

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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League of Women Voters of Pennsylvania, <i>et al.</i> ,		)	
		)	
	<i>Petitioners,</i>	)	
		)	
		)	<b>No. 261 MD 2017</b>
	v.	)	
		)	
The Commonwealth of Pennsylvania, <i>et al.</i> ,		)	
		)	
		)	
	<i>Respondents.</i>	)	
<hr/>		)	

**[PROPOSED] ORDER**

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 2017, upon consideration of Respondent the Commonwealth of Pennsylvania’s Preliminary Objections to the Petition for Review, and the Answer of Petitioners thereto, it is hereby ORDERED that the Preliminary Objections are OVERRULED.

**BY THE COURT:**

\_\_\_\_\_  
**J.**



Petitioners submit this Answer to the Preliminary Objections filed by Respondent the Commonwealth of Pennsylvania (“the Commonwealth”).

### **RESPONSE TO INTRODUCTION**

The Preliminary Objections filed by the Commonwealth begin with an “Introduction” section consisting of assertions of law in a series of unnumbered paragraphs. These statements of law require no response under the Pennsylvania Rules of Civil Procedure; nonetheless, Petitioners respond briefly below.<sup>1</sup> These matters will be addressed more fully during briefing.

The Commonwealth is a proper party to this action. Contrary to the Commonwealth’s assertion that “[a]s a general matter, the ‘Commonwealth of Pennsylvania’ is not a proper defendant to a lawsuit,” Preliminary Objections ¶ 13, the Pennsylvania Rules of Civil Procedure expressly contemplate that the Commonwealth will be a defendant or respondent. Rule 422(a) states “[s]ervice of original process *upon the Commonwealth* or an officer of the Commonwealth, or a department, board, commission or instrumentality of the Commonwealth, or a member thereof, shall be made at the office of the defendant and the office of the attorney general by handing a copy to the person in charge thereof” (emphasis

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<sup>1</sup> Pa.R.C.P. 1029(a) (“A responsive pleading shall admit or deny each averment of *fact* in the preceding pleading or any part thereof to which it is responsive.” (emphasis added)). The Commonwealth also divides its Preliminary Objections into sections and subsections using argumentative headings. In general, these statements contain assertions of law to which no response is required. To the extent a response is required, these headings and subheadings are denied.

added). Similarly, Rule 1006(c)(1) begins: “Except as otherwise provided by subdivision (c)(2), an action to enforce a joint or joint and several liability against two or more defendants, *except actions in which the Commonwealth is a party defendant . . .*” (emphasis added).

The case law similarly affirms that the Commonwealth can be a respondent. This is not a tort case of the type cited by the Commonwealth. Just this year, the Pennsylvania Supreme Court held that the Commonwealth can be a respondent in an action that challenges the constitutionality of a state statute. *Pa. Env'tl. Def. Found. v. Commonwealth*, 161 A.3d 911, 916 (Pa. 2017). The Commonwealth is particularly a proper respondent in the context of a challenge to a congressional districting plan. Indeed, in the last significant partisan gerrymandering case litigated under the Pennsylvania Constitution, the Commonwealth participated as a respondent. *Erfer v. Commonwealth*, 794 A.2d 325 (Pa. 2002).

The United States Constitution obligates *the Commonwealth* to create congressional districts. Article I, Section 2 of the United States Constitution “command[s] . . . that States create congressional districts which provide equal representation for equal numbers of people.” *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969); *accord Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016) (“States must draw congressional districts with populations as close to perfect equality as possible.”). If Petitioners prevail, the 2011 Plan will be held unconstitutional and

invalid, and the Respondents—including the Commonwealth—will be required to implement a new congressional districting plan. The Commonwealth itself will play a fundamental role in implementing this relief: while the Governor signs certificates of election and the Secretary of the Commonwealth attests those certificates, 25 P.S. § 3163, it is the Commonwealth that sends a delegation to the United State House of Representatives, *see, e.g.*, 2 U.S.C. § 2a (“Each State shall be entitled . . . to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member.”).

The relief sought in this case cannot be fully granted without the Commonwealth implementing a new congressional districting plan and sending a delegation to Washington elected under that plan. The Commonwealth is thus a proper and necessary party. *See generally York-Adams Cty. Constables Ass’n by Sponseller v. Court of Common Pleas of York Cty.*, 474 A.2d 79, 81 (Pa. Commw. 1984) (“Necessary parties are those whose presence . . . is essential if the Court is to resolve completely the controversy before it and render complete relief.”).

Petitioners now respond to the numbered paragraphs of the Commonwealth’s Preliminary Objections.

### **FACTUAL BACKGROUND**

1. Admitted, except for the characterization that “Pennsylvania’s General Assembly redrew Pennsylvania’s Congressional districts.” After

reasonable investigation and without yet having the benefit of discovery, Petitioners are without knowledge or information sufficient to form a belief as to who “redrew” Pennsylvania’s congressional map.

