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.	:	
	:	
Thomas W. Wolf *et al*.,	:	
	:	
Defendants.	:	

INTERVENOR DEFENDANTS' REPLY BRIEF
IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS

Plaintiffs have taken an odd turn in their Opposition. After filing a three-count Complaint alleging separate violations of the Privileges or Immunities Clause, Equal Protection Clause, and First Amendment, and after Intervenor Defendants filed a Motion to Stay or Abstain noting striking similarities with *Gill v. Whitford*—the partisan gerrymandering case currently pending before the U.S. Supreme Court—Plaintiffs largely abandon those theories.[1] They now assert that their claims are "exclusively" predicated upon alleged violations of the Elections Clause, which they allege allows states to pass only *evenhanded procedural* regulations for elections. Based upon this novel reading of the Elections Clause, Plaintiffs contend that *any* gerrymandering is *per se* unconstitutional (advancing the mantra of "none means none") notwithstanding that: (1) the Election Clause's plain language reserves congressional mapping to the state legislatures–inherently political bodies; and (2) the U.S. Supreme Court, *literally for centuries*, has repeatedly recognized that partisan influences are an accepted and intended part of the redistricting process.

Even setting aside the Opposition's many violations of the Fed.R.Civ.P,[2] Plaintiffs' new

[1] Intervenor Defendants rely on their Memorandum of Law in Support of their Motion to Dismiss with respect to the reasons why Plaintiffs' Equal Protection Clause and First Amendment causes of action should be dismissed.

[2] In their Opposition, Plaintiffs inappropriately include scores of alleged factual material from outside the pleadings. For example, Exhibits A through C include an expert report, alleged congressional maps from Pennsylvania

theory is completely meritless. No court has ever recognized Plaintiffs' newly-manufactured theory, i.e. that the Elections Clause renders unconstitutional any congressional map even slightly influenced by politics. Indeed, well-accepted and long-standing recognition that congressional map drawing is inherently political categorically prohibits Plaintiffs' effort to twist the Elections Clause's language to somehow find that any map drawn with a scintilla of partisan influence is *per se* unconstitutional. In fact, for Plaintiffs' theory to be viable, it must have lain dormant in the Constitution's plain text for over 200 years. This means that during the last two centuries of eagle-eye scrutiny from the Supreme Court and constitutional practitioners and scholars—resulting in dozens of fractured opinions concerning the very justiciability of partisan gerrymandering claims—everyone either: (1) got it wrong, or (2) simply missed this issue. It is far more likely that this theory is simply one concocted by Plaintiffs in an ill-conceived effort to upset the 2018 elections. Plaintiffs' Complaint, either based on what it actually states or on their new alternative theory, should be dismissed for the following reasons.

First, Plaintiffs lack standing to assert a statewide challenge. *Second*, Plaintiffs fail to state a claim for a violation of the Elections Clause. No court has ever endorsed Plaintiffs' strict liability standard in the partisan gerrymandering context. The opposite is true. For decades, courts have repeatedly found that gerrymandering is inherently political, and Plaintiffs' "none means none" theory runs headlong into the Election Clause's text, historical records about its ratification, and years of interpretive caselaw. Further, Plaintiffs' proffered support, the *Gralike* and *Thornton*

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dating back to 1943, data from election results in prior congressional races, etc. Moreover, throughout the Opposition, Plaintiffs cite purported evidence about REDMAP and prior election results, make (erroneous) references to the parties' discovery responses, discuss alleged offers they claim to have received from other interested voters wishing to join in this case, and reference amicus materials filed in *Gill*, all of which is similarly outside their Complaint. (Opp'n at 5-6, 10, 12-13.) Plaintiffs are not permitted to amend their allegations through a brief opposing a motion to dismiss. *Commonwealth of Pa. ex. rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 181 (3d Cir. 1988). Plaintiffs themselves recognize that this is improper, and represent that they "do not rely on this factual material," yet they nevertheless refer to it throughout the Opposition. (*Id.* at 6.) Indeed, nearly the entire fact section references extraneous material. (*Id.* at 4-6.)

decisions, are inapposite, as neither involves redistricting. Perhaps more importantly, however, both predate *Vieth v. Jubelirer*, 541 U.S. 267 (2004), where the plurality did not mention either decision, and where Justice Kennedy (to whom Plaintiffs' entire case appears directed) expressly undercuts Plaintiffs' theory: "A determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied." Put differently, even Justice Kennedy did not agree that Plaintiffs' theory could ever be viable.

