

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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League of Women Voters of Pennsylvania, <i>et al.</i> ,)	
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	<i>Petitioners,</i>)	
)	
)	No. 261 MD 2017
	v.)	
)	
The Commonwealth of Pennsylvania, <i>et al.</i> ,)	
)	
)	
	<i>Respondents.</i>)	
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[PROPOSED] ORDER

AND NOW, this day of , 2017, upon consideration of Respondents Pennsylvania General Assembly, Michael C. Turzai, and Joseph B. Scarnati III’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.

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**PETITIONERS' ANSWER TO THE PRELIMINARY OBJECTIONS OF
RESPONDENTS PENNSYLVANIA GENERAL ASSEMBLY, MICHAEL C.
TURZAI, AND JOSEPH B. SCARNATI III**

Petitioners submit this Answer to the Preliminary Objections to the Petition for Review (“Petition”) filed by Respondents Pennsylvania General Assembly, Michael C. Turzai, and Joseph B. Scarnati III (collectively, the “General Assembly”).

RESPONSE TO PRELIMINARY STATEMENT

The Preliminary Objections filed by the General Assembly begin with a “Preliminary Statement” 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.¹ These matters will be addressed more fully during briefing.

Petitioners’ lawsuit challenges the 2011 Pennsylvania Congressional district map (the “2011 Plan”) as an unconstitutional gerrymander violating the Constitution of Pennsylvania. The essence of Petitioners’ claim is that the 2011 Plan unlawfully manipulates the election districts so as to rig election results in favor of Republican candidates for Congress.

¹ 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 General Assembly 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.

The General Assembly's preliminary objections are an exercise in wishful thinking and are contrary to established law. The General Assembly's contention that partisan gerrymandering cases are non-justiciable is entirely groundless. The Pennsylvania Supreme Court has twice squarely held that partisan gerrymandering claims are justiciable under the Pennsylvania Constitution. *See Erfer v. Commonwealth*, 794 A.2d 325, 331-32 (Pa. 2002); *In re 1991 Reapportionment*, 609 A.2d 132, 142 (Pa. 1992). These decisions are controlling law. And while this case is not brought under federal law, it is worth noting that the U.S. Supreme Court rejected the General Assembly's non-justiciability argument in each of the Court's last three partisan gerrymandering cases. *Davis v. Bandemer*, 478 U.S. 109, 125 (1986); *Vieth v. Jubelirer*, 541 U.S. 267, 310-11 (Kennedy, J., concurring); *accord id.* at 326 (Stevens, J., dissenting); *id.* at 346 (Souter and Ginsburg, JJ., dissenting); *id.* at 355 (Breyer, J., dissenting) (2004); *LULAC v. Perry*, 548 U.S. 399, 413-14 (2006).

Contrary to the General Assembly's objections, the Petition states a claim. Count I of the Petition alleges that the 2011 Plan violates Petitioners' rights under Pennsylvania's Free Expression and Association Clauses, Art. I, §§ 7, 20, which the Pennsylvania Supreme Court has held provide greater protections than the First Amendment of the U.S. Constitution. *Pap's A.M. v. City of Erie*, 812 A.2d 591, 605 (Pa. 2002). Petitioners allege that the 2011 Plan has the purpose and effect of

disfavoring Petitioners and other Democratic voters by reason of their political views, their past votes, and the political party with which they associate, in violation of Art. I, §§ 7, 20. Pet. ¶¶ 100-07. Petitioners additionally allege that 2011 Plan violates the Pennsylvania Constitution's prohibition against retaliating against individuals on the basis of their protected speech and political views. *Id.* ¶¶ 108-13.

