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

Louis Agre, *et al.*,	)	
	)	
Plaintiffs,	)	Civil Action No. 2:17-cv-4392
	)	
v.	)	The Honorable D. Brooks Smith
	)	The Honorable Patty Schwartz
Thomas W. Wolf, *et al.*,	)	The Honorable Michael M. Baylson
	)	
Defendants.	)	

PLAINTIFFS' RESPONSE IN OPPOSITION TO
DEFENDANTS-INTERVENORS' MOTION TO DISMISS

Introduction

Plaintiffs seek to enjoin the defendant governor and other executive officers—and the intervening legislators—from enforcing the 2011 Congressional Redistricting Plan (the "2011 Plan"). The 2011 Plan is a classic gerrymander—indeed, an extreme one. Every count of this complaint is fundamentally a claim that in adopting the 2011 Plan, the state legislature exceeded its authority under Article I, Section 4 of the Constitution (the "Elections Clause"). Meeting in secret, the Republican legislators who drafted the plan used the gerrymandering techniques of "cracking" and "packing" voters to determine the outcome of elections in Pennsylvania. As described in the complaint, the 2011 Plan was intentionally drafted to favor the election of Republican candidates—indeed, to ensure that Republicans hold 13 out of 18 Congressional seats in a state that is evenly divided between Democrats and Republicans. As set out in each Count, this disreputable and politically corrupt act to rig the outcome is beyond the authority of the state legislature under the Elections Clause. As stated by the Court in *Thornton v. U.S. Term Limits*, the Elections Clause is a source of only even-handed procedural rules:

> [T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of

> power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.

514 U.S. 779, 833-34 (1995).

As noted in *Thornton*, which struck down an Arkansas law imposing term limits, the States also have no "reserved" power under the Tenth Amendment to "dictate" or even try to influence these outcomes. The Tenth Amendment could not logically "reserve" a power not in existence before the adoption of the Constitution. In *Cook v. Gralike*, 531 U.S. 510 (2001), striking down a Missouri law involving term limits, the Court reaffirmed the principle that under the Elections Clause, the state legislature may not seek to "favor or disfavor" a class of candidates. As stated by Justice Kennedy in his concurrence: "A State is not permitted to interpose itself between the people and the National Government….[This] dispositive principle...is fundamental to the Constitution." *Id* at 527-28.

As set out in Count I, by seeking to dictate or promote the election of Republicans over Democrats, the 2011 Plan deprived the plaintiffs of a privilege and immunity of federal citizenship—specifically, the right to vote for Congress without partisan interference by the state legislature. As stated by Justice Kennedy—this time concurring in *Thornton*—the right to elect members of Congress free of interference by the state in that choice is protected by the Privileges and Immunities Clause of the Fourteenth Amendment. 504 U.S. at 838-45. As set out in Count II, such an interference with the right to vote is also unlawful under the Equal Protection Clause, as it was in *Thornton*. While treating plaintiff voters as pawns in a political fraud is a severe burden on the right to vote, any burden at all would be illegal where the State is not serving "legitimate regulatory interests." See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Partisan redistricting in violation of the Elections Clause is an invidious act, with no rational relationship to any legitimate state purpose. Finally, as set out in Count III, the 2011 Plan deprives plaintiffs

of their First Amendment rights, as it segregates them into districts based on their likely political views—indeed, into districts set up as political echo chambers—and restricts their right to associate without any lawful constitutional purpose.

These claims are signally different from those raised in *Davis v. Bandemer*, 478 U.S. 109 (1986), or *Vieth v. Jubelirer*, 541 U.S. 267 (2004)—or in *Gill v. Whitford*, Case No. 16-1161 (argued October 3, 2017), now pending on the docket of the U.S. Supreme Court. None of these cases focused exclusively—as does this complaint—on the Elections Clause. Indeed, *Davis v. Bandemer* and *Gill* did not even involve federal elections. Unlike any of these cases, including *Vieth*, the plaintiffs offer a different legal standard: that any intentional gerrymandering is an invidious act in violation of the Elections Clause, and is illegal. By contrast, *Vieth* and other cases try but fail to come up with a judicially manageable standard to distinguish between "some" gerrymandering and "too much." Because this case draws no such inchoate line between "some" and "too much," it does present a judicially manageable standard: none means none, at least in federal elections.