Third, this Court cannot grant Plaintiffs the relief sought. Pennsylvania, unlike the exemplar states Plaintiffs reference, does not utilize any kind of independent commission for congressional redistricting. Rather, under state constitutional law, the map lines are drawn and passed as an ordinary statute, subject to the Governor's veto. It is the domain of the States, not the federal courts, to conduct apportionment in the first instance, and principles of federalism demand that federal courts refrain from dictating to the states the form of government to employ. *Finally*, Plaintiffs' Complaint is barred by laches. The map has not changed since 2011. Plaintiffs certainly knew elections would occur in 2018 and 2020 using the map, yet did nothing.

I. Plaintiffs Do Not Have Standing To Assert A Statewide Challenge.

Plaintiffs claim that they "have standing to challenge this gerrymander on a statewide basis," and that the three-judge panel decision in *Vieth*, as well as the lower court opinion from *Gill*, constitutes "the majority rule" and "good law." (Opp'n at 6, 8.) This claim is unfounded.[3]

The Supreme Court in *Vieth* did not adopt the standing assessment of the underlying three-judge panel, as Plaintiffs contend. (*Id.*). While the *Vieth* plurality does not reference standing except to note that Justices Stevens and Souter (in concurrence and dissent, respectively) would

[3] While Plaintiffs make no claim with respect to individual district challenges, the Complaint does not even assert the districts where they each reside. In light of this, the Court should reject any attempt to suggest that Plaintiffs have district-specific claims.

conclude that statewide challenges are non-justiciable, 541 U.S. at 267, 292, 295, it only failed to do so after finding the claims otherwise non-justiciable. *Id.* at 292. In fact, if a claim is non-justiciable, the Court would never need to address standing. And while Plaintiffs' claim that "[t]wo other dissenting Justices expressed a preference for a statewide challenge as a function of an analysis of single districts[,]" (Opp'n. at 8), that is simply not so. In dissent, Justice Souter (joined by Justice Ginsberg) stated: "As for a statewide claim, I would not attempt an ambitious definition without the benefit of experience with individual claims, and for now I would limit consideration of a statewide claim to one built upon a number of district-specific ones." 541 U.S. at 353. Thus, the Supreme Court certainly did not adopt the standing assessment of the underlying three-judge panel, and that panel's assessment is certainly not the law in this Circuit.[4]

Additionally, the *Gill* panel's decision is by no means well-settled law. On the contrary, that very issue is currently before the Supreme Court; the first Question Presented in Appellants' Jurisdictional Statement is: "Did the district court violate *Vieth v. Jubelirer*, 541 U.S. 267 (2004), when it held that it had the authority to entertain a statewide challenge to Wisconsin's redistricting plan, instead of requiring a district-by-district analysis?" (Appellant's Jurisdictional Statement at Question Presented No. 1.). And, a recent decision from a unanimous panel in Alabama reached the opposition conclusion, rejecting the conclusion reached by the divided court in *Whitford*. *Ala. Legis. Black Caucus v. Alabama*, No. 2:12-CV-691, 2017 WL 4563868, at *5 (M.D. Ala. Oct. 12, 2017)).) Plaintiffs lack standing to challenge the 2011 Plan on a statewide basis.[5]

II. Plaintiffs Have No Viable Claim For An Elections Clause "Violation."

In the Opposition, Plaintiffs state – for the first time – that "any intentional gerrymandering

[4] Because the Supreme Court in *Vieth* addressed the issue, Plaintiffs' argument that "not a single Supreme Court decision" addressed this issue is errant. (Opp'n at 9.)

