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

Louis Agre, William Ewing, Floyd Montgomery, Joy Montgomery, and Rayman Solomon, Plaintiffs, v. Thomas W. Wolf, Governor of Pennsylvania Pedro Cortes, Secretary of State of Pennsylvania, and Jonathan Marks, Commissioner of the Bureau of Elections, in their official capacities, Defendants.	)	Civil Action No. 17-4392

MEMORANDUM IN SUPPORT OF LEGISLATIVE DEFENDANTS' MOTION FOR DIRECTED VERDICT

Plaintiffs claim they should prevail on their Elections Clause claim "if they show that the defendants used political criteria to create the 2011 Plan, without any necessity to do so." (*Brief Regarding The Elements Of Their Claims* (ECF No. 157) (the "**Elements Brief**") at 1). Stated differently, Plaintiffs ask this Court to hold that *any* consideration of "political criteria" in the drawing of a congressional district map violates the Privileges or Immunities Clause.

This theory is untenable. Dozens of Supreme Court and other cases dating back decades make clear that "political criteria" are completely acceptable factors that legislatures have considered when redistricting since the Founding. In *Gaffney v. Cummings*, 412 U.S. 735 (1973), a unanimous Court upheld the use of "political consideration[s]" in reapportionment, explaining that "[t]he very essence of districting is to produce a different—a more 'politically fair'—result than would be reached with elections at large, in which the winning party would take 100% of the

legislative seats." *Id*. at 753. The Court emphasized that "politics and political considerations are inseparable from districting and apportionment," that "[d]istrict lines are rarely neutral phenomena," and that "the reality is that districting inevitably has and is intended to have substantial political consequences." *Id*. *See also, e.g*. *Cooper v*. *Harris*, 137 S. Ct. 1455, 1488, 197 L.Ed.2d 837 (2017) (Alito, J. dissenting, joined by Kennedy, J. among others); *LULAC v*. *Perry*, 548 U.S. 399, 419 (2006); *Vieth v*. *Jubelirer* , 541 U.S. 267, 285 (2004) (also cited in dissenting and concurring opinions at 307 and 320); *Bush v*. *Vera*, 517 U.S. 952, 964 (1996); *U.S. Term Limits v*. *Thornton*, 514 U.S. 779, 926 (1995) (dissenting opinion); *Shaw v*. *Reno*, 509 U.S. 630 (1993); *Mobile v*. *Bolden*, 446 U.S. 55, 69 (1980).

This conclusion is unsurprising. In virtually every federal redistricting case since 1964, courts have identified redistricting as a political process to be carried out by political actors in all but extraordinary circumstances.[1] With this underlying, clear and repeated guidance from the

[1] *Reynolds v*. *Sims*, 377 U.S. 533, 586 (1964); *Miller v*. *Johnson*, 515 U.S. 900, 916 (1995); *Chapman v*. *Meier*, 420 U.S. 1, 27 (1975) ("[R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court[.]"); *Connor v*. *Finch,* 431 U.S. 407, 414–15 (1977) ("[A] state legislature is the institution that is by far the bestsituated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality[.]"); *Growe v*. *Emison,* 507 U.S. 25, 34 (1993) ("Today we renew our adherence to the principle[]…that the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts[.]"); *Voinovich v*. *Quilter,* 507 U.S. 146, 156 (1993) ("Time and again we have emphasized that reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.") (quotation marks omitted); *Easley v*. *Cromartie*, 532 U.S. 234, 242 (2001); *Perry v*. *Perez*, 565 U.S. 388, 392 (2012) ("Redistricting is primarily the duty and responsibility of the State.") (quotation marks omitted); *League of United Latin Am*. *Citizens v*. *Perry,* 548 U.S. 399, 414–415 (2006) ("*LULAC*") (explaining that the Constitution "leaves with the States primary responsibility for the apportionment of their federal congressional…districts") (quotation marks omitted). *See also*, *e.g*., *Montes v*. *City of Yakima*, No. 12-cv-3108, 2015 WL 11120964, *4 (E.D. Wa. Feb. 17, 2015); *Evenwel v*. *Perry,* No. A-14-CV-335, 2014 WL 5780507, *4 n.5 (W.D. Tex. Nov. 5, 2014); *Harris v*. *McCrory,* No. 1:13-cv-949, 2014 WL 12600710, *2 (M.D.N.C. May 22, 2014); *Kostick v*. *Nago*, 960 F. Supp. 2d 1074, 1102 n. 17 (D. Hawaii 2013); *Essex v*. *Kobach*, 874 F. Supp. 2d 1069, 1075 (D. Kan. 2012); *Corbett v*. *Sullivan,* 202 F. Supp. 2d 972, 981 (E.D. Mo. 2002); *Johnson v*. *Mortham,* 926 F. Supp. 1460, 1504 (N.D. Fla. 1996); *NAACP v*. *Austin,* 857 F. Supp. 560, 567 (E.D. Mich. 1994); *Dye v*. *McKeithen*, 856 F. Supp. 303, 313 (W.D. La. 1994); *Gorin v*. *Karpan,* 775 F. Supp. 1430, 1445 (D. Wyo. 1991); *LaComb v*. *Growe,* 541 F. Supp. 160, 162 (D. Minn. 1982); *O'Sullivan v*. *Brier,* 540 F. Supp. 1200, 1202 (D. Kan. 1982); *Terrazas v*. *Clements,* 537 F. Supp. 514, 527 (N.D. Tex. 1982); *Graves v*. *Barnes,* 446 F. Supp. 560, 564 (W.D. Tex. 1977); *Paige v*. *Gray*, 437 F. Supp. 137, 163 (M.D. Ga. 1977).

United States Supreme Court, this Court should resolve this matter on summary judgment for the reasons outlined below and in the attached Statement of Undisputed Facts.

I. THIS CASE IS RIPE FOR SUMMARY JUDGMENT BECAUSE THERE ARE NO MATERIAL FACTS IN DISPUTE

A court should grant summary judgment where the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Hersh v. Allen Prods. Co.*, 789 F.2d 230 (3d Cir. 1986). The moving party may prove that no genuine issue of material fact exists by showing that there is insufficient evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has carried its burden, the burden shifts to the non-moving party to present evidence showing that there is a genuine issue for trial. *See id.* at 321. A fact is "material" only when it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine dispute of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* Attached hereto is a Statement of Undisputed Facts which outlines the basic facts surrounding the Congressional redistricting process and provides excerpts from depositions of Plaintiffs.

With no dispute about these material redistricting facts. The Court can rule on the remaining legal issues without a trial. A trial would only be used to adduce facts that show the degree to which "partisan election data" may have been used to create the map. The Plaintiffs just yesterday disclaimed any need to prove any level of degree. As a result, a trial really would only adduce facts the Plaintiffs have disclaimed as wholly unnecessary to their claims.

