

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

Barbara Diamond, Steven Diamond, Samuel Bashioum, Tracy Baton, Nancy Chiswick, William Cole, Patrick Costello, Stephen Dupree, Ronald Fairman, Joseph Foster, Colleen Guiney, Robert Kefauver, Elizabeth King, Gillian Kratzer, James Landis, Matthew Munsey, Deborah Noel, Zachary Rubin, Thomas Spangler, Margaret Swoboda, Susan Wood, and Pamela Zidik,

Plaintiffs

v.

Robert Torres, Acting Secretary of the Commonwealth of Pennsylvania, and Jonathan Marks, Commissioner of the Bureau of Elections, in their official capacities,

Defendants.

Civil Action No. 5:17-cv-5054

Hon. Michael M. Baylson, U.S.D.J.

THREE JUDGE COURT REQUESTED  
PURSUANT TO 28 U.S.C. § 2284(a)

**FIRST AMENDED COMPLAINT**

1. Plaintiffs bring this action to challenge, on an expedited basis, the constitutionality of Pennsylvania's 2011 Congressional district plan as a partisan gerrymander in violation of the First and Fourteenth Amendments and the Elections Clause of the United States Constitution.

2. During the 2010-2011 Congressional redistricting cycle, Pennsylvania's majority-Republican General Assembly and Republican Governor adopted a Congressional district plan ("the 2011 Plan"), which purposefully maximized the power and influence of the Republican Party and Republican-affiliated voters and minimized the power and influence of the Democratic Party and Democratic-affiliated voters, without regard to the degree of popular support enjoyed by candidates of each party. As a result, some Democratic-affiliated

voters were illegally packed into certain districts to dilute their voting power, while other Democratic-affiliated voters were cracked and spread among the remaining districts to deny them a realistic opportunity to elect candidates of their choice, resulting in one of the most extreme partisan gerrymanders in the nation by virtually any measure.

3. Indeed, under the 2011 Plan, Republican Congressional candidates have been elected to Congress in 2012, 2014, and 2016 at rates wildly asymmetric to the share of the actual votes that they earned statewide. For example, in 2012, 2014, and 2016, Republican Congressional candidates won 72% (13 of 18) of Pennsylvania's Congressional seats, despite earning less than or a bare majority of Congressional votes statewide (approximately 49%, 55%, and 54%, respectively).

4. And the objective characteristics of several of the Congressional districts—bizarrely shaped and highly non-compact—demonstrate that traditional redistricting principles were plainly subjugated to the 2011 Plan's partisan purpose.

5. Drawn with the aim of maximizing Republican power, the 2011 Plan burdens voters' freedom of speech and association based upon their political beliefs as expressed through their membership in and support for candidates of the Democratic Party. Moreover, it constitutes an exercise of power by the General Assembly that goes well-beyond its constitutionally permitted regulation of the time, place and manner of elections. As such, the 2011 Plan cannot pass constitutional muster.

6. Accordingly, Plaintiffs seek, on an expedited basis, a declaration that the 2011 Plan is invalid and an injunction prohibiting Defendants from calling, holding, administering, or taking any action with respect to the 2018 Congressional elections and future primary and general elections under the 2011 Plan.

## **PARTIES**

7. Plaintiff Barbara Diamond is a United States citizen and a registered voter in the Commonwealth of Pennsylvania. She is a registered Democrat, has supported Democratic candidates for Pennsylvania's Congressional delegation in the past, and plans to support Democratic candidates in the future. She currently resides in Congressional District 15.

8. Plaintiff Steven Diamond is a United States citizen and a registered voter in the Commonwealth of Pennsylvania. He is a registered Democrat, has supported Democratic candidates for Pennsylvania's Congressional delegation in the past, and plans to support Democratic candidates in the future. He currently resides in Congressional District 15.

9. Plaintiff Nancy Chiswick is a United States citizen and a registered voter in the Commonwealth of Pennsylvania. She is a registered Democrat, has supported Democratic candidates for Pennsylvania's Congressional delegation in the past, and plans to support Democratic candidates in the future. She currently resides in Congressional District 5.

10. Plaintiff William Cole is a United States citizen and a registered voter in the Commonwealth of Pennsylvania. He is a registered Democrat, has supported Democratic candidates for Pennsylvania's Congressional delegation in the past, and plans to support Democratic candidates in the future. He currently resides in Congressional District 3.

11. Plaintiff Ronald Fairman is a United States citizen and a registered voter in the Commonwealth of Pennsylvania. He is a registered Democrat, has supported Democratic candidates for Pennsylvania's Congressional delegation in the past, and plans to support Democratic candidates in the future. He currently resides in Congressional District 9.

12. Plaintiff Colleen Guiney is a United States citizen and a registered voter in the Commonwealth of Pennsylvania. She is a registered Democrat, has supported Democratic

candidates for Pennsylvania's Congressional delegation in the past, and plans to support Democratic candidates in the future. She currently resides in Congressional District 1.