[5] Even in the Opposition's amended allegations, Plaintiffs do not identify whether they are Democrats or Republicans, or give any information at all about their political preferences or voting records, let alone identify their congressional district. For these reasons, too, the Complaint should be dismissed for lack of specificity.

is an invidious act in violation of the Elections Clause, and is illegal." (Opp'n at 3.) Likewise, they argue now that "[e]very 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." (*Id.* at 1.)[6] But, no court has ever endorsed this theory. In fact, Plaintiffs' theory directly contradicts decades of cases where courts recognized that redistricting is inherently political. In reality, Plaintiffs' theory that *any* partisan influence renders a map constitutionally infirm flies in the face of the Elections Clause itself, historical records about its ratification, and centuries of redistricting and Elections Clause case law. And while Plaintiffs' newly-minted "standard" is apparently derived from a single passage in two cases—*Cook v. Gralike*, 531 U.S. 510 (2001), and *Thornton*, 514 U.S. at 779 (Opp'n at 1-2)—each is inapplicable and Plaintiffs' theory derived therefrom has been implicitly rejected in subsequent redistricting cases.

A. Courts Have Long Recognized That Redistricting Is Inherently Political.

State legislatures have always engaged in political gerrymandering. Even at the time of the framing, "[t]he political gerrymander remained alive and well." *Vieth*, 541 U.S. at 274. "[S]ignificant[ly] … the Framers provided a remedy for such practices in the Constitution" via the Elections Clause; "while leaving in state legislatures the initial power to draw districts for federal elections, [the Elections Clause] permitted Congress to 'make or alter' those districts if it wished." *Id.* The inclusion of this remedy is a testament to the Framers' belief that redistricting is an inherently political process. In fact, in defending this constitutional language affording a

[6] Plaintiffs' Complaint is a practical morass, and it is unclear what role they believe the Privileges or Immunities Clause plays in an alleged Elections Clause violation. There is no precedent to suggest that the Privileges or Immunities Clause confers a right to be free from partisan gerrymandering. *See Pope v. Blue*, 809 F. Supp. 392, 399 (W.D.N.C. 1992), *aff'd by* 506 U.S. 801 (1992) ("We find no precedent to suggest that the Privileges or Immunities Clause protects such a right."); *see also O'Lear v. Miller*, 222 F. Supp. 2d 850 (E.D. Mich. 2002), *aff'd by* 537 U.S. 997 (2002). Really, "[i]n the last hundred years, the Supreme Court has only relied on the Privileges or Immunities Clause in connection with the right to travel." *Byrd v. City of Philadelphia*, No. 12-4520, 2014 WL 5780825, at *13 (E.D. Pa. Nov. 6, 2014). And *Thornton v. U.S. Term Limits*, 514 U.S. 779 (1995), did not ultimately rely on the Privileges or Immunities Clause for its outcome.

congressional safeguard, James Madison argued that Congress's broad power to set aside state regulation of the time, place, and manner of federal elections was necessary because "[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." *Id.*

That basic understanding and acceptance of the political role—and the faith that Congress was constitutionally permitted to check partisanship—has underscored decades of interpretive case law. Indeed, the "Supreme Court has often recognized that redistricting is an inherently political process." *Pope*, 809 F. Supp. at 398.[7] For example, in *Gaffney v. Cummings*, 412 U.S. 735, 37 L. Ed. 2d 298, 93 S. Ct. 2321 (1973), the Court made plain why Plaintiffs' "none means none" standard could never be accepted, recognizing: "It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. Our cases indicate quite the contrary." *Id.* Indeed, the Court went on to confirm that "[p]olitics and political considerations are inseparable from districting and apportionment," and that "[t]he reality is that districting inevitably has and is intended to have substantial political consequences." *Id.* at 753. Thus, the Court has "not ventured far or attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States." *Id.* at 754.

Different Justices later expressed an identical sentiment in *Davis v. Bandemer*. 478 U.S. 109, 106 S. Ct. 2797, 92 L. Ed. 2d 85 (1986). As the *Bandemer* plurality acknowledged, "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely

[7] Again going outside the Complaint for alleged support, Plaintiffs cite to an amicus brief filed in the *Gill* appeal referencing "compelling scholarship" that the Framers were actually horrified by any gerrymandering. (*See* Opp'n. at 13-14.) The only compelling scholarship that matters is the Constitution and how it has been consistently interpreted over and over by Supreme Court Justices who repeatedly affirm that partisanship is an expected factor in redistricting.

political consequences of the reapportionment were intended." *Id.* at 129; *see also id.* at 145 (O'Connor, J., concurring) ("The opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States, and one that plays no small role in fostering active participation in the political parties at every level."). Ten years later, the Court in *Bush v. Vera* again confirmed why Plaintiffs' theory could not be viable, stating that "[w]e have not subjected political gerrymandering to strict scrutiny." 517 U.S. 952, 964, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (1996). Moreover, the Court explained that "[i]f the State's goal is otherwise constitutional political gerrymandering," "it is free to use" political data such as "precinct general election voting patterns[,] precinct primary voting patterns[,] and legislators experience[,] to achieve that goal regardless of its awareness of its racial implications and regardless of the fact that it does so in the context of a majority-minority district." *Id.* at 968 (internal citations omitted).