II. PLAINTIFFS LACK STANDING BECAUSE THEY HAVE NOT SUFFERED ANY PARTICULARIZED HARM AND ONLY STATES HAVE STANDING PURSUANT TO THE ELECTIONS CLAUSE

a. Plaintiffs Have Not Suffered Any Harm, Much Less Sufficiently Particular Harm to Afford Them Standing Under the Elections Clause.

Article III standing requirements prevent litigants from "raising another person's legal rights," and prohibits the adjudication of generalized grievances "more appropriately addressed in the representative branches." *Allen v. Wright*, 468 U.S. 737, 750-51 (1984). Thus, a plaintiff bears the burden of demonstrating that he or she has suffered an injury to a legally protected interest that is both concrete and particularized to the plaintiff, and is an injury that the court can redress. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs fail to establish standing when they raise only "generalized grievances about the conduct of government" and their alleged injuries are "predicated on the right, possessed by every citizen, to require that the Government be administered according to the law." *Common Cause v. Pennsylvania*, 558 F.3d 249, 259 (3rd Cir. 2009).

A plaintiff has standing to bring a challenge only to the district where the plaintiff resides. *See United States v. Hays*, 515 U.S. 737, 744-45 (1995). A plaintiff who has not been harmed by the shape or composition of his or her own district has not suffered the "special harms" required create standing. *Id.*; *accord Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015) (the harms threatening a voter who lives in a particular district "do not so keenly threaten a voter who lives elsewhere in the State. Indeed, the latter voter normally lacks standing to pursue a . . . gerrymandering claim.").

In their First Amended Complaint, Plaintiffs allege only general grievances which would allegedly be shared by all citizens of Pennsylvania or the Plaintiffs' respective Congressional districts. The Statement of Undisputed Facts contains numerous examples from the Plaintiffs' own testimony about the nature of the generalized harms they are asserting in this case.

But all of these alleged harms, to the extent they constitute Constitutionally recognizable harms at all, are only generalized grievances about the conduct of government that the Supreme Court has historically refused to allow as a basis for standing. *See Lance v. Coffman*, 549 U.S. 437 (2007). Accordingly, Plaintiffs' claim under the Elections Clause must be dismissed for lack of standing.

b. Only States Entities or State Officials Have Standing to Bring Challenges Under the Elections Clause.

Here, Plaintiffs are 26 individual voters and Pennsylvania residents who purport to assert violations of rights possessed by all citizens of Pennsylvania and in their respective congressional districts. But only state entities, state legislatures or state legislators have standing to bring the claims under the Elections Clause. In *Lance*, the Supreme Court held that four private citizens lacked standing to assert claims that actions of the State of Colorado violated their rights as individuals under the Elections Clause. Noting that "[t]he only injury plaintiffs allege is that the law—specifically the Elections Clause—ha[d] not been followed," the Supreme Court held that such an injury "is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." *Lance,* 549 U.S. at 442. Rather, the Supreme Court in *Lance* laid out the "lengthy pedigree" of cases where citizens claimed "generalized grievances" and where standing was rejected. *See, e.g.*, *Fairchild v. Hughes*, 258 U.S. 126 (1922) (rejecting citizen claims to challenge procedures under which the 19th Amendment was ratified); *Ex Parte Levitt*, 302 U.S. 633 (1937) (dismissing citizen suit challenging gather eligibility

of the Supreme Court justice under the Constitution); *U.S. v. Richardson*, 418 U.S. 166 (1974) (rejecting challenge under the Constitution's "Statement and Account" clause); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974) (rejecting challenge claiming that Members of Congress serving as reservists violated the Incompatibility Clause).

The Plaintiffs in this matter are no differently situated than the plaintiffs in *Lance, Fairchild*, or other cases where plaintiffs seek to assert only "generalized grievances." In contrast, state legislatures or legislators have standing to challenge redistricting maps under the Elections Clause. For example, the Supreme Court held that the Arizona State Legislature had standing to challenge the existence of the Arizona Independent Redistricting Commission under the Elections Clause. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015).

Here, the Plaintiffs are private citizens asserting claims arising from generalized grievances under the Elections Clause. The Supreme Court has made clear that such Plaintiffs have no standing to assert such a claim under the Elections Clause; only a state entity, the state legislature, or state legislators may do so. Accordingly, the Plaintiffs lack standing to challenge the 2011 Plan under the Elections Clause.

III. ASSUMING STANDING AND ASSUMING PLAINTIFFS' ASSERTED PRIMA FACIA CASE IS PROVEN BY SIMPLE UTILIZATION OF ELECTION DATA, AT MOST RATIONAL BASIS IS APPLICABLE

Plaintiffs' only remaining claim also fails on the merits, for several reasons.

First, Plaintiffs seek to enforce the Elections Clause through the Privileges and Immunities Clause, but the reach of that clause is "narrow" and only covers rights that "'owe their existence to the Federal government, its National character, its Constitution, or its laws.'" *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 755 (2010) (quoting *The Slaughter-House Cases*, at 83 U.S. [16 Wall.] 36, 79 (1872)). The right at issue here is not "fundamental" within the meaning of that

Clause and therefore enjoys no protection. See Salem Blue Collar Workers Ass'n v. City of Salem, 33 F.3d 265, 268 (3d Cir. 1994) (requiring this element for a Privileges and Immunities Clause claim to be presented). While Plaintiffs wax at length on the fundamental right to vote, that right is not at issue here because all Plaintiffs had the right to vote. The right at issue is an amorphous right to fair elections, and that right—if it is protected at all—does not owe its existence to the Federal Government or its National Character.[2]

Second, the Elections Clause analysis only comes into play if the state action at issue falls within the "powers" affirmatively granted solely by virtue of the Elections Clause; if, on the other hand, the state action falls within the states' sovereign authority, the Elections Clause itself does not impose restrictions on its exercise. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 802–08 (1995). Although the issue appears not to have been decisively resolved, the Supreme Court has suggested that redistricting falls within the states' inherent powers, *see Chapman v. Meier*, 420 U.S. 1, 27 (1975), and the fact that states have drawn districts for their representatives since before the existence of the United States is powerful evidence that this is a power reserved by the Tenth Amendment.