Count II of the Petition alleges that the 2011 Plan violates Pennsylvania's Equal Protection guarantees, Art. I, §§ 1, 26 and the Free and Equal Clause, Art. I, § 5. Pet. ¶¶ 114-20. Petitioners allege that the 2011 Plan reflects intentional discrimination against an identifiable political group (i.e., Petitioners and other Democratic voters) and accomplishes actual discriminatory effects. With respect to the discriminatory effects, Petitioners allege that the 2011 Plan disadvantages them at the polls, *id.* at ¶¶ 117-120, that the disadvantage is enduring, lasting throughout the lifetime of the Plan, *id.* at ¶ 94, and that the extreme partisanship of today's Congress magnifies the effects of gerrymandering because members of Congress overwhelmingly no longer represent the views and interests of voters of the opposite party. *Id.* at ¶¶ 95-98. That is, when voters lose the ability to elect representatives of their party as a result of gerrymandering, those voters lose not only electoral power, but also the ability to influence legislative outcomes. These facts are all that is necessary to allege an equal protection violation. *Erfer*, 794

A.2d at 332. The General Assembly also ignores that *Erfer* was decided only after an evidentiary hearing and findings of fact issued by this court.

The General Assembly's standing defenses are equally unavailing. The Pennsylvania Supreme Court in *Erfer* resoundingly rejected the General Assembly's argument that under Pennsylvania law individual voters cannot challenge the entire state congressional map: "We believe such a narrow interpretation to be discordant with the reality of challenging a reapportionment scheme A litigant cannot logically confine his challenge to his particular district. A reapportionment plan acts as an interlocking jigsaw puzzle, each piece reliant upon its neighbors to establish a picture of the hole." 794 A.2d at 329-30. With respect to the General Assembly's challenge to just the League of Women Voters, Petitioners submit that as an organization of voters, it has standing. See *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2014 Pa. Commw. Unpub. LEXIS 756, at *21 (Pa. Commw. Ct. Jan. 17, 2014) ("The LWV has standing to sue on behalf of its members or on its own behalf, particularly in lawsuits brought to challenge state laws affecting voters."); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). In any event, under the holding in *Albert v. 2001 Legislative Reapportionment Commission*, 790 A.2d 989, 995 n.6 (Pa. 2002), because the individual petitioners here have standing, the General Assembly's challenge to the League's standing is moot.

Finally, the General Assembly's defense that those Petitioners who reside in districts with a majority of voters who register Democratic do not have standing is also wrong for at least the following reasons. *First*, as set forth above, any voter can challenge the entire state map. *Second*, as the General Assembly well knows, party registration is not the only test for persons who vote Democratic, so its senseless to limit standing in the way the General Assembly proposes. *Third*, the gerrymander denies the constitutional rights of Petitioners packed into districts with Democratic representatives by diluting the weight of their votes. The General Assembly cites no authority in support of its faulty argument to the contrary.

Responses to Preliminary Objections

1. Admitted. Petitioners admit the averments in this paragraph but further respond by directing the Court to the Petition.
2. Denied. The averments in this paragraph purport to summarize paragraphs 51-52 of the Petition. Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.
3. Denied. The averments in this paragraph purport to summarize paragraphs 52, 68, and 76 of the Petition. Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.
4. Admitted. Petitioners admit the averments in this paragraph but further respond by directing the Court to the Petition.

5. Admitted. Petitioners admit the averments in this paragraph but further respond by directing the Court to the Petition.

6. Denied. The averments in this paragraph purport to summarize paragraphs 42 through 49 of the Petition. Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

7. Denied. The averments in this paragraph purport to summarize paragraphs 61 through 66 and 73 through 74 of the Petition. Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

8. Admitted. Petitioners admit the averments in this paragraph but further respond by directing the Court to the Petition.

9. Admitted. Petitioners admit the averments in this paragraph but further respond by directing the Court to the Petition.

10. Denied. The averments in this paragraph purport to summarize the claims made in the Petition. Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

11. Admitted. Petitioners admit the averments in this paragraph but further respond by directing the Court to the Petition.

12. Denied. The averments in this paragraph purport to summarize paragraphs 99 through 112 of the Petition. Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

13. Admitted. Petitioners admit the averments in this paragraph but further respond by directing the Court to the Petition.

14. Denied. The averments in this paragraph purport to summarize paragraph 117 of the Petition. Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

15. Denied. The averments in this paragraph purport to summarize paragraph 118 of the Petition. Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

16. Denied. The averments in this paragraph purport to summarize paragraphs 119 and 120 of the Petition. Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

17. Admitted in part; denied in part. Petitioners admit that this paragraph quotes portions of a Pennsylvania Rule of Civil Procedure. Petitioners deny that the rule has been quoted in full.

