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**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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| League of Women Voters of Pennsylvania, *et al.*, | ) Civ. No. 261 MD 2017 |
| *Petitioners*, | |
| v. | |
| The Commonwealth of Pennsylvania, *et al.*, | |
| *Respondents*. | |

**PRE-TRIAL MEMORANDUM OF LEGISLATIVE RESPONDENTS MICHAEL C. TURZAI AND JOSEPH B. SCARNATI, III**

Michael C. Turzai, in his official capacity as the Speaker of the Pennsylvania House of Representatives, and Joseph B. Scarnati, III, in his official capacity as Pennsylvania Senate President Pro Tempore (collectively, "Legislative Respondents") file this Pre-trial Memorandum in accordance with Paragraph 4 of this Court's November 17, 2017 Supplemental Scheduling Order.

## I. Legislative Respondents' Witness List

1. James Gimpel, Ph.D

   Professor Gimpel will testify consistently with his expert report submitted on December 4, 2017.

2. Nolan McCarty, Ph.D

   Professor McCarty will testify consistently with his expert report submitted on December 4, 2017.

3. Wendy K. Tam Cho, Ph.D

   Professor Cho will testify consistently with her expert report submitted on December 4, 2017.

4. Any witness listed on Petitioners' or Respondents' lists.

5. Legislative Respondents reserve the right to call rebuttal witnesses.

## II. Legislative Respondents' Exhibit List

| Exhibit | Description | Bates Number (if applicable) |
|---|---|---|
| LR 1 | Senate Committee Roll Call Votes (December 7, 2011) | |
| LR 2 | Senate Committee Roll Call Votes (December 14, 2011) | |
| LR 3 | Senate Vote on SB 1249; Senate Roll Call Votes (December 14, 2011) | |
| LR 4 | Costa Amendment Vote | |
| LR 5 | House Vote on SB1249; House Roll Calls; 2011-2012 Regular Session (December 20, 2011) | |
| LR 6 | Hanna Amendment Map | |
| LR 7 | Redistricting Vote: Who Crossed Party Lines – Politics PA | LR00001-7 |
| LR 8 | Altmire to Harrisburg Dems: Vote for GOP Redistricting Plan – Politics PA | LR00008-14 |
| LR 9 | U.S. Census Bureau Delivers Pennsylvania's 2010 Census Population Totals, Including First Look at Race and Hispanic Origin% | LR00015-17 |
| LR 10 | Wendy K. Tam Cho, Ph.D. CV | |
| LR 11 | Wendy K. Tam Cho, Ph.D. Expert Report | |

| | | |
|---|---|---|
| LR 12 | Wendy K. Tam Cho, Ph.D. Report<br>Figures and Tables | |
| LR 13 | James G. Gimpel, Ph.D. CV | |
| LR 14 | James G. Gimpel, Ph.D. Expert Report | |
| LR 15 | James G. Gimpel, Ph.D. Report Figures and Tables | |
| LR 16 | Nolan McCarty, Ph.D. CV | |
| LR 17 | Nolan McCarty, Ph.D. Expert Report | |
| LR 18 | Nolan McCarty, Ph.D. Figures and Tables | |
| LR 19 | Senate Dem. Congressional Plan Map | |
| LR 20 | State Maps 115th Congress | LR00018-23 |
| LR 21 | Letter dated 1-6-2012 From Kathy A. Sullivan to Jonathan M. Marks re 2011 Congressional Reapportionment Plan | LR00024 |
| LR 22 | Transcript - Joint Senate and House State Government Committee Hearing In re: Congressional Redistricting – Volume I – Pages 1-50 - Thursday, May 12, 2011 – 11:00 am | Turzai-00006 |
| LR 23 | Transcript - Joint Senate and House State Government Committee Hearing In re: Congressional Redistricting – Volume II – Pages 51-123 – Thursday, June 9, 2011 – 11:00 am | Turzai-00064 |