13. Plaintiff Gillian Kratzer is a United States citizen and a registered voter in the Commonwealth of Pennsylvania. She is a registered Democrat, has supported Democratic candidates for Pennsylvania's Congressional delegation in the past, and plans to support Democratic candidates in the future. She currently resides in Congressional District 9.

14. Plaintiff Deborah Noel is a United States citizen and a registered voter in the Commonwealth of Pennsylvania. She is a registered Democrat, has supported Democratic candidates for Pennsylvania's Congressional delegation in the past, and plans to support Democratic candidates in the future. She currently resides in Congressional District 7.

15. Plaintiff Margaret Swoboda is a United States citizen and a registered voter in the Commonwealth of Pennsylvania. She is a registered Democrat, has supported Democratic candidates for Pennsylvania's Congressional delegation in the past, and plans to support Democratic candidates in the future. She currently resides in Congressional District 5.

16. Plaintiff Susan Wood is a United States citizen and a registered voter in the Commonwealth of Pennsylvania. She is a registered Democrat, has supported Democratic candidates for Pennsylvania's Congressional delegation in the past, and plans to support Democratic candidates in the future. She currently resides in Congressional District 6.

17. Plaintiff Pamela Zidik is a United States citizen and a registered voter in the Commonwealth of Pennsylvania. She is a registered Democrat, has supported Democratic candidates for Pennsylvania's Congressional delegation in the past, and plans to support Democratic candidates in the future. She currently resides in Congressional District 11.

18. Plaintiff Samuel Bashioum is a United States citizen and a registered voter in the Commonwealth of Pennsylvania. He is a registered Democrat, has supported Democratic candidates for Pennsylvania's Congressional delegation in the past, and plans to support Democratic candidates in the future. He currently resides in Congressional District 18.

19. Plaintiff Tracey Baton is a United States citizen and a registered voter in the Commonwealth of Pennsylvania. She is a registered Democrat, has supported Democratic candidates for Pennsylvania's Congressional delegation in the past, and plans to support Democratic candidates in the future. She currently resides in Congressional District 14.

20. Plaintiff Patrick Costello is a United States citizen and a registered voter in the Commonwealth of Pennsylvania. He is a registered Democrat, has supported Democratic candidates for Pennsylvania's Congressional delegation in the past, and plans to support Democratic candidates in the future. He currently resides in Congressional District 13.

21. Plaintiff Stephen Dupree is a United States citizen and a registered voter in the Commonwealth of Pennsylvania. He is a registered Democrat, has supported Democratic candidates for Pennsylvania's Congressional delegation in the past, and plans to support Democratic candidates in the future. He currently resides in Congressional District 12.

22. Plaintiff Joseph Foster is a United States citizen and a registered voter in the Commonwealth of Pennsylvania. He is a registered Democrat, has supported Democratic candidates for Pennsylvania's Congressional delegation in the past, and plans to support Democratic candidates in the future. He currently resides in Congressional District 2.

23. Plaintiff Robert Kefauver is a United States citizen and a registered voter in the Commonwealth of Pennsylvania. He is a registered Democrat, has supported Democratic

candidates for Pennsylvania's Congressional delegation in the past, and plans to support Democratic candidates in the future. He currently resides in Congressional District 4.

24. Plaintiff Elizabeth King is a United States citizen and a registered voter in the Commonwealth of Pennsylvania. She is a registered Democrat, has supported Democratic candidates for Pennsylvania's Congressional delegation in the past, and plans to support Democratic candidates in the future. She currently resides in Congressional District 8.

25. Plaintiff James Landis is a United States citizen and a registered voter in the Commonwealth of Pennsylvania. He is a registered Democrat, has supported Democratic candidates for Pennsylvania's Congressional delegation in the past, and plans to support Democratic candidates in the future. He currently resides in Congressional District 16.

26. Plaintiff Matthew Munsey is a United States citizen and a registered voter in the Commonwealth of Pennsylvania. He is a registered Democrat, has supported Democratic candidates for Pennsylvania's Congressional delegation in the past, and plans to support Democratic candidates in the future. He currently resides in Congressional District 17.

27. Plaintiff Zachary Rubin is a United States citizen and a registered voter in the Commonwealth of Pennsylvania. He is a registered Democrat, has supported Democratic candidates for Pennsylvania's Congressional delegation in the past, and plans to support Democratic candidates in the future. He currently resides in Congressional District 8.

28. Plaintiff Thomas Spangler is a United States citizen and a registered voter in the Commonwealth of Pennsylvania. He is a registered Democrat, has supported Democratic candidates for Pennsylvania's Congressional delegation in the past, and plans to support Democratic candidates in the future. He currently resides in Congressional District 10.

29. Defendant Robert Torres is the Acting Secretary of the Commonwealth of Pennsylvania and is sued in his official capacity. Acting Secretary Torres is responsible for the general supervision and administration of Pennsylvania’s elections and election laws, including those elections administered for the districts created by the 2011 Plan.