By the time the Court heard *Vieth*, no less than eight Justices recognized that only *excessive* partisan gerrymandering might conceivably be unconstitutional (far from Plaintiffs' "none means none" standard). 541 U.S. at 326. And, as Justice Kennedy stated, a mere showing of political intent in partisan gerrymandering will not, by itself, prove to be a constitutional violation. Instead, "[a] determination that a gerrymander violates the law *must rest on something more than the conclusion that political classifications were applied*." *Id.* at 307 (Kennedy, J., concurring) (emphasis added); *see also Burns v. Richardson*, 384 U.S. 73, 89, n. 16, 16 L. Ed. 2d 376, 86 S. Ct. 1286 (1966) (finding nothing invidious in the practice of drawing district lines in a way that helps current incumbents by avoiding contests between them).[8]

[8] Numerous other cases have likewise recognized that redistricting is inherently political. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1488 (2017) (Alito, J., dissenting joined by Roberts, C.J., and Kennedy, J) ("it is well known that state legislative majorities very often attempt to gain an electoral advantage" through the districting and apportionment process) (citing *Gaffney*, 412 U.S. at 753; *Bandemer*, 478 U.S. at 129; *Vieth*, 541 U.S. at 274-76; *Hunt*

B. The Text Of The Election Clause Directly Contradicts Plaintiffs' Theory.

The Elections Clause states that:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. CONST. art. I, § 4, cl. 1. Thus, nothing in the plain language of the Elections Clause embodies the expansive sweep necessary to support Plaintiffs' "none means none" theory. To the contrary, the plain language makes clear that the Legislature of each State–known partisans–are tasked with execution of any powers derived from the Elections Clause. Of course, had the Framers intended to prohibit any partisan influence from impacting this process, they could have said so and certainly never would have ceded this power to inherently political bodies.

Notably, the Supreme Court often interprets the Elections Clause in light of what it does not prohibit, with several Justices suggesting that unless there is some explicit prohibition, then the practice should be sustained. *See Vieth,* 541 U.S. at 305 ("[N]either Article I, § 2, nor the Equal Protection Clause, nor … Article I, § 4, provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting."); *Smiley v. Holm*, 285 U.S. 355, 372–73 (1932) ("[T]here is nothing in article 1, § 4, which precludes a State from providing that legislative action in districting the state for congressional elections

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v. Cromartie, 526 U.S. 541, 551 (1999)); *League of United Latin Am. Citizens v. Perry ("LULAC")*, 548 U.S. 399, 414, 417 126 S. Ct. 2594, 165 L. Ed. 2d 609 (2006) (under the Elections Clause, states have the primary role in apportioning districts for their congressional colleagues and the state has acted constitutionally even where "the legislature does seem to have decided to redistrict with the sole purpose of achieving a Republican congressional majority"); *Easley v. Cromartie*, 532 U.S. 234, 248 (2001) (reversing district court finding that the legislature used race as the predominant factor in drawing a district's boundaries and, thus, violated the Equal Protection Clause of the United States Constitution; legislature drew its plan to protect incumbents, a legitimate political goal); *Pope*, 809 F. Supp. at 398 ("While requiring the General Assembly to adopt non-partisan, computer-generated districts might be a good idea, it clearly goes beyond what the constitution mandates."); *Balderas v. Texas*, 2001 U.S. Dist. LEXIS 25740, *19-20 (E.D. Tex. Nov. 14, 2001) (stating that "political gerrymandering, a purely partisan exercise, is inappropriate for a federal court drawing a congressional redistricting map. Even at the hands of a legislative body, political gerrymandering is much a bloodfeud, in which revenge is exacted by the majority against its rival. We have left it to the political arena, as we must and wisely should.").

shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power."); *Board of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 687 (1996) (Scalia, J., dissenting) (the Court has "no basis for proscribing as unconstitutional practices that do not violate any explicit text of the Constitution and that have been regarded as constitutional ever since the framing").