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|---|---|---|
| LR 24 | Transcript - Joint Senate and House State Government Committee Hearing In re: Congressional Redistricting – Volume III – Pages 124-151 – Thursday, June 14, 2011 – 9:00 am | Turzai-00159 |
| LR 25 | Commonwealth of PA – Legislative Journal – 195th of the General Assembly – Session of 2011 – No. 84 – Wednesday, December 14, 2011 | |
| LR 26 | Commonwealth of PA - Legislative Journal - 195th of the General Assembly - Session of 2011 - No. 85 - Thursday, December 15, 2011 | |
| LR 27 | Commonwealth of PA - Legislative Journal - 195th of the General Assembly - Session of 2011 - No. 87 - Monday, December 19, 2011 | |
| LR 28 | Commonwealth of PA - Legislative Journal - 195th of the General Assembly - Session of 2011 - No. 88 - Monday, December 20, 2011 | |
| LR 29 | Nelson Quinones, *Another View: Rendell Urges Latino Media to Get Out the Vote*, MORNING CALL (Apr. 3, 2006) | LR00025 |
| LR 30 | Ivey DeJesus, *Latino Country: Hispanic Population Surpasses Amish in Lancaster County, U.S. Census Data Show*, PENN LIVE (May 22, 2011) | LR00026-29 |
| LR 31 | Ex. A to Petitioners' Composite Interrogatory Responses | |

## III. Special Comments on Stipulations and Trial Procedures.

1. The parties stipulate to submitting testimony of Petitioners that do not testify live at trial through designation of their deposition transcripts. The parties will designate such testimony according to the following schedule:

**a.** Designations due: Sunday, December 10 at 5pm

**b.** Objections due: Tuesday, December 12 at 5pm

**c.** Parties to meet and confer on objections: Wednesday, December 13

2. The parties stipulate and agree that the Court may consider and take judicial notice of the legislative history of Act 131, including the transcripts available at:

http://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?syear=2011&sind=0&body=S&type=B&bn=1249.

3. The parties have agreed to waive opening statements.

## IV. Special Comments on Legal Issues.

Speaker Turzai and President Pro Tempore Scarnati offer the following preliminary comments on Petitioners' December 6, 2017 *Statement in Response to the Court's December 5, 2017 Order*, concerning the elements of their causes of action (their "**Elements Brief**"). For the reasons set forth below, Petitioners' claims are legally untenable under the current U.S. Supreme Court framework governing so-called "partisan gerrymandering" cases. As the Supreme Court of

Pennsylvania tracks U.S. Supreme Court precedent in this area, Petitioners' claims must fail.

### A. Petitioners' Claims Are Non-Justiciable.

Political complaints about "partisan gerrymandering" are as old as the Nation itself. *Vieth v. Jubelirer*, 541 U.S. 267, 274-75 (2004) (plurality op.). The Boston Gazette coined the term "gerrymandering" in 1812 after Governor Eldridge Gerry passed a districting plan in Massachusetts that allegedly disadvantaged the Federalists. Elmer C. Griffth, *The Rise and Development of the Gerrymander* 17 (1906). In the 205 years since, no judicially manageable standard has emerged to evaluate partisan gerrymandering claims.

The failure is not through lack of trying. Beginning with *Davis v. Bandemer*, fifteen different Justices of the United States Supreme Court have issued opinions proposing purportedly judicially manageable standards to evaluate partisan gerrymandering claims. *Davis v. Bandemer*, 478 U.S. 109, 127-37 (1986) (plurality op.); *id.* at 161-62 (Powell, J., concurring in part and dissenting in part); *Vieth*, , 541 U.S. at 292 (noting that four dissenters proposed three different standards); *see League of United Latin Am. Citizens v. Perry* ("*LULAC*"), 548 U.S. 399, 414 (2006) (Kennedy, J., concurring) (acknowledging that disagreement still persists in articulating the standard to evaluate partisan gerrymandering claims but declining to address the justiciability issue); *see also id.* at 471-72 (Stevens, J., and Breyer,

J., concurring in part and dissenting in part) (stating that plaintiffs proved partisan gerrymandering under proposed test). But the U.S. Supreme Court has never issued a binding opinion articulating the appropriate standard to evaluate partisan gerrymandering claims.

