic of Pennsylvania's Political Structure and Voting Patterns.

Pennsylvania voters have consistently "split the ticket" by voting for Republican candidates in some races and Democrat candidates in others. (*See* FOF ¶¶ 218-20; Joint Stipulated Facts ("JS") ¶¶ 127-28, 216-17). Moreover, recent data

reflects a decline in registered Democratic voters in Pennsylvania. (*See* FOF ¶¶ 205-08).

By the 2016 Presidential Election, only 24 Pennsylvania counties had more registered Democrats than registered Republicans, while 43 counties had more registered Republicans than registered Democrats. (FOF ¶ 205). From November 2012 to November 2016, the percentage of registered Republicans increased in 59 counties, while decreasing in only 8. (FOF ¶ 206). On the contrary, from November 2012 to November 2016, the percentage of registered Democrats increased in only five of Pennsylvania's counties, while decreasing in 62. (FOF ¶ 207).

Moreover, even though 24 of Pennsylvania's 67 counties had more registered Democrats than registered Republicans at the time of the 2016 Presidential Election, Democratic nominee Hillary Clinton won only 11 counties. (FOF ¶ 208). Three counties previously won by President Obama in 2012 were won by President Trump in 2016 despite having more registered Democrat voters than Republican voters, *i.e.*, Erie, Northampton, and Luzerne Counties:

County	**Trump%**	**Clinton%**	**D Reg %**	**R Reg %**
Erie	48.57%	46.99%	51.31%	35.48%
Northampton	49.98%	46.18%	46.87%	34.76%
Luzerne	58.39%	38.86%	52.62%	36.10%

(FOF ¶¶ 209-212). President Trump also won the following counties despite the number of registered Democratic voters exceeding that of registered Republican voters:

County	**Registered Democrats**	**% Vote for Trump**
Fayette	57.96%	64.33%
Greene	55.22%	68.82%
Cambria	52.25%	67.00%
Beaver	52.15%	57.64%

(FOF ¶¶ 214-17). Indeed, in 2016, President Trump won Pennsylvania; Republican Pat Toomey was re-elected to the United States Senate; but Democratic candidates won statewide races for Attorney General, Treasurer, and Auditor General. (FOF ¶ 218). In 2016, not all registered Democrats in Pennsylvania voted straight Democrat. (FOF ¶ 219).

STANDARD OF REVIEW

The 2011 Plan, an act of the General Assembly, receives a presumption of constitutionality. *Singer v. Sheppard*, 346 A.2d 897, 900 (Pa. 1975); *Erfer*, 794 A.2d at 331. "A plaintiff bears a heavy burden to prove it unconstitutional. A statute will only be declared unconstitutional if it clearly, palpably and plainly violates the constitution." *Erfer*, 794 A.2d at 331 (internal quotations omitted). The

Commonwealth Court properly understood and applied this high burden. (COL ¶¶ 16-17, 57, 64).

Additionally, this Court should afford the Commonwealth Court's Findings of Fact and Conclusions of Law due consideration. *Erfer*, 794 A.2d at 329 (citing *Annenberg v. Commonwealth,* 757 A.2d 338, 343 (Pa. 2000)). In an expedited fashion, the Commonwealth Court collected and prepared a voluminous evidentiary record, heard and assessed the live witness testimony, and applied the evidence to the law. Its conclusion that Petitioners' failed to meet their burden to demonstrate a constitutional violation—for many independently sufficient reasons—merits significant weight.

ARGUMENT

I. PETITIONERS' FREE SPEECH CLAIM FAILS

Petitioners advance two free-speech theories: (1) that the 2011 Plan amounts to "viewpoint discrimination" and (2) retaliation. Each argument is meritless.

A. A Districting Plan Is Not "Viewpoint" Discrimination.

Petitioners' free-speech and associational claims fail because districting legislation does not implicate a recognized free-speech or associational right. Infringements of those rights hinge on the government employing coercive power to burden speech or association, like a regulation giving citizens the choice between "self-censorship and criminal prosecution." *Am. Booksellers Ass'n, Inc. v. Rendell*, 481 A.2d 919, 928 (Pa. Super. Ct. 1984). Indeed, the test under federal law as to

whether a party has standing to wage a free-speech challenge is whether expressive conduct is "arguably prohibited," *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 303 (1979), directing the inquiry to whether the challenged statute's language may reasonably be read to curtail the protected speech. *See, e.g.*, *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000).[2]

But the 2011 Plan, like any districting legislation, is not directed to voter speech or conduct. Rather, the 2011 Plan simply creates 18 equipopulous districts. Here, the Commonwealth Court found that the 2011 Plan does not burden Petitioners' right to vote for the candidates of their choice or to freely associate with any political party or candidate. (COL ¶ 29). On the contrary, Petitioners can and do fully participate in the political process, and their votes carry the same weight as those of any other voter in Pennsylvania. (*See supra* Statement of the Case § III.B). That should be the end of the analysis.

Petitioners attempt to gain traction for their theory by invoking a line of cases striking down speech restrictions that render targeted speech "less effective." (Petrs. Br. 49-51). But those cases involved actual speech restrictions—laws that diminished a speaker's ability to effectively communicate with an audience. For instance, their lead case, *McCullen v. Coakley*, 134 S. Ct. 2518, 2525 (2014),

[2] For political parties, this entails a showing of burden on associational rights, such as forced association, *Cal. Democratic Party v. Jones*, 530 U.S. 567, 577-82 (2000), or non-association. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214-17 (1986).

considered a Massachusetts statute that "*makes it a crime* to knowingly stand on a 'public way or sidewalk' within 35 feet of an entrance or driveway to any place… where abortions are performed." (emphasis added). The point in *McCullen* about "effective" speech was a response to the argument that, notwithstanding the *criminal* burden on speech within the buffer zone, anti-abortion speech could occur elsewhere. *See id*. at 2537. The speech was "less effective" in the sense that the buffer zone rendered the petitioners effectively unable to connect to their targeted audience. *Id.*

Similarly, in *Insurance Adjustment Bureau v. Insurance Commissioner for Commonwealth of Pennsylvania*, this Court struck down a statute that forbade insurance adjusters from contacting fire victims within 24 hours of a fire, in part because that 24-hour window "may be the only time during which the property owner can be located before moving to an unknown address…." 542 A.2d 1317, 1323 (Pa. 1988). *Sorrell v. IMS Health Inc.*, involved a Vermont law that restricted the disclosure and use of pharmacy records that revealed individual doctors' prescribing practices, a law that "prevent[ed] detailers—and only detailers—from communicating with physicians in an effective and informative manner." 564 U.S. 552 (2011). *Davis v. Federal Election Commission*, involved a campaign finance law that penalized self-funding candidates by permitting their opponents to "receive both larger individual contributions than would otherwise be allowed and unlimited

coordinated party expenditures." 554 U.S. 724 (2008); *see also Randall v. Sorrell*, 548 U.S. 230, 236 (2006). *Ridley v. Massachusetts Bay Transportation Authority*, is one of many cases involving an outright ban on participation in a public forum. 390 F.3d 65 (1st Cir. 2004).

These cases are inapposite. Petitioners do not argue that the 2011 Plan forbade them from "effectively" exercising their free speech rights. In reality, Petitioners have the right to advocate that voters in their Congressional districts vote for Petitioners' preferred candidates, to join the Democratic Party, to exhort their representatives to vote in a particular way, and to financially support causes. (FOF ¶¶ 22-25; COL ¶ 56; LR FOF ¶¶ 62, 63, 67). In other words, nothing inhibits Petitioners' ability to communicate as they desire.