Defendants' motion seriously misstates Justice Kennedy's position. His concurring opinion in *Vieth* states that he would not foreclose the possibility of holding gerrymandering illegal. 541 U.S. at 576. Indeed, Justice Kennedy made clear that a state legislature may not lawfully favor one class of candidates over another. *Id* at 579. He also rejected the plurality's view that a gerrymandering claim was "non-justiciable." *Id.* Rather Justice Kennedy expressed concern about excessive intrusion in not just *federal* but *state* elections under such a vague standard as that offered in *Vieth*: one that focuses on the "burden" on the voter's "representation" and not—as in this case—on the illegality and invidious nature of the act itself under the Elections Clause. None of the counts here—which hinge entirely on the Elections Clause—

commits a federal court to intrusion under such a vague standard. The complaint here addresses only federal elections. And the standard is clear: the Elections Clause prohibits any state act done with the intent to influence the outcome of a Congressional race.

Factual Background

In opposing this motion to dismiss, plaintiffs rely exclusively on the allegations of the complaint, as these allegations are sufficient to state a claim. However, it may be helpful to give a preview of some of the evidence that plaintiffs anticipate that they will submit at trial on December 4, 2017. Even without resorting to mathematical probability analysis, there are ample ways to determine that the 2011 Plan is intentionally drawn to favor the election of Republicans. As Exhibit A, plaintiffs attach a 25-page analysis by Daniel McGlone, a Senior Analyst and Technical Lead on the Analytics Team of Azavea, a company that provides geographical information services. Azavea is a geospatial technology company. Its data analytics team has extensive experience in working with political boundary and election data. The report prepared by Mr. McGlone and attached as Exhibit A consists of a series of maps and describes district by district how the drafters of the 2011 Plan changed the old districting plan to pack Democrats into "supermajority" districts in Philadelphia, Pittsburgh, and the Scranton area. The report also shows how the drafters efficiently distributed Republican voters in the other 13 districts. Pictorially, the report demonstrates the use of the traditional gerrymandering techniques of cracking and packing—the specific changes by which groups of Democratic voters were moved or packed into just five districts, while groups of Republican voters were relocated to ensure party victories in the remaining 13 districts. At trial, plaintiffs will offer testimony of knowledgeable political observers as to particular movements that were clearly intentional. For example, two incumbent Democratic Congressmen were placed in a newly configured district—

and then the district lines were drawn to exclude a large group of Democratic voters formerly in those districts to ensure that neither incumbent could defeat a Republican.

In addition, as Exhibit B, plaintiffs attach the Congressional district plans adopted by the Pennsylvania state legislature dating back to 1943. As shown by Exhibit B, the boundaries in the older plans even if gerrymandered start out relatively compact and coherent—until they reach the grotesque shapes like that of District 7 and other districts in the 2011 Plan. As Exhibit C, plaintiffs attach the election results in Congressional races in the past decades under these successive maps. Under those maps in place prior to the 2011 Plan, the relative number of Republicans and Democrats elected to Congress in Pennsylvania varied in each election. Such outcomes demonstrated that Pennsylvania then and now has been evenly divided between Republicans and Democrats. Even though that division in votes is similar, everything changes abruptly under the 2011 Plan. Now there is no variation in result, despite variation in each election in turnout and support: elections in 2012, 2014, and 2016 produced exactly thirteen Republicans and five Democrats.

Not only was this revolution in Congressional elections in Pennsylvania anything but accidental, but—as Plaintiffs allege—it was crafted as part of a nationwide Republican plan to dramatically boost Republican electoral power beyond its representational share. But REDMAP was an initiative of the national Republican party leadership to draw district lines favorable to Republicans in specific states, including Pennsylvania. After adoption of the 2011 Plan, REDMAP boasted on its web site of its success in electing 13 Republicans to Congress in Pennsylvania even as Barack Obama carried the state. *See* "2012 REDMAP Summary Report" (available at http://www.redistrictingmajorityproject.com).[1] To date, the defendant legislators

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[1] "A REDMAP target state, the [Republic State Leadership Committee] spent nearly $1 million in Pennsylvania House races in 2010 – an expenditure that helped provide the GOP with majorities in both chambers of the state

have also refused to answer discovery about their meetings with consultants hired by REDMAP or with incumbent Republican Congress members—and the role of these party consultants and members of Congress in drafting the 2011 Plan.