30. Defendant Jonathan Marks is the Commissioner of the Bureau of Elections in Pennsylvania and is sued in his official capacity. Commissioner Marks is responsible for the general supervision and administration of Pennsylvania’s elections and election laws, including those elections administered for the districts created by the 2011 Plan.

### **JURISDICTION AND VENUE**

31. This Court has jurisdiction to hear Plaintiffs’ claims pursuant to 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. §§ 1331, 1343(a)(3), and 1357. This Court has jurisdiction to grant declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202.

32. A three-judge district court is requested pursuant to 28 U.S.C. § 2284(a), as Plaintiffs’ action “challeng[es] the constitutionality of the apportionment of congressional districts” in Pennsylvania. *Id.*

33. Venue is proper under 28 U.S.C. §1391(b).

### **FACTUAL ALLEGATIONS**

#### **A. Legislative History and Background of the 2011 Plan**

34. As the 2010 Census approached, the Republican State Leadership Committee (“RSLC”) began formulating a strategy to keep or win Republican control of state legislatures—including Pennsylvania’s—that would have the largest impact on congressional redistricting as a result of reapportionment.

35. In the words of the RSLC, the rationale behind this REDistricting Majority Project (“REDMAP”) was “straightforward:”

Controlling the redistricting process in these states would have the greatest impact on determining how both state legislative and congressional district boundaries would be drawn. Drawing new district lines in states with the most redistricting activity presented the opportunity to solidify conservative policymaking at the state level and **maintain a Republican stronghold in the U.S. House of Representatives for the next decade.**

Pennsylvania, which had long been known as a closely divided swing state, became a REDMAP target state in 2010. The RSLC spent nearly \$1 million in the 2010 Pennsylvania House races, and was rewarded with GOP majorities in both chambers of the state legislature. Combined with former Republican Attorney General Tom Corbett’s gubernatorial victory, Republicans took control of the state legislative and congressional redistricting process.

36. Congressional redistricting in Pennsylvania takes place through the regular legislative process: a bill defining the district boundaries is passed by both the Pennsylvania House and Senate and is signed by the governor.

37. On information and belief, beginning at least in early March of 2011, Republican state legislators and Republican operatives in Washington D.C., including operatives associated with the RSLC, worked together in secret to create a redistricting plan that would preserve Republican-held seats won in the unusually pro-Republican wave election of 2010. These efforts specifically aimed to protect such Republican-held seats not only in more typical, closely divided Pennsylvania elections, but also against a wave election in favor of Democrats. On information and belief, Republican map drawers accomplished this objective using sophisticated computerized mapping software and data that allowed them to predict the



likely electoral outcomes of a hypothetical district, and to predict the likely electoral outcomes of small changes to the configuration of a hypothetical district.

38. On September 14, 2011, after seven months of developing a plan, Republican senators introduced Senate Bill 1249, the “Congressional Redistricting Act of 2011.” The only description of any proposed district included in the bill was simply: “The [ . . . ] District is composed of a portion of this Commonwealth.” As a result, the legislation offered no meaningful opportunity for public review or comment.

39. On or around December 13, 2011, a full three months after introducing the bill, the Republican authors of the 2011 Plan publically released maps of the plan to the public for the first time. The Republican senators amended Senate Bill 1249 to include the actual descriptions of each of the districts on December 14, and the Senate passed the bill that same day.

40. A mere five days later, on December 20, the House passed Senate Bill 1249. It was signed into law by Governor Corbett on December 22, 2011.

41. During the debate on the Senate floor on December 14, Democratic Senator Jay Costa introduced an amendment to Senate Bill 1249 that he believed would create three times as many closely divided swing districts as the 2011 Plan, while still containing twice as many safe Republican districts as safe Democratic districts. Senator Costa’s amendment was voted down on a party line vote.

42. Democratic Senator Anthony Williams stated that “the process was not fair, it was not inclusive, and it was not thoroughly open and honest in its attempt to include all Pennsylvanians, certainly not those of us from this side of the aisle.”

43. In the House, Democratic Delegate Babette Josephs criticized the procedure by which the 2011 Plan was adopted:

There were hearings, and my Republican counterpart, the individual from Butler County, has talked about them, how open they were, how unprecedented they were. Well, I will tell you they were unprecedented. I have never seen a hearing in this legislature on a blank bill – never. There were no maps. There were no verbal descriptions at any of the hearings that were the only exercises open to the public, not one map, not one description. You could not tell, looking at the bill or looking for a map, what the heck the Republicans had in mind, and believe me, the citizens had no idea. They came in – I was not able to be at all of the hearings – they came in and they asked sincerely. The people before us seemed to actually believe that the majority party was going to respond to them. It was astounding. They said, “Please do not tear apart my municipality.” They said, “Please do not change this river valley,” whether it was the Lehigh or another one. They said, “Please give us districts that are compact. Please give us districts that do not stack or fracture cultural, racial, or national minorities. Please do not do that. Please do not give us districts that tear apart communities of interest. Please do not give us districts that are going to exacerbate the partisan divide in Washington.” They said all these things. I thank them for saying it, but nobody who has the power to draw this map, vote for this map, cared one whit what they said – not one whit. And had these citizens had the map this summer, there would have been an outcry that would have deafened us all, and that is why these citizens were not given the maps or the verbal descriptions.