Third, even if the Elections Clause is a source of power to redistrict, the plain language of that clause defeats Plaintiffs' position: it is a *grant* of authority, and states enjoy broad discretion in exercising that authority. Notably, the Supreme Court has never suggested that the Elections Clause prohibits partisan intent in setting place, time, and manner restrictions in elections, and, in fact, it held the opposite in *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 203–04 (2008), which held that, if a voting restriction or qualification is otherwise justified, partisan intent does

[2] For similar reasons, the Privileges and Elections Clause is not enforceable via 42 U.S.C. § 1983. Among other problems for Plaintiffs, they are not "intended to benefit" from the Clause. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989).

not invalidate the state's "valid neutral justifications" for the voting requirement. A redistricting plan, including the one challenged here, has numerous valid justification—the most significant being to reapportion to equalize population. Plaintiffs' reliance on *U.S. Term Limits v. Thornton* is unavailing because that case had precisely nothing to do with partisan intent; it struck down efforts to add qualifications for members of Congress to hold office. 514 U.S. at 787, 832, 836. That is not even alleged here. Similarly, Plaintiffs' reliance on *Cook v. Gralike* fails because that case involved ballot notations recommending that voters not vote for candidates who did not support new qualifications on holding congressional office, and the regulation provision "bears no relation to the 'manner' of elections" and was solely "intended" to "handicap candidates for the United States Congress" and "to dictate electoral outcomes" in order to achieve term limits. 531 U.S. at 1039–40 (quotation marks omitted). That has no bearing whatsoever on this case.

Fourth, even if the Court was inclined to apply *some* standard under the Elections Clause, the appropriate standard would be rational basis review, as no protected class or discrete or insular minority group is at issue. *See U.S. v. Carolene Products Co.*, 304 U.S. 144 (1938).

The Plaintiffs assert that the compelling interest test that the Supreme Court has routinely applied to judge claims of racial considerations in redistricting should apply to political gerrymandering claims with no case law or statutory support for their position. Rather, the clearest statement from the Supreme Court compels a different conclusion.

In *Shaw v. Reno,* 509 U.S. 630, 650 (1993), the Court said:

> [T[his court has held political gerrymanders to be justiciable under the Equal Protection Clause. But nothing in our case law compels the conclusion that racial and political gerrymandering are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting…would seem to compel the opposite conclusion.

(Internal citations omitted). Just a few years later, the Court continued to make this distinction saying, "Caution is especially appropriate in this case, where the State has articulated a legitimate political explanation for his districting decision…." *Cromartie*, 532 U.S. at 242 (2001). Finally, in *Harris,* every Justice agreed that political motivations are a defense to a racial gerrymandering claim, even when evaluating the shapes of districts. In fact, the majority opinion said "a bizarre shape–as of the new District 12–can raise from a political motivation as well as a racial one. And crucially, political and racial reasons are capable of yielding similar oddities in a district's boundaries….[A] trial court has a formidable task: it must…assess whether plaintiffs have managed to disentangle race from politics and prove that the former drove the district's lines." *Harris*, 137 S. Ct. at 1473 (Internal quotations and citations omitted).

Legislative Defendants believe the rational basis test applies here because there is no protected class claimed or alleged here meriting the application of the compelling interest test, nor are there any claims of facially discriminatory statutes. *See e.g. Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebreeze*, 460 U.S. 780 (1983); *Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 529-30 (3rd Cir. 2011) ([A]bsent a racially discriminatory purpose, explicit or inferable, on the part of the decisionmaker, the statutory distinction is subject only to rational basis review.") (citing and quoting *U.S. v. Frazier*, 981 F.2d 92, 95 (3rd Cir. 1992) and reversing a District Court finding that strict scrutiny review was applicable). In the absence of any assertions of race based claims or allegations, this Court should apply a rational basis test.[3]

As the Supreme Court's plurality opinion noted in *Vieth*, the Elections Clause expressly grants initial authority to state legislatures. The Court said "Article I, Section 4, while leaving in

[3] Additionally, applying the Plaintiffs' *prima facie* test would result in burden shifting in every Congressional redistricting plan in the country since election return data in publicly available and easily accessible in every state in the country.

state legislatures the initial power to draw districts for federal elections, permitted Congress to 'make or alter' those districts if it wished." *Vieth*, 541 U.S. at 275. The Supreme Court expressed this view in *Smiley* and *David*, and again in *Arizona State Legislature* (holding that for the purposes of the Elections Clause that initiatives are encompassed under the Court's understanding of legislature).

Rather than recognize the direct Constitutional grant of authority to State Legislatures absent Congressional action, the Plaintiffs in this matter pull two isolated lines from two concurring opinions in election law cases unrelated to redistricting to synthesize what they claim is a "neutrality" requirement under the Elections Claims that they claim justifies the use of the compelling interest test. For this proposition, the Plaintiffs cite to one line each from Justice Kennedy's concurring opinion in *Cook v. Gralike*, 531 U.S. 510, 527 (2001) (Kennedy, J., concurring) and *U.S. Term Limits v. Thorton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). Justice Kennedy was on the Supreme Court when *Vieth* was decided. Although clearly familiar with what he previously wrote about the Elections Clause, he apparently thought these provisions were not relevant or important enough to mention in ANY subsequent Redistricting case while they were on the court. *See generally Vieth,,* 541 U.S. at 306-17 (Kennedy, J., concurring) (no mention of Article I, Section 4 in concurring opinion of Kennedy, J.); *LULAC v. Perry,* 548 U.S. 399 (2006) (no mention of Article I, Section 4 in opinion of Kennedy, J.); *Bethune-Hill v. State Board of Elections,* 137 S.Ct. 788 (2017) (no mention of Article I, Section 4 in opinion of the Court by Kennedy, J.); *Bartlett v. Strickland,* 556 U.S. 1 (2009) (no mention of Article I, Section 4 in opinion of Kennedy, J.); *Cooper v. Harris,* 137 S. Ct. 1455, 1487 n. 2 (2017) (Citing Article I, Section 4, the opinion says "[u]nder the Constitution, state legislatures have the initial power to

draw districts for federal elections" citing *Vieth* and Article I, Section 4, in dissenting opinion of Alito, J. In which Kennedy, J. joined).

In fact, rather than consider political considerations as an anathema to the Constitution, the Court has noted that political considerations are inherent in the Redistricting process. *See e.g. Shaw v. Reno,* 509 U.S. 630, 650 (1993); *Easley v. Cromartie*, 532 U.S. 234, 242, 249 (2001) ("[T]he Constitution . . . imposes an obligation not to create . . . districts for predominantly racial, as opposed to political or traditional, districting motivations.");; *Harris,* 137 S. Ct. 1455. Not only has the Court noted that political considerations are inherent in the redistricting process, the Supreme Court has permitted claims of political motivation to be a *valid and complete defense* to claims of racial gerrymandering.