The factual material presented in the Exhibits and the information from the website come from sources that are publicly available. As stated above, however, plaintiffs do not rely on this factual material in opposing the motion to dismiss.

Argument

I. Plaintiffs have standing to enjoin the defendants from enforcing 2011 Plan—which has a comprehensive statewide gerrymandering scheme—on a statewide basis

Even defendants concede that plaintiffs have standing to challenge an illegal gerrymander in the district in which they live. But plaintiffs also have standing to challenge this gerrymander on a statewide basis. *Whitford v. Gill*, 218 F. Supp. 3d 837, 927-29 (W.D. Wis. 2016) (three-judge court); *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532 (M.D. Pa. 2002) (three-judge court). In *Vieth*, the three-judge court found that the four *Vieth* plaintiffs had standing to challenge gerrymandering in all 19 Congressional districts of Pennsylvania. Distinguishing *United States v. Hays*, 515 U.S. 737 (1995), on which defendants rely, the three-judge court in *Vieth* explained why the rule for a racial gerrymander in *Hays*—that a voter could challenge only the particular racial discrimination in that voter's own district—could not sensibly apply to a statewide scheme of partisan gerrymandering:

> The reasoning underlying claims based on racial gerrymandering, however, is quite distinct from the type of injury that partisan gerrymandering inflicts. The very nature of a claim of partisan

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legislature. Combined with former Republican Attorney General Tom Corbett's victory in the gubernatorial race, Republicans took control of the state legislative and congressional redistricting process. The impact of this investment at the state level in 2010 is evident when examining the results of the 2012 election: Pennsylvanians reelected a Democratic U.S. Senator by nearly nine points and reelected President Obama by more than five points, but at the same time they added to the Republican ranks in the State House and returned a 13-5 Republican majority to the U.S. House." *Id.*

> gerrymandering contemplates a harm which extends beyond that inflicted upon a particular voter. Rather, such a claim envisions harm to a particular class of voters that results in impermissibly denying them participation in the political process. The Supreme Court recognized this principal in *Davis v. Bandemer*, the first case holding that partisan gerrymandering may be actionable as a violation of equal protection. In that decision, the Court stated: "Although the statewide discrimination here was allegedly accomplished through the manipulation of individual district lines, the focus of the equal protection inquiry is necessarily somewhat different from that involved in the review of individual districts." 478 U.S. at 127.
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> …The constitutional injury lies not in inequality among various individual districts, but rather in the configuration of the districts as a whole when they serve to disadvantage a certain class of voters. Therefore, unlike a claim for race-based gerrymandering, a plaintiff in a partisan gerrymandering claim need not allege that he lives in a particular district that has been gerrymandered on the basis of political affiliation.

188 F. Supp. 2d at 540.

Recently, in *Whitford*, the three-judge court also upheld statewide standing. The court distinguished *Hays* as addressing a different type of injury than partisan gerrymandering—not the inability to translate votes into seats, or vote dilution, or a statewide injury, but individual racial stigma, which may or may not be imposed statewide. 218 F. Supp. 3d at 929-30. Indeed, in racial gerrymandering, a litigant may find it difficult to prove a statewide racial exclusion, while it is clear enough in a particular district. Like *Whitford* and *Vieth*—and unlike a racial gerrymandering case—plaintiffs here allege a politically corrupt act that exists in the total configuration of the districts on a statewide basis. The gist of this fraudulent statewide scheme arises not just from the shape of a particular district—or the placement of a Democratic voter in a Republican district—but from a systematic attempt to favor a class of candidates in the state as a whole by this unlawful configuration. Indeed, to effectuate this scheme, it may be essential to pack voters leaning to the Democrats into districts where they will waste their votes for

Democrats. Plaintiffs have a right to enjoin what is necessarily a statewide scheme on a statewide basis. Furthermore, because all the districts are configured as part of the scheme, a change in just one district's boundaries may do nothing but make the gerrymandering elsewhere even worse. The only remedy to this loss of a right to vote—indeed, a right of federal citizenship—is a statewide plan that complies with the Elections Clause generally.

These are rights that plaintiffs hold as federal citizens—not as voters of particular districts. The Privileges and Immunities Clause expressly protects citizens of the United States—not citizens of District 7, or District 13, or District 18.

On this question of statewide standing, the holding of the three-judge court in *Vieth* remains the only precedent within this Circuit. On appeal, a plurality of four Justices in *Vieth* assumed that the four plaintiffs had standing to bring a statewide challenge; the plurality decided the case on a "political question" ground, i.e., lack of justiciability. 541 U.S. at 281. Only Justices Stevens, in dissent, would have restricted the plaintiffs to district-specific claims. *Id.* at 328 (Stevens, J., dissenting) (citing *Hays*, 515 U.S. at 744-45). Two other dissenting Justices expressed a preference for a statewide challenge as a function of an analysis of single districts. *Id.* at 353-54 (Souter, J., joined by Ginsburg, J., dissenting). In any event, Justice Breyer as well as the four-Justice plurality would have allowed the case to proceed on standing; Justice Kennedy also did not discuss or raise any objection to standing. *Id.* at 299 (citing Breyer, J., dissenting) & 306-17 (Kennedy, J., concurring). Accordingly, the holding of the three-judge court in *Vieth* remains good law. It is also true that the recent opinion in *Alabama Legislative Black Caucus v. Alabama*, Nos. 2:12-cv-691 & 2:12-cv-1081, 2017 U.S. Dist. LEXIS 168741 (M.D. Ala. Oct. 12, 2017), takes issue with *Whitford* and *Vieth* and would deny statewide standing. However, *Whitford* and *Vieth* continue to be the majority rule.

Defendants also rely on the Supreme Court's earlier opinion in *Alabama Legislative Black Caucus*, 135 S. Ct. 1257 (2015), which addressed the racial gerrymandering claims. According to defendants, the Court denied that the Black Caucus had standing to bring racial gerrymandering claims—but the opposite is true. The three-judge court in Alabama had mistakenly held that the Black Caucus failed to demonstrate that its members resided in the challenged districts. 135 S. Ct. at 1268-69. The Court reversed on the ground that the evidence demonstrated the opposite was probably true and because the district court failed to give the Caucus the opportunity to develop a record on the point. *Id.* Nothing in *Alabama Legislative Black Caucus* limits or even discusses partisan gerrymandering. Rather, like the three-judge court in *Whitford,* the Court explained the particular reason for a district-by-district approach on race claims:

> Our district-specific language makes sense in light of the nature of the harms that underlie a racial gerrymandering claim. Those harms are personal. They include being personally subjected to racial classification, as well as being represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group. They directly threaten a voter who lives in the district attacked. But they do not so keenly threaten a voter who lives elsewhere in the State. Indeed, the latter voter normally lacks standing to pursue a racial gerrymandering claim.

135 S. Ct. at 1265 (internal citations and marks omitted).

But as the three-judge courts in *Vieth* and *Whitford* have pointed out, a partisan gerrymandering scheme does threaten voters throughout the state in a way that a racial gerrymander typically does not. There is not a single Supreme Court decision—not even *Hays*—that would deny the right to challenge a *partisan* gerrymander on a statewide basis. After all, the 2011 Plan is a state law that is applied statewide. Either that law is constitutional or not—if it is not constitutional, elections conducted under that state law will be illegitimate throughout the

State. And any voter in any district left out of the case could then challenge the conduct of Congressional elections in 2018. The state executive defendants—if not the legislative defendants—surely want to conduct the elections under a legally valid plan, and have not objected to statewide standing.

Finally, since the filing of this case on October 3, 2017, plaintiffs have received offers from Pennsylvania citizens from Congressional districts all over the State to join as plaintiffs in this action. Plaintiffs currently have agreements or commitments from at least one person in each of the 18 Congressional districts of Pennsylvania—and in most cases more than one person—to join as additional plaintiffs in this case. Should this court depart from the precedent in *Vieth* and require plaintiffs in every Congressional district, plaintiffs will ask this Court for leave to amend to bring in additional plaintiffs from every district.

II. The right to vote for Congress—without unlawful interference by a state—is a "privilege and immunity" of federal citizenship and protected by the Privileges and Immunities Clause of the Fourteenth Amendment.

Ever since the *Slaughter-House Cases*, 83 U.S. 36 (1873), the U.S. Supreme Court has held that the Privileges and Immunities Clause of the Fourteenth Amendment protects certain rights of federal citizenship from state interference. The Court has held that such rights include the right of citizens to directly elect members of Congress. *Twining v. New Jersey,* 211 U.S. 78, 97 (1908) (citing *Ex parte Yarbrough*, 110 U.S. 651, 663-64 (1884)). As stated long ago in the *Slaughter-House Cases*, the Privileges and Immunities Clause protects all the rights "which owe their existence to the Federal Government, its National character, its Constitution or its laws." 83 U.S. at 79. As the Court noted in *Yarbrough* and affirmed in *Twining*, this is undoubtedly true of the right to vote for members of Congress, which is derived from Article I, Section 2 of the Constitution. *Yarbrough*, 110 U.S. at 663-64; *see also Oregon v. Mitchell*, 400 U.S. 112, 148-49

(1970) (Douglas, J., concurring) (collecting cases). Even before *Thornton,* this has been well-settled.

In *Thornton*, striking down the Arkansas law on term limits, the Court made clear that the Elections Clause allows only "evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Thornton*, 514 U.S. at 834 (quoting *Anderson v. Celebrezze,* 460 U.S. 780, 788, n.9 (1983)). As stated by the Court, a broad reading of the Elections Clause to allow discrimination against a class of voters or candidates "is fundamentally inconsistent with the Framers' view of the Clause." *Id.* at 832.

In his concurrence, Justice Kennedy was emphatic that the right to elect members of Congress is protected by the Privileges and Immunities Clause. Because his opinion is so relevant to plaintiffs' claim, they include a substantial portion of the relevant passage here:

> The federal character of congressional elections flows from the political reality that our National Government is republican in form and that national citizenship has privileges and immunities protected from state abridgment by the force of the Constitution itself. Even before the passage of the Fourteenth Amendment, the latter proposition was given expression in *Crandall v. Nevada* where the Court recognized the right of the Federal Government to call "any or all of its citizens to aid in its service, as members of the Congress, of the courts, of the executive departments, and to fill all its other offices," and further recognized that "this right cannot be made to depend upon the pleasure of a State over whose territory they must pass[.]"…
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> In the *Slaughter-House Cases*, the Court was careful to hold that federal citizenship in and of itself suffices for the assertion of rights under the Constitution, rights that stem from sources other than the States. Though the *Slaughter-House Cases* interpreted the Privileges and Immunities Clause of the Fourteenth Amendment, its view of the origins of federal citizenship was not confined to that source. Referring to these rights of national dimension and origin the Court observed: "But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal government, its National character, its Constitution, or its laws." Later cases only reinforced the idea

> that there are such incidents of national citizenship. Federal privileges and immunities may seem limited in their formulation by comparison with the expansive definition given to the privileges and immunities attributed to state citizenship, but that federal rights flow to the people of the United States by virtue of national citizenship is beyond dispute.
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> …Quite apart from any First Amendment concerns, *see Williams v. Rhodes*, 393 U.S. 23, 30 (1968); *Anderson v. Celebrezze*, 460 U.S. 780, 786-788 (1983), neither the law nor federal theory allows a State to burden the exercise of federal rights in this manner. Indeed, as one of the "rights of the citizens of this great country, protected by implied guarantees of its Constitution," the Court [in the *Slaughter-House Cases*] identified the right "to come to the seat of government…to share its offices, to engage in administering its functions."

Id. at 843-44 (certain internal citations and marks omitted). In summary, Justice Kennedy made clear that there is a "*federal* right to vote…in a congressional election, [a] right that do[es] not derive from state power…but that belong[s] to the voter in his or her capacity as a citizen of the United States." *Id.* at 844 (emphasis added).

Likewise in *Cook*, 531 U.S. at 527-529, as quoted above in the Introduction, Justice Kennedy was equally emphatic that that "the State is not permitted to interpose itself between the people and their National Government…[This] dispositive principle…is fundamental to the Constitution, to the idea of federalism, and to the theory of representative government." *Id.* at 529.

In response to this authority, defendants refer inaccurately to a concurring opinion of Justice Thomas in *McDonald v. City of Chicago*, 561 U.S. 742, 806 (2010). Justice Thomas is alleged to say that the Privileges and Immunities Clause protects *only* the rights in the Bill of Rights. But Justice Thomas also says the Clause protects rights relating to the republican character of the government in Article IV. *Id.* at 832. And indeed, he says, "I see no reason to assume that the constitutionally enumerated rights protected by the Privileges or Immunities

Clause should consist of all the rights recognized in the Bill of Rights and no others." *Id.* at 851 n.20. In any case, it would be an exaggeration to read a passing remark by a dissenting Justice that explicitly rejects the *Slaughter-House* Cases, *see* 561 U.S. at 855, to take issue with the interpretation of this Clause that has been well-settled since those cases were decided.

III. By adoption of a corrupt political gerrymander, the state legislature exceeded its lawful authority under the Elections Clause.

The state simply has no power to gerrymander or rig the vote or conduct a politically corrupt scheme under the Elections Clause. Recently, on September 8, 2017, the three-judge court in *Common Cause v. Rucho*—having already denied a motion to dismiss—denied the motion to stay a challenge to gerrymandering under the Elections Clause, pointing out explicitly that the claim under the Elections Clause distinguished it from *Gill*. *See Common Cause v. Rucho*, Nos. 1:16-cv-1026 & 1:16-cv-1164, 2017 U.S. Dist. LEXIS 145590, at *15-*16 (M.D.N.C. Sep. 8, 2017). While the *Common Cause* case has not yet been decided, the holding here follows necessarily from the limits on the Elections Clause placed in *Thornton* and *Cook*. *Thornton* and *Cook* relied on the Elections Clause to strike down laws relating to term limits: laws that arguably had a similar bipartisan effect on candidates. There were no secret meetings to pass these laws. By comparison, gerrymandering is far more invidious—a form of political corruption or fraud. Gerrymandering is a much more direct attempt to corrupt a federal election.

In view of *Thornton* and *Cook,* defendants have no choice but to argue—implausibly—that the Elections Clause *confers* the authority to gerrymander. They imply that the Framers almost expected them to gerrymander. But there is compelling scholarship that the Framers were horrified by gerrymandering. What became known as gerrymandering was akin to the corruption they abhorred in the British parliamentary system. In *Gill v. Whitford*, 16-1161, some of the country's most respected historians filed as *amici curiae* to refute the historical fiction that

gerrymandering was at any time "acceptable" in this country. *See* Br. of *Amici Curiae* Historians in Support of Appellees 4.[2] To the contrary, it has been reviled. *Id.* In particular the *amici* take issue with Justice Scalia's idiosyncratic reading of that history in the plurality opinion in *Vieth*. As explained by the *amici*, the Framers were especially concerned about ways in which politicians could "entrench" themselves in office—and tried to prevent such attempts at "entrenchment," the term that existed before "gerrymandering." See *id.* at 10-16. Furthermore, before the principle of judicial review of state actions in cases staring with *McCulloch v. Maryland*, 17 U.S. 316 (1819), the Framers have a provision in the Elections Clause giving Congress power to override corrupt state actions. If that clause has failed to eliminate gerrymandering, as the Framers might have hoped, it is in part because too many members of Congress owe their election to the gerrymandering they should prevent. That leaves it up to the Court, which has a special charge to deal with laws that "restrict political processes," as set out in the famous "footnote 4" of *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938); *see generally* John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 105-134 (1980). Indeed, the Court has filled that very gap in the cases requiring "one person, one vote."

Whatever the attitudes of Americans about gerrymandering—or who is right about the "history" or "acceptance" of it up until now—the Supreme Court has made it clear that the Elections Clause is a source of authority for only evenhanded procedural rules. See *Cook*, 531 U.S. at 523-24; *Thornton, supra*, 504 U.S. at 834. Not even the defendant legislators in this case argue that a partisan gerrymander is an evenhanded rule.