44. While the Republican sponsors of the 2011 Plan were unsurprisingly circumspect in their public statements during the plan’s adoption, statements made by observers at the time, only further demonstrate that the 2011 Plan was intended to entrench the Republican Congressional delegation regardless of the degree of popular support enjoyed by candidates of each party. For example, in a December 14, 2011 article titled “In Pennsylvania, the Gerrymander of the Decade?,” Sean Trende, an analyst with Real Clear Politics and a testifying expert on behalf of the defendants in the *Whitford v. Gill* partisan gerrymandering case, concluded that the 2011 Plan was “probably the most effective gerrymander we’ve seen so far.” He continued:

Republicans in Pennsylvania [ . . . ] took a state that is two or three points more Democratic than the country as a whole, and created 12 districts (out of 18) that

are more Republican than the country as a whole. They did so by creating what can only be called a group of Rorschach-inkblot districts in southeastern Pennsylvania.

The net result is a map that shores up their vulnerable incumbents, and that may well result in a 14-4 Republican edge by the end of the decade.

45. Similarly, during the December 20, floor debate on the 2011 Plan, Democratic Representative Dan Frankel observed:

Anybody looking at the way this has been gerrymandered can see that today, if we pass this, there is only going to be 1 truly swing congressional seat out of 18, and that is not good for our State. That is not good for our politics. That is not good for the style of government that we are now becoming accustomed to in Washington and Harrisburg: a polarized environment which will just reinforce the most extreme positions of the political spectrum. This is not the way we ought to be governing; to overreach, to go through contortions to create districts that are safe for a majority of Republican members of Congress is not good public policy.

46. Finally, after the 2012 General Election and the success of Congressional Republicans in Pennsylvania, the RSLC openly admitted that the purpose of the 2011 Plan was to entrench and maximize Republican influence over Pennsylvania's Congressional delegation, explaining that redistricting was "an opportunity to [ . . . ] maintain a Republican stronghold in the U.S. House of Representatives for the next decade." As the RSLC observed:

President Obama won reelection in 2012 by nearly 3 points nationally, and banked 126 more electoral votes than Governor Mitt Romney. Democratic candidates for the U.S. House won 1.1 million more votes than their Republican opponents. But the Speaker of the U.S. House of Representatives is a Republican and presides over a 33-seat House Republican majority during the 113th Congress. How? One needs to look no farther than four states that voted Democratic on a statewide level in 2012, yet elected a strong Republican delegation to represent them in Congress: Michigan, Ohio, Pennsylvania and Wisconsin.

47. Though the RSLC acknowledged that "strong recruitment and [a] successful strategy [ . . . of] going on offense over Democratic cuts to Medicare and by linking their

Democratic opponents to President Obama’s most unpopular policy proposals,” were a component of Republicans’ success in maintaining the House majority in 2012, the RSLC admitted that “all components of a successful congressional race, including recruitment, message development and resource allocation, rest on the congressional district lines, and this was an area where Republicans had an unquestioned advantage.”

48. The RSLC celebrated its achievement in sending Republicans to Congress in 13 of 18 Pennsylvania districts despite Democratic Congressional candidates receiving tens of thousands more votes statewide. According to the RLSC:

The impact of [the RSLC] investment at the state level in 2010 is evident when examining the results of the 2012 election: Pennsylvanians reelected a Democratic U.S. Senator by nearly nine points and reelected President Obama by more than five points, but at the same time they added to the Republican ranks in the State House and returned a 13-5 Republican majority to the U.S. House.

[ . . . ]

REDMAP’s effect on the 2012 election is plain when analyzing the results: Pennsylvanians cast 83,000 more votes for Democratic U.S. House candidates than their Republican opponents, but elected a 13-5 Republican majority to represent them in Washington[.]

49. In other words, Pennsylvania’s Congressional district lines were key to maintaining a Republican stronghold in Congress regardless of the degree of popular support for Republican candidates.

#### **B. The 2011 Plan**

50. A partisan gerrymander can be accomplished in two ways. Mapmakers can “pack” supporters of the disfavored party into a small number of districts that candidates of the disfavored party win by overwhelming margins. They can also “crack” supporters of the disfavored party, spreading them among the remaining districts such that candidates from the

avored party win by narrower but still comfortable margins. The overwhelming differential between the share of Republican Congressional wins and the share of votes cast for Republican candidates statewide is powerful evidence that Pennsylvania's 2011 Plan packed and cracked voters who supported the Democratic Party in precisely this manner to maximize Republican power.