Instead, Petitioners claim that the "effectiveness" of their *votes* is reduced by the 2011 Plan because "Democratic voters were placed into districts where it would be harder for them to elect candidates of their choice …." (Petrs. Br. 52). But because nothing in the 2011 Plan affords Petitioners' votes less weight than those of other voters, the only plausible reason it would be "harder" for Petitioners to elect candidates of their choice is because it may be "harder" for Petitioners to persuade a majority of the other 705,000+ voters in their districts to agree with them on the candidate they prefer.

But free-speech and associational rights do not give Petitioners a right to an agreeable or more persuadable audience. For this very reason, courts have consistently concluded that redistricting plans do not violate voters' First Amendment rights. *See, e.g.*, *League of Women Voters v. Quinn*, No. 1:11-cv-5569, 2011 WL 5143044, *12-13 (N.D. Ill. Oct. 28, 2011) ("The redistricting plan does not prevent any LWV member from engaging in any political speech, whether that be expressing a political view, endorsing and campaigning for a candidate, 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); *Pope v. Blue*, 809 F. Supp. 392, 398-399 (W.D.N.C. 1992), *sum. aff'd*, 506 U.S. 801 (1992); *Badham*, 694 F. Supp. At 675. And this is because free-speech doctrines do not "guarantee political success," i.e., a right to "translate" votes into a given number of Congressional seats. *Badham*, 694 F. Supp. at 675; *see, e.g.*, *Quinn*, 2011 WL 5143044, at *4; *Comm. for a Fair and Balanced Map*, 835 F. Supp. 2d at 575; *Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1101 (10th Cir. 2006). Separately, courts have consistently held that there is no independent violation of free speech and association rights absent a violation of equal protection rights. *See Whitford v. Gill*, 218 F. Supp. 3d 837, 884 (W.D. Wis. 2016); *see also Republican Party of North Carolina v. Martin*, 980 F.2d 943, 959 n.28 (4th Cir. 1992); *Pope*, 809 F. Supp. at 398-99; *Washington v. Finlay*, 664 F.2d 913, 927-28 (4th Cir. 1981).

Stymied by applicable law, Petitioners argue that this Court *must* depart from all this judicial experience because the Pennsylvania Constitution provides "broader" protections than federal law. (Petrs. Br. 46). But Petitioners identify no Pennsylvania authority holding that a districting plan violates a voter's free speech and expression rights under Pennsylvania's Constitution where it would not have also been a violation under the First Amendment. Nor have Petitioners identified any textual basis for interpreting Article I, Sections 7 and 20 differently. Put simply, Petitioners' argument is entirely unsupported.

Moreover, the "broader" interpretation Petitioners propose for Article I, Sections 7 and 20 of Pennsylvania's Constitution would eviscerate decades of *this Court's* redistricting precedent. A mere four years ago this Court unanimously recognized that redistricting is "inherently political," that it "naturally" involves "political parties seek[ing] to protect their own incumbent seats," and that "*nothing* in the Constitution" prohibits this. *Holt*, 67 A.3d at 1234-35. That two of the most significant provisions in Pennsylvania's Constitution are now offended by even "a little" partisan intent can only come as quite a shock. (Petrs. Br. 57).

Despite decades of precedent to the contrary, Petitioners now essentially advance a "no political considerations allowed" argument—the absurd position that the *Vieth* plurality specifically foresaw: that a free speech claim "would render unlawful all consideration of political affiliation in districting, just as it renders

unlawful all consideration of political affiliation in hiring for non-policy-level government jobs." 541 U.S. at 294 (plurality op.). To be clear, Petitioners' any-partisanship-is-too-much argument flatly contradicts *Holt* and turns every other case acknowledging the entirely permissible use of partisan motive in redistricting into dead letter. *See*, *e.g.*, *Gaffney*, 412 U.S. at 753 ("Politics and political considerations are inseparable from districting and apportionment."); *Erfer*, 794 A.2d at 334.

Indeed, even the *Vieth* dissenters did not adopt Petitioners' extreme view, with all but one Justice agreeing that *some* partisan motive is permissible. *See Vieth,* 541 U.S. at 344 (Souter, J., dissenting) (acknowledging that "some intent to give political advantage is inescapable whenever political bodies devise a district plan, and some effect results from the intent"); *id.* at 358 (Breyer, J., dissenting) ("political considerations will likely play an important, and proper, role in the drawing of district boundaries").

Recognizing how radical a departure from decades of precedent their position constitutes, Petitioners attempt to limit it by drawing a distinction between "political considerations" and "partisan intent." (Petrs. Br. 56). But the two concepts are inextricably intertwined; political *parties* are comprised of *constituencies*, which in part includes "communities of interest"—what Petitioners argue is the "good" side of "political." *See Shapiro v. McManus*, 203 F. Supp. 3d 579, 597 (D. Md. 2016). And Petitioners' proposed ban on "partisan intent" undermines the notion of

incumbency protection, which this Court has considered a valid districting principle. *See Mellow v. Mitchell*, 607 A.2d 204, 210 (Pa. 1992).

Ultimately, there is no free speech right for Petitioners to be placed in Congressional districts containing some desirable proportion of voters who agree with them or who are easily persuadable, and there is no right to win elections. *Badham*, 694 F. Supp. at 675; *see, e.g., Quinn*, 2011 WL 5143044, at *4; *Committee for a Fair and Balanced Map*, 835 F. Supp. 2d at 575; *Walker*, 450 F.3d at 1101 (10th Cir. 2006). Nor could there be. Such a right lacks any limiting principle: Free speech rights belong to all citizens, not just Democrats. Indeed, if Democrats can claim a free speech violation because a districting plan makes it more difficult to elect a Democrat, so can *any* voter. Do independent or third-party voters always have a justiciable claim, because they too have a right to a Congressional district favorable to their views and associations?

Not surprisingly, Petitioners have no answer. To accept Petitioners' position, every effort to protect an incumbent—rendering the speech of those voters who dislike the incumbent less effective—or to organize a district around perceived "communities of interest"—rendering the speech of voters who have adverse interests less effective—would be a free speech violation. And affording any such right to every one of Pennsylvania's voters to challenge (and possibly throw out) a Congressional plan on that basis would be plainly beyond the pale. Such a sweeping

rule is not justified by the law, the facts, or public policy. For this reason, using the Free Speech and Expression Clause to evaluate an alleged partisan gerrymander is not judicially manageable. The Court should decline Petitioners' invitation to create such an unworkable standard.

B. Petitioners Have Not Proven a "Retaliation" Case.

Petitioners also advance a "retaliation" claim, alleging that the General Assembly deliberately drew the 2011 Plan to subject Democratic voters to disfavored treatment and thereby chill their political speech. (Petrs. Br. 61-62). In *Uniontown Newspapers, Inc. v. Roberts*, this Court articulated the elements of a retaliation claim under Pennsylvania law:

> (1) the plaintiff was engaged in a constitutionally protected activity; (2) the defendant's action caused the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and (3) the adverse action was motivated at least in part as a response to the exercise of the plaintiff's constitutional rights.

839 A.2d 185, 198 (Pa. 2003); (COL ¶ 26).

Petitioners do not satisfy this test.

First, Petitioners cannot show that the 2011 Plan was enacted by the Pennsylvania legislature in "response to the exercise of the plaintiff's constitutional rights," i.e., a retaliatory motive. *Uniontown Newspapers*, 839 A.2d at 198. As the Commonwealth Court concluded, "[t]here is no record evidence to suggest that in voting for the 2011 Plan, the General Assembly, or any particular member thereof,

was motivated by a desire to punish or retaliate against Pennsylvanians who voted for Democratic candidates." (COL ¶ 36).

Petitioners contend that the 2011 Plan was intended to favor Republican candidates, but, as the Commonwealth Court concluded, "intent to favor one party's candidates over another should not be conflated with motive to retaliate against voters for casting their votes for a particular candidate in a prior election." (COL ¶ 36). Plainly, no legislature would reasonably believe that, by gerrymandering, it could coerce voters to vote differently than they would otherwise, and it is inconceivable that this occurred here.