2. Admitted.

3. Admitted.

4. The averments in this paragraph purport to summarize facts alleged in the Petition. Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

5. Admitted.

6. Admitted. By way of further response, the individual Respondents are all named in their official capacities.

7. Admitted.

8. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

9. The averments in this paragraph purport to summarize facts alleged in the Petition. Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

10. The averments in this paragraph purport to summarize facts alleged in the Petition. Petitioners refer to the Petition for its full and complete contents and

deny anything inconsistent therewith. By way of further response, under federal constitutional principles the Commonwealth itself is obligated to have in place a congressional districting plan, and it is the Commonwealth itself that sends a delegation to the United State House of Representatives.

### **PRELIMINARY OBJECTION I**

11. Petitioners incorporate the foregoing paragraphs as if set forth at length.

12. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

13. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

14. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

15. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

16. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

17. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

18. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

19. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

20. The averments in this paragraph purport to summarize facts alleged in the Petition. Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

21. Admitted that each of the respondents listed in paragraph 20 of the Commonwealth's Preliminary Objections was properly named. The remainder of the averments in this paragraph purport to summarize facts alleged in the Petition, which speaks for itself, or contains assertions of law, to which no response is



required. To the extent that any facts in this paragraph differ from those in the Petition or a response is otherwise required, this paragraph is denied.

22. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

23. The averments in this paragraph purport to summarize facts alleged in the Petition, which speaks for itself, or contains assertions of law, to which no response is required. To the extent that any facts in this paragraph differ from those in the Petition or a response is otherwise required, this paragraph is denied.

24. The averments in this paragraph purport to summarize facts alleged in the Petition, which speaks for itself, or contains assertions of law, to which no response is required. To the extent that any facts in this paragraph differ from those in the Petition or a response is otherwise required, this paragraph is denied.

25. The averments in this paragraph purport to summarize facts alleged in the Petition, which speaks for itself, or contains assertions of law, to which no response is required. To the extent that any facts in this paragraph differ from those in the Petition or a response is otherwise required, this paragraph is denied.

26. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied. By way of further response, there is nothing anomalous about

a lawsuit against both the Commonwealth and specific state officials. *See, e.g., Del. Valley Council for Clean Air v. Pennsylvania*, 678 F.2d 470, 475-76 (3d Cir. 1982) (“[T]he Commonwealth itself was and remains bound by the consent decree. First Delaware Valley and then the United States brought suit both against the Commonwealth and against state executive branch officials. . . . Because the Commonwealth, including all its branches, is bound by the consent judgment, the argument of inability to comply rings hollow. Even if the executive branch defendants were physically or legally incapable of complying with the decree, those Commonwealth officials sitting in the General Assembly certainly are not incapable of insuring the Commonwealth’s compliance. The sanction ordered by the district court does not single out the executive branch defendants in bringing pressure to obtain compliance.”).

27. The averments in this paragraph purport to summarize facts alleged in the Petition. Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

28. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

29. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

WHEREFORE, this preliminary objection should be overruled.

### **PRELIMINARY OBJECTION II**

30. Petitioners incorporate the foregoing paragraphs as if set forth at length.

31. The averments in this paragraph purport to summarize facts alleged in the Petition. Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

32. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

33. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

34. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

35. The averments in this paragraph purport to summarize facts alleged in the Petition. Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

36. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

37. Admitted that declaratory relief is among the relief sought by the Petition for Review. The remainder of this paragraph contains assertions of law to which no response is required. To the extent a response is required, this paragraph is denied.

38. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

39. The averments in this paragraph purport to summarize facts alleged in the Petition, which speaks for itself, or contains assertions of law, to which no response is required. To the extent that any facts in this paragraph differ from those in the Petition or a response is otherwise required, this paragraph is denied.

40. The averments in this paragraph purport to summarize facts alleged in the Petition, which speaks for itself, or contains assertions of law, to which no

response is required. To the extent that any facts in this paragraph differ from those in the Petition or a response is otherwise required, this paragraph is denied.

41. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

42. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

WHEREFORE, this preliminary objection should be overruled.

### **PRELIMINARY OBJECTION III**

43. Petitioners incorporate the foregoing paragraphs as if set forth at length.

44. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

45. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

46. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

47. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

48. The averments in this paragraph purport to summarize facts alleged in the Petition, which speaks for itself, or contains assertions of law, to which no response is required. To the extent that any facts in this paragraph differ from those in the Petition or a response is otherwise required, this paragraph is denied.

49. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

WHEREFORE, this preliminary objection should be overruled.

### **CONCLUSION**

For the foregoing reasons, Petitioners respectfully request that the Court overrule the Preliminary Objections to the Petition for Review filed by Respondent the Commonwealth of Pennsylvania.

Dated: September 12, 2017

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Respectfully submitted,

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