18. Admitted in part; denied in part. Petitioners admit that this paragraph quotes portions of a Pennsylvania Rule of Civil Procedure. Petitioners deny that the rule has been quoted in full.

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. 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.

21. 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.

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. 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.

24. 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.

25. 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.

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.

27. 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. Petitioners further state that the *Vieth* plurality did not speak for the Court on the justiciability question and that the plurality's position referenced in this paragraph was rejected by a majority of the U.S. Supreme Court in *Vieth*. See *Vieth*, 541 U.S. at 310-11 (Kennedy, J., concurring); accord *id.* at 326 (Stevens, J., dissenting); *id.* at 346 (Souter and Ginsburg, JJ., dissenting); *id.* at 355 (Breyer, J., dissenting).

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.

30. 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.

31. 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.

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. 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.

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. 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.

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. Petitioners further state that the U.S. Supreme Court's language referenced in this paragraph was that intentionally disadvantaging a party's election prospects was not unconstitutional discrimination, "unless the redistricting does in fact disadvantage it at the polls." *Bandemer*, 478 U.S. at 139. Here, the Petition alleges more than amply that Democrats are disadvantaged at the polls. Pet. at ¶¶ 117-120.

39. 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.

40. 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.

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 purport to summarize paragraph 119 of the Petition. Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

43. Denied. The averments in this paragraph purport to summarize paragraph 120 of the Petition. Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

44. Denied. The averments in this paragraph purport to summarize paragraph 107 of the Petition. Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

45. Denied. The averments in this paragraph and the accompanying footnote are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied. Petitioners further state that in a footnote to this paragraph, the General Assembly states that several of Pennsylvania's statewide offices are currently held by Democrats, a fact which is

remarkably unhelpful to the General Assembly. That Democrats achieve electoral success at the state level, where Republicans are unable to engage in gerrymandering tactics, demonstrates the extent to which Petitioners are unfairly shut out of the democratic process at the Congressional level, where the General Assembly has gerrymandered the districts.

46. Admitted in part; denied in part. Petitioners admit that in the Fifteenth Congressional District Charlie Dent ran unopposed in 2014, Mike Kelly ran unopposed in the Third District in 2016, and that Tim Murphy ran unopposed in 2014 and 2016. The remainder of 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. 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.

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

50. 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.

51. 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.

52. Admitted. Petitioners admit the averments in this paragraph but further respond by directing the Court to the Petition.

53. Denied. The averments in this paragraph and the accompanying footnote purport to summarize the claims made in the Petition or are conclusions of law to which no responsive pleading is required. Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

54. Denied. The averments in this paragraph and the accompanying footnote are conclusions of law to which no responsive pleading is required and purport to summarize what is or is not in the Petition, which speaks for itself. To the extent a response is required, this paragraph is denied.

55. Denied. The averments in this paragraph purport to summarize paragraph 95 of the Petition. Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

56. 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.

57. 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.

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

59. 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.

60. 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.

61. 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.

62. 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.

63. 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.

64. 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.

65. Admitted in part; denied in part. Petitioners admit that the League of Women Voters of Pennsylvania is an organization. Petitioners further state that the organization has consisted of and represented voters in the Commonwealth since passage of the Nineteenth Amendment. The remaining averments in this paragraph purport to summarize what is or is not in the Petition, and they are denied. Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

66. Denied. The averments in this paragraph are in the nature of a request for relief. To the extent a response is required, the paragraph is denied.

67. 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.

68. 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.

69. This paragraph and its footnotes purport to characterize public records that speak for themselves. To the extent that the allegations in this paragraph and its footnotes differ from those records, this paragraph and its footnotes are denied.

70. 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.

71. 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.

72. Denied. The averments in this paragraph are in the nature of a request for relief. To the extent a response is required, it is denied.

73. 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.

74. 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.

75. 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.

76. 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.

77. 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.

78. 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.

79. 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, Petitioners respectfully request that the Court overrule the Preliminary Objections to the Petition for Review filed by respondents the Pennsylvania General Assembly, Michael C. Turzai, and Joseph B. Scarnati III.

Dated: September 7, 2017

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Respectfully submitted,

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