51. In 2012, despite the fact that more Pennsylvania voters supported Democratic candidates for Congress than Republican candidates statewide—approximately 50.8% of the two party vote cast statewide as opposed to 49.2% for Republicans—Democratic candidates prevailed in only 28% of Pennsylvania's Congressional districts (five of eighteen). Republicans, by contrast, prevailed in 72% of Pennsylvania's Congressional districts (thirteen of eighteen).

52. In those five districts, the Democrats won with approximately 77% of the two-party vote on average. In contrast, in the thirteen districts where Republicans prevailed, the Republican candidate attained only approximately 59% of the two-party vote.

53. The reason for such stark contrasts in the vote totals is plain. Democratic voters were packed into five districts where their candidates prevailed in overwhelming victories, ranging from 60% to 90% of the two-party vote. And they were cracked among the remaining districts such that Republican candidates prevailed by margins that were comfortable but not overwhelming—generally between 56% and 65% of the two-party vote.

54. The 2014 and 2016 election results are virtually identical. In 2014, Republican congressional candidates won approximately 55% of the statewide two-party vote and, again, 72% of Congressional districts. The average two-party vote in the four districts won by Democratic candidates in contested elections was approximately 73%, while the eleven

Republican winners in contested elections averaged approximately 63% of the two-party vote.

55. In 2016, Republican Congressional candidates won approximately 54% of the statewide two-party vote and, again, 72% of Congressional districts. The average two-party vote in the four districts won by Democratic candidates in contested elections was approximately 75%, while the eleven Republican winners in contested elections averaged 61% of the vote. These outcomes are not only the obvious effect of the packing and cracking used to maximize and entrench Republican power under the 2011 Plan, but they were the 2011 Plan's purpose.

56. Virtually all available standards for detecting partisan gerrymandering—including but not limited to Efficiency Gap Analysis, Seats to Votes Curve Analysis, Mean-Median District Vote Share Analysis, and Computer Simulations—further demonstrate that Pennsylvania's 2011 Plan had the purpose and effect of packing and cracking voters who supported the Democratic Party in precisely this manner to maximize Republican power. These tests are further supported by the 2011 Plan's blatant defiance of traditional redistricting principles in many districts, which, together, demonstrate that the 2011 Plan is one of the most extreme partisan gerrymanders in the country. As Eric McGhee, a leading expert on partisan gerrymandering whose methodology was relied upon by the district court in *Whitford v. Gill*, has observed, “[n]o matter what concept you care about in partisan gerrymandering, Pennsylvania is going to be an outlier.”

57. Many districts in the 2011 Plan fail to respect traditional redistricting criteria, forming highly irregular, non-compact districts that reveal the partisan nature of the map. For example, District 7—described by observers as one of America's most gerrymandered

districts—snakes its way across Berks, Chester, Delaware, Lancaster, and Montgomery counties in a shape reminiscent of “Goofy kicking Donald Duck.” As Figure 1 demonstrates below, the 2011 Plan (outlined and shaded in blue) shed voters from Philadelphia’s inner ring suburbs around West Chester and King of Prussia (outlined and shaded in green), which were included in the previous district, to create District 7. These areas were replaced with jagged appendages containing carefully selected precincts in and around Whitpain Township. Likewise, the 2011 Plan added a large and irregular swath of rural southeastern Pennsylvania running from Cochransville north to the Reading suburbs to District 7. And at several points, the district narrows to a mere 800 feet across.