In fact, the context in which the Elections Clause was crafted confirms that the Framers recognized and accepted partisan gerrymandering. Specifically, the Elections Clause addresses the Framers' concern that states could manipulate the electoral process, and its adoption "proved to be one of the most controversial provisions in the new Constitution" at the ratifying debates. Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. Pa. J. Const. L. 1, 23 (2010). Ultimately, the Framers' solution was to vest Congress with the ultimate power over electoral rules to guard against electoral manipulation. *See, e.g.*, *Vieth*, 541 U.S. at 274 (citing 2 Records of the Federal Convention of 1787, pp 240-241 (M. Farrand ed. 1911)); *see also id.* at 276 (quoting 2 Elliot's Debates at 27). And that power bestowed on Congress "has not lain dormant." *Id.* (citing bills introduced to regulate gerrymandering).

C. *Gralike* and *Thornton* Do Not Apply Here, And Subsequent Redistricting Cases Have Rejected Plaintiffs' Theory.

Although partisan gerrymandering is as old as the Republic, Plaintiffs now argue that the Framers intended the states' power under the Elections Clause to apply to passing only "evenhanded procedural rules," rather than outcome determinative, regulations of congressional elections. (*See* Opp'n at 1, 14.) And Plaintiffs rely upon *Gralike*, 531 U.S. at 510, and *Thornton*, 514 U.S. at 779, to support their strained theory. Although neither case addresses redistricting, let alone partisan gerrymandering, Plaintiffs want to extrapolate from these cases a new standard for gerrymandering cases – that the Elections Clause only affords states the ability to employ "procedural rules," and even then, only if such rules are "even-handed." (Opp'n at 1 (emphasis

added); *compare* Compl. at ¶ 1 ("the Elections Clause is a source of only neutral procedural rules").) Plaintiffs' *Gralike* and *Thornton* based theory does not withstand scrutiny.

Plaintiffs' novel theory appears to have its origin in a misreading of the 1932 case of *Smiley v. Holm*, 285 U.S. 355, 52 S. Ct. 397, 399 (1932), a decision cited in both *Thornton* and *Gralike*. In *Smiley*, the Court found that the regulatory power the Elections Clause conferred upon the state legislatures was not exempt from the restrictions individual state constitutions imposed on lawmaking powers. In exploring the text of the Elections Clause that reads "times, places and manner of holding elections," Chief Justice Hughes wrote:

> It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements *as to procedure* and safeguards which experience shows are necessary in order to enforce the fundamental right involved.

Id. at 366 (emphasis added).

Justice Stevens cited to this language first in *Thornton*, a case involving a challenge to a referendum amending the Arkansas Constitution to impose term limits on the federal congressional delegation. 514 U.S. at 832. The Court's opinion focused mainly on Article I, Sections 2 and 3, which lay out the qualifications for the House and Senate. *Id.* But the Court also looked to the Elections Clause, and noted that the Framers intended the Elections Clause to grant States authority to create procedural regulation, not to provide States with license to exclude classes of candidates from federal office. *Id.* at 832-33. The Court then relied on a small sampling of historical materials, such as Madison's rhetoric at the Constitutional Convention and Hamilton, as Publius, in *Federalist No. 60*, *id.* at 832-34, and cited *Smiley* in stating: the "Elections Clause gives States

authority 'to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.'" *Id.* at 834 (citing *Smiley*, 285 U.S. at 366).

Later, in *Gralike*, Justice Stevens again cited the foregoing language from *Smiley*. In *Gralike*, the Court was asked to decide if the Missouri legislature could designate on the ballot whether congressional candidates supported a federal term limits amendment. 531 U.S. at 510. The Court determined that the negative ballot notations next to the names of state candidates for federal office was not a permissible time, place and manner regulation under the Elections Clause, but rather an attempt to dictate substantive electoral outcomes. *Id.* at 525-26. And the Court reiterated that the Elections Clause limits the power to regulate the times, places, and manner of holding congressional elections to only what it called "procedural regulations." *Id.* at 523 (citing *Thornton*, 514 U.S. at 833). In his concurring opinion, Justice Kennedy stated, "[a] state is not permitted to interpose itself between the people and their National Government … [T]he Elections Clause is a grant of authority to issue procedural regulations, and not a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates . . . ." *Id.* at 527-28.