Finally, at least since 2004 in *Vieth*, an effective majority of the Supreme Court—the four dissenters in the case and Justice Kennedy—has been in agreement that gerrymandering is

[2] Available online at http://www.scotusblog.com/wp-content/uploads/2017/09/16-1161-bsac-historians.pdf (last accessed October 31, 2017).

unconstitutional. Nor does the prior existence of any illegal practice immunize it from judicial review. *See INS v. Chadha,* 462 U.S. 919, 944 (1987) (deciding legislative veto is not a political question). Elections should no longer take place under such illegal districting. "[I]t would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." *See Reynolds v. Sims*, 377 U.S. 533, 585 (1964).

IV. The complete bar of gerrymandering—sought in each Count—is a "judicially manageable" standard.

Unlike the challengers in *Vieth* or *Davis v. Bandemer*—who allowed that "some" gerrymandering was legal—plaintiffs say that no gerrymandering is legal. In departing in such a manner from the claims in *Vieth* and *Davis v. Bandemer*, Counts II and III as well as Count I provide a clear and manageable legal standard—any redistricting done with proven *intent* by a State legislature to favor one class of candidates or disfavor another is a violation of the Elections Clause. This is not a case like *Vieth* which struggles with "how much" is "too much." Such a legal standard is as "judicially manageable" as the standard of "one-person, one-vote," or a ban on intentional racial segregation. It is a clear rule against an inherently illegal legislative act that burdens in any way a right of federal citizenship, or right to vote, or First Amendment right. In fact, there is perhaps no question with which courts are more regularly concerned than the question of whether plaintiffs can prove intent.

Like the claim, the relief is also judicially manageable. Unlike *Vieth* or even *Gill*, plaintiffs do *not* ask this Court to redraw the map or take over the redistricting process. Plaintiffs do not seek court-ordered changes in the boundaries of this-or-that district to favor one-party-or-other. Nor do plaintiffs ask this Court to draw up "politically competitive" districts—or any district-specific relief to let them elect a favored candidate. Instead the relief sought here is just

to require the State defendants to abide by the Elections Clause—and to submit for Court approval *any* process that will safeguard against the manipulation of Congressional districting with partisan intent. The process may be a model used by other states like California, or New Jersey, or Iowa that prohibit gerrymandering. It may be the use of a bipartisan or non-partisan technical body to develop alternative maps and submit one or several maps for the General Assembly to consider. Furthermore, there should be open meetings and full disclosure of the actual drafting of these maps without the work being done in secret meetings.

In short, this is a much different case than *Vieth*, and the Election Clause claim does not even appear in *Gill*, which applies only the gerrymandering of state legislative officers. Even defendant legislators appear to recognize that Count I—alleging a violation of the Privileges and Immunities Clause—is different from any claim made in *Vieth*. But Counts II and III are different as well—while they raise claims under the Equal Protection Clause and the First Amendment, Counts II and III are basically causes of action to enforce the Elections Clause. Each invokes the Elections Clause to prohibit all gerrymandering, as *Vieth* and *Gill* do not. To be sure, the challengers in *Vieth* originally did invoke Article I, section 2 (the "Qualifications Clause") in the district court, but *Vieth* did not claim that gerrymandering was a per se illegal or "invidious" act. The focus in *Vieth* is only on the burden on the right of a voter to elect the candidate of his or her choice. That is, the challengers in *Vieth* would accept "some" gerrymandering if it did not cause an "excessive" burden on the right to vote. Justice Kennedy expressed concern as to whether this focus on "excessiveness" could ever provide a judicially manageable standard. *Id.* at 316. But, as Justice Kennedy noted, even the plurality in *Vieth* did not "conclude that partisan gerrymandering that disfavors one party is permissible." *Id.*

This case is far simpler. Unlike *Vieth,* it does allege an "invidious" act. Either the Elections Clause applies or it does not. If it applies, then any gerrymander is illegal, or invidious, for all the reasons given in the concurring opinions in *Thornton* and *Cook.* It is illegal under the standard set out in *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), which is cited by the Court in *Thornton*. In *Burdick* the Court set out a "sliding scale" approach that requires the State to demonstrate "important regulatory interests" for burdening the right to vote. Since the only State interest in a gerrymander is to entrench a party in power, and since a violation of the Elections Clause denies to plaintiffs a fundamental principle of the Constitution, no gerrymander can survive under this sliding scale test. *Burdick* states:

> Election laws will invariably impose some burden upon individual voters….
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> * * *
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> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Id. at 433-34 (quoting *Anderson*, 460 U.S. at 788-89).

Burdick requires the defendants to come forward with the "precise" and "important regulatory interest" that a politically corrupt scheme like gerrymandering serves. Even a slight burden on the right to vote would justify invalidating an act that is not just illegal under the Elections Clause but shameful and in this case disavowed and concealed.

However, as the victims or pawns in a gerrymandering scheme, plaintiffs allege not a slight but a severe burden on their right to vote. Of course for those who are registered Democrats, the 2011 Plan discriminates on a statewide basis against a voter class or political

group in which they are members. Defendants may deny any great injury because they have "packed" plaintiffs into those few districts—just five—set aside in the 2011 Plan for the election of Democrats. They demand that plaintiffs show a quantifiable "dilution" of "political power." But the diminution of "political power" is the loss of an important benefit of federal citizenship—a right that is arguably even a fundamental constitutional right. It is the right to elect members of Congress without the unlawful interference by a state legislature and redistricting plan that treats them as pawns in a corrupt scheme and denies them the benefits of the Constitutional design. The loss of that right is not a slight but a severe injury, and whether slight or severe, cannot be justified or even acknowledged by defendants as "serving important regulatory interests." *Id.* at 434. Unlike *Vieth*, this case focuses as *Burdick* would on the inability to justify such a politically corrupt act.

V. This Court has broad equitable authority to grant a remedy tailored to the violation.

Defendants argue for dismissal because gerrymandering will always be with us and there is nothing a court can do. Their motion is tainted with a certain degree of nihilism. Yes, defendants can cull quotes from the past when various Justices despair of getting rid of it. But such despairing statements are out of date. California, Arizona, Iowa, and in this Circuit New Jersey have put in place neutral redistricting procedures that ensure compliance with the Elections Clause. These states typically require neutral or bipartisan advisory bodies that act in the open and develop the map or set of maps that the General Assembly may lawfully adopt. By judicial order, plaintiffs seek similar relief—a directive to the State defendants to replace the 2011 Plan with a map or set of maps developed from a similar advisory body—or develop any other process to ensure compliance with the Elections Clause.

Such an order is appropriate when the State defendants have abused their discretion under the Elections Clause. "Once a constitutional violation has been proven, federal courts have the

power to issue remedial orders tailored to the scope of the constitutional violation." *See, e.g., Judge v. Quinn*, 624 F.3d 352, 360 (7th Cir. 2010) (requiring changes in state election laws to allow a vote to fill a vacancy in the U.S. Senate); *see also, e.g.*, *American Trucking Assn'n Inc. v. Smith*, 496 U.S. 167 (1990) (state taxation); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971) (school desegregation); *Hutto v. Finley*, 437 U.S. 678 (1978) (prison conditions).

VI. There is no basis for a laches defense.

Each election held under the 2011 Plan deprives plaintiffs of their constitutional rights. Two elections have yet to occur—the Congressional elections in 2018 and in 2020. There is no basis for allowing these elections to occur under an illegal plan. *See Reynolds*, 377 U.S. at 585. For each such violation, the two-year statute of limitations has not yet begun to run. *See Kach v. Hose*, 589 F.3d 626, 634 (3d Cir. 2009) (incorporating two-year period from 42 Pa. Cons. Stat. § 5524(2)). This complaint addresses only these future elections—not the Congressional elections that have already occurred in 2012, 2014 and 2016. Indeed, those elections establish how sophisticated the gerrymandering in the 2011 Plan has been in locking up 13 seats for the Republicans and five for the Democrats even as populations shift over years. There is no time limit on citizens seeking to prevent recurring and prospective violations of their voting rights. And while new boundaries might be set based on census data eight years old, the current boundaries are already set on census data eight years old.

Furthermore, the original state defendants—the executive officers who have to administer the 2018 and 2020 elections—have made no laches objection. Nor have any prospective candidates for Congress even filed a motion to intervene in this case. The defendant legislators here have failed to explain why laches, which is an equitable defense can even be raised as a bar to a continuing scheme of electoral fraud.

Conclusion

For all the above reasons, plaintiffs respectfully request that this Court deny the motion to dismiss under Rule 12(b)(1) and (b)(6).

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Respectfully submitted

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