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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

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LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, ET AL.,
Petitioners,
v.
THE COMMONWEALTH OF PENNSYLVANIA, ET AL.,
Respondents.

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# BRIEF OF RESPONDENT, LT. GOVERNOR MICHAEL J. STACK, III

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Clifford B. Levine
Pa. Id. No. 33507
Alex M. Lacey
Pa. Id. No. 313538
Cohen & Grigsby, P.C.
625 Liberty Avenue
Pittsburgh, PA 15222-3152
(412) 297-4900

Lazar M. Palnick
Pa. Id. No. 52762
1216 Heberton Street
Pittsburgh, PA 15206
(412) 661-3633

*On behalf of Respondent Michael J. Stack III, in his Capacity as Lieutenant Governor of Pennsylvania and President of the Pennsylvania Senate*

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## I. INTRODUCTION

The Washington Post's slogan famously warns that "Democracy dies in darkness." Here, in performing that most fundamental task in our democracy – the drawing of a congressional map – the Republican leadership in Pennsylvania's General Assembly took advantage of their majority party status and drew their map in darkness. The Democrats in the General Assembly were allowed no role, the public provided no input, and Republicans' 2011 Plan passed through the General Assembly at lightning speed. Within days of its introduction, the Republican Governor signed it into law. The Petitioners here have challenged the 2011 Plan under the Pennsylvania Constitution.

The Republicans' statewide map creates congressional districts of grotesque shapes, with boundaries that twist and turn and indiscriminately split communities. The map consistently maximizes performance in favor of Republican voters, to the detriment of Democratic voters. For three consecutive elections, the 2011 Plan has produced 13 Republican members of Congress, as compared to only 5 Democratic members – even when the aggregate statewide vote for Democratic candidates exceeded the statewide vote for Republican candidates. Democratic voters have been packed into 5 districts and cracked throughout the rest of the state, providing resilient Republican majorities in the other 13 districts.

In responding to the challenge to their 2011 Plan, the Republican Legislative Respondents hid behind the Speech and Debate Clause of the Pennsylvania Constitution to ensure that their communications, strategy and motivation in developing the plan would remain in darkness. They refused to offer any affirmative defense of their 2011 Plan. Although their interaction with partisan Republican groups responsible for the design of one-sided maps was generally referenced, the Republican Legislative Respondents attempted, without evidence, to create an inference that their contorted districts had somehow been derived without rank partisanship.

By contrast, in supporting their challenge, the Petitioners produced an array of eminently credible expert witnesses, who showed with definitive certainty that the 2011 Plan could not have been devised solely through the use of traditional redistricting criteria. Through statistical and performance analyses, reviews of community interests and partisan outcome assessments, the Petitioners conclusively established that the 2011 Plan had been derived substantially, if not exclusively, through partisan motivation. They showed that, with the increasingly sophisticated technology that has been developed, the Legislative Respondents could identify at the election district level, the voting preferences of the Commonwealth's voters, and deliberately craft a map that favors voters of one political party at the expense of another. The Commonwealth Court found that the

Petitioners' expert witnesses were credible and that the Legislative Respondents' witnesses were not. The lower court refrained, however, from providing a meaningful remedy to the partisan gerrymandered 2011 Plan.

In 2002, in *Erfer v Commonwealth*, 568 Pa. 128, 794 A.2d 325, 333 (Pa. 2002), this Court recognized that "since the field of information technology is advancing at a breakneck speed [a showing that an identifiable political class of citizens, who voted for Democratic congressional candidates] could be made by future challengers." The Petitioners here are those "future challengers" and the time is now to reject partisan gerrymandering of the 2011 Plan and to provide voters with the free and equal elections that the Pennsylvania Constitution requires.

By rejecting the 2011 Plan, as contrived in darkness, this Court has an opportunity to ensure that democracy in the Commonwealth of Pennsylvania lives and thrives.

## II. COUNTER-STATEMENT OF THE CASE

### A. RESPONDENT STACK JOINS PETITIONERS' STATEMENT OF THE CASE

Respondent Lt. Governor Michael J. Stack III joins Petitioners' Statement of the Case and adopts their description of how the 2011 Congressional Redistricting Plan ("2011 Plan") needlessly splits Pennsylvania's counties and municipalities; divides communities of interest; and sacrifices any modicum of compactness in favor of a static 13 to 5 partisan advantage towards Republicans in Pennsylvania's

congressional delegation. (Petitioners' Brief, Statement of the Case Sections (B) and (C)). Respondent Stack adopts Petitioners' description of how their expert, Dr. Jowei Chen, created a computer algorithm that adhered to traditional redistricting criteria; and, with that algorithm, generated 1,000 maps, all of which significantly outperformed the 2011 plan on the traditional redistricting criteria. (Petitioners' Brief, Statement of the Case Section (D)(1)). Respondent Stack also adopts Petitioners' descriptions of the testimony of Dr. John J. Kennedy, who explained how the 2011 Plan breaks up communities of interest; and the testimony of Dr. Christopher Warshaw, who discussed the impact of the partisan divide.

Respondent Stack supplements Petitioners' Statement of the Case by providing additional information as to how the Republicans passed the 2011 Plan, by suspending procedural rules and eschewing debate; by emphasizing the consequence of dividing communities of interest through "packing" and "cracking;" by identifying certain fundamental inconsistencies between Judge Brobson's findings and conclusions; and by directing the Court to information that would support the provision of timely relief, if this Court finds that the 2011 Plan is unconstitutional.

### B. RESPONDENT STACK'S DIRECT EXCLUSION FROM PARTICIPATION WITH RESPECT TO THE 2011 PLAN

At the time of the promulgation of the 2011 Plan, Lt. Gov. Stack served in the Pennsylvania Senate and voted against it. (FOF 111). The passage of the 2011

Plan was highly irregular. The original version of the Senate bill that became the 2011 Plan provided no information about the boundaries of the districts – each described only as "a portion of this Commonwealth." (FOF 101). Only when it was reported out of the Senate State Government Committee and the Senate State Appropriations Committee, on December 14, 2011, did the Republican Senators release detailed versions of the 2011 Plan. (FOF 104-105). On that same day, the 2011 Plan passed the Pennsylvania Senate 26 to 24, with all Democratic Senators voting against it. (FOF 109).

Senator Andrew Dinniman could not recall a situation where a "shell bill" was presented to a committee for a vote. (FOF 126a). Minority party members of the State Senate Government Committee did not see the 2011 Plan until the morning of December 14, 2011. (FOF 126b). The Pennsylvania Senate rules require a minimum of 6 hours between a bill coming out of the Appropriations Committee and its consideration on the floor of the Senate. (FOF 126c). Yet, the Republicans suspended this rule for the 2011 Plan. (*Id.*). The Republicans also suspended the rule that requires sessions to end by 11 p.m. (FOF 126d). As a result, not a single advocacy group had an opportunity to respond to the 2011 Plan. (FOF 126f). Democratic Senators could not discuss the plan, much less seek input from their constituents, before being forced to vote on it. (FOF 126g). Democratic

members of the Pennsylvania House had a similarly truncated time to review the 2011 Plan and were required to vote on it on December 20, 2011. (FOF 117).

Republican Senators pushed the 2011 Plan through to passage when it had been open to the public for less than one day. Democratic Senators and the general public were kept in the dark until the very last minute and had no opportunity to contest, revise or prevent its passage. Governor Tom Corbett, a Republican, signed the 2011 Plan on December 22, 2011. (FOF 121).

### C. RESPONDENT STACK'S AFFIDAVIT

Respondent Stack, with all parties' consent, testified through affidavit at trial. He testified from his experience as the chair of Pennsylvania's Local Government Advisory Committee. (Stack Ex. 11, ¶ 3). He described how government services throughout Pennsylvania are frequently provided at the local level through county government. (*Id.* ¶ 5). Local officials frequently interact with their local congressmen regarding funding and federal services and how they impact local government issues. (*Id.* ¶ 6). Placing counties in multiple congressional districts can create challenges for the effective delivery of services, as a single county government must interact with multiple congressmen, some of whom are based many miles away and represent only a fraction of the constituents within the county. (*Id.* ¶ 7). As a result, Respondent Stack attested that it is

beneficial, whenever possible, to keep individual counties and municipalities together in a single congressional district. (*Id.* ¶ 8).

### D. FUNDAMENTAL DISCREPANCIES BETWEEN JUDGE BROBSON'S FINDINGS AND HIS CONCLUSIONS

With his December 29, 2017 Findings of Fact and Conclusions of Law, Judge Brobson made extensive findings that support the Petitioners' case, including, most critically, his finding that the Petitioners' experts are credible. (FOF 414). He recognized that the Legislative Respondents' expert witnesses were largely not credible in their criticism of the Petitioners' experts, and that Legislative Respondents failed to provide the Court with any guidance regarding their position supporting the 2011 Plan. (FOF 415). Apart from the two witnesses who lacked credibility, the Legislative Respondents offered no testimony to support or defend their 2011 Plan.[1]

Certain of Judge Brobson's conclusions of law were worded in a manner that failed to reflect his findings of fact and the lack of affirmative testimony from the Legislative Respondents; and also failed to address the overwhelming evidence that, with the 2011 Plan, the Republican Legislative Respondents designed a statewide map that used partisan considerations as the controlling factor and severely impacted Democratic voters:

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[1] The Legislative Respondents even pulled one purported expert witness, who had submitted an expert report but never testified. (Tr. Trans. 1191).

- Although Judge Brobson concluded that Petitioners had established that "by neutral, or nonpartisan criteria *only*, it is possible to draw alternative maps that are not as favorable to Republican candidates as is the 2011 Plan" (COL 60) (emphasis in the original), Petitioners established, through an extensive statistical analysis, that it was not just "possible," but virtually certain that the use of neutral criteria would have resulted in maps that were significantly less favorable to Republicans. (Tr. Trans. 203-04).

- Although Judge Brobson concluded that "it is difficult to assign a singular and dastardly motive to a branch of government made up of 253 individual members" (COL 36), Petitioners demonstrated that the 2011 Plan could have only come into existence with partisan intent. (Tr. Trans. 203-04). The fact that Judge Brobson allowed any motivation to be concealed in the guise of "legislative privilege" and prevented any discovery into the Republican Legislative Respondents' intent eliminates any credence to this conclusion.[2]

- Although Judge Brobson concluded that "voters who are likely to vote Democratic (or Republican) in a particular district... are not an identifiable political group" (COL 53), this conclusion stands in stark contrast to what Petitioners demonstrated – that the 2011 Plan was designed to "crack and pack" Democratic voters so as to maximize the number of Congressional districts that would favor Republican candidates. (Pet. Ex. 53; Tr. Trans. 579-80, 591, 621-36). Further, with this conclusion, Judge Brobson improperly restricted his review to voters in a single district, as compared to voters statewide.

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[2] With a November 22, 2017 opinion, Judge Brobson ruled that, under the Speech and Debate clause of the Pennsylvania Constitution, the Republican Legislative Respondents must be accorded a "legislative privilege" and the Petitioners were precluded from any discovery that would have elicited from the Republican Legislative Respondents their objectives in creating the 2011 Plan. Judge Brobson reached this conclusion despite the fact that the Republican Legislative Respondent had eschewed their "legislative privilege" when sharing information relating to the 2011 Plan with third parties, including Republican National Committee, the National Republican Congressional Committee, the Republican State Leadership Committee, and the State Government Leadership Committee.

- Although Judge Brobson concluded that Petitioners failed to demonstrate improper partisan gerrymandering under *Erfer v. Commonwealth*, 794 A.2d 325, 332 (Pa. 2002) because "[a]t least 3 of the 18 congressional districts in the 2011 Plan are safe Democratic seats," that argument fails as a matter of law because packing voters into a minority party districts is a fundamental aspect of partisan gerrymandering. (Pet Ex. 53; Tr. Trans. 579-80, 591, 621-36).

- Although Judge Brobson cited *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 745 (Pa. 2012) for the proposition that "partisanship can and does play a role in congressional reapportionment cases," (COL 31), he created an artificially high standard despite acknowledging that, in *Holt*, this Court emphasized that "the constitutional commands and restrictions on the process exist precisely as a brake on the most overt of potential excesses and abuse." 38 A.3d at 745. (COL 15).

Judge Brobson's findings are revealing. He accepted the credibility of each of the Petitioners' expert witnesses (FOF 414); and concluded that the 2011 Plan has a "partisan skew in favor of Republican candidates [that] is substantial in relation to their method of comparison." (*Id.*). He further recognized that partisan gerrymandering cases are justiciable under the Pennsylvania Constitution, citing *Erfer v. Commonwealth*, 794 A.2d 325, 331 (Pa. 2002). (COL 10). Yet, despite the overwhelming evidence of partisan motivation, Judge Brobson refused to accept the fact of partisan motivation without hearing direct evidence from the Legislative Respondents, which he had effectively prevented. (COL 36).[3] He

[3] Petitioners were prepared to present exhibits related to Republicans' national concerted effort to control the redistricting process in a number of states across the country, but Judge Brobson sustained objections to their admission. (Tr. Trans

could not reach the conclusion that the Petitioners' expert witnesses, whom Judge Brobson found to be credible – and the obviously distorted boundaries of the map itself – had proven that partisan gerrymandering was the predominant factor in developing the 2011 Plan.

## E. THE MAP SET FORTH IN DR. CHEN'S FIGURE 1 IS AVAILABLE AS A GUIDE FOR A POTENTIAL REMEDY

### 1. Dr. Chen Provided Detailed Data For His Simulations That Would Allow For Appropriate Evaluation Of Equality Of Population And Contiguity

As the Petitioners explain in their brief, Dr. Chen provided extremely detailed data for each of his 1,000 simulations. (Tr. Trans. 365). In particular, Dr. Chen provided .shp ("shape") files of each of his 1,000 simulations, which include the latitude and longitude points for the district borders. (Tr. Trans. 429; 439-440). That data permits any individual to redraw Dr. Chen's maps and to evaluate them in detail, including into which district each of Pennsylvania's approximately 420,000 census blocks falls. (Tr. Trans. 375).

### 2. The Map Provided In Dr. Chen's Figure 1

In his expert report, Dr. Chen used one of his simulated maps as an illustrative figure, identified as "Chen Figure 1." (Pet. Ex. 3). Chen Figure 1 was

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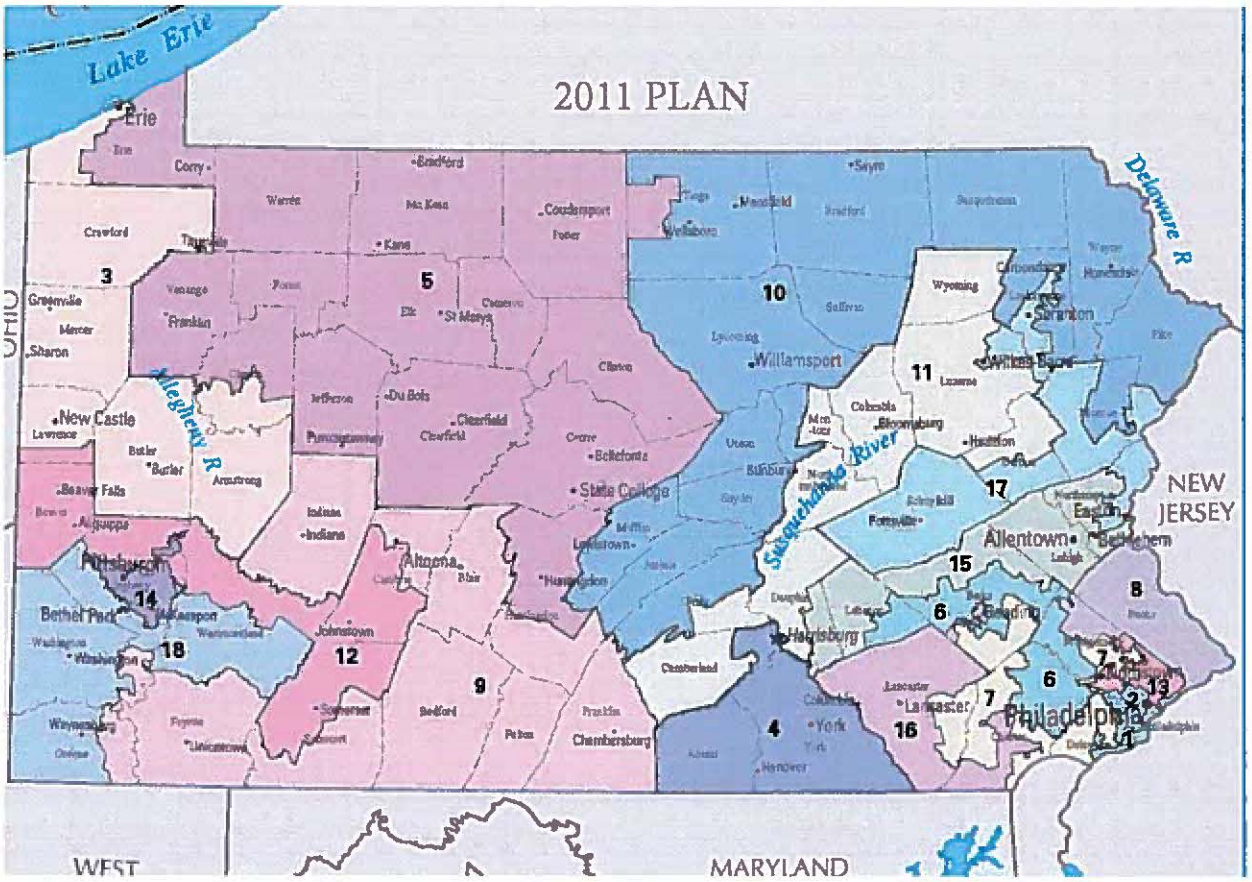
1062-65, addressing Pet. Exs. 124, 126-29, 131-34). Judge Brobson erred in excluding these documents which were admissible and self-authenticating under the Rules of Evidence. Pa. R.E. 401, 803(6), 902).

one of Dr. Chen's 500 simulations in his first set of simulations, which was identified as Simulation 308. (Tr. Trans. 518).

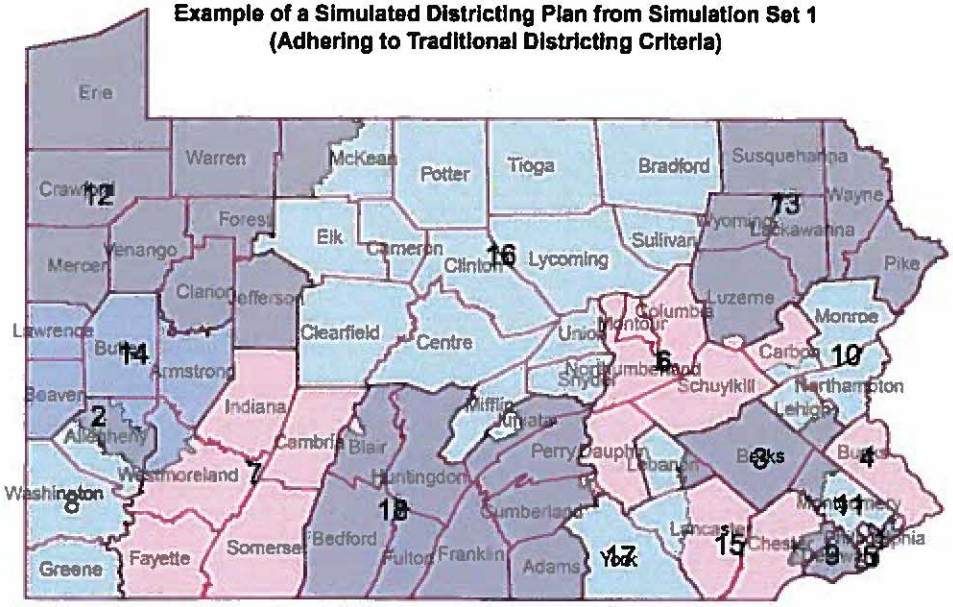
The following image shows the 2011 Plan:



The following image is Chen Figure 1 (Pet. Ex. 3):

**Chen Figure 1:**

**Example of a Simulated Districting Plan from Simulation Set 1 (Adhering to Traditional Districting Criteria)**

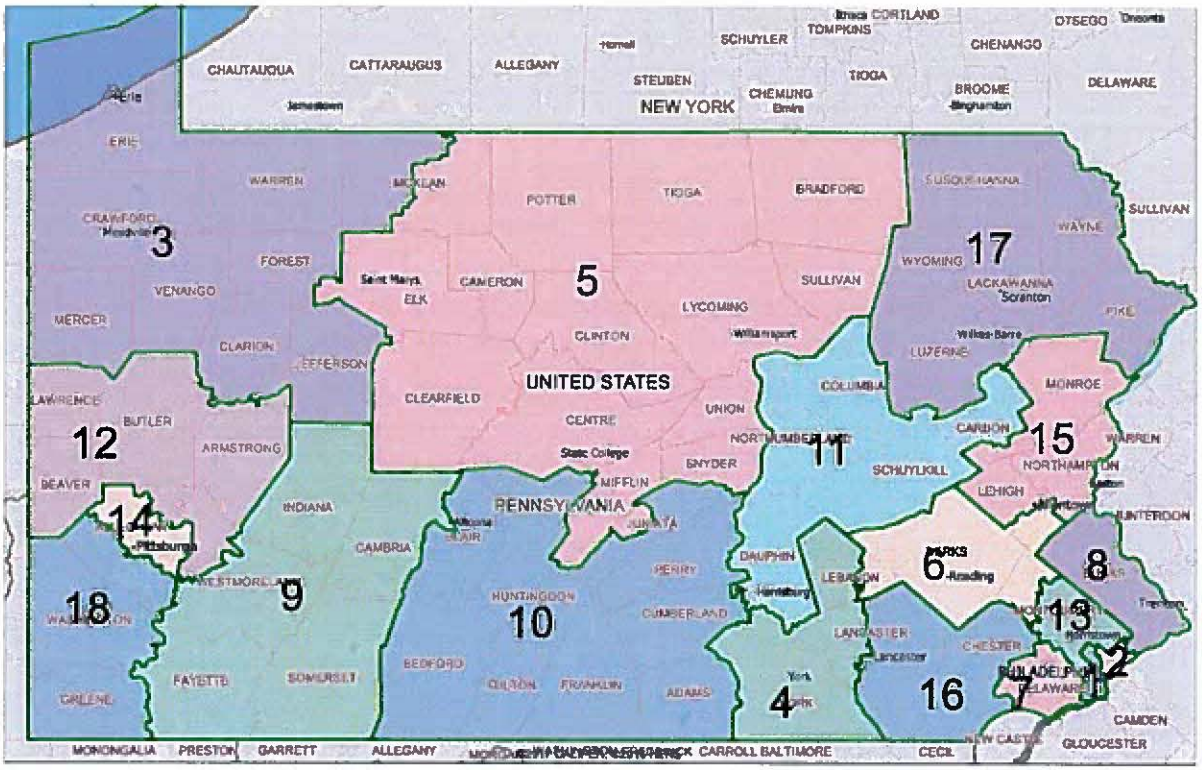



| | Simulated Map: | Enacted Map: |
|---|---|---|
| **Expected Republican Seats:** | 9 | 13 |
| **Counties Split:** | 14 | 28 |
| **Average Reock Compactness Score:** | 0.442 | 0.278 |
| **Average Popper-Polsby Compactness Score:** | 0.310 | 0.164 |

Petrs. Ex. 3

The following image is Chen Figure 1, as renumbered for illustrative purposes, to allow a comparison to the 2011 Plan:[4]

STACK ILLUSTRATIVE CONGRESSIONAL MAP




### 3. Use Of Chen Figure 1 As A Guide For Creating A Constitutional Map

Using standard mapping software, a map-maker could geo-locate any real address onto any of Dr. Chen's simulated maps to determine in which generated congressional district the address would lie. (Tr. Trans. 526-527). A geolocation of Pennsylvania's current congressional delegation onto Chen Figure 1 indicates that most incumbent member of Congress in 2018 would be sorted into individual

[4] The Stack Illustrative Congressional Map renumbers the arbitrarily numbered districts in Chen Figure 1 so that the districts generally correlate geographically to the numbers of the districts in the 2011 Plan.

districts, with only two districts pairing two incumbent members together (Lou Barletta and Matt Cartwright in one district and Brendan Boyle and Brian Fitzpatrick in another district). (*See* Stack Ex. 9 showing current congressmen placed on Chen Figure 1 in detail). Further, the incumbent members of Congress paired in Chen Figure 1 are located along the borders of the relevant districts and thus could be placed into different districts with minor edits to that map. (Compare Pet. Ex. 3 and Stipulation of Fact ¶¶ 155-56)[5].

With regard to racial consideration in redistricting, the underlying data for Chen Figure 1 provides sufficient data to evaluate the demographic components used in a Voting Rights Analysis for the Philadelphia area. (Tr. Trans. 245). Given Philadelphia's significant African-American population and the creation in Chen Figure 1 of two congressional districts located entirely within Philadelphia, it would not be difficult to create a majority minority district in Philadelphia. (*See* Stack Ex. 9; Pet. Ex. 3; Tr. Trans. 1279-80).[6] The underlying data for Chen Figure

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[5] Chen Figure 1 places Rep. Keith Rothfus in the district most analogous to the current 18th Congressional District. (Stack Ex. 9). The two candidates for the March 13, 2018 special congressional election for the 18th Congressional District, Conor Lamb and Rick Saccone, also reside within that district. (*Compare* Stack Ex. 9, p. 5 *with* FOF 96 and 468).

[6] Petitioners demonstrated that the 2011 Plan's partisan distortions cannot be explained by reference to the Voting Rights Act. (FOF 303). Although Dr. Chen analyzed the 259 simulated districting plans generated that included a congressional voting district with an African-American voting age population in excess of the 2011 Plan (FOF 300), there is no indication that any of the other

1 also provides sufficient data to evaluate whether or not any changes to Chen Figure 1 at the census block level would still result in districts that comply with equality of population and contiguity. (Tr. Trans. 375; 429; 439-400).

Like all 1,000 of Dr. Chen's simulated maps, Chen Figure 1 met or exceeded the 2011 Plan on all traditional redistricting criteria.

- Chen Figure 1 splits fewer counties than the 2011 Plan (14 v. 28) (Pet. Ex. 3);
- Chen Figure 1 keeps intact multiple counties that the 2011 Plan splits across more than two congressional districts (*Compare* Joint Ex. 1 *with* Pet. Ex. 3);
- Chen Figure 1 has a higher Reock Compactness Score and a higher Popper-Polsby Compactness Score than the 2011 Plan, demonstrating greater overall compactness (Pet. Ex. 3);
- Chen Figure 1 generally keeps intact communities of interest intact that the 2011 Plan tears apart (*See* Pet. Exs. 3, 53; Tr. Trans. 579-80, 591, 621-36).
- Chen Figure 1 produces a 9 to 9 Pennsylvania congressional delegation when Democrats win a slight majority of the statewide vote, as compared to the 2011 Plan, which maintains a locked in 13 to 5 Republican advantage. (Pet. Ex. 3).

Based on these significant features, Chen Figure 1 provides an appropriate basis for formulating a map that would provide relief.

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Chen simulations violate the Voting Rights Act factors laid out in *Thornburg v. Gingles*, 478 U.S. 30 (1986).

## III. COUNTER STATEMENT OF THE QUESTIONS BEFORE THE SUPREME COURT

### A. WHETHER PENNSYLVANIA'S 2011 CONGRESSIONAL DISTRICTING MAP, WHICH DISCRIMINATES AGAINST DEMOCRATIC VOTERS BY SORTING THEM INTO DISTRICTS BASED ON THEIR POLITICAL VIEWS, VIOLATES THE FREE EXPRESSION, FREE ASSOCIATION AND EQUAL PROTECTION PROVISIONS OF THE PENNSYLVANIA CONSTITUTION.

**(Adopting Petitioners' Question, as stated).**

**Suggested Answer: Yes.**

### B. WHETHER THIS COURT CAN ENSURE THAT A CONSTITUTIONALLY-APPROPRIATE CONGRESSIONAL DISTRICT MAP CAN BE IN PLACE FOR PENNSYLVANIA'S 2018 CONGRESSIONAL ELECTIONS.

**Suggested Answer: Yes.**

## IV. SUMMARY OF ARGUMENT

A picture is often worth a thousand words. The 2011 Plan, with its contorted districts, speaks volumes. The 2011 Plan has been in place for three congressional elections and, in each election, 13 Republican candidates and only 5 Democratic candidates have prevailed, even where more voters in the Commonwealth voted for Democratic candidates than Republican candidates.

Here, the Petitioners established through credible expert witnesses that the 2011 Plan was consistently a statistical outlier when reapportionment models were created using legitimate state interests. In response, the Legislative Respondents were silent, hiding behind the Speech and Debate Clause of the Pennsylvania Constitution and offering only the testimony of two witnesses, whose credibility even the lower court rejected.

The Petitioners established that through the use of voting patterns at the most granular precinct level, disproportionate partisan outcomes could be accomplished, to the detriment of voters who tended to vote for Democrats. Based on the record evidence, no other conclusion is possible. Because the Legislative Respondents segregated voters based on their past speech, associations and core beliefs, the 2011 Plan cannot survive a strict scrutiny standard under Article 1 Sections 7 and 20 (Freedom of Expression) or Article 1, Sections 1 and 26 (Equal Protection) and Article 1, Section 5 (Free and Equal Elections) of the Pennsylvania

Constitution. The Legislative Respondents failed even to suggest any governmental interest that could justify the 2011 Plan. Under the Pennsylvania Constitution, the 2011 Plan is unconstitutional.

Further, even under a rational basis test, the 2011 Plan must fail. The subordination of legitimate redistricting interests for partisan purposes is indefensible. The Legislative Respondents failed to defend, or even describe a legitimate governmental interest. Their blanket invocation of legislative immunity cannot render judicial review impossible.

This Court should address the constitutional infirmity of the 2011 Plan on an expedited basis so that, in 2018, Pennsylvania voters can elect members of Congress in districts that reflect legitimate factors. Although the General Assembly and the Governor may have a brief opportunity to reach consensus under Constitutional principles, this Court should employ a special master to commence the redrawing of a map in sufficient time for candidates to circulate petitions. One map, referenced at trial as Chen Figure 1, provides an appropriate starting point for creating a map, which is designed under constitutional parameters and would heal the divisions that the 2011 Plan created throughout Pennsylvania's various regions.

## V. ARGUMENT OF APPELLEE

### A. PENNSYLVANIA'S 2011 CONGRESSIONAL DISTRICTING MAP DISCRIMINATES AGAINST DEMOCRATIC VOTERS BY SORTING THEM INTO DISTRICTS BASED ON THEIR POLITICAL VIEWS AND VIOLATES THE FREE EXPRESSION, FREE ASSOCIATION AND EQUAL PROTECTION PROVISIONS OF THE PENNSYLVANIA CONSTITUTION.

With respect to this question before the Court, Respondent Stack joins the Petitioners' legal arguments. Respondent Stack supplements these arguments to demonstrate how compellingly Petitioners are entitled to relief.

#### 1. Strict Scrutiny Is The Applicable Test For The Challenge To The 2011 Plan And The 2011 Plan Fails Strict Scrutiny

##### a. Strict Scrutiny, As Applied To Freedom Of Expression

As the Petitioners explain, strict scrutiny is the applicable test for their challenge to the 2011 Plan. Laws that discriminate against or burden protected expression based on its content or viewpoint are subject to strict scrutiny under the Pennsylvania Constitution's Free Expression Clauses. *See Pap's A.M. v. City of Erie*, 812 A.2d 591, 611-12 (Pa. 2002). As this Court noted in *Pap's A.M.*, the Pennsylvania Constitution predated the federal Constitution and the "protections afforded by Article I, § 7 thus are distinct and firmly rooted in Pennsylvania history and experience. The provision is an ancestor, not a stepchild of the First Amendment." *Id.* at 605. The 2011 Plan reflects a textbook case of viewpoint

discrimination. Even Judge Brobson concluded that the map "was drawn to give Republican candidates an advantage in certain districts." (COL 52).[7]

### b. Strict Scrutiny, As Applied To Equal Protection

Laws that discriminate against citizens in the exercise of their fundamental rights are also subject to strict scrutiny. *See, e.g., Applewhite v. Commonwealth*, 2014 WL 184988, *20 (Pa. Commw. Ct. Jan. 17, 2014), *on remand from Applewhite v. Commonwealth*, 54 A.3d 1 (Pa. 2012). Participating in the political process through voting is a fundamental right under the Pennsylvania Constitution. *Id.* at * 19 (*citing* Pa. Const. art. I, sec. 5).

### c. The 2011 Plan Affects Both Freedom Of Expression And Equal Protection Rights

Petitioners demonstrated that in creating the 2011 Plan, the Republican leadership of the General Assembly, unchecked by a Republican Governor, purposefully and deliberately designed districts that twist and turn throughout the Commonwealth for no other purpose than to maximize partisan advantage. (FOF 267-68). As a result, the 2011 Plan materially infringed upon the Petitioners' free expression and equal protection rights.

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[7] Respondent Stack similarly joins Petitioners in their arguments regarding improper retaliation under Pennsylvania's Free Expression Clauses.

### d. The Legislative Respondents Could Not Defend Their 2011 Plan By Identifying Any Compelling Government Interest

Under a strict scrutiny analysis, the Legislative Respondents in this matter were required to demonstrate that the 2011 Plan was "narrowly drawn to accomplish a compelling government interest." *Pap's A.M.*, 812 A.2d at 612; *see also Applewhite*, 2014 WL 184988 at *20 ("the burden is on the government to demonstrate that the law [infringing upon a fundamental right] is *narrowly tailored* to achieve a *compelling governmental interest.*") (*quoting Petition of Berg*, 712 A.2d 340, 342 (Pa. Commw. Ct. 1998) (emphasis in the original)). Yet, Legislative Respondents could not identify a compelling government interest, much less explain how any putative interest might be narrowly tailored to accomplish that interest.

In *Holt*, this Court provided an historical analysis of both Federal and Pennsylvania Constitutional law in respect to redistricting. This Court cited a century of cases, with extensive reference to Dean Ken Gormley's treatise.[8] In undertaking that exercise, this Court made clear that compactness, contiguity and respect for the integrity of political subdivisions or communities with actual shared interests have deep roots under both Federal and Pennsylvania law, defining those

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[8] *See, e.g., Holt*, 38 A.3d at 719 (*citing* Ken Gormley, The Pennsylvania Legislative Reapportionment of 1991, at 22-24 (Commonwealth of Pennsylvania Bureau of Publications 1994)).

concerns, along with population equality, as "legitimate" interests that the state legislators are to consider. *Holt*, 38 A.3d at 745-46. Citing *Reynolds v. Sims*, 377 U.S. 533, 578-79 (1964), this Court warned that "indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering." *Holt*, 38 A.3d at 740.

This Court quite clearly distinguished between the legitimate legislative interest of state legislators and partisan gerrymandering. *Holt*, 38 A.3d at 740. Although this Court recognized that "redistricting has an inevitably legislative, and therefore an inevitably political, element," it forcefully warned that "the constitutional commands and restrictions on the process exist precisely as a brake on the most overt of political excesses and abuse." *Holt*, 38 A.3d at 745.

Here, the Pennsylvania Constitution imposes restrictions on basing the design of a map on partisan purpose, subordinating the legislative interests in the state. That is the nature here of the violations of the Pennsylvania Constitution. The Legislative Respondents' failure to offer **any** evidence to defend their 2011 Plan compels the conclusion that the 2011 Plan fails constitutional muster under the strict scrutiny analysis.

For that reason, Legislative Respondents' defense of the 2011 Plan fails as a matter of law and Petitioners are entitled to relief.

### 2. The 2011 Plan Would Fail The Less Restrictive Rational Basis Test

Respondent Stack agrees and joins with the Petitioners in asserting that strict scrutiny should apply to the 2011 Plan and that the 2011 Plan fails a strict scrutiny analysis. Respondent Stack asks this Court to recognize that, if considered under the less restrictive rational basis test, the 2011 Plan would also fail.

#### a. Under The Rational Basis Test, A Law Must Be "Reasonably Related" To A Legitimate State Interest

When subjecting a piece of legislation to strict scrutiny, Pennsylvania courts have commented on whether the relevant legislation would even pass rational basis review. *See, e.g., Applewhite*, 2014 WL 184998 at * 20 n. 25 ("Based on the comprehensive records before the Court, the provisions of the Voter ID Law as written would not, in many respects survive rational basis review..."). So too, here, this Court could invalidate the 2011 Plan for the simple reason that it lacks ***any*** rational basis under ordinary Equal Protection analysis and thus violates the Pennsylvania Constitution.

A law fails a rational basis test if it is not reasonably related to a legitimate state interest. *See Muscarella v. Commonwealth*, 87 A.3d 966, 973 (Pa. Commw. Ct. 2014); *cf. In re Nomination Papers of Marakay Rogers*, 908 A.2d 948 (Pa. Commw. Ct. 2006) (election statute violates the Free and Equal Elections Clause if the legislature abuses its discretion in pursuing a *valid state interest*). This is a

two-part test—the legislature must have a valid state purpose for its actions, and the law must be rationally related to that purpose. Here, the 2011 Plan is a law that treats Democratic and Republican voters differently and disproportionately burdens Democratic voters. (FOF 267-68). As Petitioners have demonstrated, the 2011 Plan was adopted with the intent and effect of discriminating against Democratic voters. (*Id.*).

The 2011 Plan lacks a legitimate state interest, and instead advances the impermissible interest of achieving partisan advantage. *See Vieth v. Jubelirer*, 541 U.S. 267, 293 (2004) ("excessive injection of politics" into districting decisions is unlawful); Richard Briffault, *Defining the Constitutional Question in Partisan Gerrymandering*, 14 Cornell J. L. & Pub. Pol'y 398, 414–15 (2005) ("Districting decisions that can be explained only by pure partisanship, or pure pursuit of the self-interest of the individual members of the legislature, fail to serve a legitimate governmental objective and are thus arbitrary, irrational and unconstitutional."); *cf. Muscarella*, 87 A.3d at 974 (invalidating a law that lacked a legitimate state interest).[9]

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[9] In his proposed Conclusions of Law, Judge Brobson cites to a series of cases under the Federal Constitution where courts held that some political considerations were permitted. (COL 11). Respondent Stack joins with Petitioners in noting that those cases did not address the expanded protections of the Pennsylvania Constitution's free speech clauses. Further, none of those cases held that political considerations could subordinate all other traditional redistricting criteria, as occurred here. *Shapiro v. McManus*, 203 F. Supp. 3d 579, 597 (D. Md. 2016).

### b. The Effect Of The 2011 Plan Is To Place An Artificial Thumb On The Scale To Favor Republican Candidates

The Pennsylvania Constitution is designed to prevent the heavy hand of partisanship from unduly influencing the electoral process. The constitutional requirement of "free and equal elections" contemplates that all voters are to be treated equally. The state has a duty to ensure that it governs impartially and provides free and equal elections. *See* Pa. Const. art. I, § 5 ("Elections shall be free and equal."); *Vieth*, 541 U.S. at 317 (Stevens, J., dissenting) ("The concept of equal justice under law requires the state to govern impartially."); *cf. In re Johnson*, 476 A.2d 1287 (Pa. 1984) ("It is well recognized that the preservation of the integrity of the electoral process is a legitimate and valid state goal."). Placing a thumb on the scale to artificially increase the voting power of Republicans is not a legitimate state interest. *Cf. Holt*, 38 A.3d at 745.

Yet, in creating the 2011 Plan, the Republican leadership of the General Assembly, unchecked by a Republican Governor, purposefully and deliberately designed misshapen districts for no other purpose than to maximize partisan advantage. (FOF 267-68). No other explanation exists for the bizarre shapes of District 6 and District 7. (Pet. Ex. 53; FOF 267-68). Statewide election results and the only credible expert testimony presented clearly demonstrate that Pennsylvania should have a congressional delegation that is more or less 50% Democratic and 50% Republican. (Pet. Ex. 3, pp. 5 and 16). Instead, despite who shows up to

vote, the 2011 Plan produces a delegation comprised of 13 Republicans and 5 Democrats. Through the map's careful design, Republicans win nearly 75% of all Congressional seats, thus clearly favoring one party over another. (FOF 263).

Legislation that overtly favors a particular party would, without question, be found to be unconstitutional. For instance, under current Pennsylvania election law, in the event of a tie vote in an election, the candidates "shall cast lots" to determine the winner. *See* 25 P.S. § 3168. If, hypothetically, the legislature were to amend the statute to provide that, in the event of a tie, the Republican candidate could cast two lots and the Democratic candidate could cast only one lot, that legislation would increase the probability that the Republican candidate would win the lot-casting tie-breaker from 50% to 75%.[10] Giving the Republican two lots and the Democrat only one would have the sole purpose of favoring the Republican candidate and making it more likely that the Republican would win the election. This explicitly partisan legislation would be obviously and fundamentally unfair and, under the Pennsylvania Constitution, it could not withstand an Equal Protection challenge.

Here, the 2011 Plan exhibits the heavy hand of state action that is as offensive to democracy as giving the candidate of one party two lots and the other only one in a lot-casting tie breaker. In fact, it is much worse. In 75% of the

[10] The Petitioners' witness, Dr. Pedgen, a mathematician, confirmed this fact at trial. (Tr. Trans. 804-05).

Congressional elections, Democrats, by design, have little opportunity to run competitively because of the partisan gerrymandering evident in the 2011 Plan. The Petitioners demonstrated, with unrefutable and credible evidence, that the 2011 Plan is a statistical outlier for all traditional redistricting criteria (Pet. Ex. 3, pp. 5 and 16). The 2011 Plan operates in much the same way as the hypothetical tie-breaker law – to make it more likely that Republican candidates will be elected. Where a redistricting map can only be explained by an improper purpose of increasing Republican voting power, it must fail rational basis review.[11] It is unconstitutional and invalid.

### c. The 2011 Plan Is Not Rationally Related To The Putative State Interest

Although the Legislative Respondents proffered the hypothetical state interests of redrawing the district maps to conform to the results of the census, they cannot and do not offer any rational relationship between that interest and the map they drew. *See Nixon v. Commonwealth*, 839 A.2d 277, 287 (2003) (rational basis review requires that "the means which [a law] employs must have a real and substantial relation to the objects sought to be attained").

Pennsylvania courts have repeatedly invalidated laws under a rational basis review where the law lacks a reasonable relationship to the alleged state interest.

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[11] Obviously, where the districts were design to inhibit the opportunity of Democratic voters to elect member of Congress on an equal footing with their Republican counterparts, under a strict scrutiny analysis, the 2011 Plan must fail.

*See Mixon v. Commonwealth*, 759 A.2d 442, 451 (Pa. Commw. Ct. 2000) (finding that a law which allowed felons who were registered to vote prior to their incarceration to vote upon release, but preventing those who were not previously registered from voting until five years after release was not rationally related to the state's interest in having qualified electors); *see also Nixon*, 839 A.2d at 288; *Muscarella*, 87 A.3d at 974; *Ctr. for Student Learning Charter Sch. at Pennsbury v. Pa. Dep't of Educ.*, No. 1746 C.D. 2010, 2011 WL 10846016, at *7 (Pa. Commw. Ct. Sept. 13, 2011); *Warren Cty. Human Servs. v. State Civil Serv. Comm'n (Roberts)*, 844 A.2d 70, 74 (Pa. Commw. Ct. 2004); *Wings Field Pres. Assocs., L.P. v. Com., Dep't of Transp.*, 776 A.2d 311, 320–21 (Pa. Commw. Ct. 2001). Therefore, this Court should strike down the 2011 Plan as not reasonably related to any legitimate population-based redistricting goals.

**d. This Court Has Invalidated Other Maps and Statutes And Should Not Rubber-Stamp The Legislature's Redistricting Decisions**

Although rational basis review is a deferential standard, this Court is not required to simply rubber-stamp the redistricting decisions of the legislature. This Court has, in other contexts, invalidated maps as irrational or unlawful. In *Holt v. 2011 Legislative Reapportionment Commission*, 614 Pa. 364 (2012), the Pennsylvania Supreme Court struck down a redistricting plan under the "contrary to law" standard. *See id.* at 375.

This Court has also invalidated zoning maps, particularly where the map included contorted zoning districts that did not serve any legitimate state purpose. Like a redistricting plan, a zoning map is adopted, as legislation, by a municipality, and is presumed to be valid. In rejecting zoning maps that result in "spot zoning," the Court has consistently recognized that, the legislative judgment "is never sacrosanct, and certainly not fairly debatable, when the legislative body ignores reality." *Appeal of Glorioso*, 196 A.2d 668, 671 (Pa. 1964).[12] The test of constitutionality of a zoning map is whether it can be shown to be arbitrary and unreasonable, with no substantial relation to a legitimate public interest. If a "spot" of land is singled out for different treatment than accorded to similar surrounding property that "is indistinguishable from it in character," it is an unreasonable and arbitrary exercise of the legislative power and is invalid "spot zoning." *Id.*, citing *Putney v. Abington Twp.*, 108 A.2d 134, 140 (Pa. Super. 1954); *see also Appeal of Mulac*, 210 A.2d 275 (Pa. 1965) (most relevant questions in a spot zoning challenge is whether an area with no relevant differences from neighboring property is singled out for different treatment).

In the same way, this Court can look at a map that creates different congressional districts and determine whether the design of those districts is

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[12] A zoning ordinance is presumed to be constitutionally valid unless a challenger shows that it is unreasonable, arbitrary or not substantially related to the public interest.

rationally related to legitimate state purposes. Under this Court's decisions in *Holt* and *Erfer*, legitimate state interests include population equality, contiguity, compactness and respect for political subdivisions or communities defined by shared interests. The contorted districts of the 2011 Plan are as irrationally constructed as the impermissible spot zones that this Court has rejected. Communities of interest are disrupted for no apparent reason other than to effectuate a partisan advantage. Like a zoning map with an invalid spot zone, this Court can provide meaningful review of the 2011 Plan under the rational basis standard and strike the map down as unconstitutional. Although it obviously fails under the proper strict scrutiny standard, this Court may also conclude that the 2011 Plan fails the rational basis test.

### 3. Judge Brobson Failed to Apply Strict Scrutiny or Rational Basis And Discounted the Evidence at Trial to Avoid Recognizing the Invalidity of the 2011 Plan

#### a. Petitioners Demonstrated, To A Degree Of Statistically Guaranteed Certainty, That Any Alternative Map Would Be Less Favorable To Republicans

Judge Brobson failed to apply strict scrutiny to the 2011 Plan. He also failed to apply rational basis. Instead, he improperly discounted his own findings and the evidence Petitioners presented at trial in an apparent effort to avoid acknowledging the invalidity of the 2011 Plan.

Judge Brobson mischaracterized what Petitioners' experts demonstrated as to the partisanship of the 2011 Plan. Contrary to Judge Brobson's assertion that it is "possible" to draw alternative maps that are less favorable to Republicans under neutral redistricting criteria (COL 60), the Petitioners demonstrated that it is statistically guaranteed that neutral redistricting criteria would not just "possibly" be less favorable but, in fact, **would** result in maps that **are** significantly less favorable to Republicans. (Tr. Trans. 203-204).

Judge Brobson attempted to disregard the clear distinction between "possibility" and the statistically guaranteed certainty that the Petitioners proved. The only explanation for the 2011 Plan's misshapen districts is partisan advantage. Even if only minimal respect is given to compactness, communities of interest or avoidance of county and municipal splits, Pennsylvania would have had a far less bizarre map and one that would be far less favorable to Republicans. (FOF 267-68, 355-56).

Political considerations are always a factor in drawing legislative districts. *See Shapiro v. McManus*, 203 F. Supp. 3d 579, 597 (D. Md. 2016); *Holt*, 38 A.3d at 745.[13] Yet, the difference between political considerations and partisan intent is

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[13] Although Respondent Stack cites both federal and state case law for persuasive authority, it is clear that Petitioners' claims are brought under the Pennsylvania Constitution. Whatever this Court's ruling is, it should be made clear to the U.S. Supreme Court that its ruling is based on the Pennsylvania Constitution independently, regardless of the current state of federal constitutional

critical. *Id.* Political considerations are permissible when they do not subordinate traditional districting principles or target voters of a particular party singled-out for disfavored treatment. *Id.* That is exactly what happened here. (FOF 267-68). The fact that respecting traditional districting criteria guarantees a significantly less Republican-favoring map demonstrates that distinction. (*Id.*). Judge Brobson's attempt to trivialize the statistical studies he found to be credible undermines his conclusion that the 2011 Plan was acceptable. The 2011 Plan reflects overt partisan gerrymandering and is unconstitutional.

### b. The Legislative Respondents Cannot Be Allowed To Use "Legislative Privilege" As Both Shield And Sword

Judge Brobson also improperly assumed that whether or not Petitioners can demonstrate "a singular and dastardly motive" on the part of the General Assembly (COL 36) should be considered as relevant to Petitioners' case. Judge Brobson made this assumption after precluding all discovery upon the very people who drew the 2011 Plan on the basis of the Pennsylvania Constitution's Speech and Debate Clause.[14]

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jurisprudence on this issue. *Cf. Commonwealth v. Edmunds*, 586 A.2d 887, 894-95 (Pa. 1991) (noting greater protections afforded by the Pennsylvania Constitution).

[14] In his November 22, 2017 opinion, Judge Brobson noted that the legislative privilege exists, in part, because of "the desire to protect legislative independence." (Nov. 22 Op. at 4 (*quoting United States v. Gillock*, 445 U.S. 360, 369 (1980)). Judge Brobson's opinion, however, allows: (1) Republican members of the General Assembly to protect their conversations with and information received

Petitioners, through their expert witnesses, were able to demonstrate how the 2011 Plan totally subordinated traditional redistricting criteria to naked partisan considerations. (FOF 267-68). They demonstrated that the 2011 Plan prioritizes Republican partisan advantage over county and municipal splits, communities of interest and compactness. Judge Brobson agreed that the 2011 Plan was "intentionally drawn so as to grant Republican candidates an advantage in certain districts within the Commonwealth." (COL 51).

Because strict scrutiny applies to a review of a partisan gerrymander, Petitioners need not demonstrate "a singular and dastardly motive to a branch of government." The government itself must affirmatively demonstrate that the challenged law was "narrowly drawn to accomplish a compelling government interest." *Pap's A.M.*, 812 A.2d at 612. The Legislative Respondents' failure here to justify the 2011 Plan in any way, shape or form is fatal to the 2011 Plan, without

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from the Republican National Committee, the National Republican Congressional Committee, the Republican State Leadership Committee, and the State Government Leadership Committee, and even protects conversations between those third parties; and (2) those Republican members to withhold that same information from other, non-Republican members of the General Assembly. In 2011, Respondent Stack was a member of the Pennsylvania State Senate and had no information about the 2011 Plan until the day he was expected to vote on it. Republicans outside the General Assembly had far more information than he had about the 2011 Plan during its promulgation. Judge Brobson's opinion affords greater protection under the speech and debate clause to those national Republicans than to then-Sen. Stack. That cannot be the law.

regard to whatever information the Legislative Respondents may have secreted away behind legislative privilege.

This Court has held that the Pennsylvania Constitution's legislative privilege cannot operate to "insulate the legislature from this court's authority to require the legislative branch to act in accord with the Constitution." *Pa. State Ass'n of Cty. Comm'rs v. Commonwealth*, 681 A.3d 699, 703 (Pa. 1996). The 2011 Plan fails even a rational basis test, because it subordinates all traditional redistricting criteria in favor of partisan performance. *See* Section V, A.3(a) supra. To the extent Legislative Respondents argue that Petitioners' case-in-chief would fail a rational basis test because it failed to discount every theoretical justification for the 2011 Plan, none of which the Legislative Respondents supports with any evidence, this Court should reject that argument. Even if this Court determines that partisan considerations may play some part in the redistricting process, this Court should enunciate a standard of review that cannot be foiled by an impenetrable blanket assertion of legislative privilege.[15]

For any meaningful judicial review, the Legislative Respondents would have to demonstrate the propriety of the 2011 Plan. This type of burden-shifting

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[15] Respondent Stack agrees with Petitioners' stated standards under strict scrutiny, which renders this argument moot even if this Court were to find that partisan considerations may play a role in redistricting, subordinate to the recognized, legitimate factors. This is because the Legislative Respondents failed to offer any testimony to rebut the Petitioners' compelling and *prima facie* case.

framework is familiar in Pennsylvania jurisprudence, typically where a defendant possesses all of the relevant information. *See, e.g., Allegheny Housing Rehabilitation Corp. v. Commonwealth*, 532 A. 2d 315 (Pa. 1987) (shifting burden to government employer to demonstrate proper justification for termination after employee established a *prima facie* case of sex discrimination under the Pennsylvania Human Relations Act); *Fernley v. Bd. of Supervisors*, 502 A.2d 585 (Pa. 1985) (shifting burden to municipality to justify zoning ordinance on the grounds of public health, safety, morals or general welfare upon showing that a zoning ordinance totally prohibits a legitimate use). If this Court determines that the General Assembly may consider partisan considerations alongside traditional redistricting criteria, some burden-shifting framework would provide the General Assembly with the option of asserting or waiving its legislative privileges.

The Legislative Respondents cannot use legislative privilege as both a shield and as a sword. Petitioners demonstrated the impermissible partisan distortions of the 2011 Plan. (FOF 267-68). The Legislative Respondents cannot simultaneously hide the relevant information and maintain that the Petitioners failed to prove the facts that the Respondents would conceal. For that reason, the 2011 Plan should be invalidated.

### c. The Validity Of A Redistricting Map Must Be Viewed As A Statewide Whole, Not District By District

Respondent Stack also joins with the Petitioners, and the various *amici*, who have demonstrated that, contrary to Judge Brobson's assertions (COL 53), it is easy for mapmakers to identify the locations of Democratic and Republican voters, regardless of the voters' official registration. (FOF 259-60). Respondent Stack further joins with the Petitioners in stating that Petitioners demonstrated that the drafters of the 2011 Plan themselves did, in fact, so identify Pennsylvania's voters and redistricted the Commonwealth on that basis to the subordination of all other redistricting criteria.

Judge Brobson also erred in limiting his analysis to voters "in a particular district." (COL 53).[16] Petitioners demonstrated that how individual voters and precincts vote in *statewide* elections provide a highly accurate prediction of how those voters will vote in congressional elections.[17] (FOF 259-63). Petitioners' expert, Dr. Chen, used this methodology to predict that Republicans would always win 13 of Pennsylvania's 18 congressional seats under the 2011 Plan. (FOF 263). His prediction proved accurate in all 54 of the congressional elections held under

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[16] This Court made clear in *Holt* that redistricting plans must be evaluated on a statewide basis for a proper constitutional analysis. *Holt*, 38 A.3d at 717-18, (c*iting Albert v. 2001 Legislative Comm'n*, 790 A.2d 989, 995 (Pa. 2002)).

[17] The fact that Pennsylvanians always vote in a significant, contested statewide election alongside each congressional election (i.e. the Presidential or the gubernatorial election) underscores the accuracy of this methodology.

the 2011 Plan to date. (*Id.*). By narrowing his focus to voters in a particular district, Judge Brobson put on blinders to the fact that at the time of redistricting, all voters and precincts are outside of any district. An analysis of this matter on a district-by-district basis is fundamentally flawed.

### d. Partisan Gerrymandering Is Unconstitutional Even Where A Few "Safe" Districts For The Minority Party May Result

Respondent Stack joins with Petitioners in rejecting Judge Brobson's proposition that, under *Erfer*, Democrats cannot show an unconstitutional partisan gerrymandering where 3 of 18 of the congressional districts are "safe" districts for Democrats. (COL 56b). *Erfer* cannot be understood to simultaneously hold that partisan gerrymandering is improper and justiciable, but not present if a sufficient number of voters are packed into a few safe districts. Packing, as Petitioners demonstrated, is one of the chief tools of partisan gerrymandering. (Pet Ex. 53; Tr. Trans. 579-80, 591, 621-36). Its use cannot preclude review of a partisan gerrymander. Judge Brobson committed an error of law when he concluded it did.

In the alternative, if *Erfer* does indeed stand for that proposition, it should be overturned for the reasons Petitioners enunciated. Packing cannot absolve partisan gerrymandering while forming a fundamental part of the concept.

## B. THIS COURT CAN ENSURE THAT A CONSTITUTIONALLY-APPROPRIATE CONGRESSIONAL DISTRICT MAP IS IN PLACE FOR PENNSYLVANIA'S 2018 CONGRESSIONAL ELECTIONS.

This Court may select a new redistricting plan, and need not wait for legislative action to remedy the constitutional infirmities. This Court, in *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992), has set a precedent to do just that. *See id.* (court judicially adopted a new redistricting plan where it struck down a legislative plan as unconstitutional). As in *Mellow*, no time can be wasted waiting for prolonged legislative action. February 13, 2018 is the first day to circulate and file nomination petitions for the May 15, 2018 Primary Election (FOF 422-23) and candidates cannot adequately circulate such petitions until they know the boundaries of their districts. 25 P.S. §§ 2753(a), 2868.[18] Thus, the Supreme Court can and should adopt a new redistricting map if the General Assembly and the Governor cannot reach agreement on a constitutionally valid map in time for the 2018 congressional primaries.[19]

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[18] At trial, Respondents Wolf and Torres indicated that there would be some minor flexibility with deadlines for the scheduled 2018 primary, but a new map would have to be in place no later than February 20, 2018. (FOF 448). Nonetheless, significant time constraints remain.

[19] This type of relief would be consistent with the remedy adopted in *Common Cause et. al. v. Rucho*, Docket Nos. 1:16-CV-1026 and 1164 (United States District Court for the Middle District of North Carolina, January 9, 2018).

As described in Respondent Stack's Counterstatement of the Case, Chen Figure 1 is accompanied by extremely detailed census-block-level data about its parameters. Further, Chen Figure 1 meets or exceeds the 2011 Plan on all traditional redistricting criteria and provides for a 9 to 9 congressional delegation when the statewide voter turnout is evenly divided. (*Compare* Joint Ex. 1 *with* Pet. Ex. 3; Pet. Ex. 1).

Chen Figure 1 (Stack Illustrative Congressional Map) also rectifies the 2011 Plans' negative impact to Pennsylvania's various communities of interest, resulting from the overzealous use of "packing" and "cracking" techniques which divided communities, rather than aligned related communities within a single district.[20] Chen Figure 1 specifically:

- Places an entire congressional district within Montgomery County and splits Montgomery County only once. The single split is necessary because Montgomery County's population is 799,814, which exceeds the congressional district size of 705,687 (or 705,688). Currently, Montgomery County is divided between five congressional districts (Joint Ex. 1; Stack Ex. 9; Stipulation of Fact ¶ 93; Tr. Trans. 383);
- Keeps Berks County Intact, rather than splitting it into four districts. (*Compare* Joint Ex. 5 *with* Stack Ex. 9, FOF 149);
- Splits Westmoreland County only once, instead of four times. (*Id.*);
- Keeps Delaware County intact, rather than splitting it into three districts. (*Id.*);

[20] Not surprisingly, many of the counties that the Legislative Respondents "cracked" involved large counties that tended to vote Democratic. (Compare Joint Ex. 1 and FOF 182.)

- Keeps Erie County intact. (*Id.*);
- Keeps Dauphin County intact, and does not split the City of Harrisburg. (*Id.*);
- Keeps Lackawanna County intact. (*Id.*);
- Keeps Monroe County intact. (*Id.*);
- Creates a consolidated Lehigh Valley district. (*Id.*); and
- Creates a relatively compact district in Southwest Pennsylvania, linking southern Allegheny County with Washington and Green Counties. (*Id.*).

Chen Figure 1 also shows that incumbent considerations can occur within the framework of establishing districts based on traditional criteria. Chen Figure 1 was created with an algorithm that accounted for population, contiguity, compactness and avoidance of county and municipality splits. Yet, the incumbents seeking reelection in 2018 reside in separate districts except for a few instances which would require minimal adjustment. (*See* Stack Ex. 9 *generally*).[21]

Consistent with this standard, this Court could retain a special master now to determine whether to modify Chen Figure 1 to comply with any districting requirements and to obtain input from the General Assembly or other interested parties in a compressed schedule, and to have that refined map available if the

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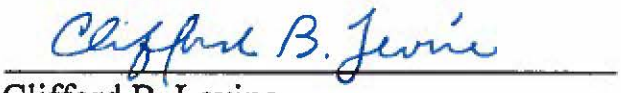
[21] Chen Figure 1 places Rep. Keith Rothfus in the district most analogous to the current 18th Congressional District. (Stack Ex. 9). The two candidates for the March 13, 2018 special congressional election for the 18th Congressional District also reside in that district. (*Compare* Stack Ex. 9, p. 5 *with* FOF 468).

General Assembly and the Governor cannot quickly reach agreement on a constitutionally valid map in time for the 2018 congressional primaries.

## VI. CONCLUSION

For the foregoing reasons, Respondent Lt. Governor Michael J. Stack III asks this Court to reject the 2011 Plan and to direct the immediate relief of producing a new, constitutional map in time for the 2018 congressional primaries.

Respectfully submitted,



Clifford B. Levine
Pa. Id. No. 33507
Alex M. Lacey
Pa. Id. No. 313538
Cohen & Grigsby, P.C.
Firm No. 621
625 Liberty Avenue
Pittsburgh, PA 15222-3152
(412) 297-4900

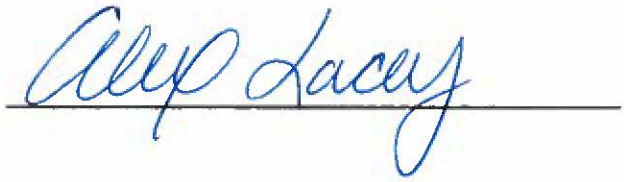
Lazar M. Palnick
Pa. Id. No. 52762
1216 Heberton Street
Pittsburgh, PA 15206
(412) 661-3633

*On behalf of Respondent Michael J. Stack III, in his Capacity as Lieutenant Governor of Pennsylvania and President of the Pennsylvania Senate*

Dated: January 10, 2018

## CERTIFICATES OF COMPLIANCE

Pursuant to Pennsylvania Rule of Appellate Procedure 2135, the length of this principal brief is 9,212 words, in compliance with the word count limit of 14,000 words.



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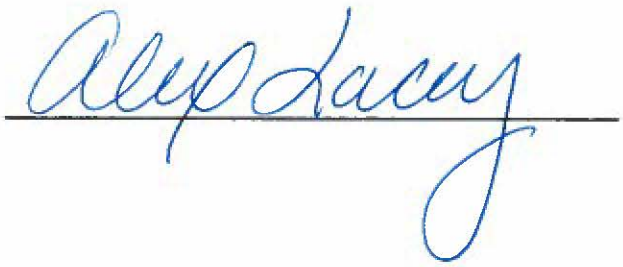

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## CERTIFICATE OF SERVICE

The undersigned does hereby certify that on this 10th day of January 2018, a true and correct copy of the foregoing **BRIEF OF RESPONDENT, LT. GOVERNOR MICHAEL J. STACK, III** was served electronically, via the PAC filing system and U.S. First Class Mail, upon the following:

| | |
|---|---|
| Mary M. McKenzie<br>Michael Churchill<br>Benjamin D. Geffen<br>**THE PUBLIC INTEREST LAW CENTER**<br>1709 Benjamin Franklin Parkway<br>2nd Floor<br>Philadelphia, PA 19103<br>Tel: (215) 627-7100<br>Fax: (215) 627-3183<br>Email: mchurchill@pubintlaw.org;<br>bgeffen@pubintlaw.org;<br>mmckenzie@pubintlaw.org<br>***Counsel for Petitioners*** | Timothy E. Gates<br>Ian B. Everhart<br>Kathleen M. Kotula<br>**DEPARTMENT OF STATE**<br>Office of Chief Counsel<br>306 North Office Building<br>Harrisburg, PA 17120<br>Tel: (717) 783-0736<br>Fax: (717) 214-9899<br>Email: tgates@pa.gov; ieverhart@pa.gov;<br>kkotula@pa.gov<br>***Counsel for Acting Secretary Robert Torres and Commissioner Jonathan M. Marks*** |
| Kathleen A. Gallagher<br>Carolyn Batz McGee<br>John E. Hall<br>Russell D. Giancola<br>Jason R. McLean<br>**CIPRIANI & WERNER, P.C.**<br>650 Washington Road, Suite 700<br>Pittsburgh, PA 15228<br>Tel: (412) 563-2500<br>Fax: (412) 563-2080<br>Email: kgallagher@c-wlaw.com;<br>cmcgee@c-wlaw.com; jhall@c-wlaw.com;<br>rgiancola@c-wlaw.com;<br>jrmclean@c-wlaw.com<br>and<br>Patrick T. Lewis<br>Robert J. Tucker<br>**BAKER & HOSTETLER, LLP** | Brian S. Paszamant<br>Jason A. Snyderman<br>John P. Wixted<br>**BLANK ROME LLP**<br>One Logan Square<br>130 North 18th Street<br>Philadelphia, PA 19103<br>Tel: (215) 569-5791<br>Fax: (215) 569-5555<br>Email: paszamant@blankrome.com;<br>snyderman@blankrome.com;<br>jwixted@blankrome.com;<br><br>Matthew Hermann Haverstick<br>Mark E. Seiberling<br>**KLEINBARD, LLC**<br>1650 Market Street, 46th Floor |

Key Tower
Cleveland, OH 44114
Fax: (216) 696-0740
***Counsel for Michael C. Turzai***

Lawrence J. Tabas
Rebecca L. Warren
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: lawrence.tabas@obermayer.com;
rebecca.warren@obermayer.com;
timothy.ford@obermayer.com
***Counsel for Republican Intervenors***

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: jtorchinsky@hvjt.law;
ssheehy@hvjt.law
***Counsel for Michael C. Turzai and Joseph B. Scarnati, III***

Mark A. Aronchick
Michele D. Hangley
Claudia De Palma
**HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER**
One Logan Square, 27th Floor
Philadelphia, PA 19103
Tel: (215) 568-6200
Email: maa@hangley.com

Philadelphia, PA 19103
Tel: (215) 496-7225
Email: mhaverstick@kleinbard.com;
mseiberling@kleinbard.com
and
Joshua J. Voss
**KLEINBARD, LLC**
115 S. State Street, 2nd Floor
Harrisburg, PA 17101
Tel: (717) 836-7492
Email: jvoss@kleinbard.com
***Counsel for Joseph B. Scarnati, III***

David P. Gersch
John A. Freedman
R. Stanton Jones
Daniel F. Jacobson
Elisabeth S. Theodore
John Robinson
John David Cella
Andrew D. Bergman
**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;
daniel.jacobson@apks.com;
elisabeth.theodore@apks.com;
john.robinson@apks.com;
john.cella@apks.com
andrew.bergman@apks.com
***Counsel for Petitioners***

Irwin W. Aronson
John R. Bielski
Lauren M. Hoye
Amy L. Rosenberger
Ralph J. Teti
**WILLIG WILLIAMS & DAVIDSON**
212 Locust Street, Suite 601

mdh@hangley.com
cdp@hangley.com
***Counsel for Thomas W. Wolf, Robert Torres, and Jonathan Marks***

Thomas P. Howell
**GOVERNOR'S OFFICE OF GENERAL COUNSEL**
333 Market Street, 17th Floor
Harrisburg, PA 17101
Tel: (717) 783-6563
Email: thowell@pa.gov
***Counsel for Thomas W. Wolf***

Richard L. Bazelon
**BAZELON LESS & FELDMAN, PC**
1 S. Broad Street, Suite 1500
Philadelphia, PA 19107-3401
Tel: (215) 568-1155
Email: rbazelon@bazless.com
***Counsel for The Brennan Center for Justice at New York University School of Law***

Martin J. Black
**DECHERT LLP**
2929 Arch Street
Philadelphia, PA 19104-2808
Tel: (215) 994-2664
Email: martin.black@dechert.com
***Counsel for Common Cause***

Edward Diver
Peter E. Leckman
**LANGER GROGAN & DIVER, P.C.**
1717 Arch Street, Suite 4130
Philadelphia, PA 19103-2846
Tel: (215) 320-5663
Email: ndiver@langergrogan.com; pleckman@langergrogan.com
***Counsel for Campaign Legal Center***

Harrisburg, PA 17101-1510
Tel: (717) 221-1000
Email: jaronson@wwdlaw.com; jbielski@wwdlaw.com; lhoye@wwdlaw.com; arosenberger@wwdlaw.com; rteti@wwdlaw.com
and
Alaine S. Williams
**WILLIG WILLIAMS & DAVIDSON**
1854 Walnut Street, 24th Floor
Philadephia, PA 19103-4708
Tel: (215) 656-3600
Email: awilliams@wwdlaw.com
***Counsel for AFSCME Council 13***

Robert A. Atkins
Andrew J. Ehrlich
Nicholas Groombridge
Michael Pernick
Pietro Signoracci
**PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP**
1285 Avenue of the Americas
New York, NY 10019-6064
Tel: (212) 373-3000
Email: ratkins@paulweiss.com
and
Jordan Berson Yeager
**CURTIN & HEEFNER, LLP**
2005 S. Easton Road, Suite 100
Doylestown, PA 18901-7103
Tel: (267) 898-0570
Email: jby@curtinheefner.com
***Counsel for Political Science Professors***

Thomas M. Bondy
Hannah Garden-Monheit
**ORRICK, HERRINGTON & SUTCLIFFE, LLP**
1152 15th Street, NW
Washington, DC 20005
Email: tbondy@orrick.com
and
Alison M. Kilmartin

James C. Martin
Traci Sands Rea
Colin E. Wrabley
**REED SMITH, LLP**
225 Fifth Avenue, Suite 1200
Pittsburgh, PA 15222-2716
Tel: (412) 288-3546
Email: jcmartin@reedsmith.com;
trea@reedsmith.com;
cwrabley@reedsmith.com
***Counsel for the Pittsburgh Foundation***

Witold J. Walczak
**AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA**
247 Ft. Pitt Boulevard
Pittsburgh, PA 15222
Tel: (412) 681-7736
Email: vwalczak@aclupa.org
and
Theresa J. Lee
Sophia Lin Lakin
**AMERICAN CIVIL LIBERTIES UNION FOUNDATION**
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 284-7359
Email: tlee@aclu.org
***Counsel for American Civil Liberties Union of Pennsylvania***

**ORRICK, HERRINGTON & SUTCLIFFE, LLP**
2121 Main Street
Wheeling, WV 26003-2809
Tel: (304) 231-2205
Email: akilmartin@orrick.com
and
E. Joshua Rosenkranz
**ORRICK, HERRINGTON & SUTCLIFFE, LLP**
51 West 52nd Street
New York, NY 10019
Tel: (212) 506-5000
***Counsel for Bernard Grofman***

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


Clifford B. Levine

Clifford B. Levine

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