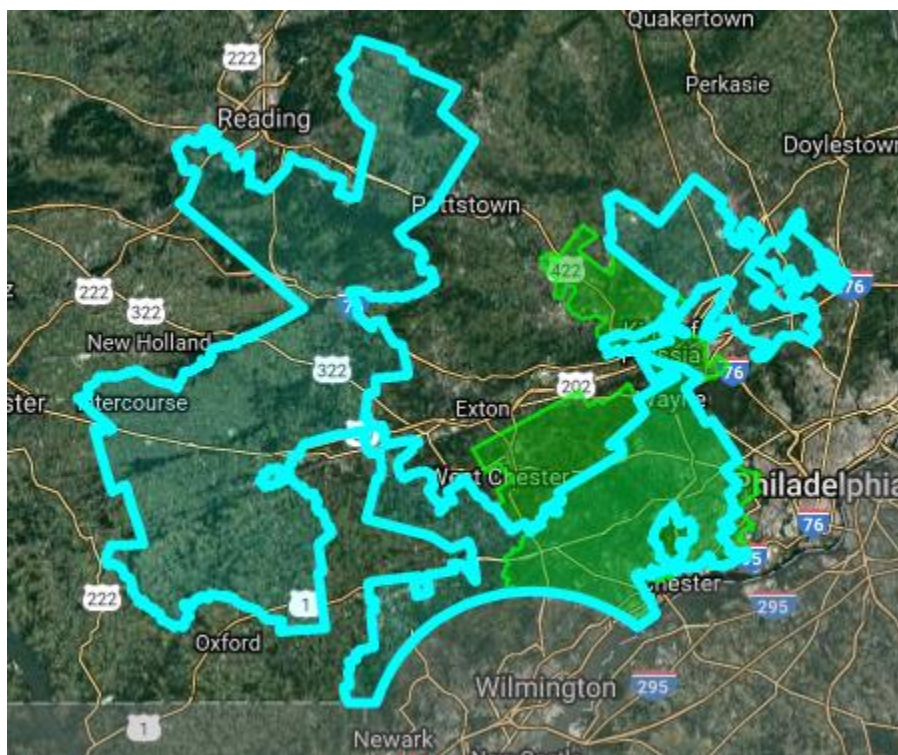


Figure 1: District 7 under the 2011 Plan (blue) and under the 2002 Plan (green)

58. The result has been a complete transformation of the district. Under the prior redistricting plan, District 7 swung from Republican to Democrat and then back to Republican. Under the 2011 Plan, it is now safely Republican, with the incumbent

Republican Congressman being elected with 59%, 62%, and 59% of the vote in 2012, 2014, and 2016, respectively.

59. Other “Rorschach inkblot” districts include Districts 6 and 16. The 2011 Plan carefully carves out the Democratic-leaning city of Reading from District 6 to bolster Republican voting strength, and then, as demonstrated in Figure 2 below, attaches Reading via a narrow, jagged appendage to District 16 in Lancaster County.

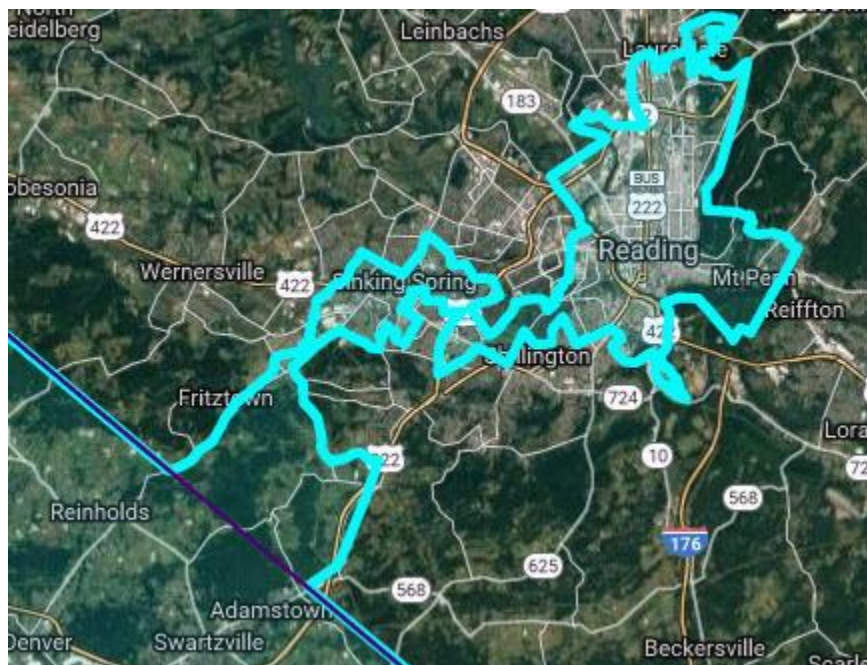


Figure 2: District 16 (in blue) and county boundary (in purple)

60. The 2011 Plan also fails to respect the boundaries of political subdivisions and communities of interest. For example, Montgomery County, which is populous enough to host its own Congressional district, is split among five different Congressional districts. Berks County is split between four districts; Chester County is split between three districts.