In actuality, there is no specific evidence that Pennsylvania's legislature acted with a retaliatory motive in enacting the 2011 Plan. To begin, the 2011 Plan passed the Pennsylvania House on a bipartisan basis with 36 Democratic votes. (COL ¶ 37). Bipartisan support was *essential* to its passage because there were insufficient Republican votes to reach a majority. (*Id.*). Surely, 36 Democratic House members did not vote to "retaliate" against their own party's supporters.[3] Moreover, there is no way to assign a "singular and dastardly motive to a branch of government made up of 253 individual members elected from distinct districts with distinct constituencies and divided party affiliations." (COL ¶ 36). As the Commonwealth

[3] The same must be true for those Democratic members of the Senate State Government Committee who unanimously voted SB 1249 out of that Committee. (LR FOF ¶ 9).

Court recognized, the 2011 Plan was bipartisan legislation passed by both Houses of the General Assembly and signed by the Governor; it was not the act of a single individual or small group whose motives could be more readily ascertained. (COL ¶¶ 36-37). Finally, given Pennsylvania's storied history of "split-ticket" voting, where voters of all political persuasions cast votes for both Democratic and Republican candidates, it is hard to see how the legislature could identify with any precision the "Democratic voters" against whom they intended to retaliate. (*See infra* Argument § II(A)(2) (providing more detailed analysis of why "Democratic voters" are not an identifiable group)).

Second, Petitioners here failed to prove that alleged gerrymandering "would likely chill a person of ordinary firmness from continuing to engage in" participation in the political process.[4] *Uniontown Newspapers*, 839 A.2d at 198. "Political gerrymanders are not new to the American scene," *Vieth*, 541 U.S. at 274 (plurality op.), so if they "chilled" speech, one would have expected Petitioners to produce evidence of such a chilling effect. But Petitioners have adduced no evidence that

[4] Petitioners also claim that they need not show that the 2011 Plan had a chilling effect, notwithstanding *Uniontown Newspapers* (Petrs. Br. 62). But the cases they rely upon for this proposition each involved tangible injuries like a "job loss or demotion," none of which have been alleged here. *See Puckett v. City of Glen Cove*, 631 F. Supp. 2d 226, 239 (E.D.N.Y. 2009). A chilling effect is indeed a critical element of any free-speech retaliation claim. *See, e.g., The Baltimore Sun Co. v. Ehrlich*, 437 F.3d 410, 415 (4th Cir. 2006) ("because government retaliation tends to chill an individual's exercise of his First Amendment rights, public officials may not…respond to an individual's protected activity with conduct or speech…"); *Pickering v. Board of Edn.*, 391 U.S. 563, 574 (1968) (noting that retaliatory acts are "a potent means of inhibiting speech").

they or any similarly situated persons have been "chilled" from engaging in political speech or association out of fear that the General Assembly would retaliate by means of a political gerrymander. Although Petitioners suggest voters might be "deter[red]" from voting (Petrs. Br. 63), there was no evidence in the record to support a decrease in voter turnout or civil participation.

To the contrary, Petitioners have been able to register to vote, to vote in every Congressional election under the 2011 Plan, and to speak in opposition to the views of their Congressperson. (FOF ¶¶ 22-24). They have also been able to make political contributions, campaign for candidates, participate in public protests, and engage in other civic activities in support of their beliefs. (LR FOF ¶¶ 62-65). Plainly, their voices have not been "chilled."

Nor is gerrymandering akin to the types of governmental conduct normally found in retaliation cases. Gerrymandering is not similar to a "prolonged and organized campaign of harassment" by law enforcement officers, *see Bennett v. Hendrix*, 423 F.3d 1247, 1254 (11th Cir. 2005), police "intimidati[on] tactics," *see Keenan v. Tejeda*, 290 F.3d 252, 259 (5th Cir. 2002), criminal prosecution, *see Bruner v. Baker*, 506 F.3d 1021, 1030 (10th Cir. 2007), or adverse employment action, *see Hill v. City of Pine Bluff, Ark.*, 696 F.3d 709, 715 (8th Cir. 2012). The target of those deprivations knows when they occur and has good reason to fear them. Conversely, the effect, if any, of political gerrymandering—where all citizens are

still permitted to register, vote, organize, advocate, protest, and receive constituent services—is *de minimis* and is therefore not afforded a remedy. *See Zelnik v. Fashion Inst. of Tech.*, 464 F.3d 217, 227 (2d Cir. 2006) (finding no deprivation of First Amendment rights where university professor was denied "emeritus" status because the "benefits of such status…carry little or no value and their deprivation therefore may be classified as de minimis"); *Mezibov v. Allen*, 411 F.3d 712, 721-23 (6th Cir. 2005) (finding no First Amendment deprivation where allegedly defamatory statements by prosecutor would not deter a "defense attorney of ordinary firmness" from continuing to defend his client).

* * *

For all these reasons, Petitioners have failed to demonstrate that the 2011 Plan violates the Free Speech and Expression protections of the Pennsylvania Constitution.

II. PETITIONERS' EQUAL PROTECTION AND FREE AND EQUAL ELECTIONS CLAUSE CLAIM FAILS

In *Erfer*, this Court set forth a two-prong test to evaluate partisan gerrymanders under the Equal Protection Guarantee and the Free and Equal Elections Clause of the Pennsylvania Constitution. Petitioners must establish that: (1) when the General Assembly passed the 2011 Plan, it engaged in "intentional discrimination against an identifiable political group;" and (2) there was an "actual

discriminatory effect on that group." *Erfer*, 794 A.2d at 332 (citing *Bandemer*, 478 U.S. at 127).

This standard is "onerous," and for good reason. Drawing a Congressional districting plan is "the most political of legislative functions, one not amenable to judicial control or correction save for the most egregious abuses of that power." *Id.* at 334 (quoting *Bandemer*, 478 U.S. at 143) (internal quotation marks omitted). As such, "[t]he *Bandemer* plurality, aware that it was treading on ground that the judiciary had previously declared forbidden to itself, was chary about creating a test that would allow for officious interference with the state legislatures' prerogative to create reapportionment plans." *Id.* at 333-334; *see also* U.S. CONST. art. I, § 4.

Petitioners have not met the *Erfer* standard, as they essentially concede.

A. Petitioners Fail to Satisfy the First *Erfer* Prong.

To satisfy *Erfer*'s intent element, Petitioners must prove that when passing the 2011 Plan, the General Assembly engaged in "intentional discrimination against an identifiable political group." 794 A.2d at 332. Petitioners cannot demonstrate that the 2011 Plan resulted from intentional discrimination, or, to the extent that there was an intent to discriminate, that such discrimination was perpetrated against an "identifiable political group."

1. There Is No Evidence of Intentional Discrimination.

The circumstances surrounding the 2011 Plan's passage indicate that it was not created with intent to discriminate against Democrats. In the House, the 2011 Plan passed in a broadly bipartisan manner, with the support of 40% of House Democrats. In fact, bipartisan support was necessary for the 2011 Plan to pass the House because of Republican opposition. (COL ¶ 37; LR FOF ¶¶ 30-33). Likewise, in the Senate, SB 1249 never would have left the Senate State Committee without the support of Democratic Senator Tina Tartaglione. (LR FOF ¶¶ 15-17; Petrs. Ex. 178 at 61:8-16, 63:5-7).[5] The fact that the legislature enacted (and could only have enacted) the 2011 Plan with substantial Democratic support completely undercuts any assertion that it was intended to discriminate against Democrats.[6]

In addition, the evidence offered by Petitioners simply does not prove that the 2011 Plan was the result of discriminatory intent. Petitioners rely on computer simulation models by Drs. Chen and Pegden that errantly did not take into account non-partisan districting factors such as, among other things, preserving cores of existing districts, preserving communities of interest, and, in the case of Dr. Pegden's analysis, protecting incumbents and the U.S. Constitutional

[5] Also, as noted above, Democrats on the Senate State Government Committee previously unanimously voted the bill out of that Committee. (LR FOF ¶ 9.)