In *Bandemer*, the Court held for the first time that partisan gerrymandering claims were justiciable. *Bandemer*, 478 U.S. at 143. But the majority of the Court could not agree on the judicially manageable standard to apply. *Id.* at 127-37; *id.* at 161-62 (Powell, J., concurring in part and dissenting in part). In fact, a majority of the Court held that the plurality's standard was not judicially manageable. *See id.* at 155 (O'Connor, and Rehnquist, JJ., and Burger, C.J., concurring in part and dissenting in part) (stating that the plurality's test will either become unmanageable or require some form of proportional representation); *id.* at 171 (Powell, J., and Stevens, J., concurring in part and dissenting in part) (stating that the plurality's standard fails "to enunciate any standard that affords guidance to legislatures and courts."); *see also Vieth*, 541 U.S. at 278-79 (plurality op.) (stating that *Bandemer* did not produce a majority opinion for a standard, as four Justices agreed that it was one standard while two thought it was something else, creating confusion in the district courts).

The Supreme Court of Pennsylvania has followed the U.S. Supreme Court's lead on these questions since at least the 1960s. *See Erfer v. Commonwealth,* 794

A.2d 325, 331 (Pa. 2002) (citing *Newbold v. Osser*, 230 A.2d 54 (Pa. 1967)). In 1992, the Supreme Court of Pennsylvania also held for the first time that partisan gerrymandering claims were justiciable. *In re 1991 Pennsylvania Legislative Reapportionment Comm'n*, 609 A.2d 132, 141–42 (1992), *abrogated by Holt v. 2011 Legislative Reapportionment Comm'n*, 614 Pa. 364, 38 A.3d 711 (2012). In 2002, the Supreme Court of Pennsylvania held that it would "continue to adhere to the view that the disposition of political gerrymandering claims should be controlled by the *Bandemer* plurality." *See Erfer v. Commonwealth*, 794 A.2d 325, 331-32 (Pa. 2002) (stating the court would "will continue the precedent enunciated in *1991 Reapportionment* and apply the test set forth by the *Bandemer* plurality.").

Since the Pennsylvania Supreme Court's decision in *Erfer*, the U.S. Supreme Court plurality reversed course on the justiciability question, and the *Bandemer* test has been rejected by the entire Court as unworkable. In *Vieth*, the U.S. Supreme Court expressly and unanimously abandoned the *Bandemer* plurality's test. *See Vieth*, 541 U.S. at 283-84 (plurality op.); *id.* at 308 (Kennedy, J., concurring); *id.* at 318 (Stevens, J., dissenting); *id.* at 346 (Souter and Ginsburg, JJ., dissenting); *id.* at 355-56 (Breyer, J., dissenting). Specifically, the plurality opinion found that "[e]ighteen years of judicial effort with virtually nothing to show for it justify us revisiting the question whether the standard promised by *Bandemer* exists." *Id.* at 281. In response it stated:

> no judicially discernable and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided.

*Id.* The Court's lack of agreement on this issue has persisted. *See LULAC*, 548 U.S. at 414, 417-19, 471-72, 492, 512.