It is not rational or logical for this Court to conclude that the Supreme Court would hold that political considerations were a valid defense to racial gerrymandering claims under the 14th Amendment if such a rationale violated another portion of the Constitution. It is nonsensical that the Court, and all of the Justices who have sat on cases alleging racial gerrymander, would permit political motivations to be a defense to racial gerrymandering claims if those same motivations violated another provision of the Constitution.

a. <u>RATIONAL BASIS IS MET BY ACHIEVING EQUALITY OF POPULATION</u>

The first rational basis or legitimate state interest advanced by the 2011 Congressional Districting Map is equality of population. Following the 2001 Census, the Congressional map originally adopted by the Pennsylvania legislature and signed by the Governor was struck down by a federal court. In *Vieth v. Pennsylvania*, 195 F.Supp. 2d 672 (M.D. Pa. 2002) (three-judge court), the court struck down Pennsylvania's Congressional plan because it contained a deviation between Congressional districts of nineteen (19) persons. The court said specifically, "[T]he

nineteen person deviation in Act 1 was avoidable." *Id*. at 677. Following the 2010 Census, the map adopted by the General Assembly and embodied in the 2011 Plan at issue in this case contains no deviations in population. The Commonwealth used the guidance given to it in prior federal court rulings and did not adopt a map with any population deviations.

b. RATIONAL BASIS IS MET BY PAIRING THE MATHEMATICALLY LEAST NUMBER OF INCUMBENT CONSIDERING THE LOSS OF A SEAT

The second rational basis or legitimate state interest for the 2011 Congressional Districting Map is avoiding the pairing of as few incumbents as mathematically possible. As agreed by all of the parties, and as a judicially noticeable fact, Pennsylvania over the last several decades has had a declining number of seats in the United States House of Representatives. Between the 2000 Census and the 2010 Census, based on Pennsylvania's population relative to other states, Pennsylvania's delegation was reduced from 19 to 18 districts. Following an analogy to the children's game of 'musical chairs,' it was not possible to draw 18 districts that preserved seats for 19 incumbents. It is also a judicially noticeable fact that western Pennsylvania lost population compared to eastern Pennsylvania. As a result of this, and to comply with the equal population requirements as detailed in *Vieth v. Pennsylvania*, 195 F.Supp. 2d 672 (M.D. Pa. 2002), western Pennsylvania needed to lose a seat.

The 2011 map paired Democratic Congressmen Critz and Altmire in the same district. Of the Democratic Congressman from the area, it was reported that both Mike Doyle and Jason Altmire supported the plan in this portion of the state, the former calling members of the General Assembly to urge support for the map and the latter writing a letter in support of the map.[4] In

[4] *See e.g.* Keegan Gibson, Redistricting Vote: Who Crossed Party Lines and Why *available at* http://www.politicspa.com/redistricting-vote-who-crossed-party-lines-and-why/30258/ (last visited Nov. 30, 2017).

addition, ten Democratic members of the State House voted in favor of the plan. Those ten members were Dom Costa, Paul Costa, Dan Deasy, Anthony DeLuca, Marc Gergely , Bill Kortz, Nick Kotik, Joe Preston, Adam Ravenstahl and Harry Readshaw.[5] This pairing is reported to have favored Altmire. As was reported, "Altmire's campaign has emphasized that about 66 percent of its constituents will be retained from his current 4th district."[6]

Avoiding pairings of incumbents and preserving cores of existing districts are two traditional redistricting criteria that have long been recognized by courts as legitimate state objectives. *See, e.g., Bush,* 517 US at 964 (opinion of O'Connor, J.) (recognizing legitimate state goal of avoiding pairing of incumbents into a single district); *Covington v. North Carolina,* Order of November 1, 2017 (M.D. N.C. 1:15-cv-399) ("the Special Master may adjust district lines to avoid pairing any incumbents who have not publicly announced their intention not to run in 2018"); *Georgia State Conference of NAACP v. Fayette County Board*, 996 F.Supp 2d 1351 (N.D. Ga. 2014); *Colleton County Council v. McConnell*, 201 F.Supp. 2d 618 at 647 (D.S.C. 2002).

c. RATIONAL BASIS IS MET BY REDUCING THE NUMBER OF COUNTY, CITY, AND MUNICIPAL SPLITS OVER THE PRIOR PLAN

The third easily discernible rational basis or legitimate state interest in the 2011 Map is reducing the number of "splits" over the prior plan. The 2011 Map reduced the number of split counties and MCDs as outlined in the chart prepared by Professor Gimpel *supra* at 3. This is has long been recognized as a legitimate state interest by numerous courts. *Covington v. North Carolina,* Order of November 1, 2017 (M.D. N.C. 1:15-cv-399) ("Split fewer precincts than the

[5] Available at http://www.legis.state.pa.us/cfdocs/legis/RC/Public/rc_view_action2.cfm?sess_yr=2011&sess_ind=0&rc_body=H&rc_nbr=1039 (last visited Nov. 30, 2017).

[6] Keegan Gibson, Altmire to Harrisburg Dems: Vote for GOP Redistricting Plan, *available at* http://www.politicspa.com/altmire-to-harrisburg-dems-vote-for-gop-redistricting-plan/30243/ (last visited November 30, 2017).

2011 Enacted Districts"); *Georgia State Conference of NAACP v. Fayette County Board*, 996 F.Supp 2d 1351 (N.D. Ga. 2014); *Colleton County Council v. McConnell*, 201 F.Supp. 2d 618 at 647 (D.S.C. 2002); *Carsten v. Lamm*, 543 F.Supp. 68 (D. Colo. 1982) (noting the splitting fewer cities and counties is an advantage).

d. RATIONAL BASIS IS MET BY MAINTAING A MAJORITY MINORITY DISTRICT IN THE PHILADELPHIA AREA

A fourth easily discernible rational basis or legitimate state interest in the 2011 Map is that it maintained District 2 as a majority-minority district in the Philadelphia area. In *Thornburg v. Gingles* the Supreme Court created a test to determine if at-large voting districts result in impermissible vote dilution. *Thornburg v. Gingles*, 478 U.S. 30 (1986). Such a test is required because "[m]ultimember districts and at-large election schemes . . . are not *per se* violative of minority voters' rights." *Id*. at 48. Unless all of the *Gingles* conditions are satisfied, "the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice." *Id*. at 48. In order to prevail in a vote dilution claim under the Voting Rights Act a minority group must demonstrate the following: 1) "it is sufficiently large and geographically compact to constitute a majority in a single-member district;" 2) "it is politically cohesive;" 3) "the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate;" and 4) "under the totality of the circumstances" the actions complained of "result in unequal access to the electoral process." *Id*. at 46, 50-51. Legislative enactments, including those by the Commonwealth of Pennsylvania, are presumed to be in good faith. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995). Not a single litigant has challenged this requirement of maintaining this district in any prior litigation. Not a single Plaintiff nor any filing from the Plaintiffs has challenged the maintenance of this district as a majority minority district in

accordance with the Voting Rights Act. District 2 has been a majority minority district since 1963. This has been maintained in the 2011 map. This is a rational basis.

