

# EXHIBIT A

**IN THE SUPREME COURT OF PENNSYLVANIA  
MIDDLE DISTRICT**

LEAGUE OF WOMEN VOTERS OF : No. 159 MM 2017  
PENNSYLVANIA, CARMEN FEBO SAN :  
MIGUEL, JAMES SOLOMON, JOHN :  
GREINER, JOHN CAPOWSKI, :  
GRETCHEN BRANDT, THOMAS :  
RENTSCHLER, MARY ELIZABETH :  
LAWN, LISA ISAACS, DON LANCASTER, :  
JORDI COMAS, ROBERT SMITH, :  
WILLIAM MARX, RICHARD MANTELL, :  
PRISCILLA MCNULTY, THOMAS :  
ULRICH, ROBERT MCKINSTRY, MARK :  
LICHTY, LORRAINE PETROSKY, :

Petitioners

v.

THE COMMONWEALTH OF :  
PENNSYLVANIA; THE PENNSYLVANIA :  
GENERAL ASSEMBLY; THOMAS W. :  
WOLF, IN HIS CAPACITY AS :  
GOVERNOR OF PENNSYLVANIA; :  
MICHAEL J. STACK III, IN HIS CAPACITY :  
AS LIEUTENANT GOVERNOR OF :  
PENNSYLVANIA AND PRESIDENT OF :  
THE PENNSYLVANIA SENATE; :  
MICHAEL C. TURZAI, IN HIS CAPACITY :  
AS SPEAKER OF THE PENNSYLVANIA :  
HOUSE OF REPRESENTATIVES; :  
JOSEPH B. SCARNATI III, IN HIS :  
CAPACITY AS PENNSYLVANIA SENATE :  
PRESIDENT PRO TEMPORE; ROBERT :  
TORRES, IN HIS CAPACITY AS ACTING :  
SECRETARY OF THE :  
COMMONWEALTH OF PENNSYLVANIA; :  
JONATHAN M. MARKS, IN HIS :  
CAPACITY AS COMMISSIONER OF THE :  
BUREAU OF COMMISSIONS, :  
ELECTIONS, AND LEGISLATION OF :  
THE PENNSYLVANIA DEPARTMENT OF :  
STATE, :

Respondents :  
:  
:

## ORDER

### PER CURIAM

AND NOW, this 9<sup>th</sup> day of November, 2017, this Honorable Court, having determined that the present case involves issues of immediate public importance requiring this Court's assumption of plenary jurisdiction, it is hereby ordered that Petitioners' Application for Extraordinary Relief is **GRANTED**.

On October 16, 2017, the Commonwealth Court granted an Application for Stay filed by Respondents Joseph B. Scarnati, President Pro Tempore of the Pennsylvania Senate, Michael C. Turzai, Speaker of the Pennsylvania House of Representatives, and the General Assembly of Pennsylvania. This stay is hereby vacated and the case will proceed expeditiously forthwith.

Under the continuing supervision of this Court, the case is hereby remanded to the Commonwealth Court and directed to President Judge Mary Hannah Leavitt for assignment to a commissioned judge of the Commonwealth Court with instructions 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. The Commonwealth Court shall file with the Prothonotary of this Court its findings of fact and conclusions of law no later than **December 31, 2017**.

Petitioners' Application for Leave to File a Reply in Support of Petitioner's Application for Extraordinary Relief, Application for Leave to Supplement the Application

for Extraordinary Relief, and Praecipe to Provide Supplemental Authority in Support of Petitioners' Application for Extraordinary Relief, treated as an application for leave to supplement the Application for Extraordinary Relief, are hereby **GRANTED**. The Legislative Respondents' Motion for Oral Argument is hereby **DENIED**.

Jurisdiction retained.

Chief Justice Saylor, Justice Baer and Justice Mundy note their dissent.

# EXHIBIT B

**[J-1-2018]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**MIDDLE DISTRICT**

LEAGUE OF WOMEN VOTERS OF : No. 159 MM 2017  
PENNSYLVANIA, CARMEN FEBO SAN :  
MIGUEL, JAMES SOLOMON, JOHN :  
GREINER, JOHN CAPOWSKI, :  
GRETCHEN BRANDT, THOMAS :  
RENTSCHLER, MARY ELIZABETH :  
LAWN, LISA ISAACS, DON LANCASTER, :  
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THE PENNSYLVANIA SENATE; :  
MICHAEL C. TURZAI, IN HIS CAPACITY :  
AS SPEAKER OF THE PENNSYLVANIA :  
HOUSE OF REPRESENTATIVES; :  
JOSEPH B. SCARNATI III, IN HIS :  
CAPACITY AS PENNSYLVANIA SENATE :  
PRESIDENT PRO TEMPORE; ROBERT :  
TORRES, IN HIS CAPACITY AS ACTING :  
SECRETARY OF THE :  
COMMONWEALTH OF PENNSYLVANIA; :  
JONATHAN M. MARKS, IN HIS :  
CAPACITY AS COMMISSIONER OF THE :  
BUREAU OF COMMISSIONS, :  
ELECTIONS, AND LEGISLATION OF :

THE PENNSYLVANIA DEPARTMENT OF :  
STATE, :  
Respondents :

**ORDER**

**PER CURIAM**

**DECIDED: January 22, 2018**

**AND NOW**, this 22<sup>nd</sup> day of January, 2018, upon consideration of the Petition for Review, the Commonwealth Court’s proposed findings of fact and conclusions of law, the briefs of the parties, intervenors, and *amici curiae*, and the oral argument presented on January 17, 2018, the Court orders as follows:

First, the Court finds as a matter of law that the Congressional Redistricting Act of 2011 clearly, plainly and palpably violates the Constitution of the Commonwealth of Pennsylvania, and, on that sole basis, we hereby strike it as unconstitutional. Accordingly, its further use in elections for Pennsylvania seats in the United States House of Representatives, commencing with the upcoming May 15, 2018 primary, is hereby enjoined.

Second, should the Pennsylvania General Assembly choose to submit a congressional districting plan that satisfies the requirements of the Pennsylvania Constitution, it shall submit such plan for consideration by the Governor on or before **February 9, 2018**. If the Governor accepts the General Assembly’s congressional districting plan, it shall be submitted to this Court on or before **February 15, 2018**.

Third, should the General Assembly not submit a congressional districting plan on or before **February 9, 2018**, or should the Governor not approve the General Assembly’s plan on or before **February 15, 2018**, this Court shall proceed expeditiously to adopt a plan based on the evidentiary record developed in the Commonwealth Court. In anticipation of that eventuality, the parties shall have the opportunity to be heard; to

wit, all parties and intervenors may submit to the Court proposed remedial districting plans on or before **February 15, 2018**.

Fourth, to comply with this Order, any congressional districting plan shall consist of: congressional districts composed of compact and contiguous territory; as nearly equal in population as practicable; and which do not divide any county, city, incorporated town, borough, township, or ward, except where necessary to ensure equality of population.

Fifth, the Executive Branch Respondents are advised to anticipate that a congressional districting plan will be available by **February 19, 2018**, and are directed to take all measures, including adjusting the election calendar if necessary, to ensure that the May 15, 2018 primary election takes place as scheduled under that remedial districting plan.

Sixth, as acknowledged by the parties, the March 13, 2018 special election for Pennsylvania's 18<sup>th</sup> Congressional District, which will fill a vacancy in an existing congressional seat for which the term of office ends in 11 months, shall proceed under the Congressional Redistricting Act of 2011 and is unaffected by this Order.

Opinion to follow.

Jurisdiction is retained.

Justice Baer files a Concurring and Dissenting Statement.

Chief Justice Saylor files a Dissenting Statement in which Justice Mundy joins.

Justice Mundy files a Dissenting Statement.



# EXHIBIT C

**[J-1-2018]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**MIDDLE DISTRICT**

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GRETCHEN BRANDT, THOMAS :  
RENTSCHLER, MARY ELIZABETH :  
LAWN, LISA ISAACS, DON LANCASTER, :  
JORDI COMAS, ROBERT SMITH, :  
WILLIAM MARX, RICHARD MANTELL, :  
PRISCILLA MCNULTY, THOMAS :  
ULRICH, ROBERT MCKINSTRY, MARK :  
LICHTY, LORRAINE PETROSKY , :

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WOLF, IN HIS CAPACITY AS :  
GOVERNOR OF PENNSYLVANIA; :  
MICHAEL J. STACK III, IN HIS CAPACITY :  
AS LIEUTENANT GOVERNOR OF :  
PENNSYLVANIA AND PRESIDENT OF :  
THE PENNSYLVANIA SENATE; :  
MICHAEL C. TURZAI, IN HIS CAPACITY :  
AS SPEAKER OF THE PENNSYLVANIA :  
HOUSE OF REPRESENTATIVES; :  
JOSEPH B. SCARNATI III, IN HIS :  
CAPACITY AS PENNSYLVANIA SENATE :  
PRESIDENT PRO TEMPORE; ROBERT :  
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SECRETARY OF THE :  
COMMONWEALTH OF PENNSYLVANIA; :  
JONATHAN M. MARKS, IN HIS :  
CAPACITY AS COMMISSIONER OF THE :  
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STATE, :  
Respondents :

**DISSENTING STATEMENT**

**CHIEF JUSTICE SAYLOR**

**FILED: January 22, 2018**

Consistent with my previous vote disfavoring the assumption of extraordinary jurisdiction, I agree with the Commonwealth Court’s original position that it would have been appropriate to stay this matter pending anticipated guidance from the Supreme Court of the United States in *Gill v. Whitford*, No. 16-1161 (U.S.). See Order dated Oct. 16, 2017, in *League of Women Voters of Pa. v. Commonwealth*, No. 261 M.D. 2017 (Pa. Cmwlth.). Indeed, the Supreme Court has stayed a series of recent federal court directives to state legislatures in cases lodging partisan gerrymandering challenges pending its review, most recently, as of last week. See Order dated Jan. 18, 2018, in *Rucho v. Common Cause*, No. 17A745 (U.S.). I hold the view that restraint is appropriate, particularly in light of the timing of the present challenge to a congressional redistricting plan that was enacted in 2011 and the proximity of the impending 2018 election cycle. Cf. Concurring and Dissenting Statement, *slip op.* at 3-4 (Baer, J.).

The crafting of congressional district boundaries is quintessentially a political endeavor assigned to state legislatures by the United States Constitution. See U.S. CONST. art. I, §4. Notably, certain political objectives – such as the aim to avoid pitting incumbents against each other or to maintain the cores of prior districts – have been recognized as traditional redistricting criteria. See *Karcher v. Daggett*, 462 U.S. 725, 740, 103 S. Ct. 2653, 2663 (1983). Federal and state courts also appreciate the

propriety of preserving communities of interest which may not overlap with political subdivision lines. See, e.g., *Evenwel v. Abbott*, \_\_\_ U.S. \_\_\_, \_\_\_, 136 S. Ct. 1120, 1124 (2016); *Holt v. 2011 Legislative Reapportionment Comm'n*, 620 Pa. 373, 422-23, 67 A.3d 1211, 1241 (2013). Furthermore, in terms of such communities, it seems plain that legislators are in a superior position to address their interests. Accord *Vieth v. Jubelirer*, 541 U.S. 267, 358, 124 S. Ct. 1769, 1824 (2004) (Breyer, J., dissenting) (“It is precisely *because* politicians are best able to predict the effects of boundary changes that the districts they design usually make some political sense.” (emphasis in original)).

To the extent that a judicially manageable standard can be articulated in this arena, I believe the proper litmus should abide such considerations. I also consider it appropriate to take into account matters of degree relative to the inevitable political and partisan dynamics associated with redistricting by a legislative body.

I realize that the recommended factual findings of Judge Brobson of the Commonwealth Court raise substantial concerns as to the constitutional viability of Pennsylvania's current congressional districts when considered under standards that have recently been applied by some federal courts in decisions, which, again, are under review by the United States Supreme Court. My position at this juncture is only that I would not presently upset those districts, in such an extraordinarily compressed fashion, and without clarifying – for the benefit of the General Assembly and the public – the constitutional standards by which districting is now being adjudged in Pennsylvania.

Justice Mundy joins this dissenting statement.

# EXHIBIT D

**[J-1-2018]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**MIDDLE DISTRICT**

LEAGUE OF WOMEN VOTERS OF : No. 159 MM 2017  
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MICHAEL C. TURZAI, IN HIS CAPACITY :  
AS SPEAKER OF THE PENNSYLVANIA :  
HOUSE OF REPRESENTATIVES; :  
JOSEPH B. SCARNATI III, IN HIS :  
CAPACITY AS PENNSYLVANIA SENATE :  
PRESIDENT PRO TEMPORE; ROBERT :  
TORRES, IN HIS CAPACITY AS ACTING :  
SECRETARY OF THE :  
COMMONWEALTH OF PENNSYLVANIA; :  
JONATHAN M. MARKS, IN HIS :  
CAPACITY AS COMMISSIONER OF THE :  
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ELECTIONS, AND LEGISLATION OF :

THE PENNSYLVANIA DEPARTMENT OF :  
STATE, :  
 :  
 :  
 Respondents :

**DISSENTING STATEMENT**

**JUSTICE MUNDY**

**FILED: January 22, 2018**

I join Chief Justice Saylor’s dissenting statement in full. I write separately to express my concern with the vagueness of the Court’s order. Despite its pronouncement that the 2011 map clearly, plainly, and palpably violates the Pennsylvania Constitution, the Court fails to identify the specific provision it so violates. This vagueness by the Court is problematic because the parties raise several state constitutional claims, including the Speech Clause, the Free Association Clause, the Elections Clause, and the Equal Protection Clause, each of which has a different mode of analysis. See *generally* PA. CONST. art. I, §§ 1, 5, 7, 20, 26; *Pap’s AM v. City of Erie*, 812 A.2d 591, 612 (Pa. 2002) (Speech Clause); *Love v. Borough of Stroudsburg*, 597 A.2d 1137, 1139 (Pa. 1991) (Equal Protection Clause); *Mixon v. Commonwealth*, 759 A.2d 442, 449-50 (Pa. Cmwlth. 2000), *aff’d*, 783 A.2d 763 (Pa. 2002) (Elections Clause). The Court’s order fails to give essential guidance to the General Assembly and the Governor, or this Court on how to create a constitutional, non-gerrymandered map.

I am also troubled by the order striking down the 2011 Congressional map on the eve of our midterm elections, as well as the remedy proposed by the Court. In my view, the implication that this Court may undertake the task of drawing a congressional map on its own raises a serious federal constitutional concern. See U.S. CONST. art. I, § 4, cl. 1 (stating, “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature thereof*”)

(emphasis added); *Ariz. State Legislature v. Ariz. Indep. Redist. Comm'n*, 135 S. Ct. 2652, 2667-68 (2015) (concluding the Federal Elections Clause permits redistricting by the state legislature, Congress, or an independent redistricting commission). For these reasons, I conclude the Court's approach is imprudent and I cannot participate in it. I respectfully dissent.



# EXHIBIT E

**[J-1-2018]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**MIDDLE DISTRICT**

LEAGUE OF WOMEN VOTERS OF : No. 159 MM 2017  
PENNSYLVANIA, CARMEN FEBO SAN :  
MIGUEL, JAMES SOLOMON, JOHN :  
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GRETCHEN BRANDT, THOMAS :  
RENTSCHLER, MARY ELIZABETH :  
LAWN, LISA ISAACS, DON LANCASTER, :  
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STATE, :  
 :  
 :  
 Respondents :

**CONCURRING AND DISSENTING STATEMENT**

**JUSTICE BAER**

**FILED: January 22, 2018**

I join the *per curiam* order (PCO) to the extent it concludes that the districts as set forth by the Congressional Redistricting Act of 2011 are unconstitutional. I also concur in the PCO’s invitation to the Legislature and Governor to craft constitutional maps, recognizing that redistricting is a legislative function. *Butcher v. Bloom*, 203 A.2d 556, 569 (Pa. 1964) (“The task of reapportionment is not only the responsibility of the Legislature, it is also a function which can be best accomplished by that elected branch of government.”).

I find myself in an awkward position regarding the PCO’s directive that the primary election shall proceed with new maps on May 15, 2018. I understand the Court’s desire to follow this schedule as it is arguably counterintuitive to believe that the current map is unconstitutional and, nevertheless, direct its usage in the May 2018 election. There are, however, other forces at play.

When faced with an unconstitutional map, courts should determine “whether the imminence of [the primary and] general elections requires the utilization of [a prior plan] notwithstanding [its] invalidity” or whether a constitutional map “can practicably be effectuated” in time for the pending election. *Id.* at 568 (*quoting Lucas v. Forty-Fourth General Assembly of State of Colorado*, 377 U.S. 713, 739 (1964)) (internal quotation marks omitted). In *Butcher*, we allowed the election to proceed employing maps that we had concluded were unconstitutional to avoid “[s]erious disruption of orderly state election processes and basic governmental functions.” *Id.* at 568 - 69.

As in *Butcher*, I believe the dangers of implementing a new map for the May 2018 primary election risks “[s]erious disruption of orderly state election processes and basic governmental functions.” *Id.* It is naïve to think that disruption will not occur. Prospective candidates, incumbents and challengers alike, have been running for months, organizing, fundraising, seeking their party’s endorsements, determining who should be on canvassing and telephone lists, as well as undertaking the innumerable other tasks implicit in any campaign - all with a precise understanding of the districts within which they are to run, which have been in place since 2011. The change of the districts’ boundary lines at this time could result in candidates, again incumbents and challengers alike, no longer living in the districts where they have been carrying out these activities for a year or more. This says nothing of the average voter, who thought he knew his Congressperson and district, and now finds that all has changed within days of the circulation of nomination petitions.

In this regard, the 18<sup>th</sup> Congressional District in southwestern Pennsylvania is worthy of specific mention. A special election will be held there on March 13, 2018. If a new map is indeed implemented for the 2018 election, voters in this district would be electing a representative in March in one district while nomination petitions would be circulating for a newly-drawn district, which may or may not include the current candidates for the special election. Again and respectfully, I find the likelihood for confusion, if not chaos, militates strongly against my colleagues’ admittedly admirable effort to correct the current map prior to the May 15, 2018 primary election.

Moreover, while the Court has set forth a timeline for resolution of this issue which theoretically allows for implementation of a new, constitutional map for the May primary election, this timeline will face immense and perhaps insurmountable pressure

through likely subsequent litigation. Regardless of the merit of any claims, litigation takes time, and under the proposed schedule, there is no time.

Finally, I do not favor the alternative of moving this year's primary election. It has been the tradition in Pennsylvania to hold a spring primary and a fall general election. This year, Pennsylvanians will elect a Governor, a Lieutenant Governor, a United States Senator, all of Pennsylvania's Congressional Representatives, one-half of the Pennsylvania Senate, and all of the Pennsylvania House of Representatives. We cannot determine the impact of moving a primary election from the timeframe it has long been held to a mid-summer substitute. I am uncomfortable risking aberrant results through such a departure.

Accordingly, I believe it more prudent to apply our holding in this case to the 2020 election cycle, which would allow ample time for our sister branches of government to comply with our holding with guidance from our forthcoming opinion, as well as providing candidates and their supporters the opportunity to campaign in their newly established districts, and, most importantly, to reduce the risk of voter confusion.

Having said all of this, I readily acknowledge the Court's commendable attempt to compress the process of correcting the map to conduct timely primary elections. I will cooperate with the Court as it pursues its admirable goal, so long as all involved receive due process. I cannot, however, join the PCO without this expression because of my concern that a well-intentioned effort can still produce an unsatisfactory process and conclusion.

# EXHIBIT F

**[J-1-2018]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**MIDDLE DISTRICT**

**SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.**

LEAGUE OF WOMEN VOTERS OF : No. 159 MM 2017  
PENNSYLVANIA, CARMEN FEBO SAN :  
MIGUEL, JAMES SOLOMON, JOHN : On the Recommended Findings of Fact  
GREINER, JOHN CAPOWSKI, : and Conclusions of Law of the  
GRETCHEN BRANDT, THOMAS : Commonwealth Court of Pennsylvania  
RENTSCHLER, MARY ELIZABETH : entered on 12/29/18 at No. 261 MD  
LAWN, LISA ISAACS, DON LANCASTER, : 2017  
JORDI COMAS, ROBERT SMITH, :  
WILLIAM MARX, RICHARD MANTELL, : ARGUED: January 17, 2018  
PRISCILLA MCNULTY, THOMAS :  
ULRICH, ROBERT MCKINSTRY, MARK :  
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Respondents :

**OPINION**

**JUSTICE TODD**

**FILED: February 7, 2018**

It is a core principle of our republican form of government “that the voters should choose their representatives, not the other way around.”<sup>1</sup> In this case, Petitioners allege that the Pennsylvania Congressional Redistricting Act of 2011<sup>2</sup> (the “2011 Plan”) does the latter, infringing upon that most central of democratic rights – the right to vote. Specifically, they contend that the 2011 Plan is an unconstitutional partisan gerrymander. While federal courts have, to date, been unable to settle on a workable standard by which to assess such claims under the federal Constitution, we find no such barriers under our great Pennsylvania charter. The people of this Commonwealth should never lose sight of the fact that, in its protection of essential rights, our founding document is the ancestor, not the offspring, of the federal Constitution. We conclude that, in this matter, it provides a constitutional standard, and remedy, even if the federal charter does not. Specifically, we hold that the 2011 Plan violates Article I, Section 5 – the Free and Equal Elections Clause – of the Pennsylvania Constitution.