A closer analysis of *Gralike* and *Thornton* reveals why they are not supportive of Plaintiffs' "none means none" theory. First, the use of the *Smiley* quote is a misapplication. It simply cannot be read to mean that there can be no "outcome" determinative rules; *Smiley* did not say state legislature could *only* pass "procedural," or "neutral" rules. Rather, it offered a non-exclusive list of the sort of requirements "*as to procedure* and safeguards" involved in elections, such as notice lists and registrations. After all, "potentially all electoral rules can be outcome determinative." Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 Utah Law Rev. 859, 879 (2010) ("For example, although Hawaii is no longer a one-party state, for a long time its ban

on write-in ballots, its onerous ballot access laws, and its requirement that primary voters choose only one ballot for all offices ensured continued Democratic dominance").

Second, each case is inapposite. Neither involved redistricting, let alone a dispute over partisan redistricting. Instead, both cases involved ballot requirements meant to prevent or severely cripple the election of particular candidates; indeed, in reaching its decisions, the Court emphasized that these provisions were specifically designed to "handicap" certain candidates. *Gralike*, 531 U.S. at 524-25 (observing that the Missouri amendment was "plainly designed to favor candidates" who support term limits and "disfavor" others, and that its "intended effect" was to "handicap" these disfavored candidates); *Thornton*, 514 U.S. at 831 (observing that the "avowed purpose and obvious effect" of the Arkansas amendment was to "handicap[] a class of candidates," namely, incumbents). Moreover, these ballot requirements were intended to affect the voter just as s/he is making a choice at the voting booth. By contrast, partisan gerrymandering "raises fewer concerns than ballot notations or term limits because, despite the composition of district lines, the voter still has an opportunity to express his choice without overt state interference." Tolson, *Partisan Gerrymandering*, supra, at 880.[9]

But most importantly, subsequent partisan gerrymandering cases *have not* embraced the "standard" that Plaintiffs claim was announced in *Thornton* and *Gralike*. For example, in *Vieth*, the plurality noted that the Elections Clause was discussed "only fleetingly" by the appellants, and held: "We conclude that neither Article I, § 2, … nor … Article I, § 4, provides a judicially

[9] Plaintiffs direct the Court to *Common Cause v. Rucho*, Nos. 1:16-cv-1026 & 1:16-cv-1164, 2017 U.S. Dist. LEXIS 145590 (M.D.N.C. Sept. 8, 2017), contending that the existence of an Elections Clause claim in that matter distinguished it from *Gill* and thus resulted in that court's refusal to enter a stay pending resolution of *Gill* in light of that claim. (*See* Opp'n at 13.) While *Common Cause* involves, *inter alia*, a claim under the Elections Clause, a review of that decision readily discloses that the existence of this claim did not weigh heavily in the court's decision to refuse entry of a stay. And, the *Common Cause* decision is surely not predicated upon *Thornton* or *Gralike,* as Plaintiffs' suggest. (*See* Opp'n at 13.)

enforceable limit on the political considerations that the States and Congress may take into account when districting." 541 U.S. at 305. Put differently, the plurality expressly recognized that political considerations could factor into redistricting and that the Elections Clause provided no bar to their consideration. In fact, the *Vieth* plurality did not even mention *Thornton* or *Gralike*. Rather, it cited to the Elections Clause to state that "the Constitution clearly contemplates districting by political entities" because the Framers allowed states to draw the districts and anticipated that partisan considerations would play a role. *Id.* at 285; *see also LULAC*, 548 U.S. at 399, 414, 417 (2006) (under the Elections Clause, states have the primary role in redistricting, and the state acted constitutionally even where "the legislature does seem to have decided to redistrict with the sole purpose of achieving a Republican congressional majority").

Further, at least five Justices in *Vieth* implicitly rejected the view that partisan gerrymandering is *per se* prohibited by *Thornton* and *Gralike* by recognizing that redistricting can influence outcomes and conceding that this form of redistricting is constitutional up to a certain point. *See, e.g.*, 541 U.S. at 285; *see also id.* at 358, 360 (Breyer, J., dissenting) (noting that the "legislature's use of political boundary-drawing considerations ordinarily does not violate the Constitution's Equal Protection Clause," and acknowledging that "political considerations will likely play an important, and proper, role in the drawing of district boundaries").