IV. THERE IS NO REQUIREMENT OF NEUTRALITY CONTAINED WITHIN THE ELECTIONS CLAUSE

Despite their claims before this Court, Plaintiffs lack any serious legal basis upon which to rely in support of their assertion that the Elections Clause is a limited grant of authority to state legislatures that enables them to enact only neutral procedural rules. *See* U.S. Const. art. I, § 4, cl. 1. Plaintiffs further erroneously claim that the presence of partisanship in the redistricting process means that the process is outcome determinative and therefore unconstitutional under the Elections Clause. These assertions are incorrect and in conflict with both Supreme Court precedent and legal scholarship.

a. This Issue Is a Matter of Law, and Not a Question of Fact Susceptible To a Trial.

Plaintiffs claim that the Elections Clause contains a requirement that states may not enact laws and regulations pertaining to redistricting that include any partisan considerations. This is not a question of fact that requires a trial before this Court. The legal requirement is either present in the Elections Clause or it is not. Because none of their legal briefings to this Court thus far have demonstrated or clearly established the existence of this 'neutrality' requirement, Plaintiffs' claims cannot succeed. Since Plaintiffs have built their entire case on this legal fiction, and there is no genuine dispute as to any material fact for the Court to decide, Defendants are entitled to judgment as a matter of law.

b. The Absence in the Elections Clause of an Explicit Prohibition on Partisan Considerations When Redistricting Supports the Constitutionality of Such Partisan Considerations

The Elections Clause states: "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 choosing Senators." U.S. Const. art. I, § 4, cl. 1. The inclusion of the language stating "Congress may at any time by Law make or alter such Regulations. . . ." constitutes a congressional veto over whatever control the states choose to exercise under the Elections Clause. The inclusion of this congressional oversight provision is a clear indication that the founders were aware of the role partisanship could play in redistricting.

During the Constitutional Convention, there was considerable debate regarding a proposed congressional veto over all state laws. Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 Vand. L. Rev. 1195, 1221 (2012). The proposed veto provision was ultimately defeated, but the congressional veto in the Elections Clause represents a compromise: it gives Congress the ability to veto state laws in the limited, but important, circumstances of representation and voting. *Id*. at 1223. During the Convention, Federalists argued that through this veto, Congress would prevent the undue influence of partisan zeal that came from unchecked state control of elections. *Id*. at 1226; The Federalist NO. 51 (James Madison). As one scholar explains:

> The congressional veto in the Elections Clause was linked to the then-prevailing notion that the national government would be insulated from the passions of the people in a way that the states were not *and probably should not be*. The absence of sovereignty in the Clause, therefore, was viewed by the founding generation as a structural safeguard against partisan zeal and tyranny. (Emphasis added.)

Tolson, *Reinventing Sovereignty?, supra,* at 1226. In fact, partisan influence over redistricting dates to well before the founding, with scholars tracing examples back to the Colony of Pennsylvania early in the 18th century, where several counties attempted to curtail the political

power of the city of Philadelphia. *See Vieth v. Jubelirer*, 541 U.S. 267, 274-75 (2004) (plurality opinion). The practice was so widespread and common that many contend that is has long been accepted "as part of the 'manner' of holding elections." *See* Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 Utah Law Review 859, 879-80 (2010), Public Law Research Paper No. 470[7].

Despite the long and established history of partisan influence in drawing districts and the founders' clear awareness of the continued potential for it to occur, they chose not include a limitation in the Election Clause's, which the Plaintiffs' claim only grants "neutral" procedural considerations. Instead, the framers chose to give the Congress a remedy through its veto power.

> It is significant that the Framers provided a remedy for such practices in the Constitution. Article 1, § 4, while leaving in state legislatures the initial power to draw districts for federal elections, permitted Congress to 'make or alter' those districts if it wished. Many objected to the congressional oversight established by this provision.

Vieth, 541 U.S. 267, 275 (2004). It is clear that not only were the founders aware of partisan consideration and its effects during redistricting, but that they drafted the Elections Clause with those considerations in the forefront of their minds. The absence in the Elections Clause of an explicit prohibition on partisan considerations in redistricting is telling and a clear indication that a 'no partisan neutrality' requirement could or should be read to exist therein.

Moreover, quite opposite to Plaintiffs' claims, the Elections Clause should actually be read to support the constitutionality of partisan considerations in redistricting. As Tolson states, the Elections Clause serves as a textual anchor to support the constitutionality of partisan gerrymandering because nothing in the Clause explicitly prohibits partisan considerations. Tolson,

[7] Available at SSRN: https://ssrn.com/abstract=1674507

Partisan Gerrymandering, *supra* at 864, 877-88. This omission is notable because the Court has often interpreted the Elections Clause in light of what it does not prohibit, with several Justices of the Supreme Court suggesting that unless there is an explicit prohibition, then the practice should be sustained. *Id*. at 878 (citing *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 shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power."); *see also Vieth*, 541 U.S. at 325 n.11 (Stevens, J., dissenting) (criticizing the plurality for assuming that if a practice does not explicitly violate the Bill of Rights, the Court has no proper basis for striking it down); *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 687 (1996) (Scalia, J., dissenting) (arguing that 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").

Plaintiffs' claim—that the Elections Clause includes a requirement of "partisan neutrality" when redistricting—stretches too far the electoral outcome limitation as interpreted by the Supreme Court. Assuming *arguendo* that the actions the Plaintiffs allege indeed affect election outcomes at all, legal scholars contend that this standard is necessarily limited because potentially all electoral rules can be outcome determinative. *See* Tolson, *Partisan Gerrymandering, supra,* at 879-80. What partisanship that does arise during the redistricting process "arguably occurs at a noncritical point, given that intervening events—such as political controversies, national tides, and even voting day weather—can all have some effect on the voter's decision-making process." *Id*.

Indeed, partisan redistricting raises far lesser concerns than ballot notations, *Cook v. Gralike*, 531 U.S. 510 (2001), or term limits, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). Voters still have the opportunity to exercise their choice without overt state interference, regardless of district lines. Simply put, while the Supreme Court has recognized that states do not possess the authority to dictate electoral outcomes, those situations are inapposite to the issues in the present case. Moreover, commentators argue that at least five of the *Vieth* justices implicitly rejected the argument that partisan redistricting is prohibited by either *Cook* or *Thornton* by explicitly recognizing that that redistricting can influence outcomes and conceding that partisan redistricting is constitutional up to a certain threshold. Tolson, *Partisan Gerrymandering, supra,* at 879-80 (citing *Vieth*, 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, since single member districts are the norm, "political considerations will likely play an important, and proper, role in the drawing of district boundaries")).

c. The Supreme Court's Plurality Opinion in *Vieth* Attests to Congress's Awareness of Alleged Political Gerrymandering as Well as Its Power to Control It, and Accordingly the Elections Clause Cannot be Construed to Provide Judicially Enforceable Limits on the Political Considerations of States and Congress When Districting

Congress has, on occasion, exercised its power under the Elections Clause to make or alter rules concerning congressional elections. Examples include establishing a single national Election Day for Congressional Elections and mandating that states divide themselves into single member congressional districts rather than electing Representatives at-large. *See Vieth*, 541 U.S. at 275-77

(2004). However, despite these actions, Congress has *never* acted to prohibit or limit political considerations in the redistricting context[8]:

> Recent history … attests to Congress's awareness of [alleged political gerrymandering], and of its power under Article I, § 4, to control [it]. Since 1980, no fewer than five bills have been introduced to regulate gerrymandering in congressional districting. See H. R. 5037, 101st Cong., 2d Sess. (1990); H. R. 1711, 101st Cong., 1st Sess. (1989); H. R. 3468, 98th Cong., 1st Sess. (1983); H. R. 5529, 97th Cong., 2d Sess. (1982); H. R. 2349, 97th Cong., 1st Sess. (1981).

Vieth, 541 U.S. at 276-77. Accordingly, the Elections Clause does not provide "a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting." *Id*. at 305. Despite Congress's awareness of partisan redistricting practices and its authority to limit the states under Article I, section 4, it has *never* exercised its power under the Elections Clause to directly stem the flow of partisanship into the process through either legislative initiatives or its veto power. This inaction is telling.

d. Plaintiffs Appear to Base Their Entire Neutrality Argument on Two Lines Taken from Concurring Opinions in *Gralike* and *Thornton* that the Supreme Court has never relied upon nor cited in a redistricting case.

Plaintiffs have continually relied on two concurring opinions from Justice Kennedy as the long-lost *sine qua non* of gerrymandering jurisprudence. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); *Cook v. Gralike*, 531 U.S. 510 (2001). This is despite three fundamental and irreconcilable flaws: 1) *Thornton* and *Cook* are not gerrymandering cases of any stripe; 2) Justice Kennedy was the *only* member of the concurrence in both cases; 3) Justice Kennedy has

[8] Congress has, however, on occasion implemented redistricting criteria that never address gerrymandering one way or the other. *See e.g.* Apportionment Act of 1842, 5 Stat. 491; Apportionment Act of 1862, 12 Stat. 572; Apportionment Act of 1901, 31 Stat. 733; Apportionment Act of 1911, 37 Stat. 13.

subsequently approved of political considerations in the gerrymandering context after *Cook* and *Thornton*.

At the outset, it is important to contextualize the cases the Plaintiffs so desperately cling to in order to advance their claims. Fundamentally, what Justice Kennedy is concerned with in these cases is the imposition of conditions upon voting. *See Cook*, 531 U.S. at 527:

> Whether a State's concern is with the proposed enactment of a constitutional amendment or an ordinary federal statute it *simply lacks the power to impose any conditions* on the election of Senators and Representatives, save neutral provisions as to the time, place, and manner of elections pursuant to Article I, § 4. (emphasis added).

Thornton addresses the fundamental issue of whether a state can prohibit, through term limits, a candidate from appearing on the ballot *at all*. *See Thornton*, 514 U.S. at 782. The *Thornton* majority held that "allowing the States to adopt term limits for congressional service would effect a fundamental change in the constitutional framework." *Id*. at 837. Kennedy, in his concurrence, goes to great lengths to explain the principals of federalism that back his reasoning. *Id*. at 838-842 (Kennedy, J. concurring) ("[t]he Framers recognized that state power and identity were essential parts of the federal balance, the Constitution is solicitous of the prerogatives of the States, even in an otherwise sovereign federal province."). One of the ways in which the Constitution gives power to the states over the "otherwise federal province" of voting is by granting "States certain powers over the times, places, and manner of federal elections (subject to congressional revision)." *Id*. at 841. Indeed, the fundamental point of Kennedy's concurrence is that the right to vote, in the literal sense of casting a ballot, is a privilege and immunity of citizenship and as such cannot be conditioned through term limits, which Justice Kennedy equates to ballot restrictions. *Id*. at 844-45. ("The arguments for term limitations (or ballot restrictions having the same effect) are not lacking in force . . . .").

In *Cook v. Gralike*, the Court invalidated a Missouri constitutional provision that instructed the members of the state's congressional delegation, inter alia, to work to pass a term-limits amendment once elected. *Cook v. Gralike*, 531 U.S. 510, 513-16 (2001). If candidates refused to do so, voters would see a notation on ballots indicating as such. *Id.* at 514-15. The Court held that the provision was unconstitutional on the grounds that it was an attempt to dictate a specific substantive outcome—by excluding or attempting to exclude a class of candidates—rather than a procedural regulation. *Id.* at 526. Justice Kennedy, in his concurring opinion, frames the issue as thus "the amendments to . . . [the] Missouri Constitution do[es] not regulate the time or place of federal elections; rather, those provisions are an attempt to control the actions of the State's congressional delegation." *Id.* at 528. Therefore, the issue was that the proposed restriction was not a time, place, or manner restriction in the first instance. "Here the State attempts to intrude upon the relationship between the people and their congressional delegates *by seeking to control or confine the discretion of those delegates*, and the interference is not permissible." *Id.* at 530 (Kennedy, J. concurring) (emphasis added).

Regardless of the cribbed interpretation Plaintiffs use of Justice Kennedy's opinions in *Cook* and *Thornton*, the simple fact is that Justice Kennedy has stated multiple times that partisan considerations are acceptable in the redistricting context. *See e.g. Bush v. Vera*, 517 U.S. 952, 968 (1996) ("If a State's goal is otherwise constitutional political gerrymandering, it is free to use . . . political data . . . .") (plurality op. by O'Connor, J., Rehnquist, CJ., and Kennedy, J.); *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (dismissing a partisan gerrymandering claim) (Kennedy, J. concurring in judgment). As Justice Kennedy quoted in his concurring opinion in *Vieth*, "[i]t would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it.") (citing and quoting *Gaffney v. Cumming*, 412

U.S. 735, 752 (1973)). In *Cooper*, Justice Kennedy has reaffirmed the opinion that he has steadfastly held all along—that the Court's "prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering." *Cooper*, 137 S. Ct. at 1488 (Alito, J., Roberts, CJ., and Kennedy, J. concurring in judgment and dissenting in part) (citing *Bandemer*, 478 U.S. at 129). Therefore, taken a whole, the Supreme Court, and Justice Kennedy in particular, has consistently held, that partisan considerations are acceptable when redistricting notwithstanding the decisions in *Cook* and *Thronton,* which were not cases concerning redistricting.

V. THE SUPREME COURTS HAS CONSISTENTLY APPROVED OF SOME DEGREE OF PARTISAN CONSIDERATION IN REDISTRICTING, WHICH FORECLOSES PLAINTIFFS' ARGUMENT.[9]

Plaintiffs in this case assert that "the Elections Clause prohibits *any* deliberate gerrymander." (ECF. No. 133 at 6); *see* (ECF No. 53) (stating that the judicially manageable standard in political gerrymandering cases is "none means none"). Legislative defendants take this assertion to mean that, as Plaintiffs' counsel stated, in the realm of partisanship in redistricting, Plaintiffs are "not interested in saving some or limited gerrymanders" and instead feel they should not be required to "struggle in determining when a lawful gerrymander becomes unlawful.[10]" *Id*. at 8.

[9] Legislative Defendants do not assume or concede that any level of partisanship was involved when drawing congressional districts in 2011. The question, however, is mostly irrelevant since there are no justiciable standards by which to measure partisan gerrymandering and some level of partisanship has always been the allowed by the courts. *See infra* at 3-7.

[10] Unfortunately for Plaintiffs, the Supreme Court has always demanded, even without a majority acceptance of a manageable standard, that *any* standard would necessarily be difficult for plaintiffs to prove. *See infra* at 6-7.

The problem the Plaintiffs' refuse to address, and the issue squarely before this Court, is that the Supreme Court has consistently and emphatically held that *some* levels of partisan intent while redistricting is inevitable, expected, and acceptable.[11] *See e.g. Gaffney v. Cummings*, 412 U. S. 735 (1973); *Bandemer*, 478 U. S. 109; *Shaw v. Reno*, 509 U.S. 630 (1993) (*Shaw I*); *Bush v. Vera*, 517 U.S. 952 (1996); *Miller v. Johnson*, 515 U.S. 900, 915 (1995) ([R]eapportionment is primarily the duty and responsibility of the State. Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests.") (internal citations and quotations omitted); *Shaw v. Hunt*, 517 U.S. 899 (1996) (*Shaw II*); *Hunt v. Cromartie*, 526 U.S. 541 (1999) (*Cromartie I*); *Easley v. Cromartie*, 532 U.S. 234, 249 (2001) (*Cromartie II*) ("[T]he Constitution . . . imposes an obligation not to create . . . districts for predominantly racial, as opposed to political or traditional, districting motivations."); *Vieth*, 541 U.S. 267; *Cooper v. Harris*, 137 S. Ct. 1455 (2017). In fact, the Supreme Court has never found a map violative of the constitution because of an alleged partisan gerrymander. *Vieth*, 541 U.S. at 279-80, n. 6. Even in the latest case claiming partisan gerrymandering to be presented to the Supreme Court, the Appellees in *Gill v. Whitford* do not even dare to make the assertion that *no* partisan intent is permissible. *Gill v. Whitford*, Brief For Appellees, No. 16-1161 (oral argument held on Oct. 3, 2017) ("[The court] must find that the map was designed with *discriminatory intent*: to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation.") (emphasis in original).

[11] Legislative Defendants point to the Plaintiffs recent admission that "political effect" is permissible since, "even *court-drawn* maps using neutral criteria have a 'political effect'" *See* Doc. No. 133 at 6. While Legislative Defendants certainly concur with plaintiffs in this regard they fail to address, and have always failed to address, the simple fact that some partisan intent has *always* been permissible when drawing legislative districts.

Instead, the question before the *Gill* Court as presented by the Appellees is *how much* partisan intent is *too much*.[12] *See id*.; *see also Vieth*, 541 U.S. at 286.

a. The History of the Elections Clause Forecloses Plaintiffs Claims.

The concept of gerrymandering was "alive and well . . . at the time of the framing." *Vieth*, 541 U.S. at 274. Therefore, "[i]t is significant that the Framers provided a remedy for such practices in the Constitution." *Id*. at 275. The Elections Clause was written based on principals of federalism. *See* U.S. Const. art. I, § 4; The Federalist Nos. 59, 60, 61 (Alexander Hamilton). As such, the founders of this country knew that political considerations would lay at the heart of the "Time, Places, and Manner of holding elections." *See* U.S. Const. art. I, § 4. As Alexander Hamilton wrote in Federalist 59:

> So far as that construction [of the Elections Clause] may expose the Union to the possibility of injury from the State legislatures, it is an evil; but it is an evil which could not have been avoided without excluding the States, in their political capacities, wholly from a place in the organization of the national government. If this had been done, it would doubtless have been interpreted into an entire dereliction of the federal principle; and would certainly have deprived the State governments of that absolute safeguard which they will enjoy under this provision.

The Federalist No. 59 (Alexander Hamilton). To that end, "it is well known that state legislative majorities very often attempt to gain an electoral advantage through that process." *Cooper*, 137 S. Ct. at 1488 (citing *Davis v. Bandemer*, 478 U.S. 109, 129 (1986)).

In order to curtail excessive gerrymandering the Framers gave Congress the power to "make or alter" the state legislatures regulations under Art. I, § 4. *Vieth*, 541 U.S. at 275-76. This is a power that Congress has repeatedly used. *See e.g*. Apportionment Act of 1842, 5 Stat. 491;

[12] This assumes that partisan intent in redistricting cases is justiciable in the first place, a question that is currently directly before the Supreme Court. *See Gill v. Whitford*, 2017 U.S. LEXIS 4040 (No. 16-1161) (2017) (order granting stay); *Gill v. Whitford*, Brief for Appellants, No. 16-1161 (2017); *see also Vieth*, 541 U.S. 267.

Apportionment Act of 1862, 12 Stat. 572; Apportionment Act of 1901, 31 Stat. 733; Apportionment Act of 1911, 37 Stat. 13.

Claims of partisan gerrymandering were non-justiciable until the Courts holding in *Davis v. Bandemer*. *See Bandemer*, 478 U.S. 109. However, even under *Bandemer* and its progeny there has *never* been an agreed upon justiciable standard by which to determine political gerrymandering claims. *See Bandemer*, 478 U.S. 109 (plurality op. as to Section III identifying a standard); *Vieth*, 541 U.S. 267. Furthermore, *none* of the standards ever put forward by the court prohibit *any and all* partisan intent. *See Bandemer*, 478 U.S. 109; *Vieth*, 541 U.S. 267. Any ruling accepting Plaintiffs' reasoning would contravene every precedent set from this country's founding and therefore should be rejected.

b. The Supreme Court Has Continuously Acknowledged Political Considerations Are Acceptable When Redistricting Because Redistricting Is an Inherently Political Process.

i. Some Level of Legislative Political Intent is Acceptable When Redistricting.

The Supreme Court has long recognized a state legislature's right to use at least some political considerations while redistricting. *See Cromartie I*, 526 U.S. at 551. As the Court said, "[o]ur prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering." *Id*; *see also Cooper*, 137 S. Ct. at 1488 (Alito, J., Roberts, CJ., and Kennedy, J. concurring in judgment and dissenting in part). In fact, redistricting legislation is the "most political of legislative functions." *Bandemer*, 478 U.S. at 143. Despite this, Plaintiffs' maintain

that no level of partisan data and therefore partisan intent is acceptable when districting.[13] *See* Hanna Dep. Tr. 54:15-55:9; Doc. No. 133 at 6. This is contrary to the Supreme Court language expressly permitting the use of census and voting data when redistricting. *Vera*, 517 U.S. 952, 968 (1996) ("If a 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.") (plurality op. by O'Connor, J., joined by Rehnquist, CJ., and Kennedy, J.). The "obligation" of the legislature—if one exists at all—is "not to apply *too much* partisanship in districting." *Vieth*, 541 U.S. at 286. Furthermore, the Court in *Bandemer* expressly rejected a scheme in which "*any* interference with an opportunity to elect a representative of one's choice" would result in a constitutional violation. *Bandemer*, 478 U.S. at 133 (emphasis in original) (addressing proposed violations of the Equal Protection Clause of the 14th Amendment). To hold otherwise would be to "invite attack on all or almost all reapportionment statutes." *Id*.

The court has upheld the general principal that at least some partisan intent is permissible in a variety of contexts. In the one-person one-vote context, the Court in *Gaffney* held that a proportional state legislative redistricting scheme did not violate the Fourteenth Amendment because "[i]t would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it." *Gaffney*, 412 U.S. at 752 (citing *Burns v. Richardson*, 384 U.S. 73 (1966); *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *Abate v. Mundt*, 403 U.S. 182 (1971)). Simply put, "[t]he reality is that districting inevitably has and *is*

[13] Legislative Defendants assert that *none* of Plaintiffs' proffered experts meet the requisite standards under the Fed. R. Evid. or *Daubert*. The exclusion of Plaintiffs experts is currently a matter before this Court. *See* (ECF Nos. 92-96, 98, 99, 134).

intended to have substantial political consequences." *Gaffney*, 412 U.S. at 753 (emphasis added). The Court has never strayed from this position.

In the racial gerrymandering context[14], partisan considerations are not only acceptable, they are a *defense*. *See Cooper*, 137 S. Ct. at 1475 (stating that partisanship is a defense in racial gerrymandering claims). The burden is on the plaintiffs, when making a racial gerrymandering claim, to "demonstrat[e] that the legislature 'subordinated' other factors—compactness, respect for political subdivisions, *partisan advantage* . . . to 'racial considerations.'" *Id*. at 1463-64 (emphasis added) (citing and quoting *Miller*, 515 U.S. at 916). It is logically impossible for partisan intent to be a *defense* in racial gerrymandering claims, *see Cooper*, 137 S. Ct. at 1475, while itself being unconstitutional in the first instance. This is because, "while some might find it distasteful, 'our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering . . . .'" *Cooper*, 137 S. Ct. at 1488 (citing and quoting *Cromartie I*, 526 U.S. at 551).

ii. The Supreme Court Has Consistently Accepted Redistricting as an Inherently Political Process.

The reason why the Supreme Court has allowed partisan considerations in the districting process to continue relatively unscathed for the past 200 years is because they understand that redistricting is an inherently political process. The Supreme Court has long noted that political considerations are inseparable from legislative district drawing. *See e.g. Gaffney*, 412 U.S. 735;

[14] In fact, the Supreme Court has stated that under some circumstances political considerations are required. For example, in the Voting Rights Act context a legislature is required to use political information to avoid a vote-dilution claim. *See Thornburg v. Gingles*, 478 U.S. 30, 51 (1986) ("[T]he minority group must be able to show that it is politically cohesive."); *see also Bethune-Hill v. Va. State Bd. Of Elections*, 137 S. Ct. 788, 801 (2017) (stating that a legislature must have "good reasons to believe" the use of race is necessary when drawing districts so as to not "diminish the ability of . . . a minority group to elect their preferred candidate of choice.").

Bandemer, 478 U. S. 109; *Shaw I*, 509 U.S. 630; *Bush v. Vera*, 517 U.S. 952 (1996); *Miller*, 515 U.S. 900; *Shaw II*, 517 U.S. 899; *Cromartie I*, 526 U.S. 541; *Cromartie II*, 532 U.S. 234; *Vieth*, 541 U.S. 267; *Cooper*, 137 S. Ct. 1455. "Redistricting plans … reflect group interests and inevitably are conceived with partisan aims in mind. To allow judicial interference whenever this occurs would be to invite constant and unmanageable intrusion." *Shaw I*, 509 U.S. at 661; *see Gaffney*, 412 U.S. at 753 ("Politics and political considerations are inseparable from districting and apportionment."). If something is "inseparable" and "inevitable" due to a grant of constitutional authority—in this case the Elections Clause—it cannot, in the same breath, be unconstitutional. *See Shaw I*, 509 U.S. at 661; *Gaffney*, 412 U.S. at 753.

The Supreme Court's tolerance for political gerrymandering can likely be explained by the fact that an act of extreme partisan gerrymandering is self limiting. *See Bandemere*, 478 U.S. at 152 (O'Connor, J., concurring). In her concurring opinion, Justice O'Connor, herself a former state legislator who has been personally involved in redistricting in Arizona, noted that if a political party drew districts with margins for their party that would be too thin, that would necessarily limit the reach and durability of any partisan gerrymandering.

The three-judge panel in *Pope v. Blue* probably best summarized this view:

> The Supreme Court has recognized and has consistently accepted the view that redistricting is an inherently political process. While members of the minority political party in any redistricted state may be apt to bemoan their fate, they can take solace in the fact that even the best laid plans often go astray: 'In order to gerrymander, the legislative majority must weaken some of its safe seats, thus exposing its own incumbents to greater risks of defeat . . . . An overambitious gerrymander can lead to disaster for the legislative majority.' (citation omitted).

Pope, 809 F.Supp. 392, aff'd 506 U.S. 801 (1992) (citing and quoting *Bandemer*, 478 U.S. at 152 (O'Connor, J., concurring)). This Court should reject Plaintiffs' claim because

partisan considerations are inherent in the process of districting and therefore cannot be unconstitutional.

VI. CONCLUSION

This case is ripe for summary judgment. The Plaintiff's "Brief Regarding the Elements of Their Claims" and the Statement of Undisputed Facts attached to this Motion make clear there are no genuine issues remaining for trial. The undisputed evidence indicates that the Plaintiffs in this case lack standing. Even if they possessed standing, this Court must assess the justiciability. Even if this claim is justiciable, and there is a prima facie case as claimed by the Plaintiffs in their "Brief Regarding the Elements of Their Claims," this Court should find that the rational basis test applies thereafter. Because the Legislative Defendants have outlined at least four legitimate and long recognized rational bases for the 2011 Map. As a result, the only potentially applicable test has been met.

For the foregoing reasons, this Court should grant summary judgment for the Defendants.

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Respectfully submitted,

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