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<sup>1</sup> Mitchell N. Berman, *Managing Gerrymandering*, 83 Tex. L. Rev. 781, 781 (2005), quoted in *Arizona State Legislature v. Arizona Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2677 (2015).

<sup>2</sup> Act of Dec. 22, 2011, P.L. 599, No. 131, 25 P.S. §§ 3596.101 *et seq.*



The challenge herein was brought in June 2017 by Petitioners, the League of Women Voters<sup>3</sup> and 18 voters – all registered Democrats, one from each of our state’s congressional districts – against Governor Thomas W. Wolf, Lieutenant Governor Michael J. Stack, III, Secretary Robert Torres, and Commissioner Jonathan M. Marks (collectively, “Executive Respondents”), and the General Assembly, Senate President Pro Tempore Joseph B. Scarnati, III, and House Speaker Michael C. Turzai (collectively, “Legislative Respondents”).<sup>4</sup> <sup>5</sup> Petitioners alleged that the 2011 Plan violated several provisions of our state Constitution.

On January 22, 2018, this Court entered a *per curiam* order<sup>6</sup> agreeing with Petitioners, and deeming the 2011 Plan to “clearly, plainly and palpably violate[]” our state Constitution, and so enjoined its further use.<sup>7</sup> See Order, 1/22/18. We further

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<sup>3</sup> On November 17, 2017, the Commonwealth Court dismissed the League of Women Voters from the case based on a lack of standing. On the presentations before us, see Petitioners’ Brief at 41 n.5, and given our resolution of this matter, we do not revisit that decision.

<sup>4</sup> A similar challenge, under federal law, was brought by citizen-petitioners against the Governor, the Secretary, and the Commissioner in federal district court, contending that Plan violates the Elections Clause, Article I, Section 4, of the federal Constitution. Trial in that case was held in December, one week prior to the trial in the instant matter. In a 2-1 decision, on January 10, 2018, the three-judge panel of the United States District Court for the Eastern District of Pennsylvania rejected the petitioners’ challenge. See *Agre v. Wolf*, No. 17-4392, 2018 WL 351603 (E.D. Pa. Jan. 10, 2018).

<sup>5</sup> On November 13, 2017, the Commonwealth Court permitted to intervene certain registered Republican voters from each district, including announced or potential candidates for Congress and other active members of the Republican Party (the “Intervenors”).

<sup>6</sup> To our Order, Justice Baer filed a Concurring And Dissenting Statement, Chief Justice Saylor filed a Dissenting Statement, joined by Justice Mundy, and Justice Mundy filed a Dissenting Statement.

<sup>7</sup> In our order, we excepted the March 13, 2018 special election for Pennsylvania’s 18th Congressional District. See Order, 1/22/18, ¶ “Sixth.”

provided that, if the General Assembly and the Governor did not enact a remedial plan by February 15, 2018, this Court would choose a remedial plan. For those endeavors, we set forth the criteria to be applied in measuring the constitutionality of any remedial plan, holding that:

any congressional districting plan shall consist of: congressional districts composed of compact and contiguous territory; as nearly equal in population as practicable; and which do not divide any county, city, incorporated town, borough, township, or ward, except where necessary to ensure equality of population.

Order, 1/22/18, ¶ “Fourth.”<sup>8</sup> Our Order indicated that an opinion would follow. This is that Opinion, and we emphasize that, while explicating our rationale, nothing in this Opinion is intended to conflict with, or in any way alter, the mandate set forth in our Order of January 22, 2018.<sup>9</sup>

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<sup>8</sup> On January 23, 2018, Legislative Respondents filed with this Court an application for a stay of our Order, alleging the Order would have a chaotic effect on the 2018 elections, and arguing the Order implicated an important question of federal law on which they would base an appeal to the United States Supreme Court. Intervenors filed a similar application. Both applications were denied on January 25, 2018, with dissents noted by Chief Justice Saylor, and Justices Baer and Mundy. On January 26, 2018, Legislative Respondents filed with the United States Supreme Court an emergency application for a stay of this Court’s January 22, 2018 Order; the application was denied on February 5, 2018.

<sup>9</sup> A brief description of the Court’s process in issuing orders with opinions to follow is instructive. Upon agreement of the majority of the Court, the Court may enter, shortly after briefing and argument, a *per curiam* order setting forth the court’s mandate, so that the parties are aware of the court’s ultimate decision and may act accordingly. This is particularly so in election matters, where time is of the essence. Justices in the minority, or who disagree with any part of the order, may issue brief concurring or dissenting statements, or may simply note their concurrence with or dissent from the order.

The Court is, however, still a deliberative body, meaning there is a back-and-forth nature not only to decision-making, but to legal analysis. Many analyses, such as those in this case, are complex and nuanced. Thus, the Court’s process involves, in the first instance, the drafting of an opinion by the majority author, and, of course, involves exhaustive research and multiple interactions with other Justices. Once a majority (continued...)

## I. Background

### A. Redistricting Mandate

Article I, Section 2 of the United States Constitution requires that a census be taken every 10 years for the purpose of apportioning the United States House of Representatives. Following the 2010 federal census, Pennsylvania's share in the House was reduced from 19 to 18 members.<sup>10</sup> As a result, the Commonwealth was required to redraw its congressional district map.

Pennsylvania's congressional districts are drawn by the state legislature as a regular statute, subject to veto by the Governor.<sup>11</sup> While this process is dictated by federal law, it is delegated to the states. The federal Constitution's Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof," unless Congress should "make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1. Pursuant to the Elections Clause, Congress passed 2 U.S.C. § 2a, which provides that,

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(...continued)

opinion is completed, it is circulated to all of the other Justices for their review and comment. At that point, each of the other Justices has the opportunity to write his or her own concurring or dissenting opinions, expressing that Justice's ultimate views on the issues presented. These responsive opinions are then circulated to the other Justices for their responses, if any. Only then, after every member of the Court has been afforded the time and opportunity to express his or her views, are the opinions finalized. At that point, a majority opinion, along with any concurring and dissenting opinions, are filed with our Prothonotary and released to the public. It is a process, and it is one to which this Court rigorously adheres.

<sup>10</sup> Public Law 94-171, enacted by Congress in 1975, requires the Census Bureau to deliver redistricting results to state officials for legislative redistricting. See 13 U.S.C. § 141. For the 2010 federal census, the Census Bureau was required to deliver redistricting data to the states no later than April 1, 2011.

<sup>11</sup> By contrast, the state legislative lines are drawn by a five-member commission pursuant to the Pennsylvania Constitution. See Pa. Const. art. II, § 17.

following the decennial census and reapportionment, the Clerk of the House of Representatives shall “send to the executive of each State a certificate of the number of Representatives to which such State is entitled” and the state shall be redistricted “in the manner provided by the law thereof.” 2 U.S.C. § 2a. If the state does not do so, Representatives are to be elected as further provided in Section 2a.<sup>12</sup>

### **B. Plan Passage**

The 2011 Plan, Senate Bill 1249, was enacted on December 22, 2011, setting forth Pennsylvania’s 18 congressional districts.<sup>13</sup> In the November 2010 general election, voters elected Republicans to majorities in both houses of the General Assembly and elected a Republican, Tom Corbett, as Governor. Thus, in 2011, the Republican-led General Assembly was tasked with reconstituting Pennsylvania’s congressional districts, reducing their number by one, and adjusting their borders in light of population changes reflected by the 2010 Census. On May 11, June 9, and June 14, 2011, the Pennsylvania House and Senate State Government Committees held hearings on the subject of redistricting, for the ostensible purpose of receiving testimony and public comment on the subject of redistricting generally. On September 14, 2011, Senate Bill 1249, Printer’s Number 1520, principally sponsored by the Republican leadership, was introduced, but contained absolutely no information concerning the

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<sup>12</sup> Both the Elections Clause and Section 2a have been interpreted as envisioning that the redistricting process will be subject to state law restrictions, including gubernatorial veto, judicial remedies, citizen referenda, and even the reconstitution, via citizen initiative, of the authority to redistrict into independent redistricting agencies. The role of courts generally, and this Court in particular, in fashioning congressional districts is a matter we discuss more fully below in Part VI, “Remedy.”

<sup>13</sup> This history is based on the joint stipulation of the parties. See Joint Stipulation of Facts, 12/8/17.

boundaries of any congressional districts. On December 7, 2011, the bill was brought up for first consideration, and, on December 11, 2011, for second consideration.

Thereafter, the bill was referred to the Senate State Government Committee, where, on December 14, 2011, it was amended and reprinted as Senate Bill 1249, Printer's Number 1862, now providing proposed boundaries for each of Pennsylvania's 18 congressional districts, before being reported out of committee. The same day, the bill was referred to the Senate Appropriations Committee, where it was again amended and reprinted as Senate Bill 1249, Printer's Number 1869, and reported out of committee to the floor. There, Democratic Senator Jay Costa introduced an amendment to the bill he indicated would modify it to create 8 Republican-favorable districts, 4 Democrat-favorable districts, and 6 swing districts, but the Senate declined to adopt the amendment and passed Senate Bill 1249, Printer's Number 1869, in a 26-24 vote, with all Democrats voting against passage. The same day, Senate Bill 1249, Printer's Number 1869, proceeded to the House of Representatives, where it was referred to the House State Government Committee, and reported out of committee. The next day, on December 15, 2011, Senate Bill 1249, Printer's Number 1869, was brought up for first consideration, and, on December 19, 2011, second consideration. On December 20, 2011, the bill was referred to the House Appropriations Committee, reported out of the committee, and passed in a 136-61 vote, with 36 Democrats voting in favor of passage.<sup>14</sup> On December 22, 2011, Senate Bill 1249, Printer's Number 1869, proceeded to the governor's desk where then-Governor Corbett signed it into law as Act 131 of 2011, the 2011 Plan.

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<sup>14</sup> Notably, 33 of the 36 Democrats who voted in favor of passage serve districts within the 1<sup>st</sup>, 2<sup>nd</sup>, 13<sup>th</sup>, 14<sup>th</sup>, or 17<sup>th</sup> Congressional Districts, which, as detailed herein, are safe Democratic districts under the 2011 Plan.

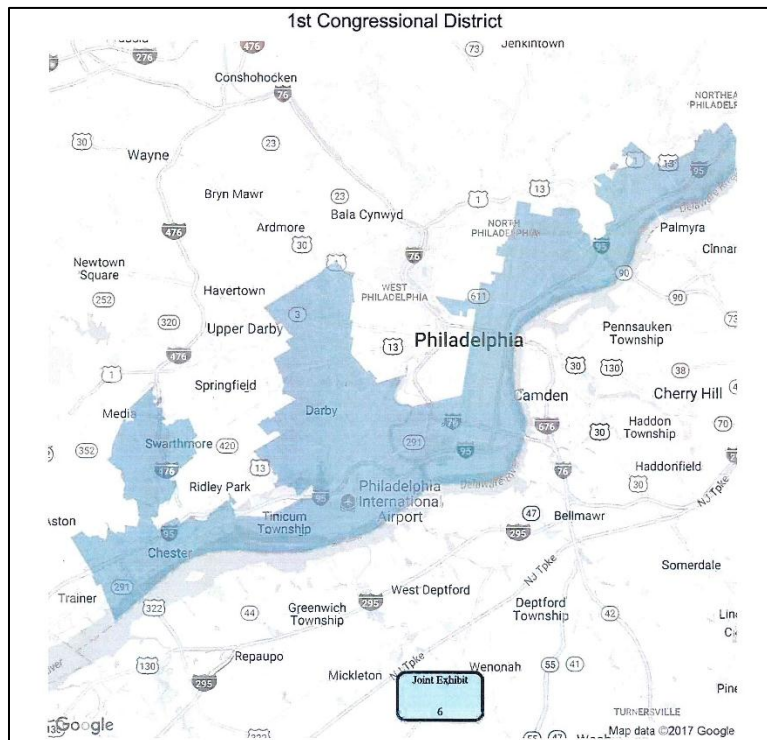
## C. The 2011 Plan

A description of the 2011 Plan and some of its characteristics is appropriate.<sup>15</sup> A map of the entire 2011 Plan is attached as Appendix A.

### 1. The Districts

#### a. 1<sup>st</sup> Congressional District

The 1<sup>st</sup> Congressional District is composed of parts of Delaware and Philadelphia Counties, and appears as follows:

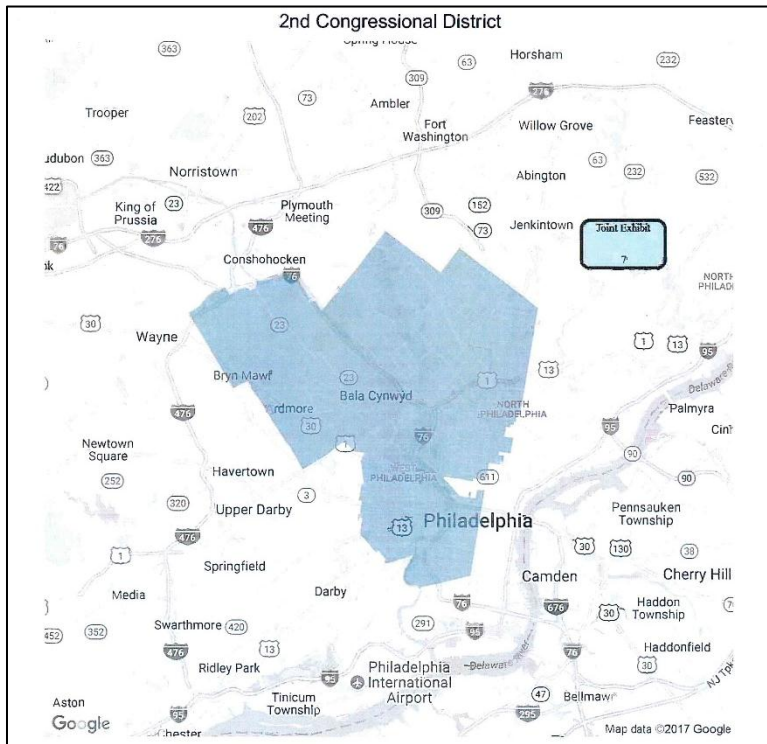


See Joint Exhibit 6.

<sup>15</sup> As with the legislative history of the 2011 Plan, this description is based upon the joint stipulation of the parties.

**b. 2<sup>nd</sup> Congressional District**

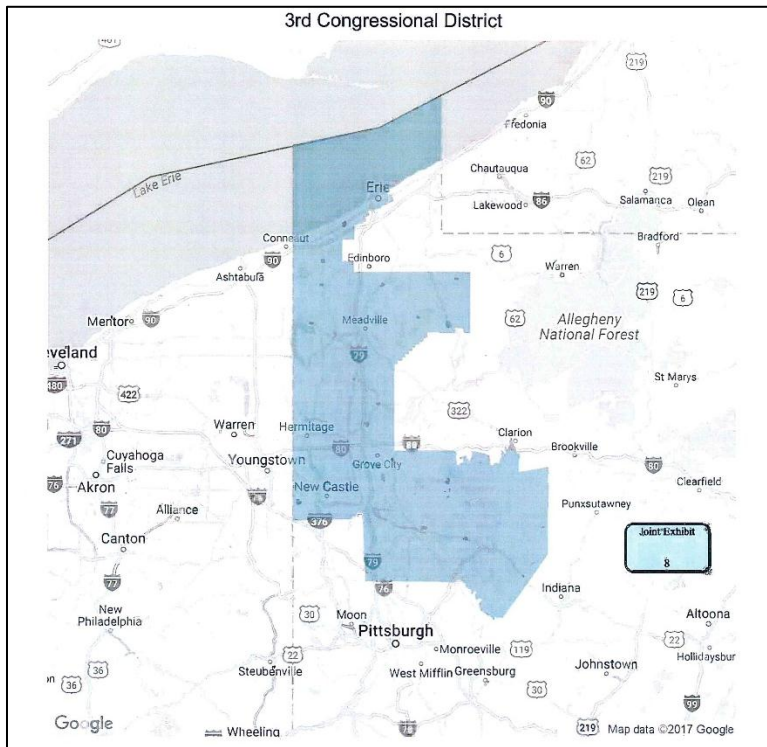
The 2<sup>nd</sup> Congressional District is composed of parts of Montgomery and Philadelphia Counties, and appears as follows:



See Joint Exhibit 7.

**c. 3<sup>rd</sup> Congressional District**

The 3<sup>rd</sup> Congressional District is composed of Armstrong, Butler, and Mercer Counties, together with parts of Clarion, Crawford, Erie, and Lawrence Counties, and appears as follows:

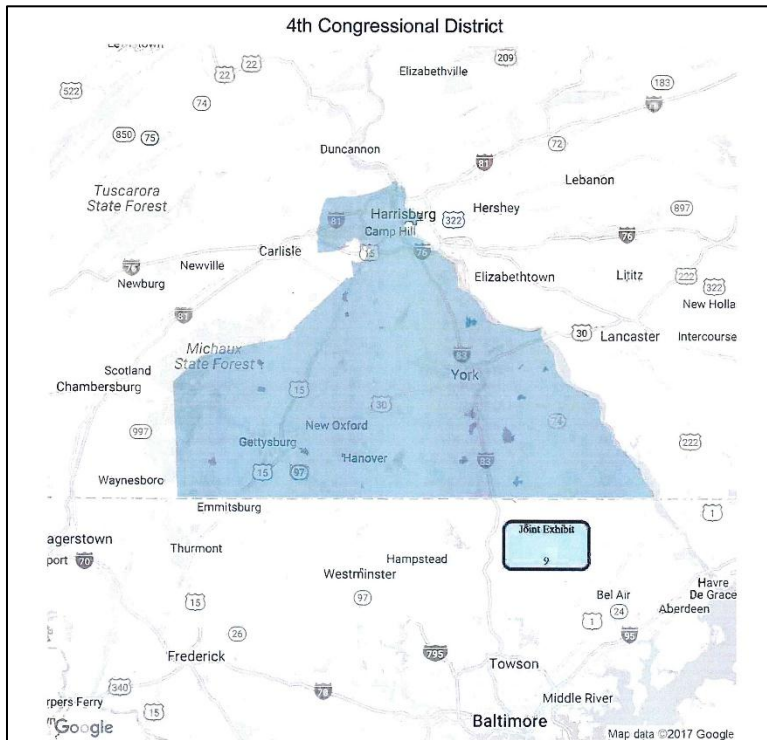


See Joint Exhibit 8.



**d. 4<sup>th</sup> Congressional District**

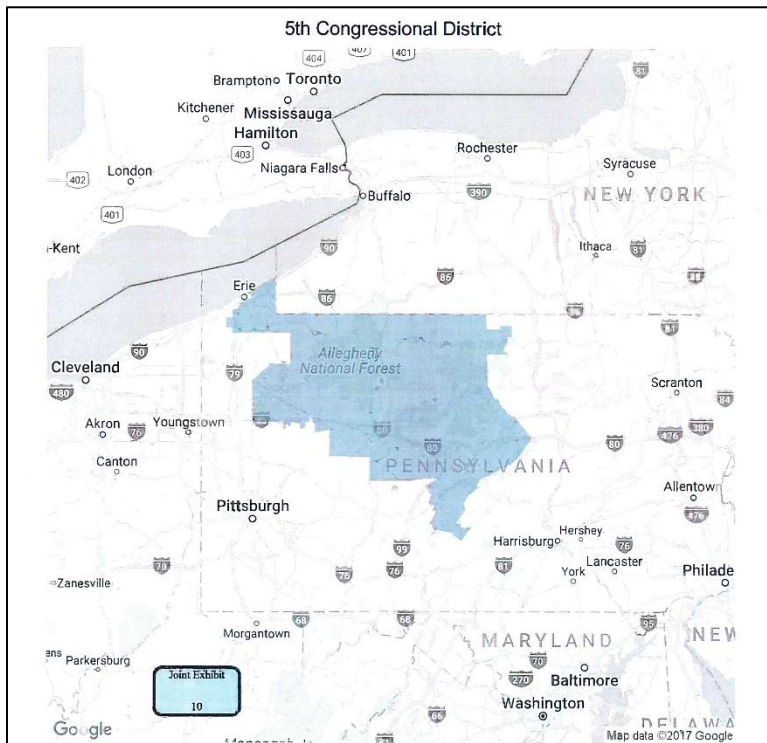
The 4<sup>th</sup> Congressional District is composed of Adams and York Counties, together with parts of Cumberland and Dauphin Counties, and appears as follows:



See Joint Exhibit 9.

