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**

PLAINTIFFS' RESPONSE IN OPPOSITION TO LEGISLATOR DEFENDANTS' MOTION TO DISMISS

Intervenor-Defendants ("Legislative Defendants") move to dismiss this action on the same grounds—standing, justiciability, failure to state a claim, and laches—that another panel of this Court correctly rejected in *Agre v. Torres*. ECF No. 83, *Agre v. Wolf*, No. 2:17-cv-04392-MMB (E.D. Pa. Nov. 16, 2017) (hereinafter "*Agre* Statement of Reasons"). Under the standards proposed by the Complaint and below, the Court has the authority and obligation to hold that the State's plan to grossly disfavor Democratic voters in elections for the House of Representative violates the Equal Protection Clause, the First Amendment, and the Elections Clause.

ARGUMENT

A complaint survives a motion to dismiss when it "contain[s] sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

I. PLAINTIFFS HAVE STANDING

Article III standing requires an injury that: (1) is "concrete and particularized," and "actual or imminent"; (2) causally connected to defendant's action; and (3) will likely be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (citations and internal quotations marks omitted). Plaintiffs are 22 citizens of Pennsylvania who are registered as Democratic voters and vote for Democratic Congressional candidates. First Am. Compl. ("FAC") ¶¶ 7-28. Plaintiffs' individual interests in the effectiveness of their votes and freedom from invidious discrimination based on their political activities, *id.* ¶¶ 2, give them standing to challenge Pennsylvania's 2011 Congressional district plan ("the 2011 Plan").

A. Plaintiffs' Injury is Particularized

The diminishment of Plaintiffs' right to fair and equal representation by virtue of invidious discrimination on the basis of their political activity is a concrete and particularized injury. *See* ECF No. 212, 213 *Agre*.

"In the context of partisan gerrymandering, to satisfy the particularized harm requirement, a plaintiff must allege that he or she is a member of a politically salient class whose

geographical distribution is sufficiently ascertainable that it could have been taken into account when drawing district boundaries." *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 540 (M.D. Pa. 2002). The injury here is particular to Democratic voters whose party membership, voting history, and other political activities motivated the enactment of the 2011 Plan. As members of this politically salient, statewide group, Democratic voters in Pennsylvania were targeted for the harm inflicted by the redistricting plan. *See, e.g.*, FAC ¶¶ 53, 56, 66, 70, 73. Plaintiffs have shown they have the political salience, and Republican lawmakers had the relevant data, to inflict a concrete, particularized injury on Democratic voters in the Commonwealth.

The statewide nature of the harm does not diminish the particularized injury to Plaintiffs throughout the state. It is precisely because of their party affiliation that Plaintiffs and other Democratic voters were targeted: to reduce the influence of millions of Democratic voters and to diminish their Congressional representation across the state. *See Whitford v. Nichol*, 151 F. Supp. 3d 918, 924-25 (W.D. Wis. 2015) (finding plaintiffs' "reduced opportunity to be represented by Democratic legislators across the state" a "sufficiently concrete and particularized [injury] under current law to satisfy *Lujan* with respect to a statewide challenge to the districting plan, even without a plaintiff from every legislative district"); *Common Cause v. Rucho*, No. 1:16-CV-1026, 2018 WL 341658, at *11-16 (Jan. 9, 2018); *Agre*, *supra*.

Legislative Defendants argue Plaintiffs' injury is not particularized because it is a "generalized grievance" shared equally by other citizens of Pennsylvania. Legislative Defs' Br. at 2-3. But that's clearly not true because the 2011 Plan "purposefully maximized the power and influence of the Republican Party and Republican-affiliated voters …." FAC ¶ 2. Moreover, the Supreme Court's equal protection jurisprudence recognizes that vote dilution suffered by individual voters as a consequence of the state's legislative districts is a particularized injury sufficient for standing, rather than a generalized grievance, despite the fact that voters throughout the state are subject to the same map. *See, e.g., Baker v. Carr*, 369 U.S. 186, 206-08 (1962).

These principles apply equally to the Elections Clause, which is enforceable by private plaintiffs so long as they suffered an injury. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S.

779, 784-85 (1995) (voter challenge); *Cook v Gralike*, 531 U.S. 510, 516 & n.6 (2001) (candidate challenge). Legislative Defendants' reliance on *Lance v. Coffman*, 549 U.S. 437 (2007) (cited in Legislative Defs' Br. at 2), for the proposition that the Elections Clause claims are not actionable by voters is therefore misplaced. The *Lance* plaintiffs challenged only the state judiciary's purported usurpation of the state legislature's authority under the Elections Clause, and not any personal injury to their rights as voters. *Lance*, 549 U.S. at 438-39. In dismissing *Lance*, the Supreme Court simply applied the conventional proposition that standing requires something more than "'every citizen's interest in proper application of the Constitution and laws ….'" *Id.* at 439 (quoting *Lujan*, 504 U.S. at 573-574); *accord* ECF No. 212, *Agre*, (Shwartz, J., concurring) at 18.

B. Plaintiffs Have Standing To Bring a Statewide Challenge to the 2011 Plan

At least one Plaintiff resides in each of Pennsylvania's 18 Congressional districts. FAC ¶¶ 7-28. Consequently, there is no question they have standing to challenge each district enacted in the 2011 Plan. *See* ECF Nos. 212, 213, *Agre*; *Agre* Statement of Reasons at 4; *Common Cause*, 2018 WL 341658; *Ala. Legis. Black Caucus v. Alabama*, No. 2:12-CV-691, 2017 WL 4563868, at *5 (M.D. Ala. Oct. 12, 2017).

Indeed, a statewide challenge to a partisan gerrymander does not even require that a plaintiff reside in each challenged district. *See Whitford v. Gill*, 218 F. Supp. 3d 837, 929 (W.D. Wis. 2016) (finding the "rationale and holding" of the racial redistricting standing requirements discussed in *United States v. Hays* "have no application here," as "the harm in such cases is not that the racial group's voting strength has been diluted, but that race has been used 'as a basis for separating voters into districts.'"). Indeed, the Supreme Court has accepted plaintiffs' standing in three cases considering statewide challenges to partisan gerrymandering. *See Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (plurality opinion); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 419-20 (2006) ("*LULAC*"); *Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004) (plurality opinion) (discussing statewide claims).

II. PLAINTIFFS HAVE STATED COGNIZABLE CLAIMS THAT THE 2011 PLAN IS AN UNCONSTITUTIONAL PARTISAN GERRYMANDER

Plaintiffs' partisan gerrymandering challenges state a claim if (1) Plaintiffs advance judicially discernable and manageable standards to assess partisan gerrymandering claims, and (2) their complaint plausibly alleges that the 2011 Plan violates that standard. Plaintiffs' claims under the Equal Protection Clause, the First Amendment, and the Elections Clause each meet those requirements.

A. Partisan Gerrymandering Claims Are Justiciable

Constitutional challenges to political gerrymandering are justiciable. The controlling Supreme Court opinion on the question provides that "[i]f workable standards do emerge to measure ['the burden a gerrymander imposes on representational rights'] courts should be prepared to order relief." *Vieth*, 541 U.S. at 317 (Kennedy, J., concurring); *see also Shapiro v. McManus*, 136 S. Ct. 450, 452 (2015) (finding Justice Kennedy's proposed use of the First Amendment in partisan redistricting claims in *Vieth* "uncontradicted in subsequent majority opinions").[1] Numerous three-judge courts have followed this mandate[2] over the past three years, either by ordering relief because such a justiciable standard has been identified and proven,[3] or at least by permitting plaintiffs to attempt to propose a workable standard and prove a violation thereof.[4]

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[1] *Accord Ga. State Conference of NAACP v. Georgia*, No. 1:17–cv–1427, 2017 WL 3698494, at *10 (N.D. Ga. Aug. 25, 2017) ("the Supreme Court has consistently held that partisan gerrymandering claims are justiciable and not barred by the political question doctrine"). *See also Common Cause*, 2018 WL 341658, at *53 n.14 ("a majority of the Supreme Court has *never* found that a claim raised a nonjusticiable political question solely due to the alleged absence of a judicially manageable standard for adjudicating the claim").

[2] Of the 15 judges to decide these five cases (*Whitford*, *Benisek*, *Georgia State Conference of NAACP*, *Common Cause*, and *Agre*), only 2 judges would have flatly held that no case was justiciable under the constitutional theory asserted by the plaintiffs in those cases. *See* ECF No. 202, *Benisek v. Lamone*, No. JKB-13-3233 (D. Md. Aug. 24, 2017), slip op. at 6 (Bredar, J., announcing the order of the Court and a separate opinion with respect to Part II.B) (partisan gerrymandering claims not justiciable under First Amendment); ECF. No. 211, *Agre*, at 72-3 (Smith, J.) (announcing judgment of the Court).

[3] *Whitford*, 218 F. Supp. 3d 837, *Common Cause*, 2018 WL 341658.

[4] ECF No. 202, *Benisek*, slip op. at 19-20 (controlling opinion denies preliminary injunction for failure to establish causation); *Agre* (controlling opinion dismisses after trial for failure to propose a workable

Whether a claim is justiciable depends on whether the claim is judicially discernable as "relevant to some constitutional violation," *Vieth*, 541 U.S. at 287-88 (plurality opinion), and judicially manageable, allowing the court to produce law that is "principled, rational, and based upon reasoned distinctions," *id*. at 278. Plaintiffs have advanced judicially discernable and manageable standards to assess a partisan gerrymandering claim under three separate theories: the Equal Protection Clause, the First Amendment, and the Elections Clause.

B. The 2011 Plan Violates Plaintiffs' Equal Protection Rights

The 2011 Plan violates Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment by impermissibly classifying voters on the basis of past, present, and future political affiliation and other political activity. The Plan dilutes Plaintiffs' and similarly situated Democratic voters' power to elect representatives of their choice in favor of a class of voters distinguished solely by political party. It does so intentionally, impermissibly discriminating against Democratic voters with the intent of partisan advantage.

1. Legal Standard

Legislative Defendants' sole challenge to Plaintiffs' Equal Protection claim is a claimed failure to identify a judicially manageable test. Legislative Defs' Br. at 5-6. But Plaintiffs have alleged a clear, principled standard for the Court to judge partisan gerrymandering claims. Plaintiffs offer a discernable and manageable standard requiring that they show that the 2011 Plan (1) was adopted with discriminatory intent, (2) has a large and durable discriminatory effect, and (3) that there are no valid justifications for the effect based upon neutral principles and legitimate state interests.[5] *See* FAC ¶ 70; *Common Cause*, 2018 WL 341658, at *81

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standard), *Georgia State Conference of NAACP* (dismissal of political gerrymandering claim under the Equal Protection Clause for failure to plead facts necessary to state a claim under efficiency gap standard).

[5] Legislative Defendants do not challenge whether the Plaintiffs' standards are judicially manageable or discernable. Plaintiffs have adequately alleged discernibility in that the standard is grounded in the constitutional harms prohibited by the Fourteenth Amendment. *See Vill. of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (setting forth the Equal Protection Clause standard for discriminatory intent); *Davis v. Bandemer*, 478 U.S. 109, 133 (1986) (plurality opinion) ("[A]n equal

(adopting three elements: intent, effect, lack of justification); *cf. Whitford*, 218 F. Supp. 3d at 884 (same); *cf. Bandemer*, 478 U.S. at 127 (plurality opinion) (equal protection claim if "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group").

2. Plaintiffs Have Stated A Cognizable Claim That The 2011 Plan Violates the Equal Protection Clause

Under the standard set forth above, Plaintiffs have alleged the 2011 Plan violates the Equal Protection Clause. *First*, Plaintiffs allege that the 2011 Plan was enacted with discriminatory intent, that is, "intentional discrimination against an identifiable political group." *Bandemer*, 478 U.S. at 127 (plurality opinion); *see* FAC ¶¶ 44, 46, 48, 49, 66 (same). The First Amended Complaint alleges that Republican map drawers used partisan electoral data and computerized mapping software to predict the likely electoral outcomes of hypothetical redistricting plans. FAC ¶ 37. Pennsylvania's 2011 Plan packed Democratic voters into a small number of districts that Democratic candidates were expected to (and did) win by overwhelming margins; it cracked Democratic voters by spreading them among the remaining districts such that Republican candidates were expected to (and did) win by narrower but still comfortable margins. FAC ¶¶ 50-55; *see Arlington Heights*, 429 U.S. at 266 (impact of the official action and whether it bears more heavily on a disfavored group is evidence of discriminatory intent).

Further, where, as here one party is in control of redistricting, "it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." *Bandemer*, 478 U.S. at 129 (plurality opinion); *see also* FAC ¶¶ 35, 37. Few Democrats were included in this process, which had minimal public proceedings in its adoption, from its

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protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively … supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.") (setting forth the requirement of large and durable discriminatory effect); *id.* at 141 ("If there were a discriminatory effect and a discriminatory intent, then the legislation would be examined for valid underpinnings.") (setting forth the legitimate state interest prong).

introduction as an empty shell bill on September 14, 2011, to the belated release of district maps on December 13, 2011, to its final passage on December 20, 2011. FAC ¶¶ 38-40;[6] *see Arlington Heights*, 429 U.S. at 267 (sequence of events leading to enactment, legislative history, and procedural deviations are evidence of discriminatory intent). 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. FAC ¶¶ 57-61; ECF No. 213, , slip op. at 127-139, (Bayelson, J., dissenting). *See also Arlington Heights*, 429 U.S. at 267 (substantive deviations are evidence of discriminatory intent).

Second, Plaintiffs have alleged facts sufficient to show the 2011 Plan's discriminatory effect on Democratic voters within the state. In 2012, Democratic candidates statewide received approximately 50.8% of the vote, yet won only 28% of the state's House districts. FAC ¶ 51. Democratic voters were packed into five districts where they elected Democratic candidates by overwhelming majorities, from 60% to 90% of the vote, diminishing their electoral power across the state. *Id*. at ¶ 53. This result was repeated in 2014 and 2016. In 2014, Republican candidates received 55% of the statewide vote but placed candidates in 72% of congressional districts. FAC ¶ 54. In 2016, Republican candidates won 54% of the statewide vote but 72% of Congressional districts. FAC ¶ 55. This severe and durable discriminatory effect is further supported by quantitative and statistical measures of partisan gerrymandering, which demonstrate that the 2011 Plan represents one of the most extreme partisan gerrymanders of any state. FAC ¶¶ 62-64.

Third, there is no countervailing justification for the 2011 Plan. Specifically, Plaintiffs allege that the 2011 Plan does not comport with traditional redistricting criteria: districts are not drawn to reflect concerns over maintaining communities of interest, the integrity of political subdivision boundaries, or compactness. FAC ¶¶ 57-61. The Plan's distorted lines in fact work

[6] That some Democratic legislators voted to permit the underlying bill does not undercut the partisan intent that drove the unique procedural process of the 2011 Plan's passage. It is unlikely defendants could prove at trial that what Democratic support existed demonstrates that the process was nonpartisan, especially given that the contemporaneous debate in both legislative chambers reflected the clear partisan nature of the 2011 Plan. *See e.g.*, FAC ¶¶ 41-43, 45.

against these factors by dividing districts among different communities of interest and political subdivisions, and spreading populations over wide, wandering geographies. *See* ECF No. 213, *Agre*, slip op. at 127-39 (Bayelson, J., dissenting). The districts were drawn, rather, "to maximize Republican power." FAC ¶ 56. In addition, computer simulations that generate thousands 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 manipulation, have shown that the partisan results of the 2011 Plan likely would not have occurred if the plan had been drawn without bias. FAC ¶ 65. Legislative Defendants nevertheless claim that their legitimate interests, including avoiding contests between sitting members of Congress, justify the 2011 Plan. *See* Legislative Defs' Br. at 9-10. Legislative Defendants do nothing to demonstrate that achieving such an objective explains the 2011 Plan's partisan skew, nor can the Court resolve the parties' competing positions on a motion to dismiss.

C. The 2011 Plan Violates Plaintiffs' First Amendment Rights

The 2011 Plan violates the First Amendment by penalizing Plaintiffs for their political viewpoint and burdening their associational rights and other political activities. The 2011 Plan was enacted to disfavor Plaintiffs because they are political opponents of the Plan's Republican adopters. The district lines serve as a tool to penalize a class of voters by diminishing the effectiveness of their votes and their representation, and does so on the basis of their political viewpoints. In addition, the 2011 Plan itself impermissibly burdens the First Amendment activities of Plaintiffs and other political opponents of the legislature by undermining their associational rights and the effectiveness of their speech and other political activity.

1. Legal Standard

Justice Kennedy's opinion in *Vieth* also shows the pathway for plaintiffs to allege a political gerrymandering claim under the First Amendment. In *Vieth*, Justice Kennedy identified the First Amendment as the most appropriate channel of a partisan gerrymandering claim, describing how the First Amendment interests are implicated when citizens are penalized "because of their participation in the electoral process, their voting history, their association with

a political party, or their expression of political views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring) (plurality opinion). The inquiry is "whether political classifications were used to burden a group's representational rights." *Id*. at 315. "If a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views," Justice Kennedy found, "there would likely be a First Amendment violation, unless the State shows some compelling interest." *Id*. This interpretation has been adopted by federal courts considering partisan redistricting claims.[7] The contrary cases on which the Legislative Defendants principally rely pre-date *Vieth*, do not address the Plaintiffs' First Amendment viewpoint discrimination theory, or both.[8]

The Republican-led legislature drew the 2011 Plan's districts with the intent to burden voters based upon their political views and activity, a violation of the First Amendment's general prohibition of intentional viewpoint discrimination. Plaintiffs appropriately propose the adoption of the same standard applied by the Supreme Court in consideration of First Amendment claims alleging government action that burdens speech on account of the speakers' viewpoint. The First

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[7] *See, e.g.*, *Common Cause*, 2018 WL 341658, at *162-63, 174-75 (finding a violation of the First Amendment when "(1) that the challenged districting plan was intended to favor or disfavor individuals or entities that support a particular candidate or political party, (2) that the districting plan burdened the political speech or associational rights of such individuals or entities, and (3) that a causal relationship existed between the governmental actor's discriminatory motivation and the First Amendment burdens imposed by the districting plan"); *Common Cause v. Rucho*, 240 F. Supp. 3d 376, 388–89 (M.D.N.C. 2017) (noting Justice Kennedy's First Amendment analysis in a partisan gerrymandering cases is "uncontradicted in subsequent majority opinions"); *Benisek v. Lamone*, 266 F. Supp. 3d 799, 830 (D. Md. 2017) (finding plaintiffs' First Amendment challenge in a partisan redistricting case justiciable); *Shapiro*, 136 S. Ct. at 452 (reversing a dismissal of a First Amendment challenge to partisan redistricting based upon Justice Kennedy's opinion in *Vieth*).

[8] *See Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C. 1992) (rejecting claim in pre-*Vieth* case that a redistricting plan chilled their speech by discouraging their participation in the electoral process); *Legislative Redistricting Cases*, 629 A.2d 646, 660 (Md. 1993) (finding the First Amendment does not prohibit states from deviating from "pure" equal populations between districts where the Fourteenth Amendment permits it); *Badham v. Eu*, 694 F. Supp. 664, 675, *sum. aff'd* 488 U.S. 1024 (1988) (failure to show discriminatory effect under *Bandemer*); *Republican Party of N.C. v. Martin*, 980 F.2d 943, 959 n.28 (4th Cir. 1992) (noting "in voting rights cases, no viable First Amendment claim exists in the absence of a Fourteenth Amendment claim" and considering plaintiff's First and Fourteenth Amendment claims); *League of Women Voters v. Quinn*, No. 1:11–cv–5569, 2011 WL 5143044 (N.D. Ill. Oct. 28, 2011) (rejecting argument that map prevented expressive activity; no retaliation theory argued). In any event, none of these cases are controlling.

Amendment prohibits the government from restricting "expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015). The adoption of this framework for partisan gerrymandering claims is both discernable and manageable, rested upon a foundation of First Amendment cases that hold taking account of citizens' political beliefs in government decision-making constitutes intentional viewpoint discrimination. *See e.g. Rutan v. Republican Party of Illinois*, 497 U.S. 62, 74 (1990) (finding the penalization of employees because of their political beliefs "impermissibly encroach[es] on First Amendment freedoms" unless "narrowly tailored to further vital government interests"); *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (plaintiffs alleging dismissal based on their political association stated valid First Amendment claim) (plurality opinion); *Ferraioli v. City of Hackensack Police Dep't*, No. CIV.A. No. 09-2663 (SRC), 2010 WL 421098, at *5 (D.N.J. Feb. 2, 2010) (denying defendants' motion to dismiss a First Amendment retaliation count alleging defendants demoted plaintiffs for exercising their right to vote in union elections). "The First Amendment analysis concentrates on whether the legislation burdens the representational rights of the complaining party's voters for reasons of ideology, beliefs, or political association." *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring).

2. Plaintiffs Have Stated A Cognizable Claim That The 2011 Plan Violates the First Amendment

Plaintiffs allege the Legislature *intended* to penalize Democratic-affiliated voters on account of their political views with the 2011 Plan, requiring that the Legislative Defendants show a compelling, narrowly tailored interest justifying the resulting burdens imposed on Plaintiffs' First Amendment rights.[9]

[9] Plaintiffs' allegations are sufficient whether they are reviewed under strict scrutiny or a more permissive standard. *See Common Cause*, 2018 WL 341658, at *162 n.37; *cf. McCauley v. City of Chicago*, 671 F.3d

Legislative Defendants argue the First Amendment does not provide an independent ground for a partisan gerrymandering claim, and that Plaintiffs' First Amendment rights are not infringed because they do not allege that they were prevented from campaigning for a candidate because of the 2011 Plan. Legislative Defs' Br. at 6. But First Amendment actions are not so limited. Specifically, government retaliation against those who exercise those rights are actionable. *See* pp. 9, *supra*. Moreover, Legislative Defendants' own cases support the proposition that, in contrast to the Fourteenth Amendment, the First Amendment protects citizens' rights "to cast an effective vote by prohibiting restrictions on ballot access …. that limit the opportunity for citizens to unite in support of the candidate of their choice." *Republican Party of N.C.*, 980 F.2d at 959–60.

Plaintiffs have adequately pled a violation of the First Amendment in the drawing of districts to intentionally penalize Democratic-affiliated voters by burdening their participation in the political process. FAC ¶ 66. Based on the same factual allegations discussed above with respect to Plaintiffs' Equal Protection claim, Plaintiffs have plausibly alleged the 2011 Plan intentionally burdens a class of voters because of their political affiliation, past participation in the political process, and expression of their political views. The Republican map drawers used information about voters' political viewpoints and associational activities—*e.g.* voters' party affiliation, voting history, and the party affiliation and voting history of their neighbors—to systematically pack Democratic voters into fewer districts, diminishing their ability as a group to elect a representative of their choice, and to systematically crack Democratic voters into noncompetitive districts where they are outnumbered by Republican voters, wasting their votes. FAC ¶ 73. In doing so, the 2011 Plan enlarges the electoral influence of Republican voters in the state, denying Plaintiffs and Democratic voters the right to fair and equal representation because of their political views. FAC ¶ 74. These allegations plausibly state the intentional classification

611, 616 (7th Cir. 2011) (finding the analysis of what level of review applied to plaintiff's equal protection claim is "a question not normally appropriate for resolution at the pleadings stage"); *Sturgis v. Copiah Cty. Sch. Dist.*, No. 3:10-CV-455-DPJ-FKB, 2011 WL 4351355, at *3 (S.D. Miss. Sept. 15, 2011) (deferring resolution of the level of scrutiny that applied to an equal protection challenge).

and burdening of Democratic-affiliated voters because of their political viewpoints, a violation of the First Amendment.

D. The 2011 Plan Violates the Elections Clause

Article I, section 4, provides state legislatures the power to prescribe the "Times, Places and Manner of holding Elections" for Congress. U.S. Const. art. I, § 4. But when a state attempts to determine the outcome of a Congressional election, it exceeds the Elections Clause's discrete grant of authority.[10]

1. Legal Standard

A state violates the Elections Clause when it attempts to dictate the substantive outcomes of congressional elections, apart from the neutral regulation of the electoral process. *See Cook*, 531 U.S. at 522-23 ("Through the Elections Clause, the Constitution delegated to the States the power to regulate the 'Times, Places and Manner of holding Elections for Senators and Representatives,' subject to a grant of authority to Congress to 'make or alter such Regulations.' … By process of elimination, the States may regulate the incidents of such elections, including balloting, only within the exclusive delegation of power under the Elections Clause."); *see also Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986). While these regulations permit a state legislature to enact "'neutral' or 'fair' procedural regulation[s]," they do not allow the dominant party to use those in "an effort to achieve an impressible substantive goal" to favor certain candidates over others. *Common Cause*, 2018 WL 341658, at *72 (quoting *Gralike*, 531 U.S. at 527 & *Thorton*, 514 U.S. at 853). Put another way, regulations cannot "'disfavor a class of candidates' and 'dictate electoral outcomes.'" *Id.* *__ [slip. op. at 185] (quoting *Thornton*, 514 U.S. at 833-34). *See also* ECF No. 212, *Agre*, slip op. at 28 (Swartz, J.) ("Plaintiffs' assertion that they must prove effects at all in an Elections Clause challenge appears to conflict with Cook,

[10] ECF No. 213, *Agre* slip op. at 116-17 (Baylson, J., dissenting); ECF No. 212, *Agre* at slip op. 26-7 (Shwartz, J.) (concluding *Agre plaintiffs'* proposed Election Clause "standard is legally flawed" but not foreclosing a standard that recognizes "politics is part of the districting process"); ECF No. 118, *Common Cause*, No. 1:16-cv-01026-WO-JEP (M.D. N.C. Jan. 9, 2018) (unanimously holding election clause violated), slip op. at 186-87 (majority op.) & (Osteen, Jr., J., concurring in part, dissenting in part), slip op. at 204 ("In this case, the legislature, not the people, dictated the outcome . . . .").

where the Supreme Court invalidated the challenged election regulation based solely on an analysis of the Missouri legislature's intent."). The Elections Clause thereby grants state legislatures the authority to regulate Congressional elections, including by drawing single-member districts, subject to judicially-enforceable limits on that authority. In this respect, the Elections Clause is no different than other provisions of the Constitution granting legislative authority. *Cf. United States v. Lopez*, 514 U.S. 549 (1995) (limiting Commerce Clause).

Plaintiffs' proposed standard is different than the standard rejected by the controlling opinion in *Agre*. There, the Court rejected the plaintiffs' proposed standard because it ignored that "politics is part of the districting process" and suggested "a guarantee of proportional representation" in House elections. Shwartz, J., at 26-27. But unlike the *Agre* plaintiffs, the Diamond Plaintiffs recognize that Supreme Court precedent requires that an Elections Clause claim demonstrate more than a slight burden on their preferred candidate or party. Rather, the districting plan must be "plainly designed to favor" certain candidates or parties in an "attempt to dictate election outcomes." *Gralike*, 531 U.S. at 523-24. Plaintiffs must show an intent to substantially favor or disfavor a class of candidates, which would then shift the burden to the State to prove that the plan was adopted for neutral, non-discriminatory reasons.

2. Plaintiffs Have Stated A Cognizable Claim That The 2011 Plan Violates the Elections Clause

Plaintiffs' complaint meets this standard by alleging that the 2011 Plan intentionally "favor[s] the Republican Party and its candidates," FAC ¶ 79, thereby dictating outcomes of Congressional elections rather than providing neutral regulations to permit Representatives to be "chosen . . . by the people," U.S. Const. art. I, § 2. Based on the same factual allegations discussed above with respect to Plaintiffs' Equal Protection claim, Plaintiffs have plausibly alleged that Republican map drawers used partisan electoral data to pack and crack Democratic voters among districts in order to maintain the unusually large number of Republican-held seats won after the Republican wave election of 2010, and to do so not only in typical, closely divided Pennsylvania elections, but also in wave elections in favor of Democrats. FAC ¶ 37. The results

of actual elections, as well by quantitative and statistical measures of partisan skew, demonstrate that Republican map drawers achieved their aim of dictating outcomes of Congressional elections. FAC ¶¶ 51-56, 62-65.

Despite the contrary decisions of two three-judge courts in *Common Cause* and *Agre* last week, Legislative Defendants nevertheless challenge the use of the Elections Clause in support of a partisan redistricting claim. Yet they cite to no case that actually decided the question of whether the Elections Clause can be applied to a partisan gerrymandering claim, citing instead a line of cases decided on the issue of whether a judicially manageable standard was proposed to decide such a claim. *See e.g.*, *Vieth*, 541 U.S. at 306 (plurality opinion). Nor do they address the standard set forth to evaluate Plaintiffs' Elections Clause Claim.

The plain text of Article I of the Constitution offers a cabined scope of authority to states to both draw congressional districts and regulate the "time, place, and manner" of elections for representatives of those districts, among others. This broad procedural power includes those things that regulate the time, place or manner of elections, such as "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices." *Cook*, 531 U.S. at 523-24 (citations omitted). This authority is both express and limited; it is not substantive, and it does not grant states the purview to dictate the outcomes of such elections by the establishment of partisan districts. The original function of the Elections Clause was substantively limited. The Supreme Court summarized the Framers' understanding of the Clause "as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *U.S. Term Limits*, 514 U.S. at 833-34; *see also id.* at 832-33 ("The Framers intended the Elections Clause to grant States authority to create procedural regulations, not to provide States with license to exclude classes of candidates from federal office."). Partisan gerrymandering may not be new, but neither is the conception of the Elections Clause as a limit, not an expansion, on state control over electoral results.

And though generally partisan considerations may influence redistricting, the dominance of partisan considerations in districting tolerated by the Constitution is not. *Vieth*, 541 U.S. 267, 337 (2004) (Stevens, J., dissenting) (plurality opinion) (noting "our opinions referring to political gerrymanders have consistently assumed that they were at least undesirable, and we always have indicated that political considerations are among those factors that may not dominate districting decisions"); *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973) (noting "[w]hat is done in so arranging for elections, or to achieve political ends or allocate political power, is not wholly exempt from judicial scrutiny under the Fourteenth Amendment," for example "if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized."); *see generally Bandemer*, 478 U.S. 109, 132-33 (plurality opinion). It is the "*excessive* injection of politics" that is unlawful, and which Plaintiffs alleged dominated the legislature's creation of the 2011 Plan. *Vieth*, 541 U.S. at 293 (emphasis in original) (plurality opinion); *see* FAC ¶¶ 44-48 (summarizing contemporaneously-made statements of partisan intent underlying the 2011 Plan).

The Elections Clause does not protect partisan attempts to dictate the outcome of Congressional elections, and Legislative Defendants identify no alternative reason that explains the adoption of the 2011 Plan. Because this partisan intent propelled the creation of districts that would primarily result in outcomes chosen by the state legislature (in this case, the election of Republicans to the U.S. House of Representatives), the 2011 Plan violates the Elections Clause's limited grant of authority to the state.

III. PLAINTIFFS' SUIT IS NOT BARRED BY LACHES

The Legislative Defendants also raise the same laches argument rejected in *Agre* Statement of Reasons at 5. As there, the laches defense fails "because the Plaintiffs have alleged a continuing violation of a Constitutional right." *Id.*

CONCLUSION

The Legislative Defendants' motion to dismiss should be denied.

Dated: January 18, 2018

By: */s/ Bruce V. Spiva*

Marc Erik Elias (*pro hac vice*)
Bruce V. Spiva (*pro hac vice*)
Brian Simmonds Marshall (*pro hac vice*)
Aria C. Branch (*pro hac vice*)
Amanda R. Callais (*pro hac vice*)
Alex G. Tischenko (*pro hac vice*)
Perkins Coie, LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211
melias@perkinscoie.com
bspiva@perkinscoie.com
bmarshall@perkinscoie.com
abranch@perkinscoie.com
acallais@perkinscoie.com
atischenko@perkinscoie.com

Caitlin M. Foley (*pro hac vice*)
Perkins Coie, LLP
131 South Dearborn Street, Suite 1700
Chicago, IL 60603-5559
Telephone: (312) 324-8400
Facsimile: (312) 324-9400
cfoley@perkinscoie.com

Adam C. Bonin, PA Bar No. 80929
The Law Office of Adam C. Bonin
30 South 15th Street
15th Floor
Philadelphia, PA 19102
Phone: (267) 242-5014
Facsimile: (215) 701-2321
Email: adam@boninlaw.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on January 18, 2018, I filed the foregoing with the Clerk of the Court using the ECF System which will send notification of such filing to the registered participants as identified on the Notice of Electronic Filing.

Date: January 18, 2018

/s/ Bruce V. Spiva
Bruce V. Spiva