The resulting lack of a judicially manageable standard has left federal district courts unable to articulate a governing standard. *See, e.g.*, *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333, 348 (4th Cir. 2016) ("We recognize that the Supreme Court has not yet clarified when exactly partisan considerations cross the line from legitimate to unlawful."); *Shapiro v. McManus*, 203 F. Supp. 3d 579, 594 (D. Md. 2016) (three-judge court) ("[T]he combined effect of *Bandemer*, *Vieth*, and *LULAC* is that, while political gerrymandering claims premised on the Equal Protection Clause remain justiciable in theory, it is presently unclear whether an adequate standard to assess such claims will emerge."); *Ala. Legis. Black Caucus v. Alabama*, No. 12-0691, 2017 U.S. Dist. LEXIS 168741, *22 (M.D. Ala. Oct. 12, 2017) (three-judge court) ("[T]he Black Caucus plaintiffs admitted that the standard of adjudication for their claim of partisan gerrymandering is 'unknowable.'").

Some courts have simply held that the *Vieth* plurality plus Justice Kennedy's concurrence constituted a majority for the proposition that partisan gerrymandering claims are non-justiciable. *Lulac of Texas v. Texas Democratic Party*, 651 F. Supp.

2d 700, 712 (W.D. Tex. 2009) (three-judge court) (noting that *Vieth* held that partisan gerrymandering claims are non-justiciable); *Meza v. Galvin*, 322 F. Supp. 2d 52, 58 (D. Mass. 2004) (three-judge court) (noting that *Vieth* held "that political gerrymandering cases are nonjusticiable"). The U.S. Supreme Court is expected to address justiciability again in *Gill v. Whitford*, 16-1161 *jurisdictional statement* at 40 (U.S. March 24, 2017); *see Gill v. Whitford*, 137 S. Ct. 2289 (U.S. June 19, 2017) (noting probable jurisdiction and staying all proceedings pending decision on the merits); *Gill v. Whitford*, 137 S. Ct. 2268 (U.S. June 19, 2017) (postponing jurisdictional questions until the merits).

The Supreme Court of Pennsylvania's adherence to the *Bandemer* plurality's standard and holding regarding justiciability is now tenuous. The Pennsylvania Supreme Court "predicated" its partisan gerrymandering jurisprudence on *Bandemer*, a case that the U.S. Supreme Court has now expressly abandoned. *1991 Reapportionment*, 609 A.2d at 141-42; *Erfer*, 794 A.2d at 331. Thus, the decision in *Vieth* effectively removed the cornerstone upon which the Pennsylvania Supreme Court had built its partisan gerrymandering jurisprudence. Furthermore, the Pennsylvania Supreme Court has not yet had an opportunity to review its partisan gerrymandering jurisprudence in light of *Vieth*.

Petitioners rely upon the same partisan intent and partisan effect framework developed in *Bandemer*, adopted by the Supreme Court of Pennsylvania in *1991*

*Reapportionment*, and again in *Erfer*, and used by the plaintiffs in *Whitford. See Whitford v. Gill*, 218 F. Supp. 3d 837, 854-55 (W.D. Wis. 2016) (three-judge court) *stay granted pending appeal Gill v. Whitford*, 137 S. Ct. 2289 (2017); (Pet. ¶ 115). But under current U.S. Supreme Court jurisprudence, such claims are nonjusticiable. Legislative Respondents submit the Court should continue to follow U.S. Supreme Court jurisprudence in this area and should therefore dismiss Petitioners' claims as nonjusticiable.

### B. Even If Petitioners Present a Justiciable Claim, the Proper Standard Is, at Best, the Standard Articulated In *Erfer v. Commonwealth*.

Although acknowledging that the *Bandemer* plurality's test has "bedeviled" commentators and courts due to its "obscuring" and "labrynthian" logic, the Supreme Court of Pennsylvania has "distilled" *Bandemer* down to two elements in a decision preceding *Vieth*. *Erfer*, 794 A.2d at 332.

*First*, Petitioners must establish that there was "intentional discrimination against an identifiable political group . . . ." *Id.*

*Second*, Petitioners must then establish that there was an "actual discriminatory effect on that group." *Id.* (citing *Bandemer*, 478 U.S. at 127).

As to the first element, Petitioners must establish that the legislature in crafting Pennsylvania's congressional districts, "intentionally discriminated against an identifiable political group." *Id.*

As to the second element, Petitioners must establish two things:

*First*, that the enacted map "works disproportionate results at the polls." *Id.* at 333. Petitioners may establish this prong using actual election results or projected outcomes in future elections. *Id.*

*Second*, Petitioners must also "adduce evidence indicating a strong indicia of lack of political power and the denial of fair representation." *Id.* This requires Petitioners to demonstrate that they have been "essentially . . . shut out of the political process." *Id.*; *see also id.* at 334 (finding that the *Erfer* petitioners did not demonstrate that they had been shut out of the political process because it was undisputed that the Democrats had "safe seats"). This test is conjunctive and Petitioners must satisfy both of the sub-elements to establish actual discriminatory effect. *Id.* at 333. Importantly, this second sub-element cannot be collapsed with the element of disproportionate election results. *Id.* at 334.

Under this test, Petitioners cannot establish a discriminatory effect merely by showing that the 2011 enacted plan makes it more difficult for Petitioners' preferred candidates to win. *Id.* at 333. Petitioners also cannot establish a discriminatory intent simply because the enacted plan fails to achieve proportional representation. *Id.* Rather, "an individual or group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other

voters in the district." *Id.* Petitioners must therefore show that the elected representative "entirely ignore[s]" the interests of those voters who voted for the losing candidate. *Id.*; *see also id.* at 334 (faulting *Erfer* petitioners for not even alleging in their brief that a winning "Republican congressional candidate will entirely ignore the interests of those citizens within his district who voted for the Democratic candidate."). This is an "onerous" standard that is "difficult" for Petitioners to satisfy. *Id.* at 333.

The test is intentionally difficult to satisfy out of deference to the state legislature and its constitutionally vested prerogative to draw congressional districts. *See id.*; *see also* U.S. Const. art. I, § 4. The test is also intentionally difficult because the U.S. Supreme Court and the Supreme Court of Pennsylvania recognize drawing congressional districts is "the most political of legislative functions one not amendable to judicial control or correction save for the most egregious abuses of that power." *Id.* at 334 (quoting and citing *Bandemer*, 478 U.S. at 143) (internal quotation marks omitted).

Importantly, even under the *Bandemer* standard, not a single federal or state district court has rejected a congressional or legislative map. *See Vieth*, 541 U.S. at 279-81 (plurality op.) (stating that in the 18 years between *Bandemer* and *Vieth*, in all cases concerning the most common form of political gerrymandering, courts denied relief). Since *Vieth*, courts have continued to consistently deny relief on

partisan gerrymandering claims. *Pearson v. Koster*, 359 S.W.3d 35, 42 (Mo. 2012) (rejecting partisan gerrymandering claim in part because of the "Supreme Court's inability to state a clear standard . . . ."); *Radogno v. Ill. State Bd. of Elections*, No. 11-4884, 2011 U.S. Dist. LEXIS 122053, *14 and 18 (N.D. Ill. Oct. 21, 2011) (three-judge court) (stating that after *Vieth* and *LULAC* the justiciability question is still "unanswered" and further stating that because the U.S. Supreme Court has not adopted a test, trying to find one may be an "exercise in futility"); *Ala. Legislative Black Caucus v. Alabama*, 988 F. Supp. 2d 1285, 1296 (M.D. Ala. 2013) ("The Black Caucus plaintiffs conceded at the hearing on the pending motions that the standard of adjudication for their claim of partisan gerrymandering is 'unknowable.'") (three-judge court); *Ala. Legis. Black Caucus*, No. 12-0691, 2017 U.S. Dist. LEXIS 168741, *22 (M.D. Ala. 2017); *but see Whitford v. Gill,* 218 F. Supp. 3d 837 (W.D. Wis. 2016) (three-judge court) *stay granted pending appeal Gill v. Whitford,* 137 S. Ct. 2289 (2017).

Despite pleading *Erfer*'s partisan effect test and that Petitioners' elected representatives are not responsive to Petitioners' views and interests (Pet. ¶¶ 95-98, 115, 117, 119-20), and despite characterizing *Erfer* as "controlling law," stating that Petitioners had pled that they had lost the ability to influence legislative outcomes and Petitioners' representatives do not represent their views or interests, facts that Petitioners described as "all that is necessary to allege an equal protection

violation[,]" (Pets.' Response to Leg. Resps.' Prelim. Obj. at 2-3,) (Sept. 7, 2017) (citing *Erfer*, 794 A.2d at 332), Petitioners now on the eve of trial attempt to escape the shoals of *Erfer*'s effects test. (Pets.' Elements Br. at 3 and n.4). Now, on the eve trial, Petitioners state that they do not have to prove Petitioners "lack political power" or that Petitioners have been "denied fair representation." (Pets.' Elements Br. at 3). Furthermore, despite describing *Erfer* as "controlling" in their response to Legislative Respondents' Preliminary Objections, now Petitioners urge the Supreme Court of Pennsylvania to adopt a less demanding test than *Erfer*. (Pets.' Elements Br. at 3-4 n.4).

But the Supreme Court of Pennsylvania intentionally adhered to the high hurdle of *Bandemer*'s effects test on at least three occasions. *Erfer*, 794 A.2d at 333; *Albert v. 2001 Legislative Reapportionment Comm'n*, 790 A.2d 989, 998 n.10 (Pa. 2002); *In re 1991 Pennsylvania Legislative Reapportionment Comm'n*, 609 A.2d at 141–42. Furthermore, Petitioners cannot satisfy *Erfer*'s effects test simply by showing that the enacted plan makes it more difficult for Petitioners to elect a candidate of their choice or that the plan does not produce proportional representation. *Id.* (citing *Bandemer*, 478 U.S. at 132). In fact, seven Justices of the U.S. Supreme Court rejected this argument. *See Vieth*, 541 U.S. at 287-89, 291 (plurality op.); *id.* at 308 (Kennedy, J., concurring); *id.* at 338 (Stevens, J., dissenting); *id.* at 352 (Souter, J., dissenting). *Erfer*'s high burden properly respects

the deference owed to the state legislature that is engaged in the most political of legislative functions. *Id.* at 334.

### C. Petitioners' Free Speech and Association Claims.

*First*,[1] although the U.S. Supreme Court has opined that free speech and association claims are at least plausible, *see Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015), a plurality of the Court has expressed concerns that permitting a free speech claim "would render unlawful all consideration of political affiliation in districting, just as it renders unlawful all consideration of political affiliation in hiring for non-policy-level government jobs." *Vieth*, 541 U.S. at 294 (plurality op.). This concern is especially present in redistricting because partisan intent is inevitable. *See, e.g.*, *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("Politics and political considerations are inseparable from districting and apportionment. . . . The reality is that districting inevitably has and is intended to have substantial political consequences."); *Cooper v. Harris*, 137 S. Ct. 1455, 1488 (2017) "([W]hile some might find it distasteful, our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering . . . ") (internal quotations and alterations omitted) (Alito, J., Roberts, C.J., and Kennedy, J., dissenting); *Erfer*, 794 A.2d at 334 (stating that "reapportionment is the most political of legislative

[1] As a threshold issue, none of the cases relied upon in footnote 2 of Petitioners' elements brief are redistricting cases. *See* Pets.' Elements Br. at 2 n.2 (Dec. 6, 2017).

functions, one not amenable to judicial control or correction save for the most egregious abuses of that power.") (internal quotation marks omitted) (citing and quoting *Bandemer*, 478 U.S. at 143).

Furthermore, even courts that have examined free speech and expression claims in redistricting cases have held that there is no independent violation of free speech and association rights absent a violation of equal protection rights. *See Whitford v. Gill*, 218 F. Supp. 3d 837, 884 (W.D. Wis. 2016) (three-judge court) (stating that elements to prove an unconstitutional partisan gerrymander under the First Amendment or the Equal Protection Clause are the same); *see also Republican Party v. Martin*, 980 F.2d 943, 959 n.28 (4th Cir. 1992) ("This court has held that in voting rights cases no viable First Amendment claim exists in the absence of a Fourteenth Amendment claim."); *Pope v. Blue*, 809 F. Supp. 392, 398-99 (W.D. N.C. 1992) *sum. aff.'d* 506 U.S. 801 (1992) ("[W]e hold as in *Washington* that the plaintiffs' freedom of association claim is coextensive with the equal protection claim . . . .").[2] Petitioners appear to concede this because the first

[2] It does not appear that any Pennsylvania court has addressed a partisan gerrymandering claim brought pursuant to Article I, §§ 7, 20 of the Pennsylvania Constitution. That said, the Pennsylvania Supreme Court has relied upon U.S. Supreme Court First Amendment precedent to interpret its own constitutional free speech and freedom of association provisions. *See Pap's A.M. v. City of Erie*, 812 A.2d 591, 611 (Pa. 2002) ("[T]his Court has often followed the lead of the U.S. Supreme Court in matters of free expression under Article I, § 7[.]"). Accordingly, law interpreting the First Amendment to the U.S. Constitution is instructive in this analysis.

element of Petitioners' free speech claim is substantially similar to the first element of Petitioners' equal protection claim. *Compare* Pets.' Elements Br. at 1, 2 ("Petitioners [must prove] that the 2011 Plan (1) discriminates against or burdens the protected political speech, expressive acts, or political association of Petitioners and other people likely to vote for Democratic congressional candidates . . . .") *with* Pets.' Elements Br. at 3 ("Petitioners [must prove] that the 2011 Plan intentionally discriminated against an identifiable political group, namely people likely to vote for Democratic congressional candidates . . . .").

Other courts reviewing free speech claims in the partisan gerrymandering context have rejected such claims where the plaintiffs were not prevented from speaking, endorsing a candidate, or campaigning for a candidate. *See, e.g.*, *League of Women Voters v. Quinn*, No. 1:11cv-5569, 2011 U.S. Dist. LEXIS 125531 *12-13 (N.D. Ill. Oct. 28, 2011) ("The redistricting plan does not prevent any LWV member from engaging in any political speech, whether that be expressing a political view, endorsing and campaigning for a candidate, contributing to a candidate, or voting for a candidate."); *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 575 (N.D. Ill. 2011); *Pope*, 809 F. Supp. at 398-99 (rejecting freedom of association claim because there is no "device that directly inhibits participation in the political process."); *Badham v. March Fong Eu*, 694 F. Supp. 664, 675 (N.D. Cal. 1988) (three-judge court) *sum aff'd.*

488 U.S. 1024 (1989) ("Plaintiffs here are not prevented from fielding candidates or from voting for the candidate of their choice. The First Amendment guarantees the right to participate in the political process; it does not guarantee political success.").

Finally, Petitioners do not accurately state the level of intent that they are required to demonstrate to prove their unlawful retaliation theory. According to the case Petitioners rely upon for their proposed standard, Petitioners must show that "those responsible for the map redrew [the congressional district lines] with the specific intent to impose a burden" on Petitioners and those similarly situated because of how Petitioners voted or the political party to which Petitioners belong. *Shapiro v. McManus*, 203 F. Supp. 3d 579, 596 (D. Md. 2016) (three-judge court) (emphasis in the original).[3] Accordingly, Petitioners must show more than political considerations and the use of partisan data "reflecting citizens' voting history and party affiliation" impacted the drawing of Pennsylvania's congressional districts. *See id.* at 597. Furthermore, it is insufficient for Petitioners to show that the Pennsylvania General Assembly was aware of the "likely political impact" of the 2011 Plan or that certain districts were "safe" for a Democrat or "safe" for a

[3] Legislative Respondents Speaker Turzai and President Pro Tempore Scarnati do not concede that the test articulated in *Shapiro v. McManus* is the appropriate test. Rather, Speaker Turzai and President Pro Tempore Scarnati assert that there is no free speech cause of action in redistricting cases that is independent from a cause of action brought under Pennsylvania's equal protection provisions.

Republican. *Id.* On the contrary, to successfully prove specific intent, Petitioners must show that this data was used with the specific intent to make it more difficult "for a particular group of voters to achieve electoral success because of the views they had previously expressed." *Id.*[4]

### D. This Court Lacks the Authority to Adopt Criteria That the Pennsylvania Legislature Has Not Adopted.

The U.S. Constitution vests the state legislatures with the authority to enact congressional districts. *See* U.S. Const. art. I, § 4. *Lance v. Coffman*, 549 U.S. 437 (2007) ("The Elections Clause of the United States Constitution provides that the "Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."); *Chapman v. Meier*, 420 U.S. 1, 27 (1975) ("We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court."); *see also Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2685 (2015) (Roberts, C.J., dissenting) ("[W]here there is a conflict of authority between the constitution and legislature of a State in regard to fixing place of elections, *the power of the*

[4] Petitioners must also demonstrate that the 2011 Plan diluted Petitioners' in a "sufficiently serious" manner producing a "demonstrable and concrete adverse effect." *See Shapiro*, 203 F. Supp. 3d at 598. Finally, Petitioners must prove that absent the legislature's intent to burden Petitioners' vote, "the concrete adverse impact would not have occurred." *Id.* at 597.

*legislature is paramount.*") (emphasis added) (internal quotation marks omitted) (quoting *Baldwin v. Trowbridge*, 2 Bartlett Contested Election Cases, H. R. Misc. Doc. No. 152, 41st Cong., 2d Sess., 46 (1866)). Included within this broad grant of authority is the power to establish the criteria by which the legislature draws congressional districts. *See Tashjian v. Republican Party*, 479 U.S. 208, 217, (1986) ("[T]he Constitution grants to the States a broad power to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives . . . ."); *Smiley v. Holm*, 285 U.S. 355, 366 (1932) ("It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections.")

The Pennsylvania Constitution adopted certain criteria for establishing its state legislative districts including, for example, requiring compact and contiguous territory, single member districts, and that each district be as nearly as equal population as practicable. *See* Pa. Const. art. II, § 16. Pennsylvania's Constitution does not include any similar or even applicable requirements for congressional districts analogous to those for the state legislature. Additionally, the legislature has not enacted any statutes that would apply these criteria to establishment of the Commonwealth's congressional districts.

Because the U.S. Constitution vests Pennsylvania's legislature with the primary duty of drawing congressional districts, *see* U.S. Const. art. I, § 4, this

Court cannot impose on the legislature any conditions or criteria that the legislature itself has not adopted. *See Upham v. Seamon*, 456 U.S. 37, 41-42 (1982) ("[W]e hold that a district court should similarly honor state policies in the context of congressional reapportionment. In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor intrude upon state policy any more than necessary."); *see also, e.g.*, *Beauprez v. Avalos*, 42 P.3d 642, 651-52 (Colo. 2002) (stating that after ensuring equal population and the non-dilution of minority voter strength, a state court may then consider criteria that is important to the state).

Accordingly, even if the Supreme Court of Pennsylvania were to find the 2011 Plan unconstitutional and orders the legislature to draw new districts, *Newbold*, 230 A.2d at 57-58, the Supreme Court of Pennsylvania cannot impose new criteria that have not been adopted by the legislature or by Pennsylvania's Constitution. To impose any new criteria on the legislature for drawing congressional districts would violate Article I, Section 4 of the United States Constitution.

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