**e. 5<sup>th</sup> Congressional District**

The 5<sup>th</sup> Congressional District is composed of Cameron, Centre, Clearfield, Clinton, Elk, Forest, Jefferson, McKean, Potter, Venango, and Warren Counties, together with parts of Clarion, Crawford, Erie, Huntingdon, and Tioga Counties, and appears as follows:

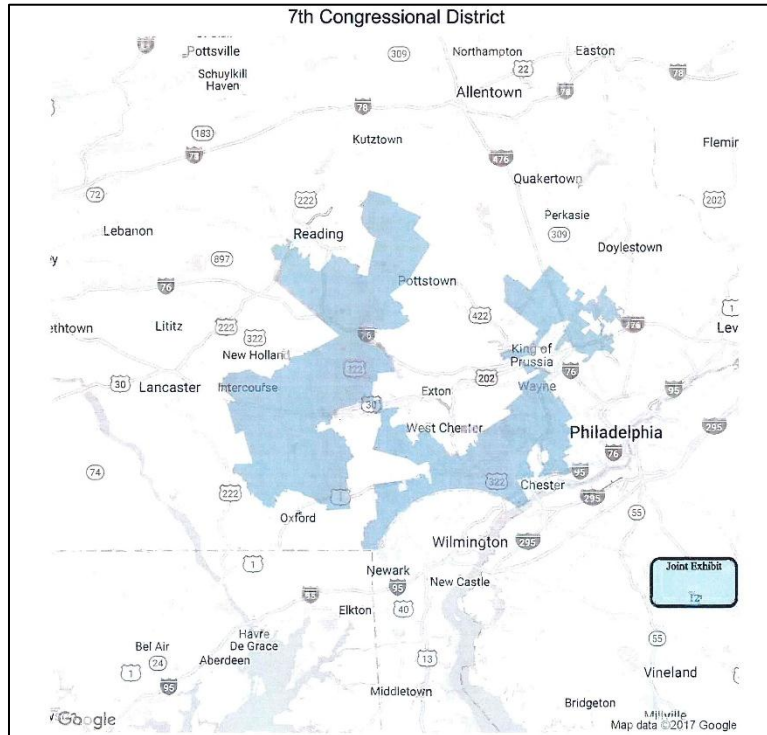


See Joint Exhibit 10.



**g. 7<sup>th</sup> Congressional District**

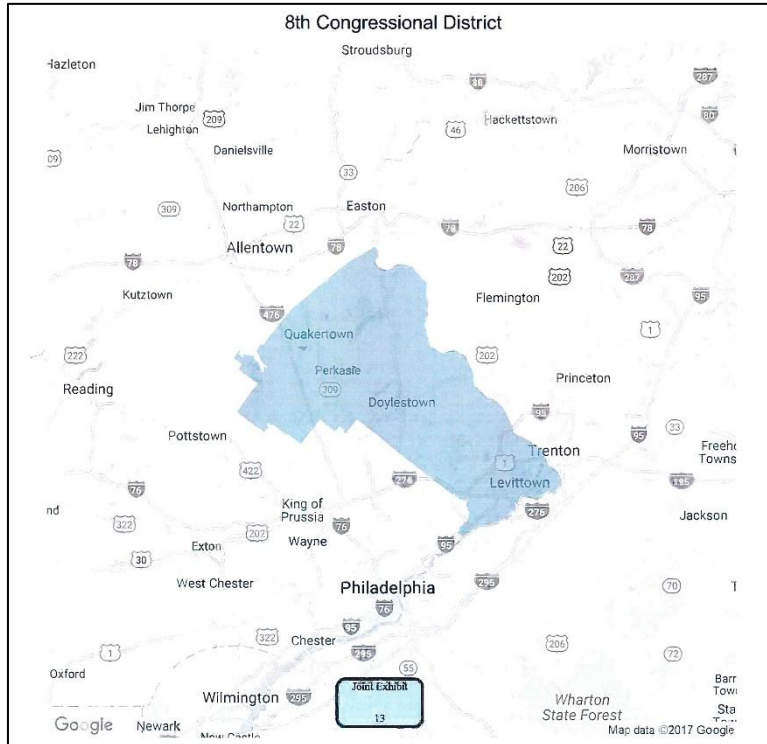
The 7<sup>th</sup> Congressional District is composed of parts of Berks, Chester, Delaware, Lancaster, and Montgomery Counties, and appears as follows:



See Joint Exhibit 12.

***h. 8<sup>th</sup> Congressional District***

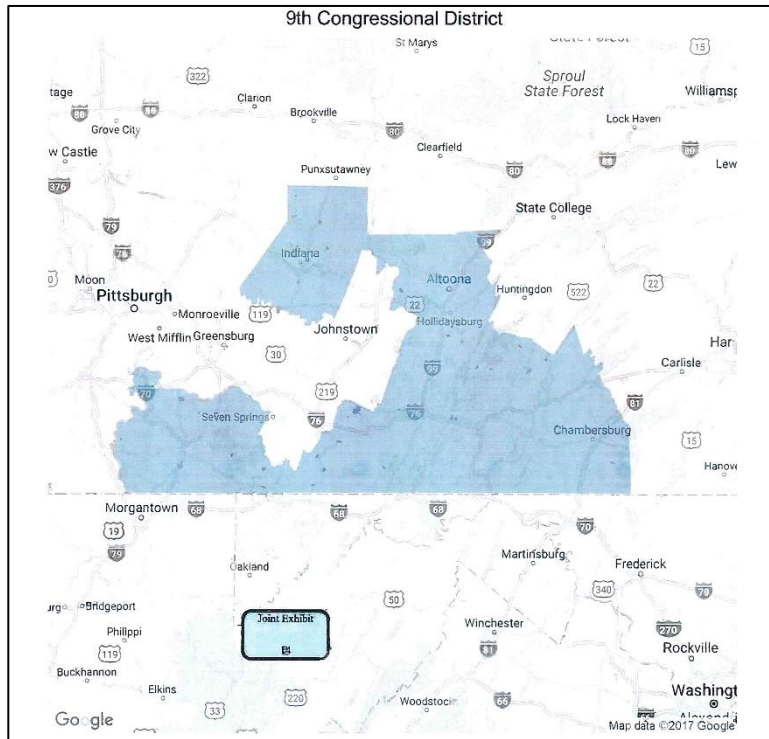
The 8<sup>th</sup> Congressional District is composed of Bucks County, together with parts of Montgomery County, and appears as follows:



See Joint Exhibit 13.

***i. 9<sup>th</sup> Congressional District***

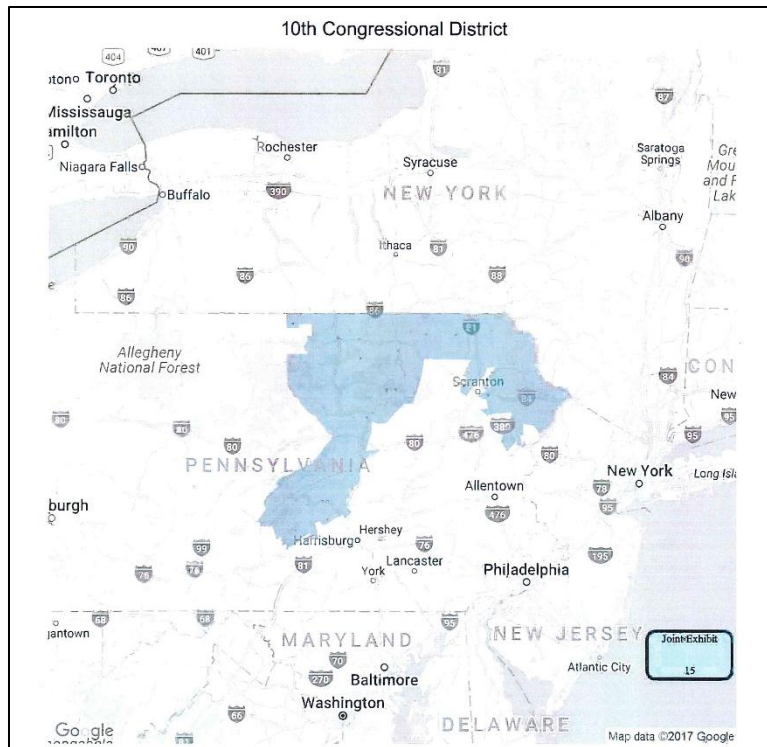
The 9<sup>th</sup> Congressional District is composed of Bedford, Blair, Fayette, Franklin, Fulton, and Indiana Counties, together with parts of Cambria, Greene, Huntingdon, Somerset, Washington, and Westmoreland Counties, and appears as follows:



See Joint Exhibit 14.

***j. 10<sup>th</sup> Congressional District***

The 10<sup>th</sup> Congressional District is composed of Bradford, Juniata, Lycoming, Mifflin, Pike, Snyder, Sullivan, Susquehanna, Union, and Wayne Counties, together with parts of Lackawanna, Monroe, Northumberland, Perry, and Tioga Counties, and appears as follows:

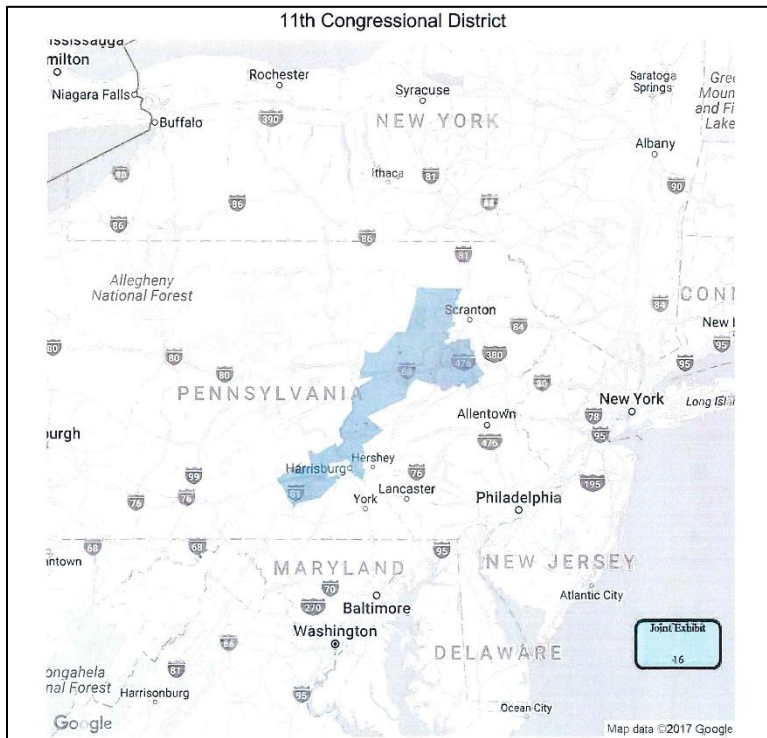


See Joint Exhibit 15.



**k. 11<sup>th</sup> Congressional District**

The 11<sup>th</sup> Congressional District is composed of Columbia, Montour, and Wyoming Counties, together with parts of Carbon, Cumberland, Dauphin, Luzerne, Northumberland, and Perry Counties, and appears as follows:

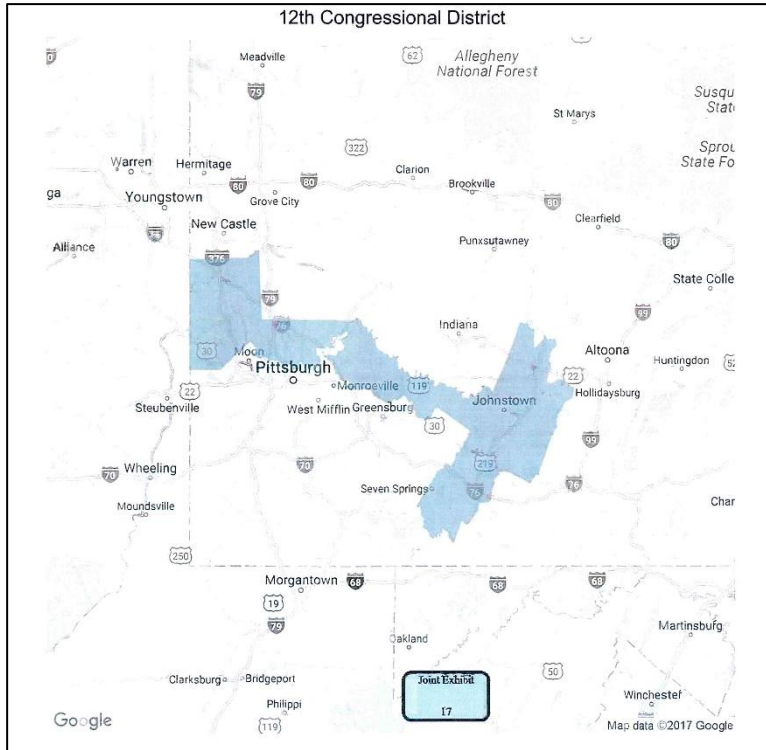


See Joint Exhibit 16.



**I. 12<sup>th</sup> Congressional District**

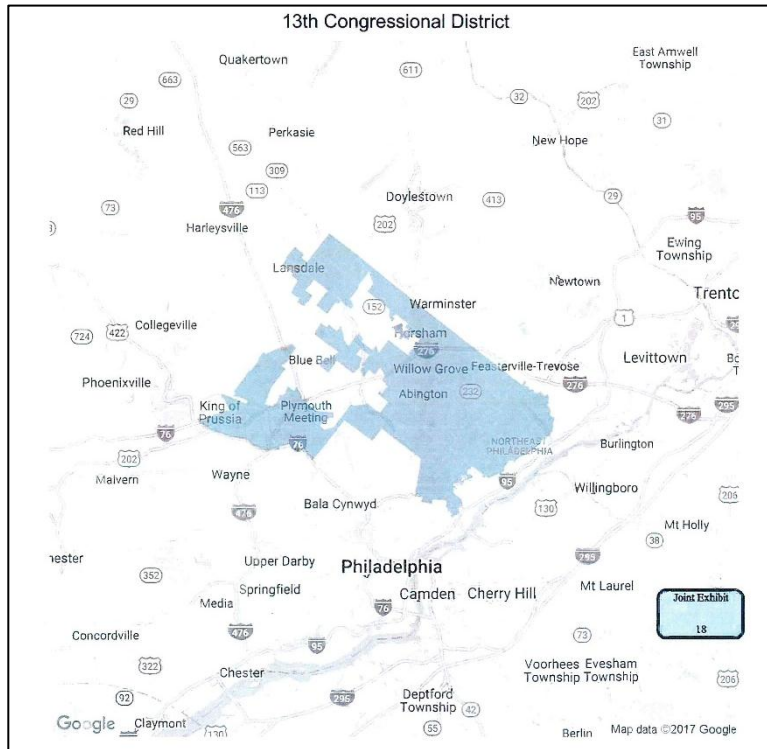
The 12<sup>th</sup> Congressional District is composed of Beaver County, together with parts of Allegheny, Cambria, Lawrence, Somerset, and Westmoreland Counties, and appears as follows:



See Joint Exhibit 17.

**m. 13<sup>th</sup> Congressional District**

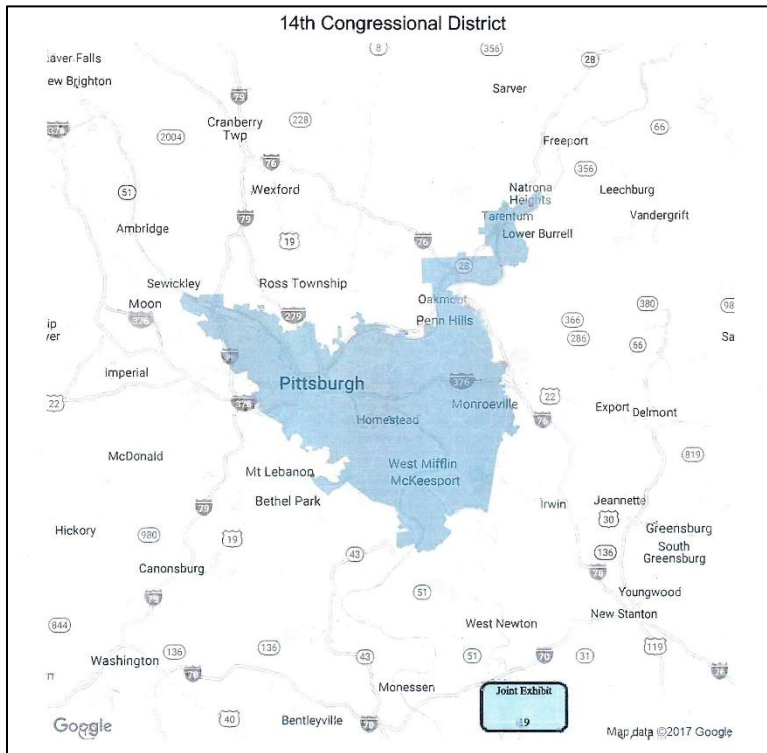
The 13<sup>th</sup> Congressional District is composed of parts of Montgomery and Philadelphia Counties, and appears as follows:



See Joint Exhibit 18.

**n. 14<sup>th</sup> Congressional District**

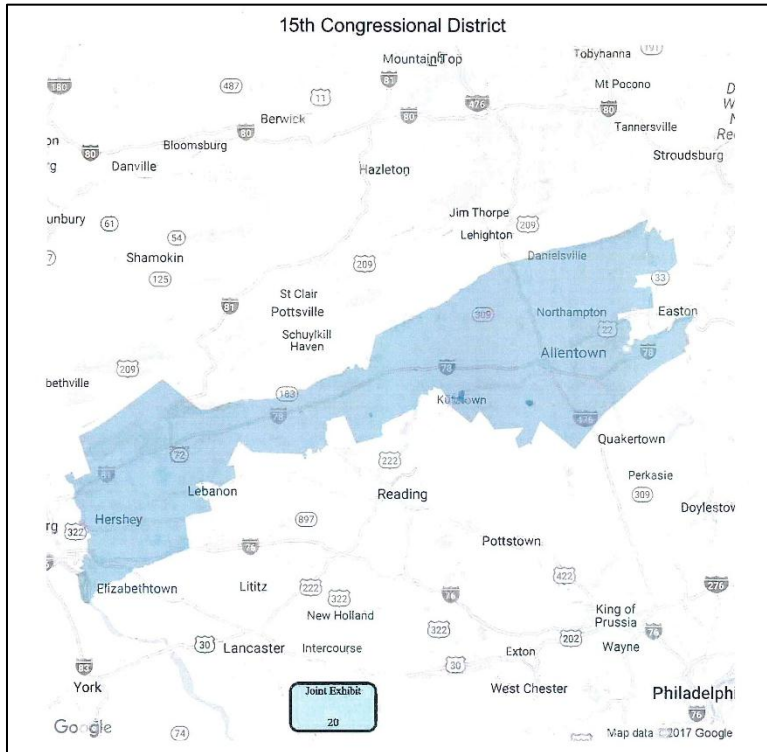
The 14<sup>th</sup> Congressional District is composed of parts of Allegheny and Westmoreland Counties, and appears as follows:



See Joint Exhibit 19.

***o. 15<sup>th</sup> Congressional District***

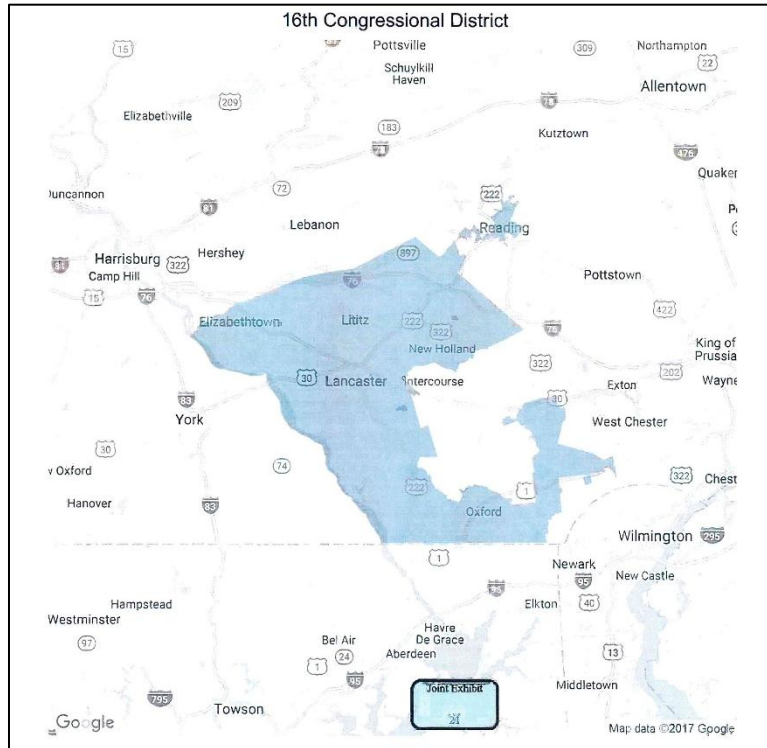
The 15<sup>th</sup> Congressional District is composed of Lehigh County and parts of Berks, Dauphin, Lebanon, and Northampton Counties, and appears as follows:



See Joint Exhibit 20.

**p. 16<sup>th</sup> Congressional District**

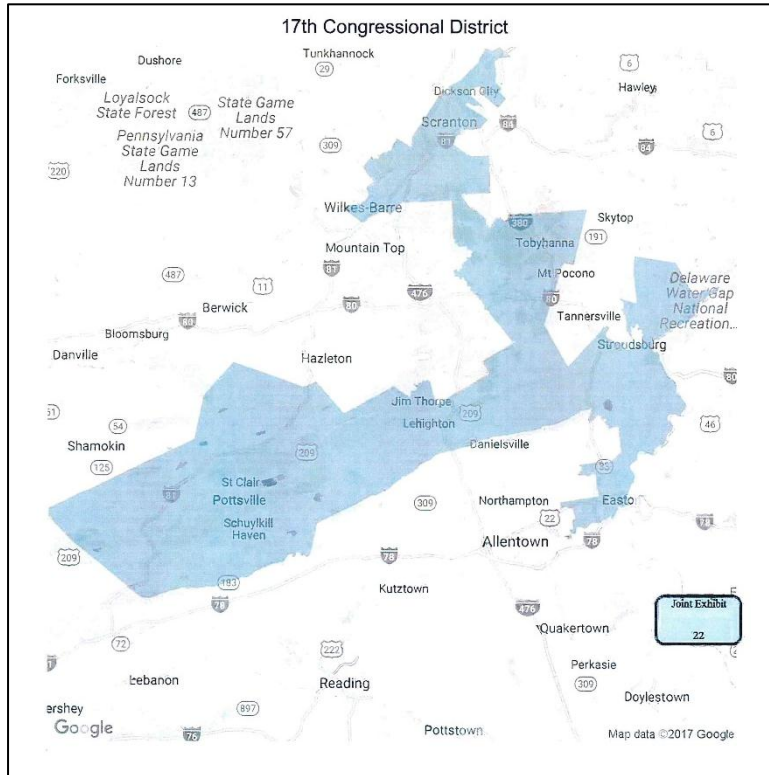
The 16<sup>th</sup> Congressional District is composed of parts of Berks, Chester, and Lancaster Counties, and appears as follows:



See Joint Exhibit 21.

**q. 17<sup>th</sup> Congressional District**

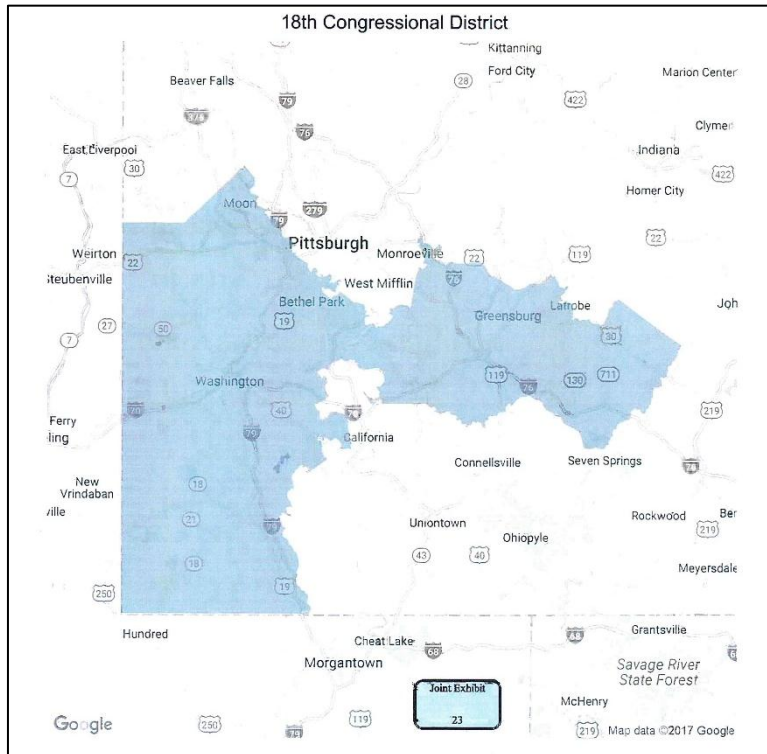
The 17<sup>th</sup> Congressional District is composed of Schuylkill County and parts of Carbon, Lackawanna, Luzerne, Monroe, and Northampton Counties, and appears as follows:



See Joint Exhibit 22.

**r. 18<sup>th</sup> Congressional District**

Finally, the 18<sup>th</sup> Congressional District is composed of parts of Allegheny, Greene, Washington, and Westmoreland Counties, and appears as follows:



See Joint Exhibit 23.

**2. Other Characteristics**

Of the 67 counties in Pennsylvania, the 2011 Plan divides a total of 28 counties between at least two different congressional districts:<sup>16</sup> Montgomery County is divided among five congressional districts; Berks and Westmoreland Counties are each divided

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<sup>16</sup> The 2011 Plan also consolidates previously split counties: prior to the 2011 Plan, Armstrong, Butler, Mercer, Venango, and Warren Counties were split between congressional districts, whereas, under the 2011 Plan, they are not.

among four congressional districts;<sup>17</sup> Allegheny, Chester,<sup>18</sup> and Philadelphia Counties are each divided among three congressional districts; and Cambria, Carbon, Clarion, Crawford, Cumberland, Delaware, Erie,<sup>19</sup> Greene, Huntingdon, Lackawanna, Lancaster, Lawrence, Lebanon, Luzerne, Monroe, Northampton,<sup>20</sup> Northumberland, Perry, Somerset, Tioga, and Washington Counties are each split between two congressional districts.<sup>21</sup> Additionally, whereas, prior to 1992, no municipalities in Pennsylvania were divided among multiple congressional districts, the 2011 Plan divides 68, or 2.66%, of Pennsylvania's municipalities between at least two Congressional districts.<sup>22</sup>

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<sup>17</sup> The City of Reading is separated from the remainder of Berks County. From at least 1962 to 2002, Berks County was situated entirely within a single congressional district.

<sup>18</sup> The City of Coatesville is separated from the remainder of Chester County.

<sup>19</sup> From at least 1931 until 2011, Erie County was not split between congressional districts.

<sup>20</sup> The City of Easton is separated from the remainder of Northampton County.

<sup>21</sup> In total, 11 of the 18 congressional districts contain more than three counties which are divided among multiple congressional districts.

<sup>22</sup> The municipalities include Archbald, Barr, Bethlehem, Caln, Carbondale, Chester, Cumru, Darby, East Bradford, East Carroll, East Norriton, Fallowfield, Glenolden, Harrisburg, Harrison, Hatfield, Hereford, Horsham, Kennett, Laureldale, Lebanon, Lower Alsace, Lower Gwynedd, Lower Merion, Mechanicsburg, Millcreek, Monroeville, Morgan, Muhlenberg, North Lebanon, Northern Cambria, Olyphant, Penn, Pennsbury, Perkiomen, Philadelphia, Piney, Plainfield, Plymouth Township, Ridley, Riverside, Robinson, Sadsbury, Seven Springs, Shippen, Shippensburg, Shirley, Spring, Springfield, Stroud, Susquehanna, Throop, Tinicum, Trafford, Upper Allen, Upper Darby, Upper Dublin, Upper Gwynedd, Upper Hanover, Upper Merion, Upper Nazareth, West Bradford, West Hanover, West Norriton, Whitehall, Whitmarsh, Whitpain, and Wyomissing. Monroeville, Caln, Cumru, and Spring Township are split into three separate congressional districts. Three of these municipalities – Seven Springs, Shippensburg, and Trafford – are naturally divided between multiple counties, and Cumru is naturally noncontiguous. Additionally, wards in Bethlehem and Harrisburg are split between congressional districts.



Finally, as noted above, the General Assembly was tasked with reducing the number of Pennsylvania's congressional districts from 19 to 18, necessitating the placement of at least two congressional incumbents into the same district. The 2011 Plan placed then-Democratic Congressman for the 12<sup>th</sup> Congressional District Mark Critz and then-Democratic Congressman for the 4<sup>th</sup> Congressional District Jason Altmire into the same district. Notably, the two faced off in an ensuing primary election, in which Critz prevailed. He subsequently lost the general election to now-Congressman Keith Rothfus, who has prevailed in each biannual election thereafter.

#### **D. Electoral History**

As grounding for the parties' claims and evidentiary presentations, we briefly review the Commonwealth's electoral history before and after the 2011 Plan was enacted.<sup>23</sup> As noted above, the map for the 2011 Plan is attached at Appendix A. The parties have provided copies of prior congressional district maps – for 1943, 1951, 1962, 1972, 1982, 1992, and 2002 – which were procured from the Pennsylvania Manual.<sup>24</sup> They are attached as Joint Exhibit 26 to the Joint Stipulations of Fact. See Joint Stipulation of Facts, 12/8/17, at ¶ 93.

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<sup>23</sup> As above, this information is derived from the parties' Joint Stipulation of Facts.

<sup>24</sup> The Pennsylvania Manual is a regularly published book issued by the Pennsylvania Department of General Services. We cite it as authoritative. See, e.g., *Erfer v. Commonwealth*, 794 A.2d 325 (Pa. 2002).

The distribution of seats in Pennsylvania from 1966 to 2010 is shown below:

<b>Year</b>	<b>Districts</b>	<b>Democratic Seats</b>	<b>Republican Seats</b>
1966	27	14	13
1968	27	14	13
1970	27	14	13
1972	25	13	12
1974	25	14	11
1976	25	17	8
1978	25	15	10
1980	25	12 <sup>[25]</sup>	12
1982	23	13	10
1984	23	13	10
1986	23	12	11
1988	23	12	11
1990	23	11	12
1992	21	11	10
1994	21	11	10
1996	21	11	10
1998	21	11	10
2000	21	10	11
2002	19	7	12
2004	19	7	12
2006	19	11	8
2008	19	12	7
2010	19	7	12

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<sup>25</sup> One elective representative, Thomas M. Foglietta, was not elected as either a Democrat or Republican in 1980.

Joint Stipulation of Facts, 12/8/17, at ¶ 70.

In the three elections since the 2011 Plan was enacted, Democrats have won the same five districts, and Republicans have won the same 13 districts. In the 2012 election, Democrats won five congressional districts with an average of 76.4% of the vote in each, whereas Republicans won the remaining 13 congressional districts with an average 59.5% of the vote in each, and, notably, Democrats earned a statewide share of 50.8% of the vote, an average of 50.4% per district, with a median of 42.8% of the vote, whereas Republicans earned only a statewide share of 49.2% of the vote.<sup>26</sup>

In the 2014 election, Democratic candidates again won five congressional races, with an average of 73.6% of the vote in each, whereas Republicans again won 13 congressional districts, with an average of 63.4% of the vote in each.<sup>27</sup> In 2014,

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<sup>26</sup> Specifically, in 2012, Democratic candidates won in the 1<sup>st</sup> Congressional District with 84.9% of the vote; the 2<sup>nd</sup> Congressional District with 90.5% of the vote; the 13<sup>th</sup> Congressional District with 69.1% of the vote; the 14<sup>th</sup> Congressional District with 76.9% of the vote; and the 17<sup>th</sup> Congressional District with 60.3% of the vote. On the other hand, Republican candidates won in the 3<sup>rd</sup> Congressional District with 57.2% of the vote; the 4<sup>th</sup> Congressional District with 63.4% of the vote; the 5<sup>th</sup> Congressional District with 62.9% of the vote; the 6<sup>th</sup> Congressional District with 57.1% of the vote; the 7<sup>th</sup> Congressional District with 59.4% of the vote; the 8<sup>th</sup> Congressional District with 56.6% of the vote; the 9<sup>th</sup> Congressional District with 61.7% of the vote; the 10<sup>th</sup> Congressional District with 65.6% of the vote; the 11<sup>th</sup> Congressional District with 58.5% of the vote; the 12<sup>th</sup> Congressional District with 51.7% of the vote; the 15<sup>th</sup> Congressional District with 56.8% of the vote; the 16<sup>th</sup> Congressional District with 58.4% of the vote; and the 18<sup>th</sup> Congressional District with 64.0% of the vote.

<sup>27</sup> Specifically, in 2014, Democrats won in the 1<sup>st</sup> Congressional District with 82.8% of the vote; the 2<sup>nd</sup> Congressional district with 87.7% of the vote; the 13<sup>th</sup> Congressional District with 67.1% of the vote; the 14<sup>th</sup> Congressional District, which was uncontested, with 100% of the vote; and the 17<sup>th</sup> Congressional District with 56.8% of the vote. Republican candidates won in the 3<sup>rd</sup> Congressional District with 60.6% of the vote; the 4<sup>th</sup> Congressional District with 74.5% of the vote; the 5<sup>th</sup> Congressional District with 63.6% of the vote; the 6<sup>th</sup> Congressional district with 56.3% of the vote; the 7<sup>th</sup> Congressional District with 62.0% of the vote; the 8<sup>th</sup> Congressional District with 61.9% of the vote; the 9<sup>th</sup> Congressional District with 63.5% of the vote; the 10<sup>th</sup> Congressional District with 71.6% of the vote; the 11<sup>th</sup> Congressional District with 66.3% of the vote; the 12<sup>th</sup> Congressional District with 59.3% of the vote; the 15<sup>th</sup> Congressional District, (continued...)

Democrats earned a 44.5% statewide vote share in contested races, whereas Republicans earned a 55.5% statewide vote share in contested races, with a 54.1% statewide share vote in the aggregate.

In the 2016 election, Democrats again won those same five congressional districts, with an average of 75.2% of the vote in each and a statewide vote share of 45.9%, whereas Republicans won those same 13 districts with an average of 61.8% in each and a statewide vote share of 54.1%.<sup>28 29</sup>

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(...continued)

which was uncontested, with 100% of the vote; the 16<sup>th</sup> Congressional District with 57.7% of the vote; and the 18<sup>th</sup> Congressional District, which was uncontested, with 100% of the vote.

<sup>28</sup> Specifically, in 2016, Democrats again prevailed in the 1<sup>st</sup> Congressional District with 82.2% of the vote; the 2<sup>nd</sup> Congressional District with 90.2% of the vote; the 13<sup>th</sup> Congressional District, which was uncontested, with 100% of the vote; the 14<sup>th</sup> Congressional District with 74.4% of the vote; and the 17<sup>th</sup> Congressional District with 53.8% of the vote. Republicans again prevailed in the remainder of the districts: in the 3<sup>rd</sup> Congressional district, which was uncontested, with 100% of the vote; in the 4<sup>th</sup> Congressional District with 66.1% of the vote; in the 5<sup>th</sup> Congressional District with 67.2% of the vote; in the 6<sup>th</sup> Congressional District with 67.2% of the vote; in the 7<sup>th</sup> Congressional District with 59.5% of the vote; in the 8<sup>th</sup> Congressional District with 54.4% of the vote; in the 9<sup>th</sup> Congressional District with 63.3% of the vote; in the 10<sup>th</sup> Congressional District with 70.2% of the vote; in the 11<sup>th</sup> Congressional District with 63.7% of the vote; in the 12<sup>th</sup> Congressional District with 61.8% of the vote; in the 15<sup>th</sup> Congressional District with 60.6% of the vote; in the 16<sup>th</sup> Congressional District with 55.6% of the vote; and in the 18<sup>th</sup> Congressional District, which was uncontested, with 100% of the vote.

<sup>29</sup> Notably, voters in the 6<sup>th</sup> and 7<sup>th</sup> Congressional Districts reelected Republican congressmen while simultaneously voting for Democratic nominee and former Secretary of State Hillary Clinton for president. Contrariwise, voters in the 17<sup>th</sup> Congressional District reelected a Democratic congressman while voting for Republican nominee Donald Trump for president. Additionally, several traditionally Democratic counties voted for now-President Trump.

In short, in the last three election cycles, the partisan distribution has been as follows:

Year	Districts	Democratic Seats	Republican Seats	Democratic Vote Percentage	Republic Vote Percentage
2012	18	5	13	50.8%	49.2%
2014	18	5	13	44.5%	55.5%
2016	18	5	13	45.9%	54.1%

Joint Stipulation of Facts, 12/8/18, at ¶ 102.

## II. Petitioners' Action

Petitioners filed this lawsuit on June 15, 2017, in the Commonwealth Court. In Count I of their petition for review, Petitioners alleged that the 2011 Plan<sup>30</sup> violates their rights to free expression and association under Article I, Sections 7<sup>31</sup> and 20<sup>32</sup> of the Pennsylvania Constitution. More specifically, Petitioners alleged that the General Assembly created the 2011 Plan by “expressly and deliberately consider[ing] the political views, voting histories, and party affiliations of Petitioners and other Democratic voters” with the intent to burden and disfavor Petitioners’ and other Democratic voters’

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<sup>30</sup> Petitioners challenged, and before us continue to challenge, the Plan as a whole. Whether such challenges are properly brought statewide, or must be district specific, is an open question. See *Vieth v. Jubelirer*, 541 U.S. 267 (2004). However, no such objection is presented to us.

<sup>31</sup> Article I, Section 7 of the Pennsylvania Constitution provides in relevant part: “The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.” Pa. Const. art. I, § 7.

<sup>32</sup> Article I, Section 20 provides: “The citizens have a right in a peaceable manner to assemble together for their common good . . . .” Pa. Const. art. I, § 20.

rights to free expression and association. Petition for Review, 6/15/17, at ¶¶ 105. Petitioners further alleged that the 2011 Plan had the effect of burdening and disfavoring Petitioners' and other Democratic voters' rights to free expression and association because the 2011 Plan "prevented Democratic voters from electing the representatives of their choice and from influencing the legislative process" and suppressed "the political views and expression of Democratic voters." *Id.* at ¶ 107. They contended the Plan "also violates the Pennsylvania Constitution's prohibition against retaliation against individuals who exercise their rights under" these articles. *Id.* at ¶ 108. Specifically, Petitioners alleged that the General Assembly's "cracking" of congressional districts in the 2011 Plan has resulted in their inability "to elect representatives of their choice or to influence the political process." *Id.* at ¶¶ 112.

In Count II, Petitioners alleged the Plan violates the equal protection provisions of Article 1, Sections 1 and 26<sup>33</sup> of the Pennsylvania Constitution, and the Free and Equal Elections Clause of Article I, Section 5<sup>34</sup> of the Pennsylvania Constitution. More specifically, Petitioners alleged that the Plan intentionally discriminates against Petitioners and other Democratic voters by using "redistricting to maximize Republican seats in Congress and entrench [those] Republican members in power." *Id.* at ¶ 116. Petitioners further alleged that the Plan has an actual discriminatory effect, because it

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<sup>33</sup> Article 1, Section 1, provides: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." Pa. Const. art. I, § 1. Section 26 provides: "Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right." Pa. Const. art. I, § 26.

<sup>34</sup> Article I, Section 5 provides: "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Pa. Const. art. I, § 5.

“disadvantages Petitioners and other Democratic voters at the polls and severely burdens their representational rights.” *Id.* at ¶ 117. They contended that “computer modeling and statistical tests demonstrate that Democrats receive far fewer congressional seats than they would absent the gerrymander, and that Republicans’ advantage is nearly impossible to overcome.” *Id.* at ¶ 118. Petitioners claimed that individuals who live in cracked districts under the 2011 Plan are essentially excluded from the political process and have been denied any “realistic opportunity to elect representatives of their choice,” and any “meaningful opportunity to influence legislative outcomes.” *Id.* at ¶ 119. Finally, Petitioners claimed that, with regard to individuals living in “packed” Democratic districts under the Plan, the weight of their votes has been “substantially diluted,” and their votes have no “impact on election outcomes.” *Id.* at ¶ 120.

In response to Respondents’ application, on October 16, 2017, Judge Dan Pellegrini granted a stay of the Commonwealth Court proceedings pending the United States Supreme Court’s decision in *Gill v. Whitford*, No. 16-1161 (U.S. argued Oct. 3, 2017). However, thereafter, Petitioners filed with this Court an application for extraordinary relief, asking that we exercise extraordinary jurisdiction over the matter.<sup>35</sup> On November 9, 2017, we granted the application and assumed plenary jurisdiction over the matter, but, while retaining jurisdiction, remanded the matter to 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

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<sup>35</sup> See 42 Pa.C.S. § 726 (“Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, in any matter pending before any court or district judge of this Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done.”); see also *Vaccone v. Syken*, 899 A.2d 1103, 1108 (Pa. 2006).

be decided.” Supreme Court Order, 11/9/17, at 2. We ordered the court to do so on an expedited basis, and to submit to us findings of fact and conclusions of law no later than December 31, 2017. *Id.* Finally, we directed that the matter be assigned to a commissioned judge of that court.

The Commonwealth Court, by the Honorable P. Kevin Brobson, responded with commendable speed, thoroughness, and efficiency, conducting a nonjury trial from December 11 through 15, and submitting to us its recommended findings of fact and conclusions of law on December 29, 2017, two days prior to our deadline.<sup>36</sup> Thereafter, we ordered expedited briefing, and held oral argument on January 17, 2018.

### **III. Commonwealth Court Proceedings**

In the proceedings before the Commonwealth Court, that court initially disposed of various pretrial matters. Most notably, the court ruled on Petitioners’ discovery requests, and Legislative Respondents’ objections thereto, directed to gleaning the legislators’ intent behind the passage of the 2011 Plan. By order and opinion dated November 22, 2017, the court concluded that, under the Speech and Debate Clause of the Pennsylvania Constitution,<sup>37</sup> the court “lack[ed] the authority to compel testimony or

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<sup>36</sup> The court’s December 29, 2017 Recommended Findings of Fact and Conclusions of Law is broken into two principal, self-explanatory parts. Herein, we refer to those two parts as “Findings of Fact” and “Conclusions of Law.”

<sup>37</sup> The Speech and Debate Clause provides:

The members of the General Assembly shall in all cases, except treason, felony, violation of their oath of office, and breach or surety of the peace, be privileged from arrest during their attendance at the sessions of their respective Houses and in going to and returning from the same; and for any speech or debate in either House they shall not be questioned in any other place.

Pa. Const. art. II, § 15.



the production of documents relative to the intentions, motivations, and activities of state legislators and their staff with respect to the consideration and passage of” the 2011 Plan, Commonwealth Court Opinion, 11/22/17, at 7, and so quashed those requests.<sup>38</sup>

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<sup>38</sup> Petitioners sought discovery from various third parties, including, *inter alia*, the Republican National Committee, the National Republican Congressional Committee, the Republican State Leadership Committee, the State Government Leadership Foundation, and former Governor Corbett, requesting all documents pertaining to the 2011 Plan, all documents pertaining the Redistricting Majority Project (REDMAP), all communications and reports to donors that refer to or discuss the strategy behind REDMAP or evaluate its success, and any training materials on redistricting presented to members, agents, employees, consultants or representatives of the Pennsylvania General Assembly and former Governor Corbett. The discovery request was made for the purpose of establishing the intent of Legislative Respondents to dilute the vote of citizens who historically cast their vote for Democratic candidates. Legislative Respondents opposed the request, asserting, in relevant part, that the information sought was privileged under the Speech and Debate Clause of Article I, Section 15 of the Pennsylvania Constitution. Agreeing with Legislative Respondents, the Commonwealth Court denied the discovery request, excluding any documents that reflected communications with members of the General Assembly or “the intentions, motivations, and activities of state legislators and their staff with respect to the consideration and passage of [the 2011 Plan],” see Commonwealth Court Opinion, 11/22/17, at 11-13, and later denied the admission of such information produced in the federal court action.

Given the other unrebutted evidence of the intent to dilute the vote of citizens who historically voted for Democratic candidates, we need not resolve the question of whether our Speech and Debate Clause confers a privilege protecting this information from discovery and use at trial in a case, such as this one, involving a challenge to the constitutionality of a statute. However, we caution against reliance on the Commonwealth Court’s ruling. This Court has never interpreted our Speech and Debate Clause as providing anything more than immunity from suit, in certain circumstances, for individual members of the General Assembly. See, e.g., *Sweeney v. Tucker*, 375 A.2d 698 (Pa. 1977). Although not bound by decisions interpreting the federal Speech or Debate Clause in Article I, Section 6 of the United States Constitution, see *id.* at 703 n.14, we note that the high Court has recognized an evidentiary privilege only in cases where an individual legislator is facing criminal charges. See, e.g., *United States v. Johnson*, 383 U.S. 169 (1966); *United States v. Helstoski*, 442 U.S. 477 (1979). To date, the United States Supreme Court has never held that an evidentiary privilege exists under the Speech or Debate Clause in lawsuits challenging the constitutionality of a statute. Further, we are not aware of any precedent to support the application of any such privilege to information in the possession of third parties, not legislators.

In addition, Petitioners sought to admit, and Legislative Respondents sought to exclude, certain materials produced by House Speaker Mike Turzai in the federal litigation in *Agre v. Wolf, supra*, in response to permitted discovery in that case, along with Petitioners' expert Dr. Jowei Chen's expert reports and testimony based on those materials. (As noted, similar discovery was denied in this case, per the Commonwealth Court's Speech and Debate Clause ruling.) These materials include redistricting maps revealing partisan scoring down to the precinct level, demonstrating that some legislators designing the 2011 Plan relied upon such partisan considerations. Ultimately, the court permitted Dr. Chen's testimony about these materials, but refused to admit the materials themselves, refused to make any findings about them, see Findings of Fact at ¶ 307, and submitted a portion to this Court under seal, see Petitioners' Exhibit 140. Notably, that sealing order required Petitioners to submit both a "Public" and a "Sealed" version of their brief in order to discuss Exhibit 140.<sup>39</sup> Given our disposition of this matter, we do not further address these materials or the court's evidentiary rulings with respect to them.

In all, the court heard oral argument and ruled on eight motions *in limine*.<sup>40</sup>

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<sup>39</sup> The sole redaction in this regard in the "Public Version" of Petitioners' Brief is on page 8. Thus, the remainder of the citations in this Opinion merely generically refer to "Petitioners' Brief."

<sup>40</sup> The other motions included:

- (1) Petitioners' motion to exclude or limit Intervenors' witness testimony, including precluding the testimony of an existing congressional candidate, limiting the number of witnesses who could testify as Republican Party Chairs to one, and limiting the number of witnesses who could testify as "Republicans at large" to one. The motion was granted. N.T. Trial, 12/11/17, at 94.
- (2) Petitioners' motion to exclude testimony from Dr. Wendy K. Tam Cho regarding Dr. Chen. The motion was denied. *Id.* at 95.
- (3) Petitioners' motion to exclude the expert testimony of Dr. James Gimpel regarding the intended or actual effect of the 2011 Plan on Pennsylvania's  
(continued...)

## A. Findings of Fact of the Commonwealth Court

Prior to the introduction of testimony, the parties and Intervenors stipulated to certain background facts, much of which we have discussed above, and to the introduction of certain portions of deposition and/or prior trial testimony as exhibits.<sup>41</sup>

### 1. Voter Testimony

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(...continued)

communities of interest. Legislative Respondents subsequently agreed to withdraw the challenged portion of the Dr. Gimpel's report. *Id.* at 95-96.

(4) Legislative Respondents' motion to exclude documents and testimony regarding REDMAP. The motion was denied. *Id.* at 96.

<sup>41</sup> Petitioners introduced designated excerpts from the depositions of: Carmen Febo San Miguel, Petitioners' Exhibit 163; Donald Lancaster, Petitioners' Exhibit 164; Gretchen Brandt, Petitioners' Exhibit 165; John Capowski, Petitioners' Exhibit 166; Jordi Comas, Petitioners' Exhibit 167; John Greiner, Petitioners' Exhibit 168; James Solomon, Petitioners' Exhibit 169; Lisa Isaacs, Petitioners' Exhibit 170; Lorraine Petrosky, Petitioners' Exhibit 171; Mark Lichty, Petitioners' Exhibit 172; Priscilla McNulty, Petitioners' Exhibit 173; Richard Mantell, Petitioners' Exhibit 174; Robert McKinstry, Jr., Petitioners' Exhibit 175; Robert Smith, Petitioners' Exhibit 176; and Thomas Ulrich, Petitioners' Exhibit 177. Generally, the testimony of the aforementioned Petitioners demonstrates a belief that the 2011 Plan has negatively affected their ability to influence the political process and/or elect a candidate who represents their interests. See Findings of Fact at ¶¶ 221-34. Petitioners also introduced excerpts from the trial testimony of State Senator Andrew E. Dinniman in *Agre v. Wolf*, Petitioners' Exhibit 178, and excerpts from the deposition testimony of State Representative Gregory Vitali, Petitioners' Exhibit 179. Senator Dinniman and Representative Vitali both testified as to the circumstances surrounding the enactment of the 2011 Plan.

Respondents introduced affidavits from Lieutenant Governor Stack and Commissioner Marks. Lieutenant Governor Stack's affidavit stated, *inter alia*, that "it is beneficial, when possible, to keep individual counties and municipalities together in a single congressional district." Affidavit of Lieutenant Governor Stack, 12/14/17, at 3, ¶ 8, Respondents' Exhibit 11. Commissioner Marks' affidavit addressed the ramifications with respect to timing in the event a new plan be ordered. Affidavit of Commissioner Marks, 12/14/17, Respondents' Exhibit 2. Intervenors introduced affidavits from Thomas Whitehead and Carol Lynne Ryan, both of whom expressed concern that granting Petitioners relief would adversely affect their political activities. See Intervenors' Exhibits 16 and 17.

Initially, several Petitioners testified at trial. They testified as to their belief that, under the 2011 Plan, their ability to elect a candidate who represents their interests and point of view has been compromised. William Marx, a resident of Delmont in Westmoreland County, testified that he is a registered Democrat, and that, under the 2011 Plan, he lives in the 12<sup>th</sup> Congressional District, which is represented by Congressman Keith Rothfus, a Republican. Marx testified that Congressman Rothfus does not represent his views on, *inter alia*, taxes, healthcare, the environment, and legislation regarding violence against women, and he stated that he has been unable to communicate with him. Marx believes that the 2011 Plan precludes the possibility of having a Democrat elected in his district. N.T. Trial, 12/11/17, at 113-14.

Another Petitioner, Mary Elizabeth Lawn, testified that she is a Democrat who lives in the city of Chester. Under the 2011 Plan, Chester is in the 7<sup>th</sup> Congressional District, which is represented by Congressman Patrick Meehan, a Republican.<sup>42</sup> *Id.* at 134, 137-39. According to Lawn, Chester is a “heavily African-American” city, and, prior to the enactment of the 2011 Plan, was a part of the 1<sup>st</sup> Congressional District, which is represented by Congressman Bob Brady, a Democrat.<sup>43</sup> *Id.* at 135, 138-39. According to Lawn, since the enactment of the 2011 Plan, she has voted for the Democratic candidate in three state elections, and her candidate did not win any of the elections. *Id.* at 140. Lawn believes that the 2011 Plan has affected her ability to participate in the

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<sup>42</sup> Reportedly, Congressman Meehan will not seek reelection in 2018. Mike DeBonis and Robert Costa, *Rep. Patrick Meehan, Under Misconduct Cloud, Will Not Seek Reelection*, Wash. Post, Jan. 25, 2018 available at [https://www.washingtonpost.com/news/powerpost/wp/2018/01/25/rep-patrick-meehan-under-misconduct-cloud-will-not-seek-reelection/?utm\\_term=.9216491ff846](https://www.washingtonpost.com/news/powerpost/wp/2018/01/25/rep-patrick-meehan-under-misconduct-cloud-will-not-seek-reelection/?utm_term=.9216491ff846).

<sup>43</sup> Reportedly, Congressman Brady also will not seek reelection in 2018. Daniella Diaz, *Democratic Rep. Bob Brady is Not Running for Re-election*, CNN Politics, Jan. 31, 2018, available at <https://www.cnn.com/2018/01/31/politics/bob-brady-retiring-from-congress-pennsylvania-democrat/index.html>.

political process because she was placed in a largely Republican district where the Democratic candidate “doesn’t really have a chance.” *Id.* Like Marx, Lawn testified that her congressman does not represent her views on many issues, and that she found her exchanges with his office unsatisfying. *Id.* at 140-44.

Finally, Thomas Rentschler, a resident of Exeter Township, testified that he is a registered Democrat. N.T. Trial, 12/12/17, at 669. Rentschler testified that he lives two miles from the City of Reading, and that he has a clear “community of interest” in that city. *Id.* at 682. Under the 2011 Plan, however, Reading is in the 16<sup>th</sup> Congressional District, and Rentschler is in the 6<sup>th</sup> Congressional District, which is represented by Congressman Ryan Costello, a Republican. *Id.* at 670-71, 677. Rentschler testified that, while he voted for the Democratic candidate in the last three state elections, all three contests were won by the Republican candidate. *Id.* at 673. In Rentschler’s view, the 2011 Plan “has unfairly eliminated [his] chance of getting to vote and actually elect a Democratic candidate just by the shape and the design of the district.” *Id.* at 674.

## **2. Expert Testimony**

Petitioners presented the testimony of four expert witnesses, and the Legislative Respondents sought to rebut this testimony through two experts of their own. We address this testimony *seriatim*.

### ***Dr. Jowei Chen***

Petitioners presented the testimony of Dr. Jowei Chen, an expert in the areas of redistricting and political geography who holds research positions at the University of Michigan, Stanford University, and Willamette University.<sup>44</sup> Dr. Chen testified that he evaluated the 2011 Plan, focusing on three specific questions: (1) whether partisan

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<sup>44</sup> None of the experts presented to the Commonwealth Court were objected to based upon their qualifications as an expert in their respective fields.

intent was the predominant factor in the drawing of the Plan; (2) if so, what was the effect of the Plan on the number of congressional Democrats and Republicans elected from Pennsylvania; and (3) the effect of the Plan on the ability of the 18 individual Petitioners to elect a Democrat or Republican candidate for congress from their respective districts. N.T. Trial, 12/11/17, at 165.

In order to evaluate the 2011 plan, Dr. Chen testified that he used a computer algorithm to create two sets, each with 500 plans, of computer-simulated redistricting plans for Pennsylvania's congressional districts. *Id.* at 170. The computer algorithm used to create the first set of simulated plans ("Simulation Set 1") utilized traditional Pennsylvania districting criteria, specifically: population equality; contiguity; compactness; absence of splits within municipalities, unless necessary; and absence of splits within counties, unless necessary. *Id.* at 167. The computer algorithm used to create the second set of simulated plans ("Simulation Set 2") utilized the aforementioned criteria, but incorporated the additional criteria of protecting 17 incumbents,<sup>45</sup> which, according to Dr. Chen, is not a "traditional districting criterion." *Id.* at 206. Dr. Chen testified that the purpose of adding incumbent protection to the criteria for the second set of computer-simulated plans was to determine whether "a hypothetical goal by the General Assembly of protecting incumbents in a nonpartisan manner might somehow explain or account for the extreme partisan bias" of the 2011 Plan. *Id.*

With regard to Simulation Set 1, the set of computer-simulated plans utilizing only traditional districting criteria, Dr. Chen noted that one of those plans, specifically, "Chen

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<sup>45</sup> Dr. Chen noted that there were 19 incumbents in the November 2012 congressional elections, but that, as discussed, Pennsylvania lost one congressional district following the 2010 census. N.T. Trial, 12/11/17, at 207-08.

Figure 1: Example of a Simulated Districting Plan from Simulation Set 1 (Adhering to Traditional Districting Criteria)” (hereinafter “Simulated Plan 1”), which was introduced as Petitioners’ Exhibit 3, results in only 14 counties being split into multiple congressional districts, as compared to the 28 counties that are split into multiple districts under the 2011 Plan. *Id.* at 173-74. Indeed, referring to a chart titled “Chen Figure 3: Simulation Set 1: 500 Simulated Plans Following Only Traditional Districting Criteria (No Consideration of Incumbent Protection),” which was introduced as Petitioners’ Exhibit 4, Dr. Chen explained that the maximum number of split counties in any of the 500 Simulation Set 1 plans is 16, and, in several instances, is as few as 11. *Id.* at 179. The vast majority of the Simulation Set 1 plans have 12 to 14 split counties. *Id.*

With respect to splits between municipalities, Dr. Chen observed that, under the 2011 Plan, there are 68 splits, whereas the range of splits under the Simulation Set 1 plans is 40 to 58. *Id.* at 180; Petitioners’ Exhibit 4. Based on the data contained in Petitioners’ Exhibit 4, Dr. Chen noted that the 2011 Plan “splits significantly more municipalities than would have resulted from the simulated plans following traditional districting criteria, and [it] also split significantly more counties.” N.T. Trial, 12/11/17, at 180. He concluded that the evidence demonstrates that the 2011 Plan “significantly subordinated the traditional districting criteria of avoiding county splits and avoiding municipal splits. It shows us that the [2011 Plan] split far more counties, as well as more municipalities, than the sorts of plans that would have arisen under a districting process following traditional districting principles in Pennsylvania.” *Id.* at 181.

In terms of geographic compactness, Dr. Chen explained that he compared Simulated Plan 1 to the 2011 Plan utilizing two separate and widely-accepted standards. First, Dr. Chen calculated the Reock Compactness Score, which is a ratio of

a particular district's area to the area of the smallest bounding circle that can be drawn to completely contain the district – the higher the score, the more compact the district. *Id.* at 175. The range of Reock Compactness Scores for the congressional districts in Simulated Set 1 was “about .38 to about .46,” *id.* at 182, and Simulated Plan 1 had an average Reock Compactness Score range of .442, as compared to the 2011 Plan's score of .278, revealing that, according to Dr. Chen, the 2011 Plan “is significantly less compact” than Simulated Plan 1. *Id.* at 175.

Dr. Chen also calculated the Popper-Polsby Compactness Score of both plans. The Popper-Polsby Compactness Score is calculated by first measuring each district's perimeter and comparing it to the area of a hypothetical circle with that same perimeter. The ratio of the particular district's area to the area of the hypothetical circle is its Popper-Polsby Compactness Score – the higher the score, the greater the geographic compactness. *Id.* at 176-77. The range of Popper-Polsby Compactness Scores for congressional districts in the Simulated Set 1 plans was “about .29 up to about .35,” *id.* at 183, and Simulated Plan 1 had an average Popper-Polsby Score of .310, as compared to the 2011 Plan's score of .164, again leading Dr. Chen to conclude that “the enacted map is significantly far less geographically compact” than Simulated Plan 1. *Id.* at 177.

Utilizing a chart showing the mean Popper-Polsby Compactness Score and the mean Reock Compactness Score for each of the 500 Simulation Set 1 plans, as compared to the 2011 Plan, see Petitioners' Exhibit 5 (“Chen Figure 4: Simulation Set 1: 500 Simulated Plans Following Only Traditional Districting Criteria (No Consideration of Incumbent Protection)”), Dr. Chen opined that “no matter which measure of compactness you use, it's very clear that the [2011 Plan] significantly and completely sacrifice[s] the traditional districting principle of geographic compactness compared to



the sorts of plans that would have emerged under traditional districting principles.” N.T. Trial, 12/11/17, at 184.

Dr. Chen next addressed the 500 Simulation Set 2 Plans, which, as noted above, included the additional criteria of protecting the 17 incumbents. Dr. Chen stated that, in establishing the additional criteria, no consideration was given to the identities or party affiliations of the incumbents. *Id.* at 208. One of the Simulation Set 2 plans, “Chen Figure 1A: Example of a Simulated Districting Plan from Simulation Set 2 (Adhering to Traditional Districting Criteria And Protecting 17 Incumbents)” (hereinafter “Simulated Plan 1A”), which was introduced as Petitioners’ Exhibit 7, resulted in only 15 counties being split into multiple congressional districts, as compared to the 28 counties that are split into multiple districts under the 2011 Plan. *Id.* at 213. Referring to Petitioners’ Exhibit 8, titled “Chen Figure 6: Simulation Set 2: 500 Simulated Plans Following Traditional Districting Criteria and Protecting 17 Incumbents,” Dr. Chen further observed that the 2011 Plan split more municipalities (68) than any of the Simulated Set 2 plans, which resulted in a range of splits between 50 and 66. Based on this data, Dr. Chen opined:

We’re able to conclude from [Petitioners’ Exhibit 8] that the [2011 Plan] subordinate[s] the traditional districting criteria of avoiding county splits and avoiding municipal splits and the subordination of those criteria was not somehow justified or explained or warranted by an effort to protect 17 incumbents in a nonpartisan manner. To put that in layman’s terms, an effort to protect incumbents would not have justified splitting up as many counties and as many municipalities as we saw split up in the [2011 Plan].

