

IN THE SUPREME COURT OF PENNSYLVANIA

No. 159 MM 2017

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, *et al.*,

Petitioners,

v.

THE COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Respondents.

**AMICUS BