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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**

PETITIONERS' STATEMENT IN RESPONSE TO THE COURT'S DECEMBER 5, 2017 ORDER

Pursuant to the Court's December 5 Order, Petitioners submit this statement regarding the elements of their claims and the applicable burdens of proof.

1. Generally, a party challenging a statute as unconstitutional bears a heavy burden of persuasion because duly enacted statutes are presumed valid. The party therefore must establish that the challenged statute clearly, palpably, and plainly violates the Pennsylvania Constitution.[1]

2. Count I of the Petition for Review involves a burden-shifting framework, as follows:

a. Petitioners bear the initial burden to prove, by a preponderance of the evidence, that the 2011 Plan (1) discriminates against or burdens the

[1] *See generally DePaul v. Commonwealth*, 969 A.2d 536, 545, 554 (Pa. 2009). The presumption of validity carries less weight when the challenged statute interferes with the very process of electing representatives to government.

protected political speech, expressive acts, or political association of Petitioners and other people likely to vote for Democratic congressional candidates (2) on the basis of political viewpoint.

b. Once Petitioners make this showing, the burden shifts to Respondents to prove that the 2011 Plan was narrowly tailored to accomplish a compelling governmental interest.[2]

3. Petitioners independently can prevail on Count I by demonstrating unlawful retaliation. This independent theory of Count I involves a different burden-shifting framework, as follows:

c. Petitioners bear the initial burden to prove, by a preponderance of the evidence, that (1) the 2011 Plan was created with an intent to burden people likely to vote for Democratic congressional candidates because of how those people voted previously or the political party with which they were affiliated; (2) the 2011 Plan diluted the votes of the targeted people to such a degree that it resulted in a tangible and concrete adverse effect (*i.e.*, that it made some practical difference); and (3) this adverse effect would not have occurred absent the intent to burden the targeted people.

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[2] Authority for the elements of Count I include, without limitation, the following: *DePaul v. Commonwealth*, 969 A.2d 536, 544 (Pa. 2009); *Pap's A.M. v. City of Erie*, 812 A.2d 591, 612 (Pa. 2002); *Purple Orchid, Inc. v. Pennsylvania State Police*, 813 A.2d 801, 806 (Pa. 2002); *Free Speech LLC v. City of Phila.*, 884 A.2d 966, 971-72 (Pa. Commw. Ct. 2005).

d. Once Petitioners make this showing, the burden shifts to Respondents to prove that the 2011 Plan was narrowly tailored to accomplish a compelling governmental interest.[3]

4. To prevail on Count II, Petitioners bear the burden to prove, by a preponderance of the evidence, that (1) the 2011 Plan intentionally discriminated against an identifiable political group, namely people likely to vote for Democratic congressional candidates, and (2) the 2011 Plan works an actual discriminatory effect on those people, meaning that they have been, or likely will be, materially disadvantaged in electing Democratic congressional candidates. Although Petitioners believe that no further showing is necessary to satisfy the "effect" element of this claim, Petitioners also will prove, by a preponderance of the evidence, that, as a result of the 2011 Plan, people likely to vote for Democratic congressional candidates will lack political power and be denied fair representation, meaning that those people have been essentially shut out of the political process.[4]

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[3] Additional authority for the elements of this independent theory under Count I include, without limitation, the following: *Shapiro v. McManus*, 203 F. Supp. 3d 579, 596-97 (D. Md. 2016).

[4] Authority for the elements of Count II include, without limitation, the following: *Erfer v. Commonwealth*, 794 A.2d 325 (Pa. 2002); *Whitford v. Gill*, 2017 WL 383360 (W.D. Wis. 2017). The Pennsylvania Supreme Court is not bound to—and should not—follow *Erfer*'s approach to the "effect" element of this claim. As the Supreme Court has explained, "in circumstances where prior decisional law has obscured the manifest intent of a constitutional provision as expressed in its plain language, engagement and adjustment of precedent as a prudential matter is fairly implicated and salutary." *Robinson Twp., Washington Cty. v. Commonwealth*, 83 A.3d

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Respectfully submitted,

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903, 946 (Pa. 2013). The Supreme Court is "not constrained to closely and blindly re-affirm constitutional interpretations of prior decisions which have proven to be unworkable or badly reasoned." *Id.* (quoting *Holt v. Legislative Redistricting Comm'n*, 38 A.3d 711, 759 n.38 (Pa. 2012)). Also, the Supreme Court in recent years has moved toward a "[n]ew federalism" in which the Court conducts its own "independent analysis of arguments premised upon the state constitution, rather than following U.S. Supreme Court precedent interpreting analogous federal constitutional provisions in lock-stop, even where the state and federal constitutional language is identical or similar." *Id.* at 944 n.33. Conducting such an independent analysis here, the Supreme Court should adopt Petitioners' proposed approach to the "effect" element.