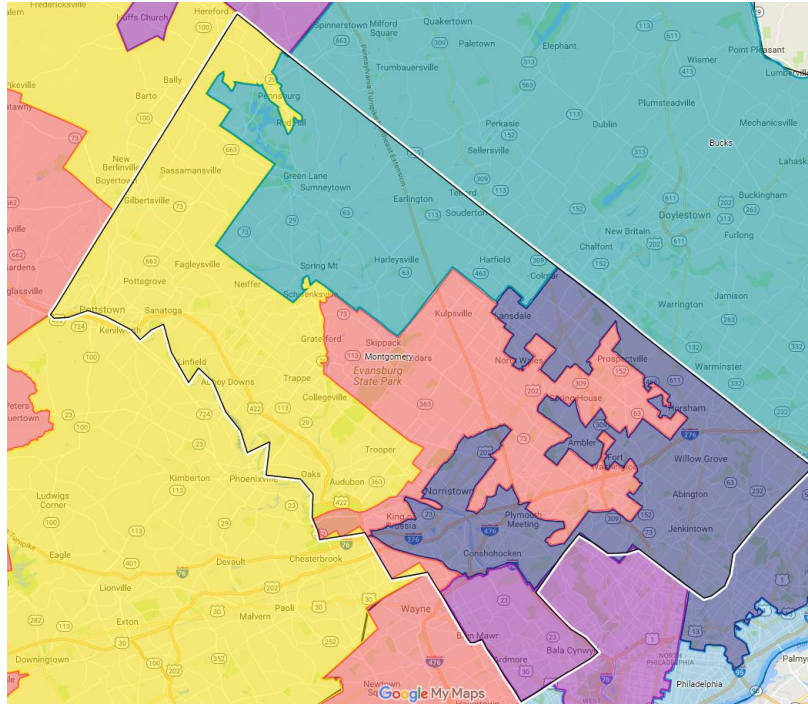


Figure 3: Montgomery County

61. More generally, in tests measuring the compactness of the districts in the 2011 Plan, the Plan scores poorly. One study comparing different states' congressional district compactness using a variety of compactness measures found that Pennsylvania was in the top ten states with the lowest average compactness.<sup>1</sup> Pennsylvania's placement in the top ten is particularly telling because most of the other states in the top ten, such as Maryland and Louisiana, have notable geography issues (*e.g.*, complex and irregular shorelines) that may partially explain their low compactness. By contrast, Pennsylvania's non-compact boundaries cannot be explained by such factors to the same degree.

62. Academic measures further support these findings. For example, one study measuring the Efficiency Gap, a measure of wasted votes in a state's elections, *i.e.*, the votes cast for the losing candidate or votes cast beyond the number needed to win, found that

<sup>1</sup> See Azavea, Redrawing the Map on Redistricting 2012 Addendum 7 (2012), available at [https://cdn.azavea.com/com.redistrictingthenation/pdfs/Redistricting\\_The\\_Nation\\_Addendum.pdf](https://cdn.azavea.com/com.redistrictingthenation/pdfs/Redistricting_The_Nation_Addendum.pdf).

among states with six or more congressional districts, the 2011 Plan exhibited one of the two highest average Efficiency Gaps of any Congressional district plan in the country between 2012 and 2016.<sup>2</sup>

63. Another study applying the Seats to Votes Curve analysis, which looks at the share of seats won by candidates of a party in a particular year as compared to its statewide vote share as well as the historical average share of seats won as compared to the party's statewide vote share, found that among states with six or more congressional districts, the 2011 Plan exhibited one of the two highest average differences between the actual and expected seat share of any Congressional district plan in the country between 2012 and 2016.<sup>3</sup>

64. In another analysis looking at the mean-median district vote share difference, *i.e.*, the difference between the average vote share for a party across all districts in the state and the median district vote share for a party across all districts in a state, among states with six or more Congressional districts, Pennsylvania had a statistically significant pro-Republican difference between the average vote share and median district vote share in each election between 2012 and 2016. The same is true of only six other states in the country.<sup>4</sup>

65. Finally, computer simulations that generate millions of hypothetical districting scenarios that can be used as a benchmark to compare an adopted plan and determine the likelihood that an adopted plan would have been created in the absence of partisan

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<sup>2</sup> See, e.g., Laura Royden & Michael Li, Brennan Center for Justice, *Extreme Maps* 4-8 (2017)

<sup>3</sup> See, e.g., *id.* at 9-11.

<sup>4</sup> See, e.g., *id.* at 12-13.

manipulation, have shown that the partisan results of the 2011 Plan likely would not have occurred if the plan had been drawn without bias.<sup>5</sup>

66. Put plainly, there is simply no explanation or justification for the composition of the 2011 Plan, other than impermissible partisan intent to classify and burden Democratic-affiliated voters because of their participation in the electoral process and their expression of their political views. The 2011 Plan has deprived and will continue to deprive Pennsylvania voters of their voice in Congressional elections.

## CAUSES OF ACTION

### COUNT I

#### **Denial of Equal Protection under the 14th Amendment of the U.S. Constitution pursuant to 42 U.S.C. § 1983**

67. Plaintiffs reallege and incorporate by reference the allegations in paragraphs 1-66.

68. The Fourteenth Amendment of the United States Constitution provides in relevant part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” In *Carrington v. Rash*, 380 U.S. 89, 94 (1965), a case brought under the Equal Protection Clause, the Supreme Court held that “[f]encing out’ from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.”

69. The 2011 Plan fails to provide Pennsylvania voters with equal protection of the laws as it has the purpose and effect of discriminating against an identifiable political group, by maximizing the power and influence of the Republican Party and Republican-affiliated

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<sup>5</sup> See, e.g., Maria Chikina, Alan Frieze & Wesley Pegden, *Assessing significance in a Markov chain without mixing*, 114 Proc. of the Nat’l Acad. of Sci. 2860, 2862-63 (2017); Samuel Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 Stan. L. Rev. 1263, 1289-92 (2016).

voters and minimizing the power and influence of the Democratic Party and Democratic-affiliated voters, without regard to the degree of popular support enjoyed by each party's candidates.