In fact, in *Vieth* no Justice suggested that *Gralike* strictly forbids any partisan intent or attempts in connection with redistricting. And Justice Kennedy—far from enforcing the "standard" or "rule" Plaintiffs divine from his opinion in *Gralike*—confirmed the *opposite*:

> A decision ordering the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process. *The Court is correct to refrain from directing this substantial intrusion into the Nation's political life. . . . With uncertain limits, intervening courts--even when proceeding with best intentions--would risk*

> *assuming political, not legal, responsibility for a process that often produces ill will and distrust*. That courts can grant relief in districting cases where race is involved does not answer our need for fairness principles here. Those controversies implicate a different inquiry. They involve sorting permissible classifications in the redistricting context from impermissible ones. Race is an impermissible classification. ***Politics is quite a different matter. A determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied***. *It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective.*

Vieth, 541 U.S. at 306-07 (Kennedy, J., concurring) (emphasis added; internal citations omitted).[10]

III. This Court Cannot Provide the Relief Plaintiffs Seek.

Additionally, Plaintiffs ask this Court to do something it lacks the authority to do. Plaintiffs are seeking "a directive to the State defendants to replace the 2011 Plan with a map or set of maps developed from a similar advisory body[,]" and tout California, Arizona, Iowa, and New Jersey as places "with neutral redistricting procedures" that Pennsylvania should be ordered to replicate. (Opp'n at 18.) But even assuming that the Court is inclined to review this information which is found nowhere in the Complaint, in each such example, the states have chosen to extract the full authority to conduct redistricting from the legislature and governor, and instead grant it to another body such as an independent commission: California (Independent commission with balanced partisan composition); Arizona (same); Iowa (drawn by the state legislature, but with substantial input from a nonpartisan advisory body and a bipartisan advisory committee, both maintained by statute); and New Jersey (politician commission with balanced partisan composition).[11]

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[10] Notably, notwithstanding Plaintiffs' claims that through his opinions in *Thornton* and *Gralike* Justice Kennedy "emphatically" supported Plaintiffs' view of the Elections Clause's application in partisan gerrymandering cases, Justice Kennedy failed to mention either case in his *Vieth* opinion written just a few years later.

[11] *See* Cal. Const. art. XXI § 2; Cal. Gov't Code §§ 8251-8253.6; Ariz. Const. art. IV, pt. 2, § 1; Iowa Const. art. III, §§ 34-39; Iowa Code §§ 42.1-42.6; N.J. Const. art. II, § II; N.J. Const. art. IV, § II; N.J. Const. art. IV, § III. Notably, even when using independent commissions and other bodies, there are still partisan factors at play. *See, e.g.*,

By contrast, in Pennsylvania, congressional lines are drawn by the General Assembly, as a regular statute, subject to gubernatorial veto. *See* Pa. Const. art. IV, § 15. And as a matter of state constitutional law, the legislative power of the Commonwealth is vested in the General Assembly. Pa. Const. art. II, § 1. Thus, by asking the Court to replace the map with one developed by some "advisory body," Plaintiffs really seek an order requiring the Commonwealth to amend its constitution to provide for a *different* manner of drawing the electoral map. But this Court cannot compel the Commonwealth to draw maps using an outside advisory body; Supreme Court precedent expressly prohibits such an end-run on the state. *See, e.g.*, *Upham v. Seamon*, 456 U.S. 37, 41-42 (1982); *Holder v. Hall*, 512 U.S. 874, 916 (1994) (Thomas, J., concurring).

IV. Plaintiffs' Complaint Is Barred By Laches.

Finally, Plaintiffs' claims should all be dismissed under the doctrine of laches. The current map has not changed since 2011. Plaintiffs have certainly known for years that elections would occur in 2018 and 2020 using the 2011 Plan, yet waited six years to raise a challenge. Plaintiffs' delay prejudices Pennsylvania's citizens and its legislature, and the Complaint must be dismissed.

Harris v. Arizona Ind. Redistricting Com'n, 136 S. Ct. 1301 (Supreme Court concluded that partisanship played a role in what the Commission did).

Dated: November 3, 2017

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