[6] That Democratic support extended beyond the General Assembly: Rep. Bob Brady, the senior-most Pennsylvania Democratic Member of Congress supported the 2011 Plan. (Petrs. Ex. 179 at 47:13-22, 48:24-49:12, 106:4-11; *see also* Petrs. Ex. 178 at 62:9-63:4).

requirement of maintaining equal population. (*See supra* Statement of the Case § III.C). In short, their models compare apples to oranges and are therefore incompetent to demonstrate any intent behind the 2011 Plan.

Likewise, Petitioners' repeated citation to data allegedly containing political classifications cannot form the basis for proving intent. (Petrs. Br. 7-8, 60, 63, 66). The data cited, compelled to be produced by Legislative Respondents to plaintiffs in a federal case, was not admitted into evidence at trial before the Commonwealth Court. And, Petitioners have adduced no credible testimony on whether and how such data was used, who used it, or in what manner.[7] Indeed, Petitioners' suggestion as to how such data was used amounts to nothing more than rote speculation, which is precisely why the Commonwealth Court refused to admit or consider it. (FOF ¶ 307). Without more, the mere fact of the data's existence is plainly insufficient to satisfy the intent prong of the *Erfer* analysis, particularly because political classifications are common and legally permissible considerations in redistricting. *Gaffney*, 412 U.S. at 753; *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring).

Finally, Petitioners glean partisan intent from the 2011 Plan based solely upon the disproportionate seat-to-vote ratio of the last three elections. (Petrs. Br. 1-2, 21-23.) But Petitioners' position ignores evidence of other explanations for the

[7] Petitioners attempted to offer this data through Dr. Chen, but he had no personal knowledge of where it came from or how it was used. (*See* Trial Tr., Vol. I at 294:21-25) (noting information about data came from counsel).

perceived partisan results in those Congressional elections, including "split ticket" voting and the decrease in Democratic voter registrations in Pennsylvania. (*See supra* Statement of the Case § III.D). And Petitioners' assessment also fails to examine other potentially impactful considerations such as distinctive local issues, national trends, incumbency advantages, candidate quality, and the impact of the federal campaign finance system.

2. There Is No Evidence of Discriminatory Intent Against an Identifiable Political Group.

As the Commonwealth Court correctly held, Petitioners also fail to demonstrate that the 2011 Plan was intended to discriminate against an "identifiable political group." (COL ¶¶ 52-53). In *Erfer*, the Court declined to reach the question of whether voters who are likely to support Democratic candidates for Congress constitute an identifiable political group, but held that the petitioners in that case had failed to make such a showing. 794 A.2d at 333.

Likewise, here, Petitioners identify the allegedly discriminated-against group as "Democratic voters," (Pet. ¶ 116), but have not established that "Democratic voters" are a sufficiently concrete and identified political group. "Democratic voters" can and do encompass a wide range of persons and go well beyond mere membership in the Democratic Party. In addition, voters in Pennsylvania can and do, with some frequency, split their tickets between the Democratic and Republican Parties, further

complicating the stereotypical identification of a voter as a "Democratic voter." (LR FOF ¶ 45-60; COL ¶ 53).

For example, in 2016, many voters who voted for Donald Trump for President also voted for Democratic candidates for Congress. (*See, e.g.*, JS ¶ 128). Other voters split their ticket in reverse, voting for Hillary Clinton for President and for a Republican Congressional candidate. (*See, e.g.*, *id*. ¶ 127). Statewide election results bear this out. President Trump and Senator Pat Toomey won their respective statewide elections, but Democratic candidates won statewide races for Attorney General, Treasurer, and Auditor General. (FOF ¶ 218). Thus, as the Commonwealth Court correctly found, "[v]oters who are likely to vote Democratic (or Republican) in a particular district based on the candidates or issues, regardless of the voters' political affiliation, are not an identifiable political group for purposes of the Equal Protection Guarantee under the Pennsylvania Constitution." (COL ¶ 53). In the end, there is no doubt that Petitioners failed to satisfy *Erfer*'s first prong, and therefore, have not shown that the 2011 Plan violates the Equal Protection clause.

B. Petitioners Fail to Satisfy the Second *Erfer* Prong.

Petitioners also fail to satisfy *Erfer's* second prong (commonly referred to as the "effects test") because they cannot show that the 2011 Plan has had a discriminatory effect on Petitioners. To satisfy the effects test, Petitioners must show: (1) that the 2011 Plan "works disproportionate results at the polls" *and* (2) a "lack

of political power and the denial of fair representation," which means that Petitioners have been effectively "shut out" of the political process. *Erfer*, 794 A.2d at 334. Because this test is conjunctive, Petitioners' failure to satisfy either of these elements constitutes an independent basis for rejecting their claims. *Id.;* (*see also generally*, COL ¶¶ 54-55).

Petitioners argue without factual support that the second element of *Erfer*'s effects test is satisfied because a Democratic voter who is represented by a Republican "is effectively shut out of the political process, and their Republican representative will entirely ignore their interests." (Petrs. Br. 71). Petitioners further argue that "[t]his is true regardless of the margin of victory." (Petrs. Br. 72). In essence, Petitioners ask this Court to assume that they are shut out of the political process merely because the candidate they voted for lost.

But the very same argument was expressly rejected in *Erfer*, where this Court held that "'an individual or group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district.'" 794 A.2d at 333 (quoting *Bandemer*, 478 U.S. at 132). And to rebut this presumption,

Petitioners would need to offer actual evidence (not mere conclusory statements) that their representatives in fact "entirely ignore" their interests.[8] *Id*.

Petitioners offer no such evidence. To the contrary, they readily acknowledge that they are able to contact their representative or the representative's aides, and that in some cases, their representatives have been responsive. In fact, some Petitioners admit that they are well represented by their Congressperson. (LR FOF ¶¶ 70-71). For these reasons, the Commonwealth Court correctly held that Petitioners failed to satisfy the second element of the *Erfer* effects test. (COL ¶ 56(a) ("This Court will not presume that members of Congress represent only a portion of their constituents simply because some constituents have different priorities and views on controversial subjects.")).[9]

[8] This, too is an "onerous" standard that is intentionally "difficult" for Petitioners to satisfy. *Id*. at 333; *see also Albert v. 2001 Legislative Reapportionment Comm'n*, 790 A.2d 989, 998 n.10 (Pa. 2002); *In re 1991 Penn. Legislative Reapportionment Comm'n*, 609 A.2d at 141-42. Petitioners all but acknowledge they cannot advance evidence to meet this test.