70. The 2011 Plan purposely classifies an identifiable group of voters—those who registered to vote as Democrats, who lived in neighborhoods that supported Democratic candidates in the past, and who are anticipated to support Democratic candidates in the future—and singles out this group for disparate and unfavorable treatment. The 2011 Plan cracks and packs Democratic voters into districts where their votes will be asymmetrically wasted and their electoral influence will be severely diluted. The 2011 Plan is subject to strict scrutiny and cannot be justified by any compelling governmental interest. Nor is the 2011 Plan narrowly tailored to achieve any such governmental interest. Neither state political geography nor legitimate redistricting objectives can justify the extreme and durable partisan bias of the 2011 Plan.

**COUNT II**  
**Violation of the First Amendment Right to Freedom of Speech and Association pursuant to**  
**42 U.S.C. § 1983**

71. Plaintiffs reallege and incorporate by reference the allegations in paragraphs 1-70.

72. Under the First Amendment, Plaintiffs have the right to express their political views, associate with and advocate for the political party of their choice, and participate in the political process. The First Amendment protects citizens against “a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views.” *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring). Burdening, penalizing, or retaliating against citizens because of their participation in the political process, their voting history, their association with a political

party, or their expression of their political views is highly disfavored and subject to strict scrutiny.

73. The 2011 Plan purposely burdens, penalizes, and retaliates against an identifiable group of voters based upon their past participation in the political process, their voting history, their association with a political party, and their expression of their political views. The Republican map drawers used voters' party registration, voting history, voting history of their neighbors and communities, and other data to single out voters who have demonstrated support for the Democratic Party and Democratic candidates in the past and who are anticipated to vote for Democratic candidates in the future. The 2011 Plan burdens and penalizes these forms of association and expression by cracking and packing these voters into districts where their votes will be asymmetrically wasted and their electoral influence will be severely diluted. In so doing, the 2011 Plan has also burdened the ability of these voters to influence the legislative process.

74. The 2011 Plan, by contrast, rewards other voters who expressed the opposite political preferences in the past and are anticipated to continue to express such political preferences in the future. Such voters, who have not been cracked or packed, enjoy greater influence over electoral and legislative outcomes.

75. The 2011 Plan is subject to strict scrutiny, and cannot be justified by any compelling governmental interest. Nor is the 2011 Plan narrowly tailored to achieve any such governmental interest. Neither state political geography nor legitimate redistricting objectives can justify the extreme and durable partisan bias of the 2011 Plan.

**COUNT III**  
**Violation of Article I, Section IV of the U.S. Constitution pursuant to 42 U.S.C. § 1983**

76. Plaintiffs reallege and incorporate by reference the allegations in paragraphs 1-75.

77. The 2011 Plan and each of the eighteen Congressional districts created by it are invalid because they were adopted in excess of the authority granted to the Pennsylvania General Assembly by Article I, Section 4 of the U.S. Constitution to determine “the Times, Places and Manner of holding Elections” of members of the House of Representatives, which is the sole source of a state’s authority to draw Congressional district lines.

78. The Elections Clause only allows legislatures to adopt procedural rules for the conduct of Congressional elections, and does not include the power to dictate or control the electoral outcomes of those elections or favor or disfavor a class of candidates. *See Cook v. Gralike*, 531 U.S. 510, 527 (2001); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833-34 (1995).

79. The Pennsylvania General Assembly exceeded its constitutional authority in the 2011 Plan by gerrymandering Pennsylvania’s eighteen Congressional districts to control electoral outcomes in each district and favor the Republican Party and its candidates, ensuring that Republican candidates would prevail in thirteen of the eighteen Congressional districts despite earning less than or a bare majority of votes statewide. The 2011 Plan will continue to ensure that Republican candidates prevail in these thirteen Congressional districts regardless of the share of partisan support that congressional candidates realistically earn on a statewide basis in the future. As a result, the 2011 Plan contravenes the Elections Clause and is unconstitutional.

**PRAYER FOR RELIEF**

Plaintiffs respectfully request that the Court enter judgment in their favor and against Defendants, and, on an expedited basis:

A. Declare that the 2011 Plan is unconstitutional because it violates Article I, Section IV of the U.S. Constitution, the 14th Amendment to the U.S. Constitution, and the 1st Amendment to the U.S. Constitution;

B. Permanently enjoin Defendants, their agents, officers, and employees from administering, preparing for, or moving forward with any future primary or general elections of Pennsylvania's U.S. House members using the 2011 Plan;

C. Make any and all orders that are just, necessary, and proper to preserve Plaintiffs' constitutional rights to equally participate in elections of Congressional seats;

D. Award Plaintiffs for their costs, disbursements, and reasonable attorneys' fees incurred in bringing this action pursuant to 42 U.S.C. §§ 1988, 1973(e); and

E. Grant any and all other relief this Court deems just and proper.

Dated: November 21, 2017

By: s/ Bruce V. Spiva

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