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

Barbara Diamond, *et al.*,	:	
	:	
Plaintiffs,	:	**Civil Action No. 5:17-cv-5054**
	:	
v.	:	
	:	
Robert Torres, *et al.*,	:	
	:	
Defendants.	:	
	:	

LEGISLATIVE DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO REALIGN PARTIES

Legislative Defendants, President Pro Tempore of the Pennsylvania Senate, Joseph B. Scarnati, III and Speaker of the Pennsylvania House of Representatives, Michael C. Turzai (collectively, "Legislative Defendants") submit this Memorandum of Law in support of their Motion to Realign Parties.

I. PRELIMINARY STATEMENT

Although nominally designated as defendants in this action, Robert Torres, Acting Secretary of the Commonwealth of Pennsylvania, and Jonathan Marks, Commissioner of the Bureau of Elections (collectively, the "Executive Branch Parties") have consistently demonstrated a shared interest with Plaintiffs Barbara Diamond *et al.* (collectively, "Plaintiffs") with the goal of overturning Pennsylvania's 2011 Congressional districting plan (the "2011 Plan"). Not only have Executive Branch Parties recently *opposed* Legislative Defendants': (1) Motion to Dismiss—a Motion which, if granted, would terminate *all* claims against Executive Branch Parties; and (2) Motion to Stay/Abstain—a Motion which, if granted, would alleviate any pressure on Executive Branch Parties associated with scrambling to administer the 2018 election using an as yet unknown districting plan, but have also argued in related actions that the 2011

Plan is an "unconstitutional map" and that "Pennsylvania would become a joke" if a new plan was not implemented.

In order to eliminate the absurd fiction that this Court is being called upon to resolve a dispute between Plaintiffs and Executive Branch Parties, the Court should realign the parties and designate Executive Branch Parties as additional Plaintiffs in this action. Realignment would not only serve to maintain the integrity of these proceedings, it would bring clarity to the actual case or controversy that confers jurisdiction upon this Court to preside over this matter.

II. RELEVANT FACTUAL AND PROCEDURAL HISTORY

A. The Present Action

Plaintiffs commenced this action on November 9, 2017, and filed their First Amended Complaint ("FAC")—which is the operative pleading in this matter—on November 22, 2017. (ECF No. 42). In the FAC, Plaintiffs challenge the constitutionality of the 2011 Plan, alleging that it "purposefully maximized the power and influence of . . . Republican-affiliated voters and minimized the power and influence [of] . . . Democratic-affiliated voters" by "packing" some Democratic-affiliated voters into certain heavily Democrat-leaning districts to dilute their voting power, and "cracking" other Democratic-affiliated voters among Republican-leaning districts "to deny them a realistic opportunity to elect candidates of their choice". (FAC ¶ 2.)

Based on these allegations, Plaintiffs have advanced three claims for relief. In Count I, Plaintiffs allege that by continuing to implement the 2011 Plan, Executive Branch Parties—who hold office in Pennsylvania's executive branch—have deprived Plaintiffs of the "equal protection of the laws as [the 2011 Plan] has the purpose and effect of discriminating against an identifiable political group [Democratic-affiliated voters] . . . and singles out this group for disparate and unfavorable treatment" in contravention of the Equal Protection Clause of the Fourteenth Amendment. (*Id.* ¶¶ 69-70.)

In Count II, Plaintiffs allege that the "2011 Plan purposely burdens, penalizes, and retaliates against [the same] 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" in violation of the First Amendment. (*Id.* ¶ 73.)

Count III alleges that the "Pennsylvania General Assembly exceeded its constitutional authority in [enacting] the 2011 Plan by gerrymandering Pennsylvania's eighteen Congressional districts" in contravention of the Elections Clause, which "does not include the power to dictate or control . . . electoral outcomes . . . or favor or disfavor a class of candidates." (*Id.* ¶¶ 78-79.) Plaintiffs seek an order permanently enjoining Executive Branch Parties "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". (*Id.* at 23.)

B. <u>Legislative Defendants' Motion to Intervene</u>

On November 20, 2017, Legislative Defendants filed a Motion to Intervene in which they explained, among other things, that they had a significant interest in this action given their integral role in drawing and enacting the 2011 Plan (and would likewise play a significant part in any redrawing of the 2011 Plan that the Court might order). (*See generally* Dkt. No. 26, Motion to Intervene.) Legislative Defendants also explained that their involvement in this matter was crucial given that Plaintiffs had brought suit against Executive Branch Parties only—

"Defendants" who share Plaintiffs' goal of eliminating the 2011 Plan and would therefore do nothing to defend it. (Dkt. No. 60, Reply Supp. Motion to Intervene at 6, n.7 ("This Court should not permit Plaintiffs an end-run around both Pennsylvania's political process *and* an authentic testing of Plaintiffs' legal claims by filing suit against friendly defendants and excluding any real adversary[.]").)

The Court granted the Motion to Intervene on January 8, 2018. (Dkt. No. 65.)

C. Legislative Defendants' Motion to Dismiss and Motion to Stay or Abstain

On January 11, 2018, Legislative Defendants filed their Motion to Dismiss the FAC (Dkt. No. 68), as well as their Motion to Stay or Abstain (the "Motion to Stay"). (Dkt. No. 69.) The Motion to Dismiss includes several, potentially case-dispositive legal arguments, including those concerning Plaintiffs' lack of standing and the non-justiciability of their claims. (*See* Dkt. No. 68). The Motion to Stay explains why the Court should refrain from proceeding with this action until a substantially similar challenge to the 2011 Plan pending in the Pennsylvania Supreme Court is resolved, and until the U.S. Supreme Court renders its decisions in other pending cases involving partisan gerrymandering claims. (Dkt. No. 69.)

On January 17 and 18, 2018, both Plaintiffs *and Executive Branch Parties* filed oppositions to the Motion to Dismiss and the Motion to Stay. (Dkt. Nos. 73, 76, 77, and 78.) Both the Motion to Dismiss and Motion to Stay remain pending before this Court.

Legislative Defendants' counsel thereafter wrote to counsel for Plaintiffs and Executive Branch Parties, asking whether they would consent to having Executive Branch Parties realigned as Plaintiffs in this matter. Counsel for Plaintiffs and Executive Branch Parties declined to give such consent, thereby necessitating the filing of this Motion.

III. ARGUMENT

A. Relevant Law Governing Realignment of Parties

In assessing motions to realign parties, the United States Court of Appeal for the Third Circuit has recognized as follows:

> The parties' determination of their alignment cannot confer jurisdiction upon the court. Although the pleadings are relevant, *it is the court's duty to look beyond the pleadings and arrange the parties according to their sides in the dispute. . . . The Court has since explained that in ruling on realignment, the courts are to determine the issue of antagonism on the face of the pleading and by the nature of the controversy. . . .*
>
> A determination of whether there is a collision of interests must be based on the facts as they existed at the time the action was commenced. . . . A court may, however, look at subsequent pleadings and proceedings in a case to determine the position of the parties, but only to the extent that they shed light on the facts as they existed at the outset of the litigation and on the actual interests of the parties. . . .

Emp'rs Ins. of Wausau v. Crown Cork & Seal Co., 905 F.2d 42, 45-46 (3d Cir. 1990) (emphasis added; citations and quotations omitted); *see also Dev. Fin. Corp. v. Alpha Hous. & Health Care*, 54 F.3d 156, 159 (3d Cir. 1995) ("In determining the alignment of the parties for jurisdictional purposes, *the courts have a duty to look beyond the pleadings and arrange the parties according to their sides in the dispute*. . . . Opposing parties must have a collision of interests over the principal purpose of the suit.") (emphasis added).

Although the issue of realignment often occurs in diversity jurisdiction actions, it is not limited to this context. Rather, "[r]ealignment in fact represents a broader principle of judicial interpretation of statutes conferring jurisdiction in federal courts, where the statutory conferral of jurisdiction is predicated upon the adversarial relationship of the parties." *Dev. Fin. Corp.*, 54 F.3d at 160; *see also Hansen v. United States*, 191 F.R.D. 492, 494 (D.V.I. 2000) ("The issue of realignment is generally addressed in the context of diversity cases, however, where the case is based on the existence of a federal question, the Court of Appeals for the Third Circuit has held that alignment turns on the presence of a 'substantial controversy'. . . . Thus, as long as the parties with the same ultimate interests are on the same side of the controversy, they are aligned properly.") (quoting *Dev. Fin. Corp.*, 54 F.3d at 159; further citations and quotations omitted).

B. <u>Executive Branch Parties Should Be Realigned as Plaintiffs</u>

Here, it is beyond question that Executive Branch Parties and Plaintiffs share the same ultimate interests—i.e., repeal and replacement of the 2011 Plan—and that there is no adversarial relationship between them. Indeed, on December 18, 2018, Executive Branch Parties actually filed a response *in opposition* to Legislative Defendants' Motion to Dismiss. (Dkt. No. 77, Exec. Defs.' Opp'n Motion to Dismiss.) Among other things, Executive Branch Parties contend that certain of Legislative Defendants' legal arguments—arguments which, if successful, would end this case immediately—"are simply not supported by existing law." (*Id.* at 2.) Executive Branch Parties therefore urge this Court to allow the case to proceed to discovery. (*Id.* at 1-2.) In any normal context, affirmatively opposing a co-defendant's motion to dismiss all of a plaintiff's claims—and voluntarily prolonging expensive, time-consuming litigation—would be among the most absurd decisions imaginable. But this of course is not a normal case. Executive Branch Parties are "defendants" in name only, and their alliance with Plaintiffs' interests has been abundantly clear throughout each of the recent challenges to the 2011 Plan in both state and federal court.

For example, in the related, recently-concluded action in this district, *Agre et al. v. Wolf et al.*, No. 2:17-cv-4392 (E.D. Pa. 2017), Executive Branch Parties[1] did not make *any* effort to defend the 2011 Plan. They did not conduct any discovery, or present any evidence or ask any questions during trial. They then dedicated their entire closing to *criticizing* the 2011 Plan. Specifically, Executive Branch Parties' counsel:

- Began his closing by arguing that "Plaintiffs have presented compelling evidence that the 2011 map was a partisan gerrymander, a map that was created for the Congressional districts where a significant factor was the intention to favor one political party over another and have the effect of doing so." *See* December 7, 2017 Trial Transcript at 39:17-22, excerpts of which are attached collectively hereto as **Exhibit A**.

- Criticized Legislative Defendants' expert, accusing him of making a "middle school computational error" in performing his calculations. *Id.* at 42:19-25.

- Rejected Legislative Defendants' evidence of incumbency protection and accused them of working to protect Republicans. *Id.* at 45:13-15 ("That's not incumbency protection. That's protecting the Republican seats that they held at the time of the drawing of this map."); *id.* at 45:21-22 ("You cannot call this map an incumbency protection plan[.]").

- Criticized Legislative Defendants' witnesses, arguing that they "helped the Plaintiffs' case", *id.* at 46:1, and that one witness "was evasive for probably 40 pages, as you sat here and listened." *Id.* at 46:6-7.

- Argued that Legislative Defendants "have utterly failed in either rebutting the Plaintiffs' case or in establishing their burden of how this map was actually created." *Id.* at 47:18-20; *see also id.* at 50:1-2 ("Let me just go over quickly some of their other attempts to rebut because they're so weak."); *id.* at 50:21-24 ("They talk about the Voting Rights Act and its importance and, sure -- surely, it's important. But, so what? There is a district

[1] In *Agre*, Executive Branch Parties also included Pennsylvania's Governor, Thomas Wolf. Of course, Governor Wolf's absence from the instant matter is irrelevant for assessing the present Motion as both Executive Branch Parties in this action serve at the pleasure of Governor Wolf.

that covers it. That doesn't mean everything else you do can be a partisan gerrymander.").

- Adamantly distanced himself from Legislative Defendants' legal theories. *Id.* at 51:24-52:3 ("I do want to go quickly to some of these other arguments, the last one that my friends made about standing. I have to tell you, I don't want to associate myself with those arg -- with those in any way, shape or form with those -- with those points.").

Executive Branch Parties similarly made no effort to defend the 2011 Plan in *League of Women Voters of Pennsylvania, et al. v. Commonwealth*, *et al.,* No. 261 MD 2017 (Pa. Commw. Ct.)/No. 159 MM 2017 (Pa.)[2], which concerns a substantially similar challenge under Pennsylvania's state constitution. In fact, at a recent oral argument held before the Pennsylvania Supreme Court, Executive Branch Parties' counsel referred to the 2011 Plan as an "unconstitutional map," and remarked that "Pennsylvania would become a joke" if a new map were not put in place.[3] Of course, counsel for Executive Branch Parties' argument was not surprising as it was only a more strident version of what Executive Branch Parties said and argued in their pre-argument filing with the Pennsylvania Supreme Court. *See* January 10, 2018 Supreme Court Brief at 1, at copy of which is attached hereto as **Exhibit B** ("Petitioners produced compelling evidence that Pennsylvania's bizarrely shaped Congressional districts are the products of a deliberate, secretive effort to minimize the value of votes for Democratic

[2] Executive Branch Parties in this matter also included Pennsylvania's Governor, Thomas Wolf.

[3] *See* Charles Thompson, *Pa. Supreme Court takes on Pennsylvania's Congressional maps case*, *available at* http://www.pennlive.com/politics/index.ssf/2018/01/supreme_court_takes_on_pennsyl.html (last visited Jan. 23, 2018); *see also* Sam Levine, *Pennsylvania Supreme Court Appears Open To Striking Down Gerrymandered Map*, available at https://www.huffingtonpost.com/entry/pennsylvania-gerrymandering_us_5a5f8856e4b046f0811c5bbe (last visited Jan. 23, 2018) (reporting that Executive Branch Parties' counsel "argued in favor of throwing out the map and said it would be possible to run the 2018 congressional election smoothly if the court decided to do so").

Congressional candidates and maximize the number of Congressional seats held by Republicans"); *id.* ("The evidence weighed overwhelmingly in favor of the conclusion that the Congressional map put in place in 2011 (the '2011 Plan') is not only a partisan gerrymander, but is an extreme outlier on the scale of partisan gerrymanders, one of the most excessively partisan maps that the nation has ever seen.").

Executive Branch Parties advanced similar positions and arguments in their earlier briefing to the Commonwealth Court of Pennsylvania. *See* December 18, 2017 Proposed Findings of Fact and Conclusions of Law at 2, a copy of which is attached hereto as **Exhibit C** ("Respondents have concluded that Petitioners have made a compelling showing that the 2011 Plan is an intentionally partisan plan to hold and protect Republican seats. Respondents have further concluded that the evidence does not support an alternative explanation for the choices made in creating the 2011 Plan.").

Further confirmation of Executive Branch Parties' alignment with Plaintiffs in this action can be gleaned from Executive Branch Parties' recently filed Opposition to Legislative Defendants' Motion to Stay or Abstain. (*See* Dkt. No. 76, Opp'n Mot. Stay or Abstain (arguing that delaying this matter "would increase the risk that the 2018 elections will proceed under an unconstitutional map").

Given Executive Branch Parties' conduct and statements in this action and related actions, the Court can best maintain the integrity of these proceedings by aligning these

"Defendants" with Plaintiffs, as they share the same interests, legal positions, and desired relief.[4] Proper alignment may also have important jurisdictional consequences. Plaintiffs have already challenged Legislative Defendants' standing to participate in this action. Should Plaintiffs raise that challenge again at another phase of these proceedings—or if Legislative Defendants' involvement in this action ceases for any other reason—the Court would be required to assess whether any actual case or controversy still existed (which is necessary to confer jurisdiction upon this Court) given that Plaintiffs and Executive Branch Parties both seek the same outcome in this action.

[4] Considering that the claims advanced within the FAC are alleged in terms of relief sought against Executive Branch Parties, Legislative Defendants recognize that Plaintiffs may need to amend their Complaint again once the parties are realigned.

IV. CONCLUSION

For all of the foregoing reasons, the Court should grant Legislative Defendants' Motion, realign the parties, and designate Executive Branch Parties as Plaintiffs in this action – where their repeatedly stated interests dictate that they belong.

Dated: January 23, 2018

Respectfully submitted,

BLANK ROME LLP

/s/ Brian S. Paszamant
BRIAN S. PASZAMANT
JASON A. SNYDERMAN
DANIEL S. MORRIS
One Logan Square
130 N. 18th Street
Philadelphia, Pennsylvania 19103
Phone: 215-569-5791
Facsimile: 215-832-5791
Email: paszamant@blankrome.com
snyderman@blankrome.com
jwixted@blankrome.com

Attorneys for Legislative Defendant Senator Joseph B. Scarnati, III

CIPRIANI & WERNER, P.C.

/s/ Kathleen A. Gallagher
KATHLEEN A. GALLAGHER
CAROLYN BATZ MCGEE
JASON R. MCLEAN
RUSSELL D. GIANCOLA
650 Washington Road, Suite 700
Pittsburgh, Pennsylvania 15228
Phone: 412-563-4978
Email: kgallagher@c-wlaw.com
cmcgee@c-wlaw.com
jrmclean@c-wlaw.com
rgiancola@c-wlaw.com

Attorneys for Legislative Defendant Representative Michael C. Turzai

HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC

/s/ Jason Torchinsky
JASON TORCHINSKY (*admitted Pro Hac Vice)*
SHAWN SHEEHY (*admitted Pro Hac Vice)*
45 North Hill Drive, Suite 100
Warrenton, Virginia 20186
Phone: 540-341-8808
Facsimile: 540-341-8809
Email: jtorchinsky@hvjt.law
ssheehy@hvjt.law

Attorneys for Legislative Defendant Senator Joseph B. Scarnati, III

BAKER & HOSTETLER LLP

/s/ Patrick T. Lewis
PATRICK T. LEWIS
(admitted *Pro Hac Vice*)
Key Tower
127 Public Square
Suite 2000
Cleveland, Ohio 44144
Phone: 216-621-0200
Email: plewis@bakerlaw.com

ROBERT J. TUCKER
(admitted *Pro Hac Vice*)
200 Civic Center Drive
Suite 1200
Columbus, OH 43215-4138
Phone: 614-228-1541
Email: rtucker@bakerlaw.com

E. MARK BRADEN
(*Pro Hac Vice* to be Filed)
Washington Square
Suite 1100
1050 Connecticut Avenue, NW
Washington, DC 20036
Phone: 202-861-1500
Email: mbraden@bakerlaw.com

Attorneys for Legislative Defendant Representative Michael C. Turzai

EXHIBIT "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

LOUIS AGRE, et al,	)	17-CV-04392 (MMB)
	)	
Plaintiffs,	)	
vs.	)	P.M. Session
	)	
THOMAS W. WOLF, et al,	)	Philadelphia, PA
	)	December 7, 2017
Defendants.	)	

TRANSCRIPT OF TRIAL DAY 3
BEFORE THE HONORABLE D. BROOKS SMITH, CHIEF JUDGE
THE HONORABLE MICHAEL M. BAYLSON
THE HONORABLE PATTY SHWARTZ
UNITED STATES JUDGES

APPEARANCES:

For the Plaintiffs:

ALICE W. BALLARD, ESQUIRE
LAW OFFICES OF ALICE W. BALLARD, PC
123 South Broad Street
Suite 2135
Philadelphia, PA 19109

BRIAN A. GORDON, ESQUIRE
GORDON & ASHWORTH, PC
One Belmont Avenue
Suite 519
Bala Cynwyd, PA 19004

THOMAS H. GEOGHEGAN, ESQUIRE
MICHAEL P. PERSOON, ESQUIRE
SEAN MORALES-DOYLE, ESQUIRE
DESPRES, SCHWARTZ & GEOGHEGAN, LTD
77 W Washington Street
Suite 711
Chicago, IL 60602

VIRGINIA HARDWICK, ESQUIRE
HARDWICK BENFER
179 N Broad Street
Doylestown, PA 18901

For the Defendants:

MARK A. ARONCHICK, ESQUIRE
MICHELE D. HANGLEY, ESQUIRE
ASHTON R. LATTIMORE, ESQUIRE
HANGLEY ARONCHICK SEGAL & PUDLIN
One Logan Square
27th Floor
Philadelphia, PA 19103

For Intervenor Defendant Joseph B. Scarnatti, III:	JASON B. TORCHINSKY, ESQUIRE PHILLIP M. GORDON, ESQUIRE HOLTZMAN VOGEL JOSEFIAK & TORCHINSKY, PLLC 45 North Hill Drive Suite 100 Warrenton, VA 20186
	BRIAN S. PASZAMANT, ESQUIRE BLANK ROME One Logan Square Philadelphia, PA 19103
For Intervenor Defendant Michael C. Turzai:	CAROLYN BATZ MCGEE, ESQUIRE KATHLEEN A. GALLAGHER, ESQUIRE CIPRIANI & WERNER, PC 650 Washington Road Suite 700 Pittsburgh, PA 15228
Audio Operator:	JANICE LUTZ
Transcribed by:	DIANA DOMAN TRANSCRIBING P.O. Box 129 Gibbsboro, New Jersey 08026 Office: (856) 435-7172 Fax: (856) 435-7124 E-mail: dianadoman@comcast.net

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MR. ARONCHICK: Thank you, Your Honors. I'm glad I get a chance to talk now. Our defense at the outset was based on two principles. One was that the executive will enforce this statute in the absent of a court order that we shouldn't and, second, that we wanted to give our legislative coordinate branch the opportunity to defend its work. And, believe me, I found myself in an unusual position throughout this case, an unusual place for me, largely letting the record develop as the parties themselves thought it should develop and not interfering and not intervening. I want my remarks today to -- to -- to be understood that I'm basing them only on this record, the record that was developed in this court, what was proffered here. That's what I'm reacting to, not what it could be in some other case at some other time.

The viability of the Plaintiffs' legal test is a whole -- is a separate question; but, factually, the Legislative Defendants think that the Plaintiffs have presented compelling evidence that the 2011 map was a partisan gerrymander, a map that was created for the Congressional districts where a significant factor was the intention to favor one political party over another and have the effect of doing so. Thus, we are not contesting the factual case that the Plaintiffs have made.

In fact, that case suggests that the -- the diminishment of traditional redistricting criteria, that they what he said. And that's exactly what happened here.

The -- the Republic -- the -- the -- what we have is the Republican Caucus produced data that they sought out. Whether it was available publically or not is not the point. They sought it out and they took the extra affirmative step of gathering up that data and loading it into their redistricting software. Whether it was sophisticated or not is not the point. They used the software to load the data to, then, produce the information that Mr. McGlone and Ms. Hanna tied to how the little -- the maps were drawn whenever they needed to make little cuts and changes. They were always partisan Democratic cuts and changes. That's what this record shows.

Now, the -- and -- and that's just my brief reaction to what McGlone and Hanna said. I know we'll probably hear more from them. But, here's some additional points: There's great use here by my friends who represent the Legislative Defendants about how terrific their experts were in support of their case; but, that's not what I heard. I heard Mr. McCarty, after conceding that he made a middle school computational error, middle school computational error, when he was predicting a lower number of Democratic seats and said, "Oh, yes, based on all my data and reports, I predict that under the 2011 map, the Democrats should have had eight seats, could have had eight seats." Well, they've only had five. What into the first cycle under this 2011 map.

You will see that there were four freshman Republicans at that time who were protected: Meehan, Bartolotta, Marino and Kelly. They had all served only one term. And, then, however you want to look at Mike Fitzpatrick, he had previously been a Congressman and, then, he was out of office for two terms. Now, he's back in for one term. So, you can decide whether he is a sort of freshman with an asterisk. But, he was out of office for two terms. And they eliminate two Democratic incumbents in this plan, Altmire and Critz, are put together in a district that favors Republicans. Incumbency protection? This freshman incumbent protection? That's not incumbency protection. That's protecting the Republican seats that they held at the time of the drawing of this map.

Now, I heard Ms. Hanna say, you know, incumbency, yes, I'll recognize that as a factor. But, it's got to be based on real seniority. I heard Mr. Gimpel say it has to be based on real seniority. Let's not talk about historic traditions. The basis of those traditions is what's important, real seniority. You cannot call this map an incumbency protection plan and that -- and you -- and in words of Mr. Gimpel, it does conflate to a partisan party protection plan.

Now, the defendants' witnesses also, in our estimation, helped the Plaintiffs' case. Mr. Arneson and Mr. Schaller both conceded that partisan data was used. They didn't say to what extent; I -- I grant that, but that it was used. But, each one of them really said something very different. They said in -- this was all about incumbents. That's what we were interested in. Mr. Schaller was evasive for probably 40 pages, as you sat here and listened.

But, at the end -- and -- and -- and, at the end, he makes a huge concession at the end of his direct -- the direct that was read at page 76 and '7, he says -- the question was:

> "Is it fair for me to say that the information you got about the discussion among Republican stakeholders and the legislative process was probably the most important factor that you used in drawing the maps?" "Yes, I would say so."

And there was some testimony in -- in an effort to make -- you know, to -- to -- to re -- rehabilitate him that:

> "Did you do a simulation of districts more likely to vote Republican?"
>
> "I don't remember."
>
> "Did you use the Cook PVI?"
>
> "No."

He was never asked a direct question which was: was partisan voter data a factor in the drawing of these maps?

That was the direct question. They evaded that and went all the way around that. And, to me, this kind of evasion, not producing the server information, Mr. Memmi, all of these kinds of things, inform -- help, at least, inform me in the position that we're taking on this record of what this map was and what it looks like.

You know, Mr. Schaller and Mr. Arneson, when you -- when you pin it all down, you pair it all down, what are they saying? They're saying that their real job here was to please the Republican stakeholders. Mr. Brady may have had some input, but it was the Republican stakeholders and to get 26 of those votes and to listen to what they had to say and Mr. Memmi, to tinker with the map, based on what that input was all about. That's what was really going on here. And -- and to dress it up with these generalities about, well, we were waiting and considering all kinds of other things and -- they never tied that down: How? Where? How?

If -- if the burden shifts to them, they have utterly failed in either rebutting the Plaintiffs' case or in establishing their burden of how this map was actually created. They have the information. My friends on the other side of -- of, you know, on this table behind me here who represent the legislature, several of those lawyers were involved as legal counsel to the Caucuses at that time.

You know what was one of the more amazing -- I mean, Let me just go over quickly some of their other attempts to rebut because they're so weak. Some democrats were also protected. Okay, maybe they shouldn't have been. But when you have 54 percent of the Congressional vote, you've got to put them somewhere. They've got to be in some districts, and, so, they wind up in five districts.

Somehow or other that -- this map creates competition, I assume, if there's no incumbents. But if you look at P-4 again, you will see that three incumbent Republicans either resigned or chose not to run, and three new Republicans were elected: Costello, Smucker, and -- I'll get the other. There's a third. And all three filled in the spots of those incumbents.

Now, there isn't a vote total in this record; the Plaintiffs didn't put that in there. You can decide whether you can take judicial notice of those vote totals. But we know in these supposedly competitive districts that we still had 13-5, 13-5, 13-5, even if there were no incumb -- even when the long-term incumbents stopped -- you know, had left -- left office. That doesn't work.

They talk about the Voting Rights Act and its importance and, sure -- surely, it's important. But, so what? There is a district that covers it. That doesn't mean everything else you do can be a partisan gerrymander.

They say that Mr. Gimpel, “Well, these carveouts, yes, they look like they're all Democratic little spots," every -- you know, the ones that Mr. McGlone talked about. "But voters are people." How many times did he scream and yell that, "Voters are people?" Of course, they're people. Of course, they're people. But -- and they -- and -- and voters make decisions for all sorts of reasons. Where's the Republicans' data set of all the sociological reasons that they incorporated into redrawing this map? The only data set we have is the partisan voting data. That's what it boiled down to.

The -- they -- well, they worked off 2002. I already said it, 2002, their own experts couldn't say whether that was a gerrymandering map.

Fewer county and municipal splits show up in 2011 than 2002; but, you know, what's not calculated here and, there -- therefore, this can't really be credited: Was Montgomery County split three times maybe in a pervious map and five times now, and so that's only one county split both times? Or is it three and five? We don't know how you're adding up splits. You can't tell from this record. So certainly the legislative defendant can't get -- can't get any credit for that.

I want to go very quickly -- I'll come back to some of these additional points, but I -- I do want to go quickly to some of these other arguments, the last one that my friends made about standing. I have to tell you, I don't want to associate myself with those arg -- with those in any way, shape or form with those -- with those points.

We saw citizens in here, people who talked about their harms. One person whose medical condition is such that she wishes she could talk to be involved in a competitive location where she can -- can advance her particular point of view. A high school teacher who -- who said, “I’m -- I'm not in a competitive place, but I've got to teach my students civics and they are losing interest in everything about this democracy; each generation is -- is more turned off.”

Witness-wide. I mean seriously, witness-wide. People who said their votes are diluted. "I don't have meaningful competition. I don't have people I can really vote for." And what did the Legislative Defendants say? They said, “Well, but you voted for somebody and you called your congressman and your voice -- you made your voice heard, didn't you? And you don't have any right, you don't have any right to have your viewpoints considered.”

You know what that is? That's taking people who haven't yet lost the hope and faith in this democracy, who still think notwithstanding they are in the most difficult situation, they're not in competitive districts, and they are still believing enough in the system to go to these people that don't -- that they have to vote for, that -- that it --

Friday, that is by 4 p.m. next Friday, and that no submission exceed 10 pages. Sorry, we can't afford more time, but that'll be -- we feel compelled to proceed quickly toward an adjudication.

So is there anything further before we adjourn the proceedings?

MR. TORCHINSKY: Nothing from us, Your Honor.

MR. ARONCHICK: Nothing from us, Your Honor.

MR. B. GORDON: Nothing, Your Honor.

JUDGE SMITH: Thank you very much.

JUDGE SHWARTZ: Thank you all.

JUDGE BAYLSON: Thank you.

(Proceedings concluded at 3:08 p.m.)

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C E R T I F I C A T I O N

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IN THE SUPREME COURT OF PENNSYLVANIA

NO. 159 MM 2017

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, *et al.*,
***Petitioners*,**

v.

THE COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

BRIEF OF RESPONDENTS GOVERNOR THOMAS W. WOLF, ACTING SECRETARY ROBERT TORRES, AND COMMISSIONER JONATHAN MARKS

On Review of the Commonwealth Court's Recommended Findings of Fact and Conclusions of Law, No. 261 M.D. 2017 (Dec. 29, 2017)

Thomas P. Howell, Deputy General Counsel (ID No. 079527)
Office of General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17101
Tel: (717) 783-6563

Timothy E. Gates,
Chief Counsel (ID No. 202305)
Kathleen M. Kotula, Deputy Chief Counsel (ID No. 318947)
Ian B. Everhart, Assistant Counsel (ID No. 318947)
Pennsylvania Department of State
Office of Chief Counsel
306 North Office Building
Harrisburg, PA 17120
Tel: (717) 783-0736

Mark A. Aronchick (ID No. 20261)
Michele D. Hangley (ID No. 82779)
Claudia De Palma (ID No. 320136)
Ashton R. Lattimore (*pro hac vice*)
HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER
One Logan Square, 27th Floor
Philadelphia, PA 19103
(215) 568-6200

Counsel for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

At trial, Petitioners produced compelling evidence that Pennsylvania's bizarrely shaped Congressional districts are the products of a deliberate, secretive effort to minimize the value of votes for Democratic Congressional candidates and maximize the number of Congressional seats held by Republicans. The evidence weighed overwhelmingly in favor of the conclusion that the Congressional map put in place in 2011 (the "2011 Plan") is not only a partisan gerrymander, but is an extreme outlier on the scale of partisan gerrymanders, one of the most excessively partisan maps that the nation has ever seen. Respondents Michael C. Turzai and Joseph B. Scarnati, III (together, the "Legislative Respondents") let this evidence go largely unopposed. They provided no explanation of how traditional redistricting principles, or any considerations other than pure partisanship, could have caused the mapmakers to create such oddly shaped districts.

In its Recommended Findings of Fact ("FOF"), the Commonwealth Court agreed that partisan intent – the desire to advantage Republican candidates and disadvantage Democratic ones – underlay the creation of the 2011 Plan. Nonetheless, and in spite of this Court's direction that Pennsylvania courts should correct "egregious" and "excessive" political gerrymandering, the Commonwealth Court recommended that this Court rule against Petitioners. The Commonwealth Court's chief reason for its conclusion was that Petitioners had failed to provide a finely tuned, mathematically precise formula for distinguishing redistricting plans that comply with the Pennsylvania Constitution from redistricting plans that do not. It would be unfair and inappropriate, however, to place that burden on Petitioners. They have shown that the 2011 Plan falls far outside any possible constitutional grey zone, and thus are entitled to relief. The task of navigating within the grey zone will fall to future courts in future cases, who will have ample guidance from established principles of law; it is not Petitioners' responsibility to provide an exacting measuring stick for lawsuits that may never be brought.

As representatives of the branch of the Commonwealth government charged with executing and implementing the statutes that the General Assembly enacts, Respondents Governor Thomas W. Wolf, Acting Secretary of the Commonwealth Robert Torres, and Commissioner Jonathan Marks, in their official capacities (together, the "Executive Branch Respondents") intend to enforce the 2011 Plan unless and until a Court orders them to do otherwise. However, the Executive Branch Respondents are deeply concerned that the 2011 Plan infringes upon rights that lie at the very heart of what it means to be a citizen of a democracy: the rights to speak about politics without fear of punishment and to take part in free and fair elections. The Executive Branch Respondents believe that this Court should make it clear that blatant manipulation of political boundaries intended to secure lasting political dominance violates the Pennsylvania Constitution and will not be tolerated. Such a ruling, especially if the redistricting process that follows is open and transparent, could do much to restore Pennsylvanians' faith that their votes matter and that the state and federal officials they elect will truly represent them.

SUMMARY OF ARGUMENT

In this Brief, the Executive Branch Respondents discuss what they believe to be a few of the most critical errors in the Commonwealth Court's Conclusions of Law, and offer recommendations regarding the relief that this Court may grant.

As justification for its recommendation that this Court uphold the 2011 Plan, the Commonwealth Court attempted to place an extraordinary burden upon Petitioners: that they not only show that the 2011 Plan falls far beyond any conceivable boundaries provided in the Pennsylvania Constitution, but also provide a precise metric for applying those boundaries to any conceivable plan. This is an unnecessary (and impossible) task; a petitioner who has shown that a statute is flagrantly unconstitutional does not, as the price of relief, have to provide an analysis of hypothetical improved statutes. Here, the Executive Branch Respondents submit, governing law provides a standard that is precise enough to adjudicate this case: When partisan intent subordinates traditional districting principles to advantage one party's voters over another's, a violation of the Pennsylvania Constitution has taken place. The 2011 Plan subordinated traditional districting principles to partisan intent in an extreme and flagrant way, and thus the

Court should find that it violated Petitioners' rights under the Pennsylvania Constitution's Free Expression and Association Clause, Free and Equal Clause, and Equal Protection Guarantee.

The Commonwealth Court also found that Democratic voters are not an "identifiable political group" for purposes of an Equal Protection analysis. The Commonwealth Court did not elaborate on the basis for this conclusion, and the Executive Branch Respondents believe that it is incorrect for a number of reasons (chief among them that the 2011 Plan's mapmakers actually did identify Democratic voters and distributed them to advantage Republican candidates).

Should the Court find that the 2011 Plan violates the Pennsylvania Constitution, as the Executive Branch Respondents believe it should, the Executive Branch Respondents urge the Court to ensure that a new map is put in place in time for the 2018 Congressional elections. To allow the creators of the 2011 Plan to benefit from their unconstitutional actions for one more electoral cycle would be unfair to voters and would cloud confidence in the Commonwealth's government. In Part II of this Brief, the Executive Branch Respondents offer suggestions for creating a new map and putting it in place in time for the 2018 primary elections.

ARGUMENT

I. The Commonwealth Court's Conclusions of Law Contain Critical Errors

Because this Court exercises plenary jurisdiction over this matter, its review of the Commonwealth Court's recommended findings is *de novo*. *Erfer v. Commonwealth*, 794 A.2d 325, 329 (Pa. 2002). Although the Commonwealth Court's Findings of Fact are thus not binding upon this Court, the Court should give them "due consideration, as the jurist who presided over the hearings was in the best position to determine the facts." *Id.* This Court need not, however, give any deference to the Commonwealth Court's Conclusions of Law; it should not do so, because the Commonwealth Court reached incorrect legal conclusions on several critical points.

A. The Commonwealth Court Incorrectly Concluded That the Petitioners Were Required to Provide Precise Tools to Resolve Not Only This Case, But Any Conceivable Redistricting Case

In its recommended Conclusions of Law, the Commonwealth Court suggested that Petitioners could not prevail in this case unless they not only demonstrated the unconstitutionality of the 2011 Plan, but also showed, with mathematical precision, how far the 2011 Plan deviated from the constitutional line. (*See* COL ¶31 ("Petitioners, in order to prevail, must articulate a judicially manageable standard by which a court can determine that partisanship crossed the line into an unconstitutional infringement on Petitioners' free speech and associational rights.").) The Commonwealth Court interpreted this task to include an inquiry into hypothetical factual circumstances not before the court, stating, "[t]he comparison, then, that is most meaningful for a constitutional analysis, is the partisan bias (by whatever metric) of the 2011 Plan when compared to the most partisan congressional plan that could be drawn, but not violate the Pennsylvania or United States Constitution." (FOF ¶421.)

The Commonwealth Court faulted Petitioners' experts for failing to draw a precise line between constitutional and unconstitutional plans:

> Bringing this back to Drs. Chen, Pegden, and Warshaw, none of these experts opined as to where on their relative scales of partisanship, the line is between a constitutionally partisan map and an unconstitutionally partisan districting plan.

(FOF ¶421; *see also* FOF ¶312 ("Dr. Chen's testimony, while credible, failed to provide this Court with any guidance as to the test for when a legislature's use of partisan considerations results in unconstitutional gerrymandering.").) The Commonwealth Court also made clear that this hypothetical line-drawing would have to take into account any number of variables:

> Some unanswered questions that arise based on Petitioners' presentation include: (l) what is a constitutionally permissible efficiency gap; (2) how many districts must be competitive in order for a plan to pass constitutional muster (realizing that a competitive district would result in a skewed efficiency gap); (3) how is a "competitive" district defined; (4) how is a "fair" district defined; and (5) must a plan guarantee a minimum number of congressional seats in favor of one party or another to be constitutional.

(COL ¶61 n.24.)

It is difficult to imagine how any expert could combine these factors, without any factual context, and provide the exacting recipe for constitutionality that the Commonwealth Court demanded. Moreover, to set forth such a bright line rule would be contrary to the role of the expert, who is not charged with determining what is constitutional and what is not. *See Waters v. State Employees' Ret. Bd.*, 955 A.2d 466, 471 n.7 (Pa. Cmwlth. 2008) ("It is well settled that an expert is not permitted to give an opinion on question of law."). Doing so would also be contrary to the role of the Court, which need not, and should not, rule on hypothetical issues or make determinations that are "unnecessary to the adjudication of the parties' dispute." *Powell v. Hous. Auth. of City of Pittsburgh*, 812 A.2d 1201, 1210 (Pa. 2002).

Fortunately, in this case, no bright line rule is required. Where, as here, the level of partisan gerrymandering is extreme, the court has all the information it needs to make a decision; there is no need for it to speculate about how much less egregiously partisan a redistricting plan would have to be to pass muster under the Pennsylvania Constitution. While the Executive Branch Respondents believe that all gerrymanders undertaken with the intent to disadvantage a political party are problematic, even if they are far less extreme than the 2016 Plan, analysis of the less extreme gerrymanders can be left for another day; the Court need only examine the blatant, flagrant piece of partisan engineering that is before it now.

1. The Court Need Not Develop Tools for Assessing All Possible Constitutional Violations in Order to Correct an Egregious Violation

The Court's task in this case is to set forth and apply a standard to determine whether *the 2011 Plan* is constitutionally permissible, not to assess hypothetical future plans. A vast body of law demonstrates that courts do not require precise line-drawing in order to recognize constitutional violations, particularly where, as here, a violation lies far beyond any reasonable constitutional line. In fact, courts routinely decide constitutional cases using judicially manageable standards that are rooted in constitutional principles but that are not susceptible of precise calculation. *See Common Cause v. Rucho*, No. 1:16-CV-1026, Memorandum Opinion at 65-66, ECF No. 118 (M.D.N.C. Jan. 9, 2018) ("Plaintiffs need not show that a particular empirical analysis or statistical measure appears in the Constitution to establish that a judicially manageable standard exists. . . . Rather, Plaintiffs must identify cognizable constitutional standards to govern their claims, and provide credible *evidence* that Defendants have violated those standards.").[1]

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[1] Throughout this Brief, the Executive Branch Respondents point to federal court cases only to illustrate or give examples of concepts. For example, *Common Cause v. Rucho* ("*Rucho*"), decided the day before this Brief was filed, is instructive because it examines, and overturns, a similarly egregious partisan gerrymander

For example, in this Court's jurisprudence regarding the Fourth Amendment and its analogous provision of the Pennsylvania Constitution – Article I, Section 8 – the Court has applied a "reasonableness" standard for evaluating seizures, and has declined to set "a hard and fast rule[,]" recognizing the "fact-specific nature of the reasonableness inquiry." *Com. v. Revere*, 888 A.2d 694, 706-07 (Pa. 2005). Similarly, at the federal level, in evaluating whether an award of punitive damages in a fraud action was "grossly excessive" such that it violated the Due Process Clause of the Fourteenth Amendment, the U.S. Supreme Court stated: "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. [. . .] When the ratio [between punitive damages and the assessment of actual damages] is a breathtaking 500 to 1, however, the award must surely raise a suspicious judicial eyebrow." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582-83 (1996).

In *BMW*, the court "declin[ed] to draw a bright line marking the limits of a constitutionally acceptable punitive damages award," but nevertheless was "fully convinced that the grossly excessive award imposed in this case transcends the constitutional limit." *Id.* at 585-86. *See also Lynch v. Donnelly*, 465 U.S. 668, 678-

using statistical techniques similar to those used in this case. However, this Court does not need to, and should not, interpret or apply federal law; as Petitioners state, "this Court should expressly hold that the [2011 Plan] runs afoul of Pennsylvania law irrespective of federal law." (Pet. Br. at 42.)

79 (1984) (deciding case under Establishment Clause of First Amendment, but noting that "no fixed, per se rule can be framed" and the "line between permissible [government-religion] relationships and those barred by the Clause can be no more straight and unwavering than due process can be defined in a single stroke or phrase or test"); *Indianapolis Power & Light Co. v. Pennsylvania Pub. Util. Comm'n*, 711 A.2d 1071, 1075 (Pa. Cmwlth. 1998) (deciding Commerce Clause case but acknowledging that "there is no bright-line test to determine whether a statute violates the Commerce Clause" because modern jurisprudence under the Clause "involves a case-by-case examination" of each particular statute at issue).

Indeed, when invalidating a prior state legislative redistricting plan as contrary to law, this Court nevertheless reiterated its rejection of "the premise that any predetermined [population] percentage deviation [existed] with which any reapportionment plan [had to comply]," and declined to "set any immovable 'guideposts' for a redistricting commission to meet that would guarantee a finding of constitutionality." *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 736 (Pa. 2012); *see also Butcher v. Bloom*, 203 A.2d 556, 572 (Pa. 1964) ("In our view, the establishment of a rigid mathematical standard is inappropriate in evaluating the constitutional validity of a state legislative apportionment scheme."). While the lack of a precise answer to the question of how much partisanship renders a redistricting plan unconstitutional may yield some uncertainty for parties and the courts, "that is often the case when constitutional principles are at work," particularly in areas of law requiring case-by-case, fact-specific determinations. *Holt*, 38 A.3d at 757. Fortunately, as this Court has recognized, courts are more than capable of applying standards flowing from constitutional principles that have developed incrementally over several cases rather than being stated with certainty in the first instance. *See Com. v. Lyles*, 97 A.3d 298, 306 n.4 (Pa. 2014) (applying "reasonable person test" for evaluating seizures under Fourth Amendment and acknowledging that the standard "evolved from cases following *Terry v. Ohio*," 392 U.S. 1 (1968)); *Joseph v. Scranton Times L.P.*, 129 A.3d 404, 425 (Pa. 2015) (discussing the "evolving constitutional infrastructure" of defamation law in light of decades of precedent).

2. Governing Law Supplies a Standard for Evaluating Petitioners' Claims

The Pennsylvania Supreme Court has explicitly ruled that judicial intervention is appropriate to stop "egregious abuses" (*Erfer*) and "excesses" (*Holt*) in the redistricting process. (COL ¶15.) The U.S. Supreme Court has also consistently held that extreme partisan gerrymandering is unconstitutional and "incompatible with democratic principles." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion)); *see also Vieth*, 541 U.S. at 294 ("an excessive injection of politics [into redistricting] is unlawful"). Regardless of where the exact line between acceptable and excessive partisanship may lie, there should be no dispute that that line has been crossed when partisan intent subordinates traditional districting principles – namely, compactness, contiguity, and preservation of political subdivisions – to advantage one party's voters over another's. *See Whitford v. Gill*, 218 F. Supp. 3d 837, 887 (W.D. Wis. 2016) ("[w]hatever gray may span the area between acceptable and excessive, an intent to entrench a political party in power signals an excessive injection of politics into the redistricting process" that violates the Constitution). These principles, which seek to protect and promote voters' interests, have "deep roots in Pennsylvania constitutional law" and "represent important principles of representative government"; namely, "that communities indeed have shared interests for which they can more effectively advocate when they can act as a united body and when they have representatives who are responsive to those interests." *Holt*, 38 A.3d at 745. Their subversion to partisan aims is constitutionally impermissible.[2]

[2] However, it should be noted that adherence to the principles of compactness, contiguity, and preservation of political subdivisions will not necessarily be sufficient to ensure a fair map; nor is deviation from these principles a necessary element of a partisan gerrymandering claim. *See Whitford v. Gill*, 218 F. Supp. 3d 837, 888 (W.D. Wis. 2016) ("the Court has made clear that 'traditional districting principles' are not synonymous with equal protection requirements. Instead, they are objective factors that may serve to defeat a claim that a district has been gerrymandered . . . . a map's compliance with traditional districting principles does not necessarily speak to whether a map constitutes a partisan gerrymander.") (internal quotation marks and citations omitted); *see also Rucho* Mem. Op. at 112-

3. The 2011 Plan Falls Far Outside What Should Be Permissible Under the Pennsylvania Constitution

At trial, Petitioners presented compelling evidence that the 2011 Plan jettisons traditional districting principles in favor of partisan advantage. The bizarre configuration of the map itself supplies the first indication that the traditional principles of compactness, contiguity, and avoiding splits of political subdivisions played a scant role in the mapmakers' work. (*See* Pet. Br. at 9-21.) The 2011 Plan is riddled with geographic "anomalies," using narrow tracts, isthmuses, and appendages to join disparate plots of land while dividing communities. (FOF ¶318.) The boundaries of the 7th District deliberately skirt Democratic areas to maintain a Republican majority (PX83; PX53 at 31-32); a tentacle of land reaches up the Allegheny River to drain important Democratic precincts out of the 12th District. (FOF ¶334.) The 2011 Plan also detaches Democrat-leaning cities from their moorings, relocating Erie, Swarthmore, Harrisburg, Bethlehem, Easton, Scranton, and Wilkes-Barre to alter partisan breakdowns. (FOF ¶¶320-334.) For example, the map plucks Reading, the Berks County seat and a Democratic stronghold, from Berks County's 6th District, feeding it to the Republican 16th District via a skinny arm only two stores wide. (FOF ¶324; Tr.618:25-620:6; PX99.) The map is also a jumble of improbable splits: the 2011 Plan breaks up 28 counties and 68

13 (compliance with traditional redistricting criteria does not immunize a plan from scrutiny).

municipalities between at least 2 different congressional districts, and even divides several neighborhoods in half. (FOF ¶¶149-176.)

The circumstances of the 2011 Plan's creation also suggest partisan aims. (*See* Pet. Br. at 6-8.) The map was created in a process under the exclusive control of Republicans, behind closed doors, with almost no public deliberation. (FOF ¶¶97-108.) Republicans introduced the bill as an empty shell and did not amend it to include descriptions of the new districts until the morning of the day on which it was adopted by the Senate, which suspended procedural rules to hasten its passage. (FOF ¶¶104-109, 126.) Within a week, the bill had been passed by the Republican House and signed into law by the Republican Governor.[3] (FOF ¶¶114-121, 128.) While the 2011 Plan's official consideration was rushed, however, evidence

[3] The Commonwealth Court suggested that unilateral Republican control of the legislative and executive branches somehow justified the partisan nature of the 2011 Plan:

> In the elections . . . leading up the drawing of the 2011 Plan, Pennsylvania voters elected Republicans to control the congressional redistricting process. There should be no surprise then that when choices had to be made in how to draw congressional districts, elected Republicans made choices that favored their party (and thereby their voters).

(FOF ¶420.) By their very nature, however, Constitutional rights do not come and go with changes in political control; members of a minority party do not have to tolerate infringement of their rights simply because they do not have the good fortune to be in the majority. If anything, the exclusive Republican control of the mapmaking process should buttress the Court's conclusion that the Plan was an unconstitutional partisan gerrymander.

demonstrates that the map itself was painstakingly and deliberately crafted to have partisan effect.

Petitioners' experts credibly demonstrated that by multiple measures, the Pennsylvania map prioritizes partisan goals. Dr. Kennedy showed that the 2011 map "packed" and "cracked" Democratic voters into bizarre districts that fractured Pennsylvania's communities in order to maximize Republican seats. (FOF ¶¶313-39; Tr.579:18-644:15.) Dr. Warshaw used an efficiency gap analysis to establish that the map's pro-Republican advantage is historically extreme. (FOF ¶380; Tr.865:2-866:10.) Dr. Chen created simulated districting plans governed by traditional districting criteria and concluded with 99.9% statistical certainty that the 2011 Plan's 13-5 Republican advantage would never have emerged from a districting process adhering to those traditional principles. (FOF ¶291; Tr.203:14-204:16.) Dr. Pegden generated hundreds of billions of maps using an algorithm that enabled him to conclude, with 99.99% certainty, that the 2011 Plan could *only* be the product of partisan intent. (FOF ¶359; Tr.1384:22-1386:12.). As set forth by Petitioners in greater detail, these experts each "demonstrated, using objective measures, the extent to which the map targets Democratic voters for disfavored treatment."[4] (*See* Pet. Br. at 9-34.)

[4] The Commonwealth Court found that each of these experts was credible. It had few criticisms of their work, each of which are easily refuted. First, the

The trial record contains no evidence that any considerations other than purely partisan ones could explain the 2011 Plan. Moreover, the Legislative Respondents could not rebut the facts and expert analysis that Petitioners had presented. The Commonwealth Court found that the Legislative Respondents' rebuttal experts were not credible. (FOF ¶¶398-400, 409-410.) Dr. McCarty, who attempted to criticize Dr. Chen's methodology, admitted that his own simulation had proven incorrect 97% of the time. (Tr.1517:3-6.) (Meanwhile, as the Commonwealth Court pointed out, Dr. Chen's methodology resulted in accurate

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Commonwealth Court noted that no single expert provided an analysis of every aspect of the inquiry. (*See*, *e.g.*, FOF ¶¶310-312, 340.) In a complex inquiry such as this, however, it is not unusual for a party to present different experts from different fields whose analyses lead to the same conclusion. The court in *Rucho*, faced, as here, with a group of experts who, using different data and methods, separately concluded that a districting plan was a partisan outlier, stated that this diversity would give the court "*greater* confidence in the correctness of the conclusion." *Rucho* Mem. Op. at 75. Second, the Commonwealth Court criticized the experts for failing to consider incumbency protection as a traditional districting principle. (*See, e.g.*, FOF ¶¶284, 398.) However, the Commonwealth Court's critique is based on a misinterpretation of the case law and erroneously elevates the role of incumbency considerations in redistricting. Incumbency protection is not recognized as a valid districting criterion in the Pennsylvania Constitution, and is recognized in case law only "in the *limited form* of avoiding contests between incumbents," *see Bush v. Vera*, 517 U.S. 952, 964 (1996) (plurality opinion) (citing cases) (emphasis added), and, even in its proper form, must always be secondary to constitutional requirements and traditional redistricting principles. *See Larios v. Cox*, 314 F. Supp. 2d 1357, 1362 (N.D. Ga. 2004); *see also Abrams v. Johnson*, 521 U.S. 74, 84 (1997) (finding that incumbency protection should be subordinated to other districting factors because it is "inherently more political"). Moreover, Dr. Chen demonstrated that even after incumbency was factored in, the 2011 Plan was still an extreme outlier. (FOF ¶¶285-291.)

predictions for 54 out of 54 congressional elections under the 2011 Plan. (FOF ¶409).) Dr. Cho, who was supposed to rebut Dr. Pegden's and Dr. Chen's analyses, did not even review either expert's algorithm or code, and the Commonwealth Court found her criticisms were also not credible. (FOF ¶¶398-401.) The Legislative Respondents offered no rebuttal at all to Dr. Kennedy's work, and offered no other defense of the map.

The Court should find that the 2011 Plan's successful effort to subordinate traditional districting objectives to Republican partisan goals violates Petitioners' rights under the Pennsylvania Constitution. Petitioners have set forth tests anchored in Pennsylvania constitutional precedent that recognize the central importance of voting under our democracy. First, under the Free Expression Clause, Pa. Const. Art. I, § 7, and Free Association Clause, Pa. Const. Art. I, § 20, it is unconstitutional to discriminate against or burden protected speech – like voting – based on its viewpoint unless the law is narrowly tailored to accomplish a compelling governmental interest. *See Pap's A.M. v. City of Erie*, 812 A.2d 591, 612 (Pa. 2002). The Court should find that mapmakers' decision to subvert traditional districting principles designed to protect voters' rights in order to disadvantage one party's voters at the polls constitutes prohibited viewpoint discrimination.

Second, under the Free Expression and Association Clauses, it is also unconstitutional to retaliate against voters based on how they have voted in the past. *See Uniontown Newspapers, Inc. v. Roberts*, 839 A.2d 185, 192-93, 198-99 (Pa. 2003). The Court should find that deliberately placing Democratic voters in districts that diluted the effectiveness of their votes demonstrates an intent to burden petitioners' speech "because of how they voted or the political party with which they were affiliated"; that this caused Petitioners to suffer a tangible and concrete harm; and that but for that the mapmakers' intent, Petitioners would not have been injured.

Finally, the Equal Protection Guarantee, Pa. Const. Art. I, §§ 1, 26, and Free and Equal Clause, Pa. Const. Art. I, § 5, prohibit intentional discrimination against identifiable political groups where there has been an actual durable discriminatory effect on that group. *See Erfer*, 794 A.2d at 332. The Court should find that the 2011 Plan subordinated traditional principles to partisan goals with the intent of discriminating against Democratic voters as a political group, and that this subordination caused a discriminatory effect on those voters by artificially diminishing their ability to elect candidates of their choice in favor of their Republican counterparts.

Petitioners' approach provides the Court with judicially manageable standards upon which it can rule; the amici have offered other perspectives on how to evaluate this case, which the Court may also consider. Executive Branch Respondents note that there are a number of formulations available to courts assessing partisan gerrymanders that are susceptible to judicially manageable standards. *See*, *e.g.*, *DePaul v. Com.*, 969 A.2d 536 (Pa. 2009); *Ins. Adjustment Bureau v. Ins. Comm'r for Commonwealth of Pa.*, 542 A.2d 1317 (Pa. 1988).

B. The Commonwealth Court's Conclusion That Democratic Voters Are Not an Identifiable Group Does Not Stand Up to Examination

The Commonwealth Court also erred in concluding, with no explanation, that "[v]oters who are likely to vote Democratic (or Republican) in a particular district based on the candidates or issues, regardless of the voters' political affiliation, are not an identifiable political group for purposes of the Equal Protection Guarantee under the Pennsylvania Constitution." (COL ¶53.) That conclusion finds no support either in case law or in the facts of this case. This Court acknowledged in 2002 that advances in information technology might facilitate a showing in that Democratic or Republican voters are an identifiable political group. *See Erfer*, 794 A.2d at 332-33 (plaintiffs could "adduce sufficient evidence to establish that such an identifiable class exists").

Similarly, a federal district court evaluating a partisan gerrymander rejected the argument that an identifiable political group could only be established where the plaintiffs "allege facts demonstrating that Democrats in Pennsylvania vote as a block." *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 543-44 (M.D. Pa. 2002). Noting that "no such requirement" exists, the court suggested that plaintiffs needed only to allege "that they are members of an identifiable political group whose geographical distribution is sufficiently ascertainable that it could have been used in drawing electoral district lines." *Id.* at 544, *rev'd on other grounds*, 541 U.S. 267 (2004). While block voting is not required, however, the U.S. Supreme Court has acknowledged in the context of the Voting Rights Act that a showing that "group members usually vote for the same candidates is one way of proving political cohesiveness" for a claim of vote dilution. *Thornburg v. Gingles*, 478 U.S. 30, 56 (1986).

While courts have not set forth rules regarding what specific evidence would be required to show the existence of an identifiable political group, Petitioners' evidence here has borne out the *Erfer* court's prediction that information technology would provide such evidence. Petitioners' expert Dr. Jowei Chen analyzed six cycles of Pennsylvania statewide election results using precinct-level vote counts. (Tr.189:17-190:2.) The same data, Dr. Chen noted, would have been available to the Pennsylvania General Assembly at the time the 2011 Plan was drafted. *Id.* Using that data, Dr. Chen concluded that voters' "past voting history and federal and statewide election[s]" are "a strong predictor of future voting[.]" (Tr.315:6-9.) Accordingly, such information permits a determination that there exists "a group of people who consistently vote for Democratic candidates," and whose voting patterns could be expected to persist across future elections. (Tr.314:12-20, 315:6-14, 317:1-15.)

Additionally, Dr. Chen pointed out that the same information permits users to ascertain the geographical distribution of likely Democratic voters, as "recent statewide elections are the most reliable indicator of the underlying partisan tendencies of a particular district." (Tr.190:21-24.) Indeed, it is clear that the drafters of the 2011 Plan had no trouble identifying the existence and location of likely Democratic voters with such precision that they were able to craft a map that accounted for their distribution and produced a durable Republican majority. Thus, the contention that such voters do not, as a matter of law, constitute an identifiable political group contravenes legal precedent and the observed reality of partisan gerrymandering.

C. Petitioners' Injuries Establish Concrete Harms

Petitioners presented extensive testimony that the 2011 Plan harmed each of them individually, as well as collectively, by taking away their ability to cast meaningful votes, lessening the chance that they could elect a Congressperson who represented their views, diminishing the power of their vote, muffling the strength of their voices on the issues, cutting off their access to their Congressmen, and/or harming their community by splitting it off from like-minded communities of interest. (*See* FOF ¶¶221-33.) For example, the 2011 Plan artificially redistributes Petitioners Lawn, Isaacs, and Smith to effectively ensure they will never be able to elect a candidate of their choice. (FOF ¶¶7, 8, 11; PX1 at 35-38.) Petitioners Greiner's, Petrosky's, and Ulrich's votes have been nullified because their districts are now so uncompetitive that there is no one to vote for. (FOF ¶¶191, 197, 233.) Petitioners Febo San Miguel, Solomon, Lichty, Mantell, and McNulty have also seen their votes gutted, by a different tack: their inclusion in packed Democratic districts. (*see*, *e.g.*, PX172 at 33:19-34:8 (Lichty); PX173 at 7:5-20, 66:8-67:3 (McNulty); PX163 at 9:7-8, 34:6-36:13, 41:14-19 (Febo San Miguel); PX169 at 7:2-22, 21:2-22:11 (Solomon); PX174 at 7:6-18, 13:7-13:10, 18:19-18:20 (Mantell).) Petitioners in the other districts have not been spared. Their representatives in Congress are cowed by fellow delegates that have no motivation to be receptive to voters' concerns. (FOF ¶¶ 227-228; 232; 387-388.)

These injuries constitute tangible, cognizable harms – they are not, as the Commonwealth Court suggested, mere "feelings." (*See* COL ¶56(a).) They deny Democratic voters fair representation. *Erfer*, 794 A.2d at 333. They also affect Petitioners' ability to achieve electoral success based on their political beliefs. Indeed, these injuries are at the heart of Petitioners' standing to challenge the map statewide: As the Supreme Court has recognized, "[a] reapportionment plan acts as an interlocking jigsaw puzzle, each piece reliant upon its neighbors to establish a picture of the whole." *Erfer*, 794 A.2d at 329-30. Taken together, Petitioners' harms demonstrate how the 2011 Plan diminishes every Democratic voter's ability to influence the political process, regardless of whether they are personally located in a "packed" or "cracked" district.

II. The Remedy

If this Court finds that the 2011 Plan violates the Pennsylvania Constitution, it should take steps to ensure that a new map is in place in time for the 2018 Congressional elections.[5] In this Section, the Executive Branch Respondents, as

[5] The Commonwealth Court stated that "Petitioners and likeminded voters from across the Commonwealth can exercise their political power at the polls to elect legislators and a Governor who will address and remedy any unfairness in the 2011 Plan through the next reapportionment following the 2020 U.S. Census." (COL ¶56e.) If this Court finds a constitutional violation, however, it cannot abdicate its responsibility to let the violation go uncorrected in the hope that the Legislature might someday correct the problem. Here, the Court has the power to step in in time for the next election, and should do so. *See, e.g., Holt*, 38 A. 3d. at 716

representatives of the Department that administers elections, make suggestions regarding options for achieving that goal.

A. The 2018 Election Schedule

On November 6, 2018, Pennsylvanians will elect their delegation to the 116th U.S. Congress. Leading up to this date are a series of election deadlines imposed by federal or state law, the earliest of which are rapidly approaching. (FOF ¶¶432-445.) Under the current schedule, candidates must submit their nomination petitions by March 6, and the primary election is scheduled for May 15, 2018. (FOF ¶¶424, 422.) In anticipation of these deadlines, ideally the congressional district boundaries should be finalized by January 23. (FOF ¶446.) However, should the Court order that a new plan be drafted, and that plan cannot be finalized by January 23, the Executive Branch Respondents will make every effort to ensure that the 2018 election cycle can still proceed under the new plan.

Through a combination of internal administrative adjustments and date changes, it would still be possible to hold the primary on May 15 as long as a new map is in place by February 20, 2018. (FOF ¶¶447-451.) It would also be possible, if the Court so ordered, to postpone the 2018 primary elections from May 15 to a

(directing reapportionment and adjusting calendar for impending primary elections).

date in the summer of 2018. (FOF ¶455.)[6] Although any postponements will result in significant logistical challenges for County election administrators, delaying the primary would allow a new plan to be put in place as late as the beginning of April. (FOF ¶¶456-457.)

B. The Process for Creating a New Plan

If this Court finds that the 2011 Plan is unconstitutional, the Court has the authority to issue deadlines by which the General Assembly must enact a new congressional redistricting plan conforming to the criteria set forth by the Court, the Governor must sign that plan, and the General Assembly must submit the new plan to the Court for review and approval. *See, e.g.*, *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 679 (M.D. Pa. 2002).

The Executive Branch Respondents submit that it would be reasonable to allow the General Assembly and the Governor three weeks to accomplish these tasks. See, *e.g.*, *Vieth v. Pennsylvania*, 241 F. Supp. 2d 478, 480 (M.D. Pa. 2003), *aff'd sub nom. Vieth v. Jubelirer*, 541 U.S. 267 (2004) (noting the General Assembly's successful enactment of a revised congressional districting plan within 10 days of the court's order to remedy the existing map).

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[6] The Court could either postpone the entire primary election or postpone the congressional primary election alone. (FOF ¶455.) As Commissioner Marks testified via affidavit at trial, the former scenario is preferable, since the latter option would result in a significant additional expenditure of public funds. (FOF ¶¶457-460.)

In the course of enacting a new Plan, the General Assembly may also amend the Pennsylvania Election Code to make any necessary changes to the current election schedule, including those changes discussed above. *See* Pa. Const. Art. II, § 1 and Art. III. In the alternative, the Court has the power to order changes to the current election schedule, without the General Assembly's involvement. *See, e.g.*, *Holt*, 38 A.3d at 761; *In re 1991 Pennsylvania Legislative Reapportionment Comm'n*, 609 A.2d 132, 134 (Pa. 1992).

If the General Assembly fails to pass a plan that the Governor can sign and submit to the Court by the Court's deadline, or if the Court finds that the submitted plan is unconstitutional, the Court, upon consideration of evidence submitted by the parties, should assume the responsibility for drafting a new plan. *See, e.g.*, *League of Women Voters of Florida v. Detzner*, 179 So. 3d 258 (Fla. 2015). At any point, the Court may appoint a special master to assist the Court by, *inter alia*, helping the Court evaluate any plan enacted by the General Assembly, proposing alternative plans, and otherwise providing recommendations and guidance. *See, e.g.*, *In re 2012 Legislative Districting*, 80 A.3d 1073 (Md. 2013).

CONCLUSION

For the foregoing reasons, the Executive Branch Respondents respectfully request that the Court rule that the 2011 Plan violates the Pennsylvania

Constitution and put a process in place to replace the 2011 Plan in time for the 2018 primary elections.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

Dated: January 10, 2018

/s/ Mark A. Aronchick

Mark A. Aronchick (ID No. 20261)
Michele D. Hangley (ID No. 82779)
Claudia De Palma (ID No. 320136)
Ashton R. Lattimore (*pro hac vice*)
One Logan Square, 27th Floor
Philadelphia, PA 19103
Tel: (215) 568-6200
Fax: (215) 568-0300
maa@hangley.com
mdh@hangley.com
cdp@hangley.com
arl@hangley.com

Attorneys for Respondents Governor Thomas W. Wolf, Acting Secretary of the Commonwealth Robert Torres, and Commissioner Jonathan Marks

Thomas P. Howell (ID No. 079527)
Office of General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17101
Tel: (717) 783-6563
Fax: (717) 787-1788
thowell@pa.gov
Attorney for Governor Wolf

Timothy E. Gates (ID No. 202305)
Kathleen M. Kotula (ID No. 86321)
Ian B. Everhart (ID No. 318947)

Pennsylvania Department of State
Office of Chief Counsel
306 North Office Building
Harrisburg, PA 17120
Tel: (717) 783-0736
tgates@pa.gov
kkotula@pa.gov
ieverhart@pa.gov
Attorneys for Acting Secretary Torres and Commissioner Marks

CERTIFICATION

This 10th day of January, 2018, I certify that:

Electronic version. The electronic version of this brief that has been provided to the Court in .pdf format in an electronic medium today is an accurate and complete representation of the paper original of the document that is being filed by Respondents Governor Thomas W. Wolf, Acting Secretary Robert Torres, and Commissioner Jonathan Marks.

Public Access Policy. I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

The undersigned verifies that the preceding Brief does not contain or reference exhibits filed in the Commonwealth Court under seal. Therefore, the preceding Brief does not contain confidential information.

Service. I am this day serving this Brief in the manner indicated below, which service satisfies the requirements of Pennsylvania Rule of Appellate Procedure 121:

VIA eService

Mary M. McKenzie
Michael Churchill
Benjamin D. Geffen
George A. Donnelly, IV
Daniel Urevick-Ackelsberg
THE PUBLIC INTEREST LAW CENTER
1709 Benjamin Franklin Parkway, 2nd Flr.
Philadelphia, PA 19103
Tel: (215) 627-7100
Email: mchurchill@pubintlaw.org;
bgeffen@pubintlaw.org;
mmckenzie@pubintlaw.org;
George.a.donnelly@gmail.com;
dackelsberg@pubintlaw.org
Counsel for Petitioners

Kathleen A. Gallagher
Carolyn Batz McGee
Russell D. Giancola
Jason R. McLean
CIPRIANI & WERNER, P.C.
650 Washington Road, Suite 700
Pittsburgh, PA 15228
Tel: (412) 563-2500
Fax: (412) 563-2080
Email: kgallagher@c-wlaw.com;
cmcgee@c-wlaw.com
rgiancola@c-wlaw.com
jrmclean@c-wlaw.com
Counsel for Michael C. Turzai

Michael R. Abbott
CIPRIANI & WERNER, P.C.
450 Sentry Pkwy, Suite 200
Blue Bell, PA 19422
Tel: (215) 518-1054
Email: Mabbott@c-wlaw.com
Counsel for Michael C. Turzai

Brian S. Paszamant
Michael D. Silberfarb
Jason A. Snyderman
John P. Wixted
BLANK ROME LLP
One Logan Square
130 North 18th Street
Philadelphia, PA 19103
Tel: (215) 569-5791
Fax: (215) 569-5555
Email: paszamant@blankrome.com;
snyderman@blankrome.com;
jwixted@blankrome.com;
msilberfarb@blankrome.com
Counsel for Joseph B. Scarnati, III

Alex M. Lacey
Clifford B. Levine
Alice B. Mitinger
COHEN & GRIGSBY, P.C.
625 Liberty Avenue, 5th Floor
Pittsburgh, PA 15222
Tel: (412) 297-4642
Fax: (412) 209-0672
Email: alacey@cohenlaw.com;
clevine@cohenlaw.com;
amitinger@cohenlaw.com
Counsel for Michael J. Stack III

Lawrence J. Tabas
Rebecca L. Warren
OBERMAYER REBMANN MAXWELL & HIPPEL LLP
Center Square West
1500 Market Street, Suite 3400
Philadelphia, PA 19102
Tel: (215) 665-3158
Fax: (215) 665-3165

Email: lawrence.tabas@obermayer.com;
rebecca.warren@obermayer.com;
timothy.ford@obermayer.com
Counsel for Republican Intervenors

Karl S. Myers
STRADLEY RONON STEVENS & YOUNG, LLP
2600 One Commerce Square
Philadelphia, PA 19103
Tel: (215) 564-8000
Fax: (215) 564-8120
Email: kmyers@stradley.com
Counsel for Pennsylvania General Assembly

Matthew H. Haverstick
Mark Seiberling
Joshua Voss
Kleinbard LLC
1650 Market. St., 46th Floor
Philadelphia, PA 19103
Tel: (215) 496-7225
Email: mhaverstick@kleinbard.com
mseiberling@kleinbard.com
jvoss@kleinbard.com
Counsel for Joseph B. Scarnati, III

VIA First-Class Mail, Postage Prepaid

Jason Torchinsky
Shawn Sheehy
Holtzman Vogel Josefiak Torchinsky Pllc
45 North Hill Drive, Suite 100
Warrenton, VA 20186
Tel: (540) 341-8808
Fax: (540) 341-8809
Email: jssheehy@hvjt.law
pgordon@hvjt.law
Counsel for Michael C. Turzai and Joseph B. Scarnati, III

John E. Hall
CIPRIANI & WERNER, P.C.
650 Washington Road, Suite 700
Pittsburgh, PA 15228
Tel: (412) 563-2500
Fax: (412) 563-2080
Email: jhall@c-wlaw.com
Counsel for Michael C. Turzai

Patrick T. Lewis
BAKER & HOSTETLER LLP
Key Tower, 127 Public Square

Lazar M. Palnick
1216 Heberton Street
Pittsburgh, PA 15206
Tel: (412) 661-3633
Email: lazarp@earthlink.net
Counsel for Michael J. Stack III

Jonathan F. Bloom
Kyle A. Jacobsen
STRADLEY RONON STEVENS & YOUNG, LLP
2600 One Commerce Square
Philadelphia, PA 19103
Tel: (215) 564-8000
Fax: (215) 564-8120
Email: jbloom@stradley.com
kjacobsen@stradley.com
Counsel for Pennsylvania General Assembly

Bruce M. Gorman
Daniel S. Morris
BLANK ROME LLP
301 Carnegie Center, 3rd Fl
Princeton, NJ 08540
Tel: (609) 750-2642
Fax: (609) 897-7283

Cleveland, OH 44114
Tel: (216) 861-7096
Fax: (216) 696-0740
Email: plewis@bakerlaw.com
Counsel for Michael C. Turzai

Robert J. Tucker
BAKER & HOSTETLER LLP
200 Civic Center Drive, Suite 1200
Columbus, OH 43215
Tel: (614) 462-2680
Fax: (614) 462-2616
Email: rtucker@bakerlaw.com
Counsel for Michael C. Turzai
David P. Gersch
John A. Freedman
R. Stanton Jones
Helen Mayer Clark
Daniel F. Jacobson
John Robinson
Elisabeth S. Theodore
Lindsey D. Carson
John D. Cella
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001-3743
Tel: (202) 942-5000
Fax: (202) 942-5999
Email: david.gersch@apks.com; john.freedman@apks.com; stanton.jones@apks.com; helen.clark@apks.com; daniel.jacobson@apks.com; john.robinson@apks.com; elisabeth.theodore@apks.com lindsey.carson@apks.com john.cella@apks.com
Counsel for Petitioners

Email: Gorman@blankrome.com; morris-d@blankrome.com
Counsel for Joseph B. Scarnati, III

Huaou Yan
BLANK ROME LLP
One Logan Square
130 North 18th Street
Philadelphia, PA 19103
Tel: (215) 569-5449
Fax: (215) 569-5555
Email: HYan@blankrome.com
Counsel for Joseph B. Scarnati, III

Andrew D. Bergman
ARNOLD & PORTER KAYE SCHOLER LLP
700 Louisiana Street, Suite 4000
Houston, TX 77002
Tel: (713) 576-2430
Fax: (713) 576-2499
Email: andrew.bergman@apks.com
Counsel for Petitioners

Timothy J. Ford
OBERMAYER REBMANN MAXWELL & HIPPEL LLP
Center Square West
1500 Market Street, Suite 3400
Philadelphia, PA 19102
Tel: (215) 665-3158
Fax: (215) 665-3165
Email: timothy.ford@obermayer.com
Counsel for Republican Intervenors

/s/ *Mark A. Aronchick*
Mark A. Aronchick

EXHIBIT "C"

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Mark A. Aronchick (ID No. 20261)
Michele D. Hangley (ID No. 82779)
Claudia De Palma (ID No. 320136)
Ashton R. Lattimore (pro hac vice)
HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER
One Logan Square, 27th Floor
Philadelphia, PA 19103
Tel: (215) 568-6200
maa@hangley.com
mdh@hangley.com
cdp@hangley.com
arl@hangley.com
Attorneys for Respondents Governor Thomas W. Wolf, Acting Secretary of the Commonwealth Robert Torres, and Commissioner Jonathan Marks

Linda C. Barrett (ID No. 46543)
Sean M. Concannon (ID No. 205998)
Thomas P. Howell (ID No. 079527)
OFFICE OF GENERAL COUNSEL
333 Market Street, 17th Floor
Harrisburg, PA 17101
Tel: (717) 783-6563
lbarrett@pa.gov
Attorney for Governor Wolf

Timothy E. Gates (ID No. 202305)
Kathleen M. Kotula (ID No. 86321)
Pennsylvania Department of State
Office of Chief Counsel
306 North Office Building
Harrisburg, PA 17120
Tel: (717) 783-0736
tgates@pa.gov
kkotula@pa.gov
Attorneys for Acting Secretary Torres and Commissioner Marks

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

League of Women Voters of Pennsylvania, *et al.*,

Petitioners,

v.

The Commonwealth of Pennsylvania, *et al.*,

Respondents.

No. 261 MD 2017

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF RESPONDENTS WOLF, TORRES AND MARKS

I. Discussion

At trial, Respondents Governor Thomas W. Wolf, Acting Secretary of the Commonwealth Robert Torres, and Commissioner Jonathan Marks, in their official capacities (together, "Respondents"), neither attacked nor defended the congressional redistricting plan at issue (the "2011 Plan"). Respondents understood that their appropriate roles at trial were to allow the Legislative Respondents, who created the 2011 Plan, to defend it as they saw fit; to provide the Court with information where necessary, including information about parallel proceedings; and to prevent disruption of the 2018 elections by keeping the Court and the other parties apprised of election schedules and potential alterations to those schedules.

Now that the trial has ended, however, Respondents have concluded that Petitioners have made a compelling showing that the 2011 Plan is an intentionally partisan plan to hold and protect Republican seats. Respondents have further concluded that the evidence does not support an alternative explanation for the choices made in creating the 2011 Plan. However, Respondents will not propose findings regarding the details of the evidence or the constitutionality of the 2011 Plan, because they are confident that Petitioners and the Legislative Respondents will do so and wish to avoid cumulative submissions to the Court.

As representatives of the branch of the Commonwealth government charged with executing and implementing the statutes that the General Assembly enacts, Respondents intend to enforce the 2011 Plan unless and until a Court orders them to do otherwise. Should the Pennsylvania Supreme Court order that a new plan be drafted, however, Respondents believe that they must provide the Court with information on potential remedies and the timing of those remedies, in order to ensure that the 2018 elections proceed under a constitutional plan with minimal disruption. Respondents thus propose limited findings of fact and conclusions of law regarding what remedies might be available in the event that the Supreme Court holds that the 2011 Plan is unconstitutional.

II. Proposed Findings of Fact

A. Facts Regarding Respondents

1. Respondent Thomas W. Wolf is Governor of the Commonwealth and is sued in his official capacity. (Joint Stip. Facts at ¶ 23.)

2. One of the Governor's official duties is signing or vetoing bills passed by the General Assembly. Pennsylvania's governors, including Governor Wolf, are charged with, among other things, faithfully executing valid laws enacted by the General Assembly. (Joint Stip. Facts at ¶ 24.)

3. Respondent Thomas Wolf was elected Governor of Pennsylvania in November 2014, and assumed office on January 20, 2015. (Joint Stip. Facts at ¶ 25.)

4. Governor Wolf did not hold public office at the time that Senate Bill 1249 ("SB 1249") was drafted and enacted. (Joint Stip. Facts at ¶ 26.)

5. Respondent Robert Torres is the Acting Secretary of the Commonwealth and is sued in his official capacity. (Joint Stip. Facts at ¶ 27.)

6. Respondent Jonathan Marks is the Commissioner of the Bureau of Commissions, Elections, and Legislation of the Pennsylvania Department of State ("Department") and is sued in his official capacity. (Joint Stip. Facts at ¶ 28.)

7. Neither the Secretary of the Commonwealth, nor the Commissioner for the Bureau of Commissions, Elections, and Legislation, had any role in the drafting or enactment of SB 1249. (Joint Stip. Facts at ¶ 29.)

B. Facts Regarding the Current Election Schedule

8. Under the current election schedule, Pennsylvania's 2018 general primary election is scheduled for May 15, 2018. (Joint Stip. Facts at ¶ 130; *see* 25 P.S. § 2753(a).)

9. Under the current election schedule, the first day to circulate and file nomination petitions is February 13, 2018. (Joint Stip. Facts at ¶ 131; *see* 25 P.S. § 2868.)

10. Under the current election schedule, the last day to circulate and file nomination petitions is March 6, 2018. (Joint Stip. Facts at ¶ 132; *see* 25 P.S. § 2868.)

11. Under the current election schedule, the first day to circulate and file nomination papers is March 7, 2018. (Joint Stip. Facts at ¶ 133; *see* 25 P.S. § 2913(b).)

12. Under the current election schedule, the last day for candidates who filed nomination petitions to withdraw their candidacy is March 21, 2018. (Joint Stip. Facts at ¶ 134; 25 P.S. § 2874.)

13. Under the current election schedule, the County Boards of Elections must send remote military-overseas absentee ballots by March 26, 2018. (Joint Stip. Facts at ¶ 135; 25 Pa.C.S. § 3508(b)(1).)

14. Under the current election schedule, the County Boards of Elections must send all remaining military-overseas absentee ballots by March 30, 2018. (Joint Stip. Facts at ¶ 136; 52 U.S.C. § 20302(a)(8)(A); 25 Pa.C.S. § 3508(a)(1).)

15. Under the current election schedule, the last day for voters to register before the primary election is April 16, 2018. (Joint Stip. Facts at ¶ 137; 25 Pa.C.S. § 1326(b).)

16. Under the current election schedule, the last day to apply for a civilian absentee ballot is May 8, 2018. (Joint Stip. Facts at ¶ 138; 25 P.S. § 3146.2a(a).)

17. Under the current election schedule, the last day for County Boards of Elections to receive voted civilian absentee ballots is May 11, 2018. (Joint Stip. Facts at ¶ 139; 25 P.S. § 3146.6(a).)

18. Under the current election schedule, the first day for voters to register after the primary election is May 16, 2018. (Joint Stip. Facts at ¶ 140; *see* 25 Pa.C.S. § 1326(c)(2)(iii).)

19. Under the current election schedule, the last day for County Boards of Elections to receive voted military-overseas ballots for the primary election is May 22, 2018. (Joint Stip. Facts at ¶ 141; *see* 25 Pa.C.S. § 3511(a).)

20. Under the current election schedule, the last day to circulate and file nomination papers is August 1, 2018. (Joint Stip. Facts at ¶ 142; *see* Consent Decree, *Hall v. Davis*, No. 84-1057 (E.D. Pa. June 14, 1984).)

21. Under the current election schedule, the last day for minor political party and political body candidates who filed nomination papers to withdraw their candidacy is August 8, 2018. (Joint Stip. Facts at ¶ 143; *see* 25 P.S. § 2937.)

22. Under the current election schedule, the last day for candidates nominated by a political party to withdraw their candidacy is August 13, 2018. (Joint Stip. Facts at ¶ 144; *see* 25 P.S. § 2938.1.)

23. Under the current election schedule, the County Boards of Elections must send remote military-absentee ballots by August 28, 2018. (Joint Stip. Facts at ¶ 145; *see* 25 Pa.C.S. § 3508(b)(1).)

24. Under the current election schedule, the County Boards of Elections must send all remaining military-overseas absentee ballots by September 21, 2018. (Joint Stip. Facts at ¶ 146; *see* 52 U.S.C. § 20302(a)(8)(A); 25 Pa.C.S. § 3508(a)(1).)

25. Under the current election schedule, the last day for voters to register before the November election is October 9, 2018. (Joint Stip. Facts at ¶ 147; *see* 25 Pa.C.S. § 1326(b).)

26. Under the current election schedule, the last day for voters to apply for a civilian absentee ballot is October 30, 2018. (Joint Stip. Facts at ¶ 148; *see* 25 P.S. § 3146.2a(a).)

27. Under the current election schedule, the last day for County Boards of Elections to receive voted civilian absentee ballots is November 2, 2018. (Joint Stip. Facts at ¶ 149; *see* 25 P.S. § 3146.6(a).)

28. Under the current election schedule, Pennsylvania's 2018 general election is scheduled for November 6, 2018. (Joint Stip. Facts at ¶ 150; *see* Pa. Const. Art. VII, § 2; 25 P.S. § 2751.)

29. Under the current election schedule, the first day for voters to register after the General Election is November 7, 2018. (Joint Stip. Facts at ¶ 151; *see* 25 Pa. C.S. § 1326(c)(2)(iii).)

30. Under the current election schedule, the last day for County Boards of Elections to receive voted military-overseas ballots for the general election is November 13, 2018. (Joint Stip. Facts at ¶ 152; *see* 25 Pa.C.S. § 3511(a).)

31. All of the deadlines set forth in paragraphs 130-152 of the Joint Stipulation of Facts are required by federal or state law. (EBD Ex. 2 (Marks Aff.) at ¶ 10.)

C. Facts Regarding Alterations to the Current Election Schedule

32. In order to prepare for the first deadline on the current election calendar, which is February 13, 2018, it would be highly preferable to have all Congressional district boundaries finalized and in place by January 23, 2018, which would give the Department three weeks to prepare. (EBD Ex. 2 (Marks Aff.) at ¶¶ 11-12.)

33. However, should there be a Court order directing that a new plan be put in place, and that plan is not ready until after January 23, it may still be possible for the 2018 primary election to proceed as scheduled using the new plan. (EBD Ex. 2 (Marks Aff.) at ¶ 13.)

34. Through a combination of internal administrative adjustments and Court-ordered date changes, it would be possible to hold the primaries on the scheduled May 15 date even if a new plan is not put into place until on or before February 20, 2018. (EBD Ex. 2 (Marks Aff.) at ¶ 14.)

35. First, the current election schedule gives the counties ten weeks between the last date for circulating and filing nomination petitions (currently March 6) and the primary election date to prepare for the primary election. (EBD Ex. 2 (Marks Aff.) at ¶ 15.)

36. The counties could fully prepare for the primary election in six to eight weeks. (EBD Ex. 2 (Marks Aff.) at ¶ 16.)

37. Therefore, the close of the nomination petitions period could be moved back two weeks to March 20, without compromising the election process in any way. (EBD Ex. 2 (Marks Aff.) at ¶ 17.)

38. Second, if the Court were to order a time period for circulating and filing nomination petitions that lasted two weeks, instead of three, the nominations period could start on March 6. (EBD Ex. 2 (Marks Aff.) at ¶ 18.)

39. Although the Department would normally need three weeks of preparation time before the first date for filing and circulating nomination petitions, it would be possible for the Department to complete its preparations in

two weeks instead of three with the addition of staff and increased staff hours. (EBD Ex. 2 (Marks Aff.) at ¶¶ 19-20.)

40. Accordingly, if the first date for filing and circulating nomination petitions was moved to March 6, the Department would need to have a final plan in place by approximately February 20, 2018. (EBD Ex. 2 (Marks Aff.) at ¶ 21.)

41. Should there be a Court order directing that a new plan be put in place, and that plan is not ready until after February 20, 2018, it would also be possible, if the Court so ordered, to postpone the 2018 primary elections from May 15 to a date in the summer of 2018. (EBD Ex. 2 (Marks Aff.) at ¶ 22.)

42. There would be two options under this scenario: (1) the Court could postpone all of the primary elections currently scheduled for May 15; or (2) the Court could postpone the Congressional primary election alone. Either option would require a primary date no later than July 31, 2018. (EBD Ex. 2 (Marks Aff.) at ¶ 23.)

43. Depending on the date of the postponed primary election, the date by which the new plan would be put in place could be as late as the beginning of April 2018. (EBD Ex. 2 (Marks Aff.) at ¶ 24.)

44. Postponement of the primary in any manner would not be preferable, because it would result in significant logistical challenges for County election administrators. If postponement takes place, for administrative and cost savings

reasons, the Department's preferred option would be postponement of the entire primary. (EBD Ex. 2 (Marks Aff.) at ¶ 25.)

45. Postponing the Congressional primary alone would require the administration of two separate primary elections (one for Congressional seats and one for other positions), which would result in an additional expenditure of a significant amount of public funds. (EBD Ex. 2 (Marks Aff.) at ¶ 26.)

46. The cost of holding a single primary in 2018 would be approximately $20 million. If two primaries are held, each will cost approximately $20 million. (EBD Ex. 2 (Marks Aff.) at ¶ 27.)

47. For each primary, Pennsylvania's 67 counties will be reimbursed a portion of the costs associated with mailing absentee ballots to certain military and overseas civilian voters and bedridden or hospitalized veterans. The other costs of the primary are paid by the counties. This is similar to the way that costs are allocated in special Congressional elections. (EBD Ex. 2 (Marks Aff.) at ¶ 28.)

III. Proposed Conclusions of Law

1. If the Pennsylvania Supreme Court finds that the 2011 Plan is unconstitutional, the Court has the authority to issue deadlines by which the General Assembly must enact a new congressional redistricting plan conforming to the criteria set forth by the Court, the Governor must sign that plan, and the

General Assembly must submit the new plan to the Court for review and approval. *See, e.g.*, *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 679 (M.D. Pa. 2002).

2. Respondents submit that it would be reasonable to allow the General Assembly and the Governor three weeks to accomplish these tasks. *See, e.g. Vieth v. Pennsylvania*, 241 F. Supp. 2d 478, 480 (M.D. Pa. 2003), *aff'd sub nom. Vieth v. Jubelirer*, 541 U.S. 267 (2004) (noting the General Assembly's successful enactment of a revised congressional districting plan within 10 days of the court's order to remedy the existing map).

3. In the course of enacting a new Plan, the General Assembly may also amend the Pennsylvania Election Code to make any necessary changes to the current election schedule, including those changes discussed in ¶¶ 35-43 above. *See* Pa. Const. art. II, § 1 and art. III.

4. In the alternative, the Court has the power to order changes to the current election schedule, without the General Assembly's involvement. *See, e.g.*, *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 761 (Pa. 2012); *In re 1991 Pennsylvania Legislative Reapportionment Comm'n*, 609 A.2d 132, 134 (Pa. 1992).

5. If the General Assembly fails to pass a plan that the Governor could sign and submit to the Court by the Court's deadline, or if the Court finds that the submitted plan is unconstitutional, the Court, upon consideration of evidence

submitted by the parties, should assume the responsibility for drafting a new plan. *See, e.g.*, *League of Women Voters of Florida v. Detzner*, 179 So. 3d 258 (Fla. 2015).

6. At any point, the Court may appoint a special master to assist the Court by, *inter alia*, helping the Court evaluate any plan enacted by the General Assembly, proposing alternative plans, and otherwise providing recommendations and guidance. *See, e.g.*, *In re 2012 Legislative Districting*, 80 A.3d 1073 (Md. 2013).

Respectfully submitted,

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

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/s/ Michele D. Hangley

Mark A. Aronchick (ID No. 20261)
Michele D. Hangley (ID No. 82779)
Claudia De Palma (ID No. 320136)
Ashton Lattimore (pro hac vice)
One Logan Square, 27th Floor
Philadelphia, PA 19103
Tel: (215) 568-6200
Fax: (215) 568-0300
maa@hangley.com
mdh@hangley.com
cdp@hangley.com
arl@hangley.com
Attorneys for Respondents Governor Thomas W. Wolf, Acting Secretary of the Commonwealth Robert Torres, and Commissioner Jonathan Marks

Linda C. Barrett (ID No. 46543)

Sean M. Concannon (ID No. 205998)
Thomas P. Howell (ID No. 079527)
Office of General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17101
Tel: (717) 783-6563
Fax: (717) 787-1788
lbarrett@pa.gov
sconcannon@pa.gov
thowell@pa.gov
Attorneys for Governor Wolf

Timothy E. Gates (ID No. 202305)
Kathleen M. Kotula (ID No. 86321)
Pennsylvania Department of State
Office of Chief Counsel
306 North Office Building
Harrisburg, PA 17120
Tel: (717) 783-0736
tgates@pa.gov
kkotula@pa.gov
Attorneys for Acting Secretary Torres and Commissioner Marks

CERTIFICATE OF SERVICE

I, Michele D. Hangley, hereby certify that on this 18th day of December 2017, the foregoing Proposed Findings of Fact and Conclusions of Law of Respondents Wolf, Torres and Marks has been served upon counsel in the manner indicated below, which service satisfies the requirements of Pennsylvania Rule of Appellate Procedure 121:

VIA eService

Mary M. McKenzie
Michael Churchill
Benjamin D. Geffen
George A. Donnelly, IV
Daniel Urevick-Ackelsberg
THE PUBLIC INTEREST LAW CENTER
1709 Benjamin Franklin Parkway
2nd Floor
Philadelphia, PA 19103
Tel: (215) 627-7100
Fax: (215) 627-3183
Email: mchurchill@pubintlaw.org;
bgeffen@pubintlaw.org;
mmckenzie@pubintlaw.org;
George.a.donnelly@gmail.com;
dackelsberg@pubintlaw.org
Counsel for Petitioners

Brian S. Paszamant
Michael D. Silberfarb
Jason A. Snyderman
John P. Wixted
BLANK ROME LLP
One Logan Square
130 North 18th Street
Philadelphia, PA 19103
Tel: (215) 569-5791
Fax: (215) 569-5555
Email: paszamant@blankrome.com;
snyderman@blankrome.com;
jwixted@blankrome.com;
msilberfarb@blankrome.com
Counsel for Joseph B. Scarnati, III

Kathleen A. Gallagher
Carolyn Batz McGee
Russell D. Giancola
Jason R. McLean
CIPRIANI & WERNER, P.C.
650 Washington Road, Suite 700
Pittsburgh, PA 15228

Alex M. Lacey
Clifford B. Levine
Alice B. Mitinger
COHEN & GRIGSBY, P.C.
625 Liberty Avenue, 5th Floor
Pittsburgh, PA 15222
Tel: (412) 297-4642

Tel: (412) 563-2500
Fax: (412) 563-2080
Email: kgallagher@c-wlaw.com;
cmcgee@c-wlaw.com
rgiancola@c-wlaw.com
jrmclean@c-wlaw.com
Counsel for Michael C. Turzai

Fax: (412) 209-0672
Email: alacey@cohenlaw.com;
clevine@cohenlaw.com;
amitinger@cohenlaw.com
Counsel for Michael J. Stack III

Michael R. Abbott
Cipriani & Werner, P.C.
450 Sentry Pkwy, Suite 200
Blue Bell, PA 19422
Tel: (215) 518-1054
Email: Mabbott@c-wlaw.com
Counsel for Michael C. Turzai

Karl S. Myers
STRADLEY RONON STEVENS & YOUNG, LLP
2600 One Commerce Square
Philadelphia, PA 19103
Tel: (215) 564-8000
Fax: (215) 564-8120
Email: kmyers@stradley.com
Counsel for Pennsylvania General Assembly

Lawrence J. Tabas
Rebecca L. Warren
OBERMAYER REBMANN MAXWELL & HIPPEL LLP
Center Square West
1500 Market Street, Suite 3400
Philadelphia, PA 19102
Tel: (215) 665-3158
Fax: (215) 665-3165
Email: lawrence.tabas@obermayer.com;
rebecca.warren@obermayer.com;
timothy.ford@obermayer.com
Counsel for Republican Intervenors

VIA First-Class Mail, Postage Prepaid

Jason Torchinsky
Shawn Sheehy
Phillip Gordon
HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC

Lazar M. Palnick
1216 Heberton Street
Pittsburgh, PA 15206
Tel: (412) 661-3633
Email: lazarp@earthlink.net

45 North Hill Drive, Suite 100
Warrenton, VA 20186
Tel: (540) 341-8808
Fax: (540) 341-8809
Email: jtorchinsky@hvjt.law;
ssheehy@hvjt.law
pgordon@hvjt.law
Counsel for Michael C. Turzai and Joseph B. Scarnati, III

John E. Hall
CIPRIANI & WERNER, P.C.
650 Washington Road, Suite 700
Pittsburgh, PA 15228
Tel: (412) 563-2500
Fax: (412) 563-2080
Email: jhall@c-wlaw.com
Counsel for Michael C. Turzai

Patrick T. Lewis
Baker & Hostetler LLP
Key Tower, 127 Public Square
Cleveland, OH 44114
Tel: (216) 861-7096
Fax: (216) 696-0740
Email: plewis@bakerlaw.com
Counsel for Michael C. Turzai

Robert J. Tucker
Baker & Hostetler LLP
200 Civic Center Drive, Suite 1200
Columbus, OH 43215
Tel: (614) 462-2680
Fax: (614) 462-2616
Email: rtucker@bakerlaw.com
Counsel for Michael C. Turzai

David P. Gersch
John A. Freedman
R. Stanton Jones

Counsel for Michael J. Stack III

Jonathan F. Bloom
Kyle A. Jacobsen
STRADLEY RONON STEVENS & YOUNG, LLP
2600 One Commerce Square
Philadelphia, PA 19103
Tel: (215) 564-8000
Fax: (215) 564-8120
Email: jbloom@stradley.com
kjacobsen@stradley.com
Counsel for Pennsylvania General Assembly

Bruce M. Gorman
Daniel S. Morris
BLANK ROME LLP
301 Carnegie Center, 3rd Fl
Princeton, NJ 08540
Tel: (609) 750-2642
Fax: (609) 897-7283
Email: Gorman@blankrome.com;
morris-d@blankrome.com
Counsel for Joseph B. Scarnati, III

Huaou Yan
BLANK ROME LLP
One Logan Square
130 North 18th Street
Philadelphia, PA 19103
Tel: (215) 569-5449
Fax: (215) 569-5555
Email: HYan@blankrome.com
Counsel for Joseph B. Scarnati, III

Andrew D. Bergman
ARNOLD & PORTER KAYE SCHOLER LLP
700 Louisiana Street, Suite 4000

Helen Mayer Clark
Daniel F. Jacobson
John Robinson
Elisabeth S. Theodore
Lindsey D. Carson
John D. Cella
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001-3743
Tel: (202) 942-5000
Fax: (202) 942-5999
Email: david.gersch@apks.com;
john.freedman@apks.com;
stanton.jones@apks.com;
helen.clark@apks.com;
daniel.jacobson@apks.com;
john.robinson@apks.com;
elisabeth.theodore@apks.com
lindsey.carson@apks.com
john.cella@apks.com
Counsel for Petitioners

Houston, TX 77002
Tel: (713) 576-2430
Fax: (713) 576-2499
Email: andrew.bergman@apks.com
Counsel for Petitioners

Timothy J. Ford
OBERMAYER REBMANN MAXWELL & HIPPEL LLP
Center Square West
1500 Market Street, Suite 3400
Philadelphia, PA 19102
Tel: (215) 665-3158
Fax: (215) 665-3165
Email: timothy.ford@obermayer.com
Counsel for Republican Intervenors

/s/ *Michele D. Hangley*
Michele D. Hangley