*Id.* at 217.

With respect to geographic compactness, Dr. Chen explained that Simulated Plan 1A had an average Reock Compactness Score of .396, as compared to the 2011 Plan’s score of .278, and Simulated Plan 1A had a Popper-Polsby Compactness Score

of .273, as compared to the 2011 Plan's score of .164. *Id.* at 214; Petitioners' Exhibit 7. Based on an illustration of the mean Popper-Polsby Compactness Score and the mean Reock Compactness Score for each of the 500 Simulation Set 2 plans, as compared to the 2011 Plan, see Petitioners' Exhibit 9 ("Chen Figure 7: Simulation Set 2: 500 Simulated Plans Following Traditional Districting Criteria and Protecting 17 Incumbents"), Dr. Chen concluded that the 2011 Plan "significantly subordinated [the] traditional districting criteria of geographic compactness and that subordination of geographic compactness of districts was not somehow justified or necessitated or explained by a hypothetical effort to protect 17 incumbents." N.T. Trial, 12/11/17, at 220.

Dr. Chen also testified regarding the partisan breakdown of the 2011 Plan. Dr. Chen explained that he requested and obtained from the Department of State the actual election data for each voting precinct in Pennsylvania for the six 2008 and 2010 statewide elections. *Id.* at 185-86. Those elections included the elections for the President, Attorney General, Auditor General, and State Treasurer in 2008, and the United States Senate election and the state gubernatorial election in 2010. *Id.* at 187. The election data obtained by Dr. Chen indicated how many votes were cast for each party candidate. *Id.* at 189. By overlaying the precinct-level election results on top of the geographic boundaries as shown on a particular map, he was able to determine whether a particular district had more Republican or Democratic votes during the elections. *Id.* at 196-97. Those districts that had more Republican votes would, naturally, be classified as Republican.

Dr. Chen observed that, under the 2011 Plan, 13 of the 18 congressional districts are classified as Republican. *Id.* at 198. However, when Dr. Chen overlaid the precinct-level election results on Simulated Plan 1, only 9 of the 18 congressional

districts would be classified as Republican. *Id.* at 197. Indeed, in the 500 Simulation Set 1 plans, the highest number of classified Republican districts was 10, and in none of the simulated plans would 13 of the congressional districts be classified as Republican. *Id.* at 200. Based on this data, Dr. Chen stated “I’m able to conclude with well-over 99.9 percent statistical certainty that the [2011 Plan’s] creation of a 13-5 Republican advantage in Pennsylvania’s Congressional delegation is an outcome that would never have emerged from a districting process adhering to and following traditional districting principles.” *Id.* at 203-04.

Moreover, Dr. Chen testified that, even under the Simulation Set 2 plans, which took into account preservation of incumbent candidates, none of the 500 plans resulted in a Republican District/Democratic District ratio of more than 10 to 8. *Id.* at 221-22; Petitioners’ Exhibit 10. Based on a comparison of the 2011 Plan and his simulated redistricting plans, Dr. Chen determined that “partisan intent predominated the drawing of the [2011 Plan] . . . and the [2011 Plan] was drawn with a partisan intent to create a 13-5 Republican advantage and that this partisan intent subordinated traditional districting principles in the drawing of the enacted plan.” *Id.* at 166.

Dr. Chen was asked to consider whether the partisan breakdown of the 2011 Plan might be the result of a “hypothetical effort to produce a certain racial threshold of having one district of over a 56.8 percent African-American voting-age population.” *Id.* at 245.<sup>46</sup> To answer this question, Dr. Chen explained that he analyzed the 259 computer-simulated plans from Simulation Sets 1 and 2 that included a congressional voting district with an African-American voting age population of at least 56.8%. Dr.

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<sup>46</sup> Under the 2011 Plan, the only congressional district with an African-American voting-age population of more than 50% is the 2<sup>nd</sup> Congressional District, which includes areas of Philadelphia; the African-American voting-age population for that district is 56.8%. N.T. Trial, 12/11/17, at 239.

Chen testified that, of those 259 simulated plans, *none* resulted in a Republican-Democrat congressional district ratio of 13 to 5. *Id.* at 244-45, 250. Indeed, of the Simulated Set 1 plans, which did not take into account protection of incumbents, the maximum ratio was 9 to 9, and of the Simulated Set 2 plans, which did protect incumbents, the maximum ratio was 11 to 8, and, in one case, was as low as 8 to 11. *Id.*; Petitioners' Exhibit 15 ("Chen Figure 10"). Dr. Chen concluded "the 13-5 Republican advantage of the enacted map is an outcome that is not plausible, even if one is only interested in plans that create one district with over 56.8 percent African-American voting-age population." N.T. Trial, 12/11/17, at 245.

Dr. Chen also was asked whether the 13-5 Republican advantage in the 2011 Plan could be explained by political geography – that is, the geographic patterns of political behavior. *Id.* at 251. Dr. Chen explained that political geography can create natural advantages for one party over another; for example, he observed that, in Florida, Democratic voters are often "far more geographically clustered in urban areas," whereas Republicans "are much more geographically spaced out in rural parts" of the state, resulting in a Republican advantage in control over districts and seats in the state legislature. *Id.* at 252-53.

In considering the impact of Pennsylvania's political geography on the 2011 Plan, Dr. Chen explained that he measured the partisan bias of the 2011 Plan by utilizing a common scientific measurement referred to as the mean-median gap. *Id.* at 257. To calculate the mean, one looks at the average vote share per party in a particular district. *Id.* To calculate the median, one "line[s] up" the districts from the lowest to the highest vote share; the "middle best district" is the median. *Id.* at 258. The median district is the district that either party has to win in order to win the election. *Id.* Dr. Chen testified that, under the 2011 Plan, the Republican Party has a mean vote share of 47.5%, and a

median vote share of 53.4%. *Id.* at 261; Petitioners' Exhibit 1, at 20. This results in a mean-median gap of 5.9%, which, according to Dr. Chen, indicates that, under the 2011 Plan, "Republican votes . . . are spread out in a very advantageous manner so as to allow -- in a way that would allow the Republicans to more easily win that median district." N.T. Trial, 12/11/17, at 259. The converse of this mean-median gap result is that Democratic voters "are very packed into a minority of the districts, which they win by probably more comfortable margins," which makes it "much harder for Democrats under that scenario to be able to win the median district. So, in effect, what that means is it's much harder for the Democrats to be able to win a majority of the Congressional delegation." *Id.* at 260.

Dr. Chen recognized that "Republicans clearly enjoy a small natural geographic advantage in Pennsylvania because of the way that Democratic voters are clustered and Republican voters are a bit more spread out across different geographies of Pennsylvania." *Id.* at 255. However, Dr. Chen observed that the range of mean/median gaps created in any of the Simulated Set 1 plans was between "a little over 0 percent to the vast majority of them being under 3 percent," with a maximum of 4 percent. *Id.* at 262-63; Petitioners' Exhibit 16 ("Chen Figure 5"). Dr. Chen explained that this is a "normal range," and that a 6% gap "is a very statistically extreme outcome that cannot be explained by voter geography or by traditional districting principles alone." N.T. Trial, 12/11/17, at 263-64. Dr. Chen noted that the range of mean/median gaps created by any of the Simulated Set 2 plans also did not approach 6%, and, thus, that the 2011 Plan's "extreme partisan skew of voters is not an outcome that naturally emerges from Pennsylvania's voter geography combined with traditional districting principles and an effort to protect 17 incumbents in a nonpartisan manner. It's not a plausible outcome given those conditions." *Id.* at 266; Petitioners' Exhibit 17 ("Chen Figure 9").

In sum, Dr. Chen “statistically conclude[d] with extremely high certainty . . . that, certainly, there is a small geographic advantage for the Republicans, but it does not come close to explaining the extreme 13-5 Republican advantage in the [2011 Plan].” N.T. Trial, 12/11/17, at 255-56.

Ultimately, the Commonwealth Court found Dr. Chen’s testimony credible; specifically, the court held that Dr. Chen’s testimony “established that the General Assembly included factors other than nonpartisan traditional districting criteria in creating the 2011 Plan in order to increase the number of Republican-leaning congressional voting districts.” Findings of Fact at ¶ 309. The court noted, however, that Dr. Chen’s testimony “failed to take into account the communities of interest when creating districting plans,” and “failed to account for the fact that courts have held that a legislature may engage in some level of partisan intent when creating redistricting plans.” *Id.* at ¶¶ 310, 311.

***Dr. John Kennedy***

Petitioners next presented the testimony of Dr. John Kennedy, an expert in the area of political science, specializing in the political geography and political history of Pennsylvania, who is a professor of political science at West Chester University. Dr. Kennedy testified that he analyzed the 2011 Plan “to see how it treated communities of interest, whether there were anomalies present, whether there are strangely designed districts, whether there are things that just don’t make sense, whether there are tentacles, whether there are isthmuses, whether there are other peculiarities.” N.T. Trial, 12/12/17, at 580. Dr. Kennedy also explained several concepts used to create a gerrymandered plan. For example, he described that “cracking” is a method by which a particular party’s supporters are separated or divided so they cannot form a larger, cohesive political voice. *Id.* at 586. Conversely, “packing” is a process by which

individual groups who reside in different communities are placed together based on their partisan performance, in an effort to lessen those individuals' impact over a broader area. *Id.* Finally, Dr. Kennedy defined "highjacking" as the combining of two congressional districts, both of which have the majority support of one party – the one not drawing the map – thereby forcing two incumbents to run against one another in the primary election, and automatically eliminating one of them. *Id.* at 634.

When asked specifically about the 2011 Plan, Dr. Kennedy opined that the 2011 Plan "negatively impacts Pennsylvania's communities of interest to an unprecedented degree and contains more anomalies than ever before." *Id.* at 579. For example, Dr. Kennedy noted that Erie County, in the 3rd Congressional District, is split under the 2011 Plan for "no apparent nonpartisan reason," when it had never previously been split. *Id.* at 591. According to Dr. Kennedy, Erie County is a historically Democratic county, and, in splitting the county, the legislature "cracked" it, diluting its impact by pushing the eastern parts of the county into the rural and overwhelmingly Republican 5<sup>th</sup> Congressional District. *Id.* at 597; see Petitioners' Exhibit 73.

Dr. Kennedy next addressed the 7<sup>th</sup> Congressional District, which he noted "has become famous certainly systemwide, if not nationally, as one of the most gerrymandered districts in the country," earning the nickname "the Goofy kicking Donald district." N.T. Trial, 12/11/17, at 598-99; see Joint Exhibit 12. According to Dr. Kennedy, the 7<sup>th</sup> Congressional District was historically based in southern Delaware County; under the 2011 Plan, it begins in Delaware County, moves north into Montgomery County, then west into Chester County, and finally, both north into Berks County and south into Lancaster County. At one point, along Route 30, the district is contiguous only by virtue of a medical facility, N.T. Trial, 12/11/17, at 600-01; at another point, in King of Prussia, it remains connected by a single steak and seafood restaurant.

*Id.* at 604. Dr. Kennedy further observed that the 7<sup>th</sup> Congressional District contains 26 split municipalities. *Id.* at 615.

Dr. Kennedy offered the 1<sup>st</sup> Congressional District as an example of a district which has been packed. *Id.* at 605; see Petitioners' Exhibit 70. He described that the 1<sup>st</sup> Congressional District begins in Northeast Philadelphia, an overwhelmingly Democratic district, and largely tracks the Delaware River, but occasionally reaches out to incorporate other Democratic communities, such as parts of the city of Chester and the town of Swarthmore. N.T. Trial, 12/11/17, at 605-08.

Dr. Kennedy also discussed the 4<sup>th</sup> Congressional District, as shown in Petitioners' Exhibit 75, observing that the district is historically "a very Republican district." *Id.* at 631. In moving the northernmost tip of the City of Harrisburg, which is predominantly a Democratic city, to the 4<sup>th</sup> Congressional District from the district it previously shared with central Pennsylvania and the Harrisburg metro area, which are part of the same community of interest, the 2011 Plan has diluted the Democratic vote in Harrisburg. *Id.* at 631-32.<sup>47</sup>

In sum, Dr. Kennedy concluded that the 2011 Plan "gives precedence to political considerations over considerations of communities of interest and disadvantages Democratic voters, as compared to Republican voters. This is a gerrymandered map." *Id.* at 644. The Commonwealth Court found Dr. Kennedy's testimony credible. However, it concluded that Dr. Kennedy "did not address the intent behind the 2011 Plan," and it specifically "disregarded" Dr. Kennedy's opinion that the 2011 Plan was an unconstitutional gerrymander as an opinion on the ultimate question of law in this case. Findings of Fact at ¶¶ 339-41.

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<sup>47</sup> Dr. Kennedy's testimony was not limited to discussion of the four specific congressional districts discussed herein.



***Dr. Wesley Pegden***

Petitioners next presented the testimony of Dr. Wesley Pegden, an expert in the area of mathematical probability, and professor of mathematical sciences at Carnegie Mellon University. Dr. Pegden testified that he evaluated the 2011 Plan to determine whether it “is an outlier with respect to partisan bias and, if so, if that could be explained by the interaction of political geography and traditional districting criteria in Pennsylvania.” N.T. Trial, 12/13/17, at 716-17. In evaluating the 2011 Plan, Dr. Pegden utilized a computer algorithm that starts with a base plan – in this case, the 2011 Plan – and then makes a series of small random changes to the plan. Dr. Pegden was able to incorporate various parameters, such as maintaining 18 contiguous districts, maintaining equal population, and maintaining compactness. *Id.* at 726. Dr. Pegden then noted whether the series of small changes resulted in a decrease in partisan bias, as measured by the mean/median. *Id.* at 722-23.

The algorithm made approximately 1 trillion computer-generated random changes to the 2011 Plan, and, of the resulting plans, Dr. Pegden determined that 99.999999% of them had less partisan bias than the 2011 Plan. *Id.* at 749; Petitioners’ Exhibit 117, at 1. Based on this data, Dr. Pegden concluded the General Assembly “carefully crafted [the 2011 Plan] to ensure a Republican advantage.” Petitioners’ Exhibit 117, at 1. He further testified the 2011 Plan “was indeed an extreme outlier with respect to partisan bias in a way that could not be explained by the interaction of political geography and the districting criteria” that he considered. N.T. Trial, 12/13/17, at 717.

The Court found Dr. Pegden’s testimony to be credible; however, it noted that, like Dr. Chen’s testimony, his testimony did not take into account “other districting considerations, such as not splitting municipalities, communities of interest, and some

permissible level of incumbent protection and partisan intent.” Findings of Fact at ¶¶ 360-61. Further, as with Dr. Kennedy, the Commonwealth Court “disregarded” Dr. Pegden’s opinion that the 2011 Plan was an unconstitutional gerrymander as an opinion on a question of law. *Id.* at ¶ 363.

***Dr. Christopher Warshaw***

Petitioners next presented the testimony of Dr. Christopher Warshaw, an expert in the field of American politics – specifically, political representation, public opinion, elections, and polarization – and professor of political science at George Washington University. Dr. Warshaw testified that he was asked to evaluate the degree of partisan bias in the 2011 Plan, and to place any such bias into “historical perspective.” N.T. Trial, 12/13/17, at 836.

Dr. Warshaw suggested that the degree of partisan bias in a redistricting plan can be measured through the “efficiency gap,” which is a formula that measures the number of “wasted” votes for one party against the number of “wasted” votes for another party. *Id.* at 840-41. For a losing party, all of the party’s votes are deemed wasted votes. For a winning party, all votes over the 50% needed to win the election, plus one, are deemed wasted votes. The practices of cracking and packing can be used to create wasted votes. *Id.* at 839. He explained that, in a cracked district, the disadvantaged party loses narrowly, wasting a large number of votes without winning a seat; in a packed district, the disadvantaged party wins overwhelmingly, again, wasting a large number of votes. *Id.* at 839-40. To calculate the efficiency gap, Dr. Warshaw calculates the ratio of a party’s wasted votes over the total number of votes cast in the election, and subtracts one party’s ratio from the ratio for the other party. The larger the number, the greater the partisan bias. For purposes of evaluating the 2011 Plan, Dr. Warshaw explained that an efficiency gap of a negative percentage represents a

Republican advantage, and a positive percentage represents a Democratic advantage. *Id.* at 842. (The decision of which party's gap is deemed negative versus positive – the scale's polarity – is arbitrary. *Id.* at 854.) He summed up the approach as follows:

The efficiency gap is just a way of translating this intuition that what gerrymandering is ultimately about is efficiently translating votes into seats by wasting as many of your opponent's supporters as possible and as few as possible -- as possible of your own. So it's really just a formula that captures this intuition that that's what gerrymandering is at its core.

*Id.* at 840.

Dr. Warshaw testified that, historically, in states with more than six congressional districts, the efficiency gap is close to 0%. An efficiency gap of 0% indicates no partisan advantage. *Id.* at 864. He explained that 75% of the time, the efficiency gap is between 10% and negative 10%, and, less than 4% of the time, the efficiency gap is outside the range of 20% and negative 20%. *Id.* at 865.

In analyzing the efficiency gap in Pennsylvania for the years 1972 through 2016, Dr. Warshaw discovered that, during the 1970s, there was “a very modest” Democratic advantage, but that the efficiency gap was relatively close to zero. *Id.* at 870; see Petitioner's Exhibit 40. In the 1980s and 90s, the efficiency gap indicated no partisan advantage for either party. *Id.* Beginning in 2000, there was a “very modest Republican advantage,” but the efficiency gaps “were never very far from zero.” *Id.* at 870-71. However, in 2012, the efficiency gap in Pennsylvania was negative 24%, indicating that “Republicans had a 24-percentage-point advantage in the districting process.” *Id.* at 871. In 2014, “Republicans continued to have a large advantage in the districting process with negative 15 percent,” and, in 2016, Republicans “continued to have a very large and robust” advantage with an efficiency gap of negative 19%. *Id.*

Dr. Warshaw confirmed that, prior to the 2011 Plan, Pennsylvania never had an efficiency gap of 15% in favor of either party, and only once had there been an efficiency gap of even 10%. *Id.* at 872. Thus, Dr. Warshaw concluded that the efficiency gaps that occurred after the 2011 Plan were “extreme” relative to the prior plans in Pennsylvania. *Id.* Indeed, he noted that the efficiency gap in Pennsylvania in 2012 was the largest in the country for that year, and was the second largest efficiency gap in modern history “since one-person, one-vote went into effect in 1972.” *Id.* at 874. The impact of an efficiency gap between 15% and 24%, according to Dr. Warshaw, “implies that Republicans won an average of three to four extra Congressional seats each year over this timespan.” *Id.* at 873.

When asked to consider whether geography may have contributed to the large efficiency gap in Pennsylvania, Dr. Warshaw stated, “it’s very unlikely that some change in political geography or some other aspect of voting behavior would have driven this change. This change was likely only due to the districts that were put in place.” *Id.* at 879. With regard to the change in the efficiency gap between the 2010 and 2012 elections, Dr. Warshaw opined that “there’s no possible change in political geography that would lead to such a dramatic shift.” *Id.* Dr. Warshaw further concluded that “the efficiency gaps that occurred immediately after the 2011 Redistricting Plans went into place are extremely persistent,” and are unlikely to be remedied by the “normal electoral process.” *Id.* at 890-91.

In addition to his testimony regarding the efficiency gap, Dr. Warshaw discussed the concept of polarization, which he defined as the difference in voting patterns

between Democrats and Republicans in Congress, *id.* at 903, and the impact of partisan gerrymandering on citizens' faith in government. *Id.* at 953.<sup>48</sup>

The Commonwealth Court found Dr. Warshaw's testimony to be credible, particularly with respect to the existence of an efficiency gap in Pennsylvania. Nevertheless, the court opined that the full meaning and effect of the gap "requires some speculation and does not take into account some relevant considerations, such as quality of candidates, incumbency advantage, and voter turnout." Findings of Fact at ¶ 389. The court expressed additional concerns that the efficiency gap "devalues competitive elections," in that even in a district in which both parties have an equal chance of prevailing, a close contest will result in a substantial efficiency gap in favor of the prevailing party. *Id.* at ¶ 390. Finally, the court concluded that Dr. Warshaw's comparison of the efficiency gap in Pennsylvania and other states was of limited value, as it failed to take into consideration whether there were state differences in methods and limitations for drawing congressional districts. *Id.* at 89-90 ¶ 391.<sup>49</sup>

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<sup>48</sup> A detailed explanation of this aspect of his testimony is unnecessary for purposes of this Opinion.

<sup>49</sup> Following the presentation of Dr. Warshaw's testimony, Petitioners requested permission to admit into the record several documents, including: Petitioners' Exhibit 124 (Declaration of Stacie Goede, Republican State Leadership Conference); Petitioners' Exhibit 126 (Redistricting 2010 Preparing for Success); Petitioners' Exhibit 127 (RSLC Announces Redistricting Majority Project (REDMAP); Petitioners' Exhibit 128 (REDistricting MAjority Project); Petitioners' Exhibit 129 (REDMAP Political Report: July 2010); Petitioners' Exhibit 131 (REDMAP 2012 Summary Report); Petitioners' Exhibit 132 (REDMAP Political Report: Final Report); Petitioners' Exhibit 133 (2012 RSLC Year in Review); Petitioners' Exhibit 134 (REDMAP fundraising letter); and Petitioners' Exhibit 140 ("Map-CD18 Maximized"). As noted above, the Commonwealth Court sustained Respondents' objections to the admission of these documents, but admitted them under seal "for the sole purpose of . . . allowing the Supreme Court to revisit my evidentiary ruling if it so chooses." N.T. Trial, 12/13/17, at 1061; see *id.* at 1070. Petitioners also moved for the admission of Exhibits 27, 28, 29, 30, 31, and 33. The court refused to admit Exhibits 27, 28, 29, 30, and 31, and reiterated that it had (continued...)

***Dr. Wendy K. Tam Cho***

In response to the testimony offered by Petitioners, Legislative Respondents presented the testimony of their own experts, beginning with Wendy K. Tam Cho, Ph.D., a professor at the University of Illinois, who was certified as an expert in the areas of political science with a focus on political geography, redistricting, American elections, operations research, statistics, probability, and high-performance computing; she was called to rebut Dr. Chen's and Dr. Pegden's testimony. N.T. Trial, 12/14/17, at 1132. Dr. Cho opined that, based upon her review of one of Dr. Chen's prior papers, she believed that his methodology was a flawed attempt at a Monte Carlo simulation – *i.e.*, a flawed attempt to use random sampling to establish the probability of outcomes. Specifically, Dr. Cho explained that Dr. Chen's methodology was flawed because, although his algorithm randomly selected an initial voting district from which to compile a redistricting plan, it subsequently followed a determined course in actually compiling it, thereby undermining its ability to establish probabilistic outcomes. *Id.* at 1137-38. Dr. Cho also criticized Dr. Chen's algorithm on, *inter alia*, the basis that it had not been academically validated, *id.* at 1170-73; that many or all of the alternative plans failed to include all legally applicable and/or traditional redistricting principles "as [she] understand[s] them," *id.* at 1176; and that the algorithm generated too small a sample size of alternative plans to establish probabilistic outcomes. *Id.* at 1181-85.

Dr. Cho testified that, based upon her review of Dr. Pegden's published work, she believed his methodology too was flawed, in that it failed to incorporate ordinary

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previously ruled on Exhibit 33 and held it was not admissible. *Id.* at 1077. The court also refused to admit Exhibits 135, 136, 137, 138, 139, and 141-161. *Id.* at 1083.

redistricting criteria such as avoiding municipal splits and protecting incumbents. *Id.* at 1219.

Notably, however, Dr. Cho conceded that she did not actually review either Dr. Chen's or Dr. Pegden's algorithms or codes, *id.* at 1141, 1296, and both Dr. Pegden and Dr. Chen testified on rebuttal that the bulk of Dr. Cho's assumptions regarding their methodology – and, thus, derivatively, her criticisms thereof – were erroneous. *Id.* at 1368-95; N.T. Trial, 12/15/17, at 1650-75. Ultimately, the Commonwealth Court found Dr. Cho's testimony incredible "with regard to her criticisms of the algorithms used by Dr. Chen and Dr. Pegden, but credible with regard to her observation that Dr. Pegden's algorithm failed to avoid municipal splits and did not account for permissible incumbency protection." Findings of Fact at ¶ 398. Nevertheless, the court found Dr. Cho's testimony did not lessen the weight of either Dr. Chen's conclusion that adherence to what he viewed as traditional redistricting criteria could not explain the 2011 Plan's partisan bias, or Dr. Pegden's conclusion that the 2011 Plan is a statistical outlier as compared to maps with nearly identical population equality, contiguity, compactness, and number of county splits. *Id.* at ¶¶ 399-400. The court also concluded that Dr. Cho offered no meaningful guidance as to an appropriate test for determining the existence of an unconstitutional partisan gerrymander. *Id.* at ¶ 401.

***Dr. Nolan McCarty***

Respondents also presented the testimony of Dr. Nolan McCarty, an expert in the area of redistricting, quantitative election and political analysis, representation and legislative behavior, and voting behavior, and professor of politics and public affairs at Princeton University. Dr. McCarty was asked to comment on the expert reports of Dr. Chen and Dr. Warshaw. Dr. McCarty explained that he analyzed whether the 2011 Plan resulted in a partisan bias by calculating the partisan voting index ("PVI") of each

congressional district. N.T. Trial, 12/15/17, at 1421. The PVI is calculated by taking the presidential voting returns in a congressional district for the previous two elections, subtracting the national performance of each political party, and then calculating the average over those two elections. *Id.* Utilizing the PVI, Dr. McCarty opined that there was no evidence of a partisan advantage to the Republican Party under the 2011 Plan. *Id.* at 1489-90. He further suggested that, under the 2011 Plan, the Democratic Party should have won 8 of the 18 congressional seats, and that its failure to do so was the result of other factors, including candidate quality, incumbency, spending, national tides, and trends within the electorate. *Id.* at 1447-48.

Dr. McCarty criticized Dr. Chen's method of calculating the partisan performance of a district, opining that it is an imperfect predictor of how a district will vote in congressional elections. *Id.* at 1458-76. However, Dr. Chen addressed Dr. McCarty's criticisms on rebuttal, *id.* at 1675-701, "to the satisfaction of the Court." Findings of Fact at ¶ 407.

Dr. McCarty also criticized Dr. Warshaw's reliance on the efficiency gap as an indicator of gerrymandering, contending (1) that the efficiency gap does not take into consideration partisan bias that results naturally from geographic sorting; (2) that proponents of the efficiency gap have not developed principled ways of determining when an efficiency gap is too large to be justified by geographic sorting; and (3) close elections can have an effect on the calculation of efficiency gaps. N.T. Trial, 12/15/17, at 1484; see also Legislative Respondents' Exhibit 17 at 18-20. He further suggested there are many components to wasted votes that are not related to partisan districting. N.T. Trial, 12/15/17, at 1483-84. Finally, Dr. McCarty criticized Dr. Warshaw's testimony regarding the effect gerrymandering has on the polarization of political parties. *Id.* at 1477-82.



The Commonwealth Court found Dr. McCarty's testimony not credible with regard to his criticism of Dr. Chen's report; indeed, the court concluded that "the methodology employed by Dr. Chen to calculate partisan performance appears to have been a reliable predictor of election outcomes in Pennsylvania since the enactment of the 2011 Plan." Findings of Fact at ¶ 409. Moreover, the Commonwealth Court observed that "Dr. Chen's methodology resulted in accurate predictions for 54 out of 54 congressional elections under the 2011 Plan." *Id.*

With regard to Dr. Warshaw's expert report, the Commonwealth Court likewise determined that Dr. McCarty's criticisms were not credible to the extent he (1) disagreed that gerrymandering does not exacerbate problems associated with polarization, and (2) suggested that cracking and packing may actually benefit voters. *Id.* at ¶ 410. The court further rejected as incredible Dr. McCarty's criticism of Dr. Warshaw's reliance on the efficiency gap, noting that "Dr. Warshaw accounted for some geographic sorting in his analysis of the efficiency gap and did not dispute that close elections can impact the calculation of an efficiency gap." *Id.* Although the court credited Dr. McCarty's testimony that proponents of the efficiency gap have not developed principled methods of determining when an efficiency gap is so large it necessarily evidences partisan gerrymandering, and that wasted votes are not always the result of partisan districting, the Commonwealth Court concluded that Dr. McCarty's testimony did not lessen (1) "the weight given to Dr. Chen's testimony that the 2011 Plan is an outlier with respect to its partisan advantage," or (2) "the weight given to Dr. Warshaw's testimony that an efficiency gap exists in Pennsylvania." *Id.* at ¶¶ 411-12. The court also concluded that Dr. McCarty offered no guidance as to the appropriate test for determining when a legislature's use of partisan considerations results in unconstitutional gerrymandering. *Id.* at ¶ 413.

## B. Conclusions of Law of the Commonwealth Court

After setting forth its findings of fact, the Commonwealth Court offered recommended conclusions of law. Preliminarily, the court explained that the federal Constitution requires that seats in the United States House of Representatives be reapportioned decennially among the states according to their populations as determined in the census, and commits post-reapportionment redistricting to the states' legislatures, subject to federal law. Conclusions of Law at ¶¶ 1-2 (quoting the federal Elections Clause). The court reasoned that, in Pennsylvania, although the General Assembly in performing post-reapportionment redistricting is subject to federal restrictions – e.g., the requirement that districts be as equal in population as possible and the requirements of the Voting Rights Act of 1965 – it is largely free from state restrictions, as its task is not subject to explicit, specific, constitutional or statutory requirements.<sup>50</sup> The Commonwealth Court intimated that, although a party's claim that a legislative redistricting plan is unconstitutional on the ground that it is a partisan gerrymander is justiciable under federal and state law, *id.* at ¶ 10 (citing *Davis v. Bandemer*, 478 U.S. 109, 124-27 (1986));<sup>51</sup> *Erfer v. Commonwealth*, 794 A.2d 325, 331

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<sup>50</sup> The court contrasted the General Assembly's freedom in this regard with the Legislative Reapportionment Commission's relatively lesser freedom in performing state legislative redistricting, which, as noted above, is governed by Article II, Section 16 of the Pennsylvania Constitution; political subdivisions' lesser freedom in performing political-subdivision redistricting, which is governed by Article IX, Section 11 of the Pennsylvania Constitution; and other states' lesser freedom in performing congressional redistricting subject to their own state restrictions, see Conclusions of Law at ¶ 7 (citing, as an example, Va. Const. art. II, § 6 (requiring Virginia's Congressional districts to be contiguous and compact)).

<sup>51</sup> Actually, such a claim's justiciability under federal law is, at best, unclear. In *Bandemer*, the United States Supreme Court held that such claims are justiciable under the Equal Protection Clause, but was unable to agree on an adjudicative standard. However, in *Vieth*, the court revisited the issue, and a four-Justice plurality indicated they would overrule *Bandemer's* holding, with an equal number of Justices indicating they would reaffirm it, although they remained unable to agree on an adjudicative (continued...)

(Pa. 2002)), it is insufficient to allege that a redistricting plan employs partisan or political classifications *per se*: rather, a party must demonstrate that the plan employs *excessive* partisan or political classifications, see *id.* at ¶¶ 10-15 (citing, *inter alia*, *Vieth*, *supra*, at 307 (Kennedy, J., concurring) (opining that such a claim predicated on partisan or political classifications *per se* is nonjusticiable, but that one predicated on the allegation that “the [partisan or political] classifications . . . were applied in an invidious manner or in a way unrelated to any legitimate legislative objective” might be justiciable); *Erfer*, 794 A.2d at 334 (describing such a claim’s justiciability as “not amenable to judicial control or correction save for the most egregious abuses.”); *Holt v. 2011 Legislative Reapportionment Comm’n*, 38 A.3d 711, 745 (Pa. 2012) (“*Holt I*”) (acknowledging, in the context of state legislative redistricting, that redistricting “has an inevitably legislative, and therefore an inevitably political, element,” but indicating that constitutional requirements function as a “brake on the most overt of potential excesses and abuse”). The court noted that Petitioners, insofar as they are challenging the 2011 Plan’s constitutionality, bear the burden of proving its unconstitutionality, and that it is insufficient for them to demonstrate that a better or fairer plan exists; rather, they must demonstrate that the 2011 Plan clearly, plainly, and palpably violates constitutional

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standard. See *Vieth*, 541 U.S. at 270-306 (plurality opinion) (Scalia, J., joined by Rehnquist, C.J., O’Connor, J., and Thomas, J.); *id.* at 317 (Stevens, J. dissenting); *id.* at 342-55 (Souter, J., joined by Ginsburg, J., dissenting); *id.* at 355-68 (Breyer, J., dissenting). Justice Kennedy, concurring in the judgment, agreed with the plurality that the claim at bar was nonjusticiable, insofar as he viewed some political partisan or political classifications as permissible and, largely due to that circumstance, could not glean an appropriate adjudicative standard, but declined to foreclose future claims for which he expressed optimism that such a standard might be determined. See *id.* at 308-17 (Kennedy, J., concurring in the judgment).

requirements. See *id.* at ¶ 16 (citing, *inter alia*, *Singer v. Sheppard*, 346 A.2d 897, 900 (Pa. 1975)).

Turning to Petitioners' claims, the Commonwealth Court first rejected Petitioners' argument that the 2011 Plan violated their rights to free speech pursuant to Article I, Section 7 of the Pennsylvania Constitution and free assembly pursuant to Article I, Section 20 of the Pennsylvania Constitution. The court acknowledged that these provisions predate the First Amendment to the United States Constitution, and that, although their interpretation is often guided by analogy to First Amendment jurisprudence, they provide broader protection of individual freedom of speech and association. The court cited its decision in *Working Families Party v. Commonwealth*, 169 A.3d 1247 (Pa. Cmwlth. 2017), for the proposition that, where a party challenges a statute as violative of Article I, Sections 7 and 20, the fundamental adjudicative framework is a means-ends test weighing "the character and magnitude of the burden imposed by the [statute] against the interests proffered to justify that burden": specifically, "regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest[;] [l]esser burdens, however, trigger less exacting review, and a [s]tate's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." Conclusions of Law at ¶ 25 (quoting *Working Families Party*, 169 A.3d at 1260-61 (internally quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (internal quotation marks omitted))). The court then explained that this Court has recognized that the right to free speech includes the right to free speech unencumbered by official retaliation:

To prove a claim of retaliation, a plaintiff must establish: (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.

*Id.* at ¶ 26 (quoting *Uniontown Newspapers, Inc. v. Roberts*, 839 A.2d 185, 198 (Pa. 2003) (internal citations and quotation marks omitted)).

Observing that no majority of the United States Supreme Court has yet addressed a challenge to a redistricting plan as violative of the First Amendment and that no Pennsylvania court has yet considered a challenge to a redistricting plan as violative of Article I, Sections 7 and 20, the court remarked that Petitioners are not precluded by the 2011 Plan from freely associating with any candidate or political party or from voting. The court characterized Petitioners' claims as actually seeking a declaration that they are entitled to a redistricting plan "free of any and all partisan considerations," noting that such a right was "not apparent in the Pennsylvania Constitution or in the history of gerrymandering decisions in Pennsylvania or throughout the country," and that both the United States Supreme Court and this Court have previously acknowledged that partisan considerations may play some role in redistricting. *Id.* at ¶¶ 27-38 (citing *Vieth* and *Holt I*).

The court then noted Justice Kennedy's remarks in *Vieth* that courts must have some judicially administrable standard by which to appraise partisan gerrymanders, and found that Petitioners presented no such standard.<sup>52</sup> Finally, assuming *arguendo* that

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<sup>52</sup> Later, the Commonwealth Court explained:

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

(continued...)

Petitioners' putative retaliation claim is cognizable under Pennsylvania law, the court found that Petitioners failed to establish the same. Although conceding that Petitioners were engaged in constitutionally-protected political activity, the court first found that they failed to establish that the General Assembly caused them to suffer any injury that would chill a person of ordinary firmness from continuing to engage in such activity, essentially because they remained politically active:

With respect to the second element, Petitioners all continue to participate in the political process. Indeed, they have voted in congressional races since the implementation of the 2011 Plan. The Court assumes that each Petitioner is a person of [at least] ordinary firmness.

*Id.* at ¶ 34.

The court also determined that Petitioners failed to establish that the General Assembly's adoption of the 2011 Plan was motivated in part as a response to Petitioners' participation in the political process, essentially reasoning that intent to gain a partisan advantage over a rival faction is not equivalent to an intent to punish the faction's voters, that gleaning the intent of the General Assembly as a body was largely impossible, and that the fact that some Democratic state representatives voted in favor of the 2011 Plan undermined the notion that its intent was to punish Democratic voters:

With respect to the third element, Petitioners have similarly failed to adduce evidence that the General Assembly passed the 2011 Plan with any motive to retaliate against Petitioners (or others who voted for Democratic candidates in any particular election) for exercising their right to vote. . . .

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. There is no record evidence to suggest that in

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Conclusions of Law at ¶ 61 n.24.

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. Indeed, it is difficult 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. . . .

On final passage of the 2011 Plan in the PA House, of the 197 members voting, 136 voted in the affirmative, with some Republican members voting in the negative and 36 Democratic members voting in the affirmative. Given the negative Republican votes, the 2011 Plan would not have passed the PA House without Democratic support. The fact that some Democrats voted in favor of the 2011 Plan further militates against a finding or conclusion that the General Assembly passed the 2011 Plan, in whole or in part, as a response to actual votes cast by Democrats in prior elections.

*Id.* at ¶¶ 35-37 (paragraph numbering omitted).

Next, the court rejected Petitioners' argument that the 2011 Plan violated their rights to equal protection pursuant to Article I, Sections 1 and 26 of the Pennsylvania Constitution (the "Equal Protection Guarantee") and their right to free and equal elections pursuant to Article I, Section 5 of the Pennsylvania Constitution. The court opined that, "[i]n the context of partisan gerrymandering, the Pennsylvania Supreme Court has stated that the Equal Protection Guarantee is coterminous with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution," Conclusions of Law at ¶ 45 (citing *Erfer*, 794 A.2d at 332 (citing *Love v. Borough of Stroudsburg*, 597 A.2d 1137, 1139 (Pa. 1991)); *Kramer v. Workers' Comp. Appeal Bd. (Rite Aid Corp.)*, 883 A.2d 518, 532 (Pa. 2005); *Zauflik v. Pennsbury Sch. Dist.*, 72 A.3d

773, 789 n. 24 (Pa. Cmwlth. 2013), *aff'd*, 104 A.3d 1096 (Pa. 2014); *Doe v. Miller*, 886 A.2d 310, 314 n.9 (Pa. Cmwlth. 2005), *aff'd per curiam*, 901 A.2d 495 (Pa. 2006)).<sup>53 54</sup>

The Commonwealth Court further opined that this Court has previously described the Free and Equal Elections Clause as requiring that elections “are public and open to all qualified electors alike;” that “every voter has the same right as any other voter;” that “each voter under the law has the right to cast his ballot and have it honestly counted;” that “the regulation of the right to exercise the franchise does not deny the franchise[;]” and that “no constitutional right of the qualified elector is subverted or denied him[,]” but, in the context of partisan gerrymandering, merely reiterates the protections of the Equal

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<sup>53</sup> The court further opined that *Erfer* was “consistent with decades of Pennsylvania Supreme Court precedent holding that the ‘equal protection provisions of the Pennsylvania Constitution are analyzed . . . under the same standards used by the United States Supreme Court when reviewing equal protection claims under the Fourteenth Amendment to the United States Constitution.’” Conclusions of Law at ¶ 45 (quoting *Love*, 597 A.2d at 1139; citing *Commonwealth v. Albert*, 758 A.2d 1149, 1151 (Pa. 2000); *James v. SEPTA*, 477 A.2d 1302, 1305 (Pa. 1984); *Laudenberger v. Port Auth. of Allegheny Cnty.*, 436 A.2d 147, 155 n.13 (Pa. 1981); *Baltimore & Ohio R.R. Co. v. Commonwealth*, 334 A.2d 636, 643 (Pa. 1975)).

<sup>54</sup> Notably, in *Erfer*, our determination that the Equal Protection Guarantee was to be adjudicated as coterminous with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution was predicated on *Love*, in which we merely remarked that the Equal Protection Guarantee and Equal Protection Clause involve the same jurisprudential framework – *i.e.*, a means-ends test taking into account a law’s use of suspect classification, burdening of fundamental rights, and its justification in light of its objectives. See *Erfer*, 794 A.3d at 331-32; *Love*, 597 A.2d at 1139. The same was true in *Kramer*, where we remarked that we had previously employed “the same standards applicable to federal equal protection claims” and that the parties therein did not dispute “that the protections [were] coterminous[.]” *Kramer*, 883 A.2d at 532. Moreover, our affirmance in *Zauflik* was rooted in the parties’ failure to conduct an analysis under *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991). See *Zauflik*, 104 A.3d at 1117 n.10; *infra* note 53. Finally, concerning *Doe*, the issue was not meaningfully litigated before the Commonwealth Court, and, in any event, this Court affirmed its decision *per curiam*, rendering it of no salient precedential value in the instant case. See *Commonwealth v. Tilghman*, 673 A.2d 898, 903-05 (Pa. 1996) (noting that orders affirming a lower court’s *decision*, as opposed to its *opinion*, *per curiam* should not be construed as endorsing its reasoning).



Protection Guarantee. *Id.* at ¶¶ 40 (citing *In re 1991 Pa. Legislative Reapportionment Comm'n*, 609 A.2d 132 (Pa. 1992) (quoting *City Council of City of Bethlehem v. Marcincin*, 515 A.2d 1320, 1323 (Pa. 1986)), and *Erfer*, 794 A.2d at 332).<sup>55</sup>

The court explained that, in *In re 1991 Legislative Reapportionment Comm'n*, this Court adopted a standard suggested by a plurality of justices in *Bandemer* for determining whether a redistricting plan was unconstitutional on the basis of partisan gerrymandering:

A plaintiff raising a gerrymandering claim must establish that there was intentional discrimination against an identifiable political group and that there was an actual discriminatory effect on that group. In order to establish discriminatory effect, the plaintiff must show: (1) that the identifiable group has been, or is projected to be, disadvantaged at the polls; (2) that by being disadvantaged at the polls, the identifiable group will lack political power and be denied fair representation.

Conclusions of Law at ¶ 47 (internal quotation marks, citations, and brackets omitted). The Commonwealth Court acknowledged that *Bandemer's* and, with it, *Erfer's* test, was abrogated by *Vieth* as a matter of federal law, but, noting that this Court has not yet specifically discarded it, nevertheless endeavored to apply it to Petitioners' claim. Although acknowledging that Petitioners had established intentional discrimination – in that the General Assembly was likely aware of, and intended, the 2011 Plan's political consequences – the court determined that Petitioners could not establish that they constituted an identifiable political group:

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<sup>55</sup> Notably, as discussed below, although we did reject in *Erfer* the suggestion that the Free and Equal Elections Clause provided greater protection of the right to vote than the Equal Protection Guarantee, our rejection was predicated on the lack of a persuasive argument to that end. *Erfer*, 794 A.2d at 331-32.

In light of the standard articulated in *Erfer*, and based on the evidence adduced at trial, Petitioners have established intentional discrimination, in that the 2011 Plan was intentionally drawn so as to grant Republican candidates an advantage in certain districts within the Commonwealth. . . . Although the 2011 Plan was drawn to give Republican candidates an advantage in certain districts within the Commonwealth, Petitioners have failed to meet their burden of showing that the 2011 Plan equated to intentional discrimination against an identifiable political group. . . . Voters 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.

*Id.* at ¶¶ 51-53 (paragraph numbering omitted).

Moreover, the court found that Petitioners had failed to establish that they would be disadvantaged at the polls or would lack political power or fair representation, noting that they remain free to participate in democratic processes:

While Petitioners contend that Republican candidates who prevail in congressional districts do not represent their particular views on issues important to them and will effectively ignore them, the Court refuses to make such a broad finding based on Petitioners' feelings. There is no constitutional provision that creates a right in voters to their elected official of choice. As a matter of law, an elected member of Congress represents his or her district in its entirety, even those within the district who do not share his or her views. 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 issues. . . . At least 3 of the 18 congressional districts in the 2011 Plan are safe Democratic seats. . . . Petitioners can, and still do, campaign for, financially support, and vote for their candidate of choice in every congressional election. . . . Petitioners can still exercise their right to protest and attempt to influence public opinion in their congressional district and throughout the Commonwealth. . . . Perhaps most importantly, Petitioners and likeminded voters from across the Commonwealth can exercise their political power at the polls to elect legislators and a Governor who will address and remedy any unfairness

in the 2011 Plan through the next reapportionment following the 2020 U. S. Census.

Conclusions of Law at ¶ 56 (paragraph labeling omitted).<sup>56</sup>

Finally, in a post-script summary, the court reiterated its view that Petitioners had failed to identify a judicially manageable standard for claims of partisan gerrymandering, and noted that it predicated its conclusions of law on what it viewed as the “evidence presented and the current state of the law,” acknowledging that there are matters pending before the United States Supreme Court that might impact the applicable legal framework. *Id.* at ¶ 65 (citing *Gill v. Whitford*, *supra*; *Benisek v. Lamone* No. 17-333 (U.S. jurisdictional statement filed Sept. 1, 2017)).

#### **IV. Arguments**

##### **A. Petitioners and Aligned Respondents and *Amici***

We now address the arguments presented to this Court. We begin with Petitioners, those Respondents arguing that Petitioners are entitled to relief, and Petitioners’ supporting *amici*.

Petitioners first assert that the 2011 Plan violates the free expression and free association clauses of the Pennsylvania Constitution, see Pa. Const. art. I, §§ 7, 20, which, they highlight, pre-date the First Amendment and provide broader protections for speech and associational rights than those traditionally recognized under the federal Constitution. Consistent with that notion, Petitioners emphasize that, in contrast to federal challenges to laws restricting the freedom of expression, which are assessed under the rubric of intermediate scrutiny, courts apply the more exacting strict scrutiny standard to challenges to such laws under the Pennsylvania Constitution. See

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<sup>56</sup> On the court’s last point, one imagines that Petitioners find cold comfort in their right to protest and advocate for change in an electoral system that they allege has been structurally designed to marginalize their efforts in perpetuity.

Petitioners' Brief at 46-47 (citing *Pap's A.M. v. City of Erie*, 812 A.2d 591 (2002) ("*Pap's II*").

According to Petitioners, these broad protections under the Pennsylvania Constitution's Article I, Section 7 free expression clause necessarily extend to the act of voting, as voting constitutes direct "personal expression of favor or disfavor for particular policies, personalities, or laws," Petitioners' Brief at 47-48 (quoting *Commonwealth v. Cobbs*, 305 A.2d 25, 27 (Pa. 1973)), and gives voters a firsthand opportunity to "express their own political preferences." *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 288 (1992)). Petitioners further suggest that the political nature of the expression inherent in voting deserves even greater protection than other forms of expression, as "the right to participate in electing our political leaders" is the most "basic [right] in our democracy." *Id.* (quoting *McCutcheon v. FEC*, 134 S. Ct. 1434, 1440-41 (2014) (plurality)).

While Petitioners recognize that, in the instant matter, the 2011 Plan does not entirely limit Democratic voters' political expression, they note that laws which discriminate against or burden protected expression based on content or viewpoint — including those laws which render speech less effective — are nevertheless subject to strict scrutiny analysis. Petitioners' Brief at 49 (citing *Ins. Adjustment Bureau v. Ins. Com'r for Com. of Pa.*, 542 A.2d 1317, 1323-24 (Pa. 1988)). Petitioners maintain that such is the case here, as the Plan was drawn to give Republicans an advantage in 13 out of 18 congressional districts (see Conclusions of Law at ¶ 52; Findings of Fact at ¶ 291) and discriminates against the political viewpoint of Democratic voters across the Commonwealth by: splitting traditionally Democratic strongholds to reduce the effectiveness of the Democratic vote — *i.e.*, Erie County, Harrisburg, and Reading; removing predominantly Democratic municipalities from their broader communities and

combining them with other Democratic municipalities to dilute the weight of the Democratic vote — *i.e.*, Swarthmore, Easton, Bethlehem, Scranton, Wilkes-Barre, and the Allegheny River Valley; or knitting together “disparate Republican precincts while excising Democratic strongholds” to diminish the representational rights of Democrats — *i.e.*, Pennsylvania’s 12<sup>th</sup> District. Petitioners’ Brief at 52.

As further proof of the diminished value of the Democratic vote under the 2011 Plan, Petitioners emphasize that, in each of the past three elections, Democrats won only 5 of the 18 seats, despite winning the majority of the statewide congressional vote in 2012 and nearly half of that vote in 2014 and 2016. Petitioners also rely upon the experts’ testimony and alternative plans, described above, which they contend constitute “powerful evidence” of the intent to disadvantage Democratic voters. *Id.* at 53 (quoting *Holt I*, 38 A.3d at 756-57).

In light of the above evidence, Petitioners argue that the 2011 Plan does not satisfy strict scrutiny — or *any* scrutiny, for that matter — because Legislative Respondents failed to identify any legitimate, much less compelling, governmental interest served by drawing the congressional district boundaries to disadvantage Democratic voters. As such, Petitioners criticize the Commonwealth Court for failing to address whether the Plan constitutes viewpoint discrimination and for failing to assess the Plan with any measure of judicial scrutiny — strict scrutiny or otherwise.

While the Commonwealth Court found that Petitioners failed to offer a manageable standard for determining when permissible partisanship in drawing districts becomes unconstitutional, Petitioners maintain that the constitutional prohibition against viewpoint discrimination and the strict scrutiny standard are indeed the appropriate standards by which to assess their claim, noting that courts have long applied modern constitutional principles to invalidate traditionally acceptable practices, such as the

gerrymandering employed in the instant case. Petitioners' Brief at 55 (citing *Elrod v. Burns*, 427 U.S. 347 (1976) (holding that the First Amendment to the United States Constitution prohibited the practice of terminating government employees on a partisan basis); *Reynolds v. Sims*, 377 U.S. 533, 579 (1964) (invalidating the practice of drawing legislative districts with unequal population)). Petitioners additionally take issue with the Commonwealth Court's conclusion that there is no right to a "nonpartisan, neutral redistricting process," Conclusions of Law at ¶ 30, noting that the cases upon which the Commonwealth Court relied in reaching this conclusion were equal protection cases, and, thus, distinguishable from free speech-based gerrymandering challenges, which the high Court allowed to proceed in *Shapiro v. McManus*, 136 S. Ct. 450 (2015). Petitioners' Brief at 57 (citing *Erfer*, 794 A.2d at 328 n.2).

Based on the foregoing, Petitioners urge this Court to find that the Pennsylvania Constitution categorically prohibits partisan gerrymandering to any degree, as it "serves no good purpose and offers no societal benefit." *Id.* However, Petitioners argue that, even if some partisan considerations were permitted in drafting the map of congressional districts, this Court should nevertheless hold that the 2011 Plan's "extreme and obvious viewpoint discrimination" is unconstitutional. *Id.* at 58. Petitioners offer that, at a minimum, the subordination of traditional districting criteria in an attempt to disadvantage a party's voters based on their political beliefs, as they claim Respondents did in the instant case, should be prohibited.

Alternatively, Petitioners allege that the 2011 Plan impermissibly retaliates against Democratic voters based upon their voting histories and party affiliation. Petitioners note that, to establish a free-speech retaliation claim in the context of redistricting, a party must establish that: (1) the plan intended to burden them "because of how they voted or the political party with which they were affiliated"; (2) they suffered

a “tangible and concrete adverse effect”; and (3) the retaliatory intent was a “but for” cause of their injury. *Id.* at 59-60 (quoting *Shapiro v. McManus*, 203 F. Supp.3d 579, 596-98 (D. Md. 2016)). Petitioners maintain that they have satisfied each of the three elements of this test and that the Commonwealth Court erred in finding otherwise.

With respect to the first retaliation prong, Petitioners assert that the materials provided by Speaker Turzai in the federal litigation, discussed above, are “direct, conclusive evidence that the mapmakers drew district boundaries to disadvantage Democratic voters *specifically* based on their voting histories, which the mapmakers measured for every precinct, municipality, and county in Pennsylvania.” *Id.* at 60 (emphasis original). Petitioners claim this is further evidenced by the testimony of their experts, which demonstrated that the mapmakers used Democratic voters’ past voting history when “packing and cracking” legislative districts to subject those voters to disfavored treatment. *Id.* Regarding the second prong, Petitioners argue that they proved the Plan caused them to suffer a tangible and concrete adverse effect — namely, losing several seats statewide. Finally, as to the third prong, Petitioners contend that they would have won at least several more seats had the Plan not been drawn to intentionally burden Democratic voters based on their past voting histories.

In rejecting their claim, the Commonwealth Court relied upon the three-part test in *Uniontown Newspapers*, which required, *inter alia*, the challenger to establish that the action caused “an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity.” *Uniontown Newspapers*, 839 A.2d at 198. However, Petitioners submit that doing so was improper because “chilling” is not an element of a constitutional retaliation claim. Rather, according to Petitioners, the focus on “chilling” in *Uniontown Newspapers* was due to the fact that it was the only injury alleged in the case, not because it was the only cognizable injury in a retaliation case.

Indeed, Petitioners suggest that they suffered multiple concrete harms wholly separate from any chilling, which they claim is sufficient to establish the second prong of the retaliation test. In any event, Petitioners argue that they were, in fact, chilled, as, objectively, the Plan's "uncompetitive districts clearly would deter many 'ordinary' persons from voting." Petitioners' Brief at 63.

Lastly, Petitioners reject the Commonwealth Court's conclusion that the General Assembly lacked a retaliatory motive, noting the "overwhelming evidence" — including the documents produced by Speaker Turzai — conclusively established that the mapmakers considered Democrats' votes in prior elections when drawing the map to disadvantage Democratic voters.

Petitioners next argue that the Plan violates equal protection principles and the Free and Equal Elections Clause of the Pennsylvania Constitution. *Id.* at 64 (quoting Pa. Const. art I, §§ 1, 5, 26). Specifically, principally relying upon the standard articulated in *Erfar*, Petitioners explain that a congressional districting map violates the equal protection clause if it reflects "intentional discrimination against an identifiable political group" and if "there was an actual discriminatory effect on that group." *Id.* at 65 (quoting *Erfar*, 794 A.2d at 332). First, regarding the intentional discrimination requirement, Petitioners maintain that the overwhelming evidence proved that the 2011 Plan intentionally discriminated against Democratic voters, noting the Commonwealth Court specifically found that such discrimination occurred. Second, with respect to the identifiable political group requirement, Petitioners argue that Democratic voters do, in fact, constitute an identifiable political group, citing the statistical evidence from Dr. Chen regarding the high correlation in the level of support for Democratic candidates in particular geographic units and Dr. Warshaw's expert opinion with respect to the highly predictable nature of congressional elections based on political party.



Third, Petitioners assert that the Plan had an actual discriminatory effect on Democratic voters in the Commonwealth, arguing that, thereby, they have been discriminated against in an exercise of their civil right to vote in violation of Article I, Section 26, and deprived of an “equal” election in violation of the Free and Equal Elections Clause. As noted, at least as a matter of equal protection, Petitioners must prove: (1) that the Plan created disproportionate results at the polls, and (2) that they have “essentially been shut out of the political process.” *Erfer*, 794 A.2d at 333. Petitioners allege, based upon the evidence detailed above, that they satisfy the first element because drawing the Plan to purposely diminish the effectiveness of Democrats’ votes and to give Republicans the advantage at the polls created disproportional election results, denying Democrats political power and fair representation. Petitioners submit, however, that the second “shut out of the political process” element should be eliminated because it is vague and “unworkable,” claiming that *Erfer* provided no guidance regarding the type of evidence that would satisfy that standard, and that *Bandemer*, *supra*, upon which *Erfer* was based, did not impose such a requirement. Petitioners further suggest that imposing an “essentially shut out” requirement is counterintuitive, as it would allow partisan map drawers to continue to politically gerrymander so long as the minority party receives *some* of the congressional seats. In any event, Petitioners argue that, because the Plan artificially deprives Democratic voters of the ability to elect a Democratic representative, and, given the extreme political polarization between the two political parties, Republican representatives will not adequately represent Democrats’ interests, thus shutting Democratic voters out of the political process.

Finally, Petitioners reject the Commonwealth Court’s conclusion that the Plan satisfies equal protection principles because Democrats potentially will have the

opportunity to influence the new map in 2020. Petitioners emphasize that “the possibility that the legislature may itself change the law and remedy the discrimination is not a defense under the Pennsylvania Constitution,” as, under that logic, *every* discriminatory law would be constitutional. Petitioners’ Brief at 73.

Petitioners requested that this Court give the legislature two weeks to develop a new, constitutional plan that satisfies non-partisan criteria, and that we adopt a plan ourselves with the assistance of a special master if the legislature fails to do so.

Executive Respondents Governor Wolf, Secretary Torres, Commissioner Marks and Lieutenant Governor Stack have filed briefs supporting Petitioners, arguing, for largely the same reasons advanced by Petitioners, that the 2011 Plan violates the free expression and free association provisions of the Pennsylvania Constitution, as well as equal protection principles and the Free and Equal Elections Clause. Further, Executive Respondents agree that the evidence provided by Petitioners was sufficient to establish that the Plan is unconstitutional.

Beyond the points raised by Petitioners, Executive Respondents Wolf, Torres, and Marks assert that, although the Commonwealth Court found that Petitioners were required to provide a standard to assess when partisan considerations in creating a redistricting plan cross the line into unconstitutionality, no such bright line rule was necessary to determine that the Plan was unconstitutional in this case, given the extreme and, indeed, flagrant level of partisan gerrymandering that occurred. Additionally, while the Commonwealth Court suggested that Petitioners’ standard must account for a variety of specific variables such as the number of districts which must be competitive and the constitutionally permissible efficiency gap percentage, Respondents Wolf, Torres, and Marks argue that precise calculations are not required, noting that “courts routinely decide constitutional cases using judicially manageable standards that

are rooted in constitutional principles but that are not susceptible of precise calculation.” Wolf, Marks, and Stack Brief at 8 (citing, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585-86 (1996) (declining “to draw a bright line marking the limits of a constitutionally acceptable punitive damages award,” but finding “the grossly excessive award imposed in this case transcends the constitutional limit”)). *Id.* at 9. Respondents Wolf, Torres, and Marks further observe that this Court, in invalidating a prior state legislative redistricting plan as contrary to law in *Holt I*, expressly rejected “the premise that any predetermined [population] percentage deviation [existed] with which any reapportionment plan [had to comply],” and declined to “set any immovable ‘guideposts’ for a redistricting commission to meet that would guarantee a finding of constitutionality.” *Id.* at 10 (quoting *Holt I*, 38 A.3d at 736).

For his part, Respondent Stack adds that, while he concurs with Petitioners’ position that the Plan fails strict scrutiny analysis, in his view, the Plan also fails under the rational basis standard, as the Plan “lacks a legitimate state interest, and instead advances the impermissible interest of achieving partisan advantage.” Stack Brief at 24. Respondent Stack further argues that, “[a]lthough the Legislative Respondents proffered the hypothetical state interests of redrawing the district maps to conform to the results of the census, they cannot and do not offer any rational relationship between that interest and the map they drew.” *Id.* at 27. Additionally, with respect to Petitioners’ claim under the Free and Equal Elections Clause, Respondent Stack emphasizes that “[t]he constitutional requirement of ‘free and equal elections’ contemplates that all voters are to be treated equally.” *Id.* at 25. As the Plan was overtly drawn to favor Republicans, Respondent Stack maintains that the Plan “exhibits the heavy hand of state action . . . offensive to democracy,” violating the Commonwealth’s duty to ensure that it provides free and equal elections. *Id.* at 26.

Executive Respondents provide additional insight into how this Court should fashion a remedy, noting that, as representatives of the department that administers elections in Pennsylvania, they are uniquely positioned to make suggestions in this regard. Specifically, Respondents Wolf, Torres, and Marks offer that it is still possible to hold the primary on the scheduled May 15 date if a new redistricting map is in place by February 20, 2018. However, they submit that it would also be possible, through a series of internal administrative adjustments and date changes, to postpone the primary elections from May to the summer of 2018, which would allow a new plan to be administered as late as the beginning of April.

As to the process of creating a new plan, Respondents Wolf, Torres, and Marks assert that three weeks is a reasonable time period for the General Assembly and Governor to enact and sign into law a new redistricting plan, noting that the General Assembly previously enacted a revised congressional districting plan within only 10 days of the court's order to do so. Wolf, Torres, Marks Brief at 25 (citing *Vieth v. Pennsylvania*, 241 F. Supp.2d 478, 480 (M.D. Pa. 2003), *aff'd sub nom. Vieth*, 541 U.S. at 267). However, if the General Assembly fails to enact a plan by the Court's deadline, Respondents Wolf, Torres, and Marks suggest that this Court should draft a plan upon consideration of the evidence submitted by the parties. *Id.* at 26 (citing *League of Women Voters of Florida v. Detzner*, 179 So.3d 258 (Fla. 2015)).

Respondent Stack agrees with the suggestion of Respondents Wolf, Torres, and Marks that this Court may, and indeed should, adopt a new redistricting plan if the General Assembly and the Governor cannot reach an agreement on a constitutionally valid map in time for the 2018 congressional primaries. Should this Court take that route, Respondent Stack cites favorably one of the maps developed by Dr. Chen – Chen Figure 1, Petitioners' Exhibit 3 (identified as Simulated Plan 1 above) – which he