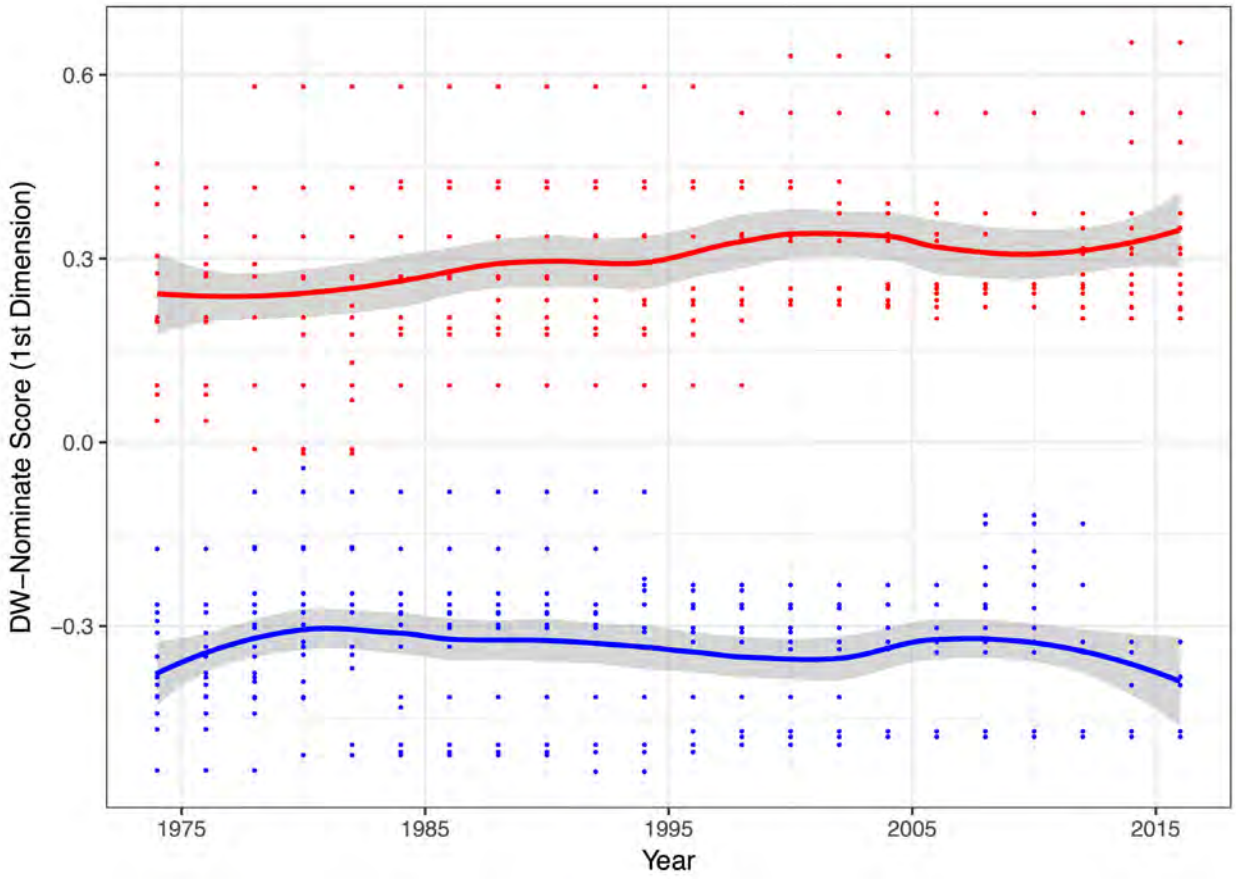
[9] Some courts have suggested that a plaintiff could show she has been shut out of the political process if there has been interference with party registration, organizing, fundraising, voting, or campaigning. *See Badham*, 694 F. Supp. 670; *Pope*, 809 F. Supp. at 397; *Erfer*, 794 A.2d at 333 (citing *Badham* and *Pope*). As the Commonwealth Court concluded, here, however, there was no evidence adduced of "interference" with Democratic Party operations in Pennsylvania, and Petitioners have testified they are able to organize and protest laws that they do not like. (LR FOF ¶ 63; COL ¶ 56(d)). No Petitioner has been prohibited from speaking in opposition to the views and/or actions of his/her Congressional representative since the 2011 Plan became law. (JS ¶ 20). Petitioners are able to register to vote, make political contributions, campaign for the candidates of their choice, and vote for the candidates of their choice. (COL ¶ 56(c)-(d); JS ¶ 17; LR FOF ¶¶ 61-63, 65). And, since the 2011 Plan was enacted, no Petitioner has been told by his/her Congressperson that their constituent services would be provided or denied on the basis of that Petitioner's partisan affiliation. (JS ¶ 21).

Further significant support exists for the Commonwealth Court's finding that Petitioners have not been shut out of the political process. As Petitioners acknowledge, there are five safe Democratic seats within Pennsylvania's Congressional delegation. (Pet. ¶ 80; Trial Tr., Vol. III at 1022:12-15). This is the same number of safe seats held by Democrats following enactment of the 2002 plan that was upheld in *Erfer*. And, given that the 2011 Plan has fewer Congressional districts than the plan considered in *Erfer*, those five safe Democratic seats represent a greater percentage of Pennsylvania's Congressional delegation. *See Erfer*, 794 A.2d at 334. In fact, the existence of these five Democratic seats alone establishes that there is no actual discriminatory effect shutting Petitioners out of the political process. *See id.*

Petitioners attempt to demonstrate that they are "shut out of the political process" because of polarization in Congress. (Petrs. Br. 71-72). They claim there is no overlap between the ideological positions of Democrats and Republicans in Pennsylvania. (Petrs. Br. 72). They claim this was not true when *Erfer* was decided, and, thus, the evidence absent in *Erfer* is present here.

Petitioners' argument is wrong and belied by their expert's analysis. Dr. Warshaw's analysis of polarization demonstrates there has never been an ideological overlap between Democrat and Republican Congressional representatives in Pennsylvania. The below figure from Dr. Warshaw reflects his

calculations of the historical ideological scores of Pennsylvania's' Congressional representatives (Democrats reflected by the blue dots and Republicans the red):



(Petrs. Ex. 46; Petrs. Ex. 35 at 19, Fig. 9). This analysis further shows that the ideological gap between Republican and Democrat Congressional representatives in Pennsylvania was *larger* in 2002 when *Erfer* was decided than it was when the 2011 Plan was enacted. Thus, the notion that Pennsylvania's Congressional delegation is divided along party lines is not a new trend. Moreover, Dr. Warshaw conceded that Democratic voters in districts represented by Republicans can have their

interests represented by Democratic Congresspersons in other districts. (Trial Tr., Vol. III at 1025:10-13).

Finally, nowhere do Petitioners define the "interests" of a "Democratic voter," or how this Court should reach the conclusion that such voters' interests are not represented in Congress. The record demonstrates that a number of voters in Pennsylvania voted for a Democratic Congressional candidate and for President Trump. (*See, e.g.*, JS ¶ 128). Petitioners blankly state that due to polarization an individual who votes for a Democratic Congressional candidate is shut out of the political process if their candidate is not successful because they won't have their views represented in Congress, but don't identify how this Court is to determine the "views" of such a "split ticket" voter. Petitioners merely assume all "Democratic voters" interests are the same and will not be represented by a Republican Congressperson with no evidentiary foundation or support.

For all these reasons, Petitioners fail to present sufficient evidence to demonstrate an un-defined group of Democratic voters are shut out of the political process.

C. Petitioners' Requests to Change the Law Should Be Declined.

Because Petitioners' claim fails under *Erfer*, they largely direct their efforts toward a request that *Erfer* be gutted. Specifically, they request that one of its essential requirements—the second element of the effects test—be eliminated. (Petrs.

Br. 68-71). But the Court should decline Petitioners' request. This Court in *Erfer* properly derived the second element of its effects test from *Bandemer*'s plurality opinion, and that second element derives, in turn, from important equal protection principles. Moreover, Petitioners' request in effect seeks a right to proportional representation on a statewide basis from the aggregated votes of 18 separate single-member district elections, a right that has never been recognized under the Pennsylvania or United States Constitutions.

Additionally, to the extent that the Court is inclined to alter the *Erfer* standard (and it should not), the Court is compelled by its own precedent to follow current federal law as articulated by the U.S. Supreme Court in *Vieth* and thereafter. Petitioners' claims fail under this standard as well.

1. *Erfer* Properly Applied *Bandemer*'s Plurality Opinion.

Petitioners claim that *Erfer* was badly reasoned and should be overturned because it drew the requirement for showing an identifiable political party was "shut out of the political process" from *Bandemer*, which, Petitioners claim, never imposed such a requirement. (Petrs. Br. 70). Petitioners are wrong. The *Bandemer* plurality expressly incorporated such a requirement. 478 U.S. at 139. In responding to Justice Powell's opinion that the intentional drawing of district boundaries for partisan ends would in some cases alone satisfy the requirements for a partisan gerrymandering claim, the plurality noted:

> In the individual multimember district cases, we have found equal protection violations only where a history of disproportionate results appeared in conjunction with strong indicia of lack of political power and the denial of fair representation. In those cases, the racial minorities asserting the successful equal protection claims had essentially been *shut out* of the political process. *In the statewide political gerrymandering context, these prior cases lead to the analogous conclusion that equal protection violations may be found only where history (actual or projected) of disproportionate results appears in conjunction with similar indicia*.

Id. at 139-40 (emphasis added).

In other words, to demonstrate strong indicia of lack of political power, racial minorities had to show they were essentially shut out of the political process, and the same showing is required in statewide partisan gerrymandering cases. The Court in *Erfer* properly gleaned and applied the effects test from the *Bandemer* plurality, and the effects test ties *Erfer* to important equal-protection principles. Petitioners attempt to escape this second prong of the effects test for good reason; it is an extremely onerous standard they cannot meet. *Erfer*, 794 A.2d at 333. But that is no reason to lower the standard.

Moreover, in advocating for removal of this key requirement, Petitioners are essentially seeking a state constitutional right to proportional representation, based on an aggregate of votes from 18 different single-member district elections, in the Congressional delegation from Pennsylvania, a right neither the Pennsylvania nor the U.S. Constitution recognizes. Indeed, Congress expressly rejected proportional

representation in requiring single-member Congressional districts. 2 U.S.C. § 2c. And the legislative history of this provision demonstrates that Congress intended to avoid at-large, statewide elections for Congress. *See Shayer v. Kirkpatrick*, 541 F. Supp. 922, 926 (W.D. Mo. 1982) (three judge court) ("the floor debate on Section 2c indicates that Congress intended to eliminate the possibility of at-large elections….") *aff'd, Schatzle v. Kirkpatrick*, 456 U.S. 966 (1982).

Put simply, the law does not view Pennsylvania Democrats as being represented by Democrats and Pennsylvania Republicans as being represented by Republicans; it views each resident as being represented by the Congressperson representing his or her district. *Bandemer*, 478 U.S. at 132. And while Petitioners advocate for a result whereby a Democratic voter whose district in one election has elected a Republican to Congress has been discriminated against and deprived of equal elections, (Petrs. Br. 68), that is the exact standard rejected by the U.S. Supreme Court in *Bandemer*: "a mere lack of proportionate results in one election cannot suffice." 478 U.S. at 139.

2. If the Court Changes the Elements of an Equal Protection Gerrymandering Claim, It Is Compelled to Follow *Vieth*'s Plurality Opinion.

But, even if the Court chooses to depart from *Erfer*, it should not simply eliminate the second prong of the effects test. Since at least the 1960s, this Court has tracked U.S. Supreme Court precedent in the area of redistricting. *See Erfer*,

794 A.2d at 331 (citing *Newbold*, 230 A.2d 54). Indeed, this Court has long held that the equal protection provisions of Pennsylvania's Constitution are co-extensive with the U.S. Constitution's Fourteenth Amendment's Equal Protection Clause, and, it is therefore axiomatic that the U.S. Supreme Court's standards will apply to Petitioners' equal protection-based partisan gerrymandering claim in the event that this Court jettisons *Erfer*. *Id*. Thus, if this Court opts to alter its analysis of the Pennsylvania Constitution, it is necessarily compelled to rely upon current U.S. Supreme precedent of analogous federal Constitutional law, not application of a modified *Erfer* test that Petitioners have manufactured out of whole cloth.

Current federal precedent requires this Court to look to the U.S. Supreme Court's decision in *Vieth*. 541 U.S. at 283-84. And, as detailed below, Petitioners' claims fail under *Vieth*.

3. Petitioners' Claim Fails Under *Vieth.*

In *Vieth*, the U.S. Supreme Court produced five splintered opinions that articulated several different standards in an attempt to determine an equal protection violation due to partisan gerrymandering. *Vieth*, 541 U.S. at 292. The split of views in *Vieth* suggests that the standard under federal law may be a moving target, but that is surely not to Petitioners' benefit. The four-Justice plurality in *Vieth* held that partisan gerrymandering claims are simply not justiciable. *Id.* at 281. Justice Kennedy, in a concurring opinion, recognized that the plurality's opinion is

"weighty," "may prevail in the long run," and speaks for itself. *Id.* at 309. Moreover, while Justice Kennedy's opinion leaves open the possibility that some judicially manageable standard might be "found," he does not purport to enunciate such a standard. *Id.* at 306. If the Court adopts *Vieth*, Petitioners' claim is non-justiciable unless they can identify a judicially-manageable standard by which partisan gerrymandering claims can be assessed.

But despite the Commonwealth Court's invitation to do so, Petitioners have offered no such standard. Indeed, while the Commonwealth Court accepted the opinions of Petitioners' experts that the 2011 Plan has a partisan skew in favor of Republicans, it properly found they did not address the central issue in this case: "where on their relative scales of partisanship, the line is between a constitutionally partisan map and an unconstitutionally partisan districting plan." (FOF ¶¶ 414, 419, 421). In other words, Petitioners' experts provided methodologies for identifying partisan bias in a redistricting plan, but not how and when (if ever) such bias results in an unconstitutional partisan gerrymander. As a result, the Commonwealth Court correctly concluded that "Petitioners have not articulated a judicially manageable standard by which this Court can discern whether the 2011 Plan crosses the line

between permissible partisan considerations and unconstitutional partisan gerrymandering under the Pennsylvania Constitution." (COL ¶ 61).[10]

Likewise, the various standards proposed by the *amici* do not compensate for Petitioners' failure to provide a judicially manageable standard. Each of the *amici* suggests a standard incompatible with the other standards proffered by the *amici*; indeed, the only unifying theme among the standards proposed by the *amici* is their nebulousness. For example, *amici* Professors Grofman and Gaddie propose a standard that considers "partisan asymmetry," a standard previously suggested by *amici* in *League of United Latin American Citizens v. Perry*, but which the U.S. Supreme Court refused to adopt. *See* 548 U.S. 399, 420 (2006). On the other hand, the Pittsburgh Foundation suggests a Congressional redistricting plan cannot pass constitutional muster if it "was intentionally designed predominately to attain a partisan result," (Br. at 13), without providing any guidance for how a court could make such a finding.

[10] Notably, the Commonwealth Court posed a number of questions for Petitioners to answer to the extent that they desired to identify a judicially-manageable standard, including: (1) what is a constitutionally permissible efficiency gap; (2) how many districts must be competitive in order for a plan to pass constitutional muster; (3) how is a "competitive" district defined; (4) how is a "fair" district defined; and (5) must a plan guarantee a minimum number of congressional seats in favor of one party or another to be constitutional. (COL ¶ 61 fn. 24). Petitioners still do not answer any of these questions. And, to the extent they attempt to identify a new standard never before offered in the Commonwealth Court or in their original brief, such argument is waived. *See Commonwealth v. Baumhammers*, 960 A.2d 59 (2008); Pa. R.A.P 2113.

The Brennan Center cites various metrics such as the efficiency gap, seats-to-vote curve, and mean-median district vote share, (Br. at 11-14), without ever delineating where partisanship crosses from acceptable to "too much." Indeed, the variety of unworkable and inconsistent standards offered by the *amici* calls to mind the opinion of Justice Scalia in *Vieth*, wherein he noted that "the mere fact that these four dissenters come up with three different standards—all of them different from the two proposed in *Bandemer* and the one proposed here by appellants—goes a long way to establishing that there is no constitutionally discernable standard." 541 U.S. at 292.

At bottom, neither Petitioners nor *amici* have addressed the central question in this case: Where do partisan considerations cross the line into the land of an unconstitutional gerrymander? Because Petitioners have proposed no workable test, this Court, if it overturns *Erfer*, is compelled by its own well-settled jurisprudence to find that partisan gerrymandering claims are not justiciable unless and until the U.S. Supreme Court articulates a new workable standard.[11]

[11] If the Court is inclined to reject *Erfer*, it should await guidance from the U.S. Supreme Court which is currently reviewing partisan gerrymandering claims under federal law in *Gill v. Whitford* (U.S., No. 16-1161) and *Benisek v. Lamone* (U.S., No. 17-333), and perhaps require additional briefing and argument after those decisions are rendered.

4. Under Principles of *Stare Decisis* and the *Edmunds* Analysis, This Court Should Refuse to Depart From *Erfer* or Federal Precedent and Adopt an Entirely New Standard for Partisan Gerrymandering Claims Under the Pennsylvania Constitution.

Petitioners have no claim under current federal standards, given the choice between the *Bandemer* plurality's standard applied by this Court in *Erfer* and the *Vieth* plurality's standard holding that such claims are all but non-justiciable. In seeking a change in the law, Petitioners must both contend with *stare decisis* and demonstrate why a departure from federal standards is justified. They do neither.

Petitioners state that "this Court is 'not constrained to closely and blindly re-affirm constitutional interpretations of prior decisions which have proven unworkable or badly reasoned.'" (Petrs. Br. 69) (quoting *Holt*, 38 A.3d at 759 n.38). Although this Court should not continue to follow precedent merely from "blind imitation," *Mayle v. Pennsylvania Dep't of Highways*, 388 A.2d 709, 720 (Pa. 1978) (quotation marks omitted), decades of precedent controlling this case, and this Court's long-standing practice of following the U.S. Supreme Court, are nothing of the sort. As discussed above, Petitioners have not demonstrated *Erfer* was badly reasoned or is unworkable. And if this Court is inclined to change the law, it should follow the current, controlling federal case law—the *Vieth* opinion—and conclude that this matter is non-justiciable. If the U.S. Supreme Court changes federal law later this year in either *Whitford* or *Benisek* and permits partisan gerrymandering

claims under some yet-to-be announced standard, then new claims can thereafter be reviewed by state or federal courts with the benefit of the most updated guidance from the U.S. Supreme Court.

But, even setting this aside and assuming *arguendo* that this was a question of first impression, Petitioners would be required to show that Pennsylvania's Constitution provides greater protection than does its federal counterpart in order to depart from federal law. *Working Families Party v. Commonwealth*, 169 A.3d 1247, 1262 (Pa. Commw. Ct. 2017) (citing *DePaul v. Commonwealth*, 969 A.2d 536, 541 (Pa. 2009)). This showing must include an analysis of (1) the text of the Pennsylvania Constitution, (2) the history of the provision, including Pennsylvania case law, (3) related case law from other states, and (4) policy considerations, with an emphasis on unique issues of state and local concern and applicability within modern Pennsylvania jurisprudence. *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991). Petitioners' make no attempt to perform this analysis. Even if they did, they would fail on each inquiry.

Both the text and history of Pennsylvania's Equal Protection Guarantee and the Free and Equal Elections Clause demonstrate that they provide no greater protections than the federal Equal Protections Clause. *See Erfer*, 794 A.2d at 332 (citing *Love v. Borough of Stroudsburg*, 597 A.2d 1137, 1139 (Pa. 1991)); (*see also* COL ¶ 45). And Pennsylvania's decades of case law could not be clearer both

in its specific rejection of a partisan gerrymandering standard beyond what federal law provides and its general view that applicable federal and state standards are identical. The Court has, to be sure, shifted positions on the question of partisan redistricting, but the shifts have consistently followed the federal courts between outright denial of gerrymandering claims, *see Newbold*, 230 A.2d at 60, and application of the *Bandemer* standard, *see Erfer*, 794 A.2d at 332-33.

The case law of other states in no way supports Petitioners. The overwhelming majority of state Supreme Courts have rejected partisan gerrymandering claims under similarly worded constitutional provisions. *See, e.g., State ex rel. Cooper v. Tennant*, 730 S.E.2d 368, 388-90 (W. Va. 2012); *Florida Senate v. Forman*, 826 So.2d 279, 280-82 (Fla. 2002). And the exceptions have interpreted specific provisions spelling out specific criteria, or specific processes to be followed. *See League of Women Voters of Florida v. Detzner*, 172 So.3d 363, 369-372 (Fla. 2015) (ballot measure amended state constitution to prohibit partisan line drawing); *Pearson v. Koster*, 359 S.W.3d 35, 37-38 (Mo. 2012) (state constitution contained compactness criteria); *Ariz. Minority Coalition for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 208 P.3d 676, 680 (Ariz. 2009) (*en banc*) (reviewing product of a commission created as a result of a ballot measure); *State ex rel. Montgomery v. Mathis*, 290 P.3d 1226, 1229 (Ariz. Ct. App. 2012) (same).

Additionally, "policy considerations," both generally and in Pennsylvania, weigh heavily against improvising a new partisan-gerrymandering standard never before adopted by this Court or any federal court. Plainly, the wealth of judicial experience declining to intervene beyond the equal-population requirement for enforcement of abstract "fairness" standards should raise bright red flags.

Indeed, all fair-minded observers agree that partisan considerations are inherent in redistricting and that, if the judiciary has any role in policing it, the question is what is "too much." *Vieth*, 541 U.S. at 344 (Souter, J., dissenting). But the roadblock to enforcing such a nebulous standard has always been, and continues to be, that legislatures have unique competency to engage in redistricting, which the judiciary lacks the resources and expertise to match. *See Gaffney*, 412 U.S. at 754. And subjecting legislative will to judicial oversight invades its discretionary sphere on a highly subjective basis and raises sensitive separation-of-powers concerns. It also guarantees expensive litigation each cycle that is virtually guaranteed to go to trial. Moreover, each case tempts the presiding judge or judges to abandon neutral rules of law in favor of partisan preference. So vindicating the arguably justified fear that legislatures might place "too much" weight on partisan considerations poses the unquestionably unacceptable risk that *judges* will place *any* weight on such considerations—thereby trading partisan redistricting for partisan redistricting *litigation*.

Perhaps most importantly, Petitioners ignore (1) the positive elements of political considerations in redistricting, (2) the checks already in place to curtail its excesses, and (3) the ability of the political process to provide further control, if needed.

The positive benefits include preservation of core constituencies and incumbent bases of support to preserve "the seniority the members of the State's [Congressional] delegation have achieved in the United States House of Representatives." *White v. Weiser*, 412 U.S. 783, 791 (1973). Positive benefits also include the right of states to establish districts in their own chosen manner and to provide states with a variety of options for reaching that determination. *See generally* Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 UTAH L. REV. 859 (2010). Politically blind redistricting threatens a perpetually "junior" Pennsylvania delegation, as constantly new maps, carving up existing constituencies, would likely result in a revolving-door delegation while other states' delegations attain the rank, influence, and key positions that come with seniority.

The largest "check" on the states is the "Make or Alter" provision of Article I, Section 4 of the U.S. Constitution. The U.S. Congress, as noted above, has from time-to-time imposed constraints on the states' ability to draw Congressional districts. *See* Tolson, 2010 UTAH L. REV. at 881-86. The current federal restrictions in place include the Voting Rights Act and 2 U.S.C. § 2c.

Additional "checks" include the threat of retaliation once the political tables have turned and the ability of either party to control either the state legislature, or the executive branch, and thus hold a veto over any proposed plan, irrespective of how district lines are drawn. *See, e.g.*, *Holt*, 67 A.3d at 1237. Pennsylvania has even more protection in that the General Assembly's districts are not drawn by a majority of the legislature, but by an equally divided bi-partisan Commission; this is therefore *not* a case of representatives holding gerrymandered seats who, in turn, gerrymander the Congressional districts.

And the existence of such a Commission (and the existence of similar commissions around the nation) as a result of *legislation* proves that judicial fiat is not required to solve the "problem" of partisan gerrymandering—if the electorate deems it a problem. There is no reason for the courts to make that judgment call when the electorate is competent to do so (and has in the past).

For these reasons, the problem of "gerrymandering" in Pennsylvania is, if anything muted, as compared to the problem in other states. At minimum, no unique gerrymandering concerns specific to the Commonwealth were identified in *Vieth* or *Erfer*, and the bipartisan redistricting of the General Assembly's plan, the current Democratic Party control over the executive branch, the relative equality of power of the two major parties in the state, and the willingness of Pennsylvania voters to cross the aisle based on election-specific considerations all suggest that whatever ills

may exist due to gerrymandering remain tempered. The countervailing policy problems with judicial intervention outweigh the risks.

5. If This Court Were to Adopt a Different Standard, the Appropriate Remedy Would Be a New Trial Under That Standard.

If, despite the countervailing precedent and policy considerations, this Court were inclined to adopt a new standard by which to evaluate partisan-gerrymandering (which, as discussed below, creates a serious federal issue under Article I, Section 4 of the U.S. Constitution), the appropriate course would be to send this matter back to the Commonwealth Court for further proceedings and evaluation of the 2011 Plan under that new standard. *See Kaczkowski v. Bolubasz*, 421 A.2d 1027, 1039 (Pa. 1980) (remanding to allow the parties to develop a record under a newly developed standard); *Cuevas v. Platers & Coasters, Inc.*, 346 A.2d 6, 9 (Pa. 1975) (same).

Indeed, the United States Supreme Court has remanded redistricting cases to lower courts for further evaluation after it has altered or clarified a standard. *See, e.g., Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 800 (2017) (declining the request to apply a clarified racial gerrymandering standard at the same time the standard was established, noting that the High Court is a court of "final review and not first review," and that the lower court was best positioned to evaluate application of the new standard in the first instance); *see also Baker* 369 U.S. at 237 (remanding for further proceedings after establishing the "one person, one vote" standard).

For this Court to develop a new legal standard not heretofore annunciated or applied, and then determine in the first instance that the 2011 Plan violates that new standard would not only run counter to the above precedent but would leave this Court to make such a decision entirely without the benefit of an appropriate record relative to that new standard.

III. THIS COURT LACKS THE AUTHORITY TO ADOPT ANY CRITERIA THAT THE PENNSYLVANIA LEGISLATURE HAS NOT ADOPTED

The U.S. Constitution's Elections Clause provides that "[t]he Times, Places and Manner" of Congressional elections "shall be prescribed in each State by the Legislature thereof" unless "Congress" should "make or alter such Regulations." U.S. CONST. art. I, § 4. It vests authority in two locations: (1) the state legislature and (2) Congress. State courts enjoy none of this delegated authority. Thus, if this Court were to adopt additional criteria not found in the Pennsylvania Constitution, it would run afoul of the federal Elections Clause.

In interpreting the Elections Clause, the U.S. Supreme Court has held that "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2668 (2015). Although it has held that the word "Legislature" is not so restrictive as to exclude "the referendum and the Governor's veto," no one contends here that the Pennsylvania courts hold the "power

that makes laws." *Id.* at 2668, 2671; *see Watson v. Witkin*, 22 A.2d 17, 23 (Pa. 1941) ("[T]he duty of courts is to interpret laws, not to make them.").

If this Court were to create legal standards not contained in Pennsylvania's Constitution, it would change the role of this Court from interpreting the constitutionality of enacted legislation to legislating itself. In the "few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government" the "text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance." *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring). The Court should faithfully apply its precedents.

CONCLUSION

For all the above reasons, this Court should follow the thoughtful, thorough, and well-reasoned recommendation of the Commonwealth Court and hold that Petitioners have failed to demonstrate that the 2011 Plan "clearly, plainly, and palpably violates the Pennsylvania Constitution. For the judiciary, this should be the end of the inquiry." (COL ¶ 64).

Dated: January 10, 2018

Respectfully submitted,

BLANK ROME LLP

/s/ Brian S. Paszamant
Brian S. Paszamant, PA #78410
paszamant@blankrome.com
Jason A. Snyderman, PA #80239
snyderman@blankrome.com
John P. Wixted, PA #309033
jwixted@blankrome.com
One Logan Square
130 N. 18th Street
Philadelphia, Pennsylvania 19103
Phone: 215-569-5791
Facsimile: 215-832-5791
Attorneys for Respondent/Appellee Senator Joseph Scarnati III

CIPRIANI & WERNER PC

/s/ *Kathleen Gallagher*
Kathleen Gallagher, PA #37950
kgallagher@c-wlaw.com
Carolyn Batz McGee, PA #208815
cmcgee@c-wlaw.com
650 Washington Road, Suite 700
Pittsburgh, Pennsylvania 15228
Phone: 412-563-4978
Attorneys for Respondent/Appellee Representative Michael Turzai

HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC

/s/ Jason Torchinsky
Jason Torchinsky (*pro hac vice*)
jtorchinsky@hvjt.law
Shawn Sheehy (*pro hac vice*)
ssheehy@hvjt.law
45 North Hill Drive, Suite 100
Warrenton, Virginia 20186
Phone: 540-341-8808
Facsimile: 540-341-8809
Attorneys for Respondents/Appellees Senator Joseph Scarnati III and Representative Michael Turzai

BAKER & HOSTETLER LLP

/s/ Patrick T. Lewis
E. Mark Braden
(*pro hac vice* to be filed)
mbraden@bakerlaw.com
1050 Connecticut Avenue, NW
Suite 1100
Washington, D.C. 20036-5403
Phone: 202-861-1504

Patrick T. Lewis (*pro hac vice*)
plewis@bakerlaw.com
Key Tower
127 Public Square, Suite 2000
Cleveland, OH 44114
Phone: 216-621-0200

Robert J. Tucker (*pro hac vice*)
rtucker@bakerlaw.com
200 Civic Center Drive, Suite 1200
Columbus, OH 43215
Phone: 614-462-2680
Attorneys for Respondent/Appellee Representative Michael Turzai

CERTIFICATE OF COMPLIANCE WITH Pa. R. A. P. 2135(d)

Pursuant to Pennsylvania Rule of Appellate Procedure 2135(d), I, Brian S. Paszamant, Esquire, counsel for Respondent/Appellee Senator Joseph Scarnati, III, hereby certify that the foregoing Brief of Respondents/Appellees Michael C. Turzai, in his official capacity as Speaker of the Pennsylvania House of Representatives, and Joseph B. Scarnati, III, in his official capacity as Pennsylvania Senate President Pro Tempore does not exceed 14,000 words.

Dated: January 10, 2018

/s/ Brian S. Paszamant

BLANK ROME LLP
Brian S. Paszamant, PA #78410
paszamant@blankrome.com
One Logan Square
Philadelphia, PA 19103-6998
Tel: (215) 569-5791
Fax: (215) 832-5791
Attorney for Respondent/Appellee Senator Joseph Scarnati III

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

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

The undersigned certifies that this Brief does not contain confidential information.

Dated: January 10, 2018

/s/ Brian S. Paszamant

BLANK ROME LLP
Brian S. Paszamant, PA #78410
paszamant@blankrome.com
One Logan Square
Philadelphia, PA 19103-6998
Tel: (215) 569-5791
Fax: (215) 832-5791
Attorney for Respondent/Appellee
Senator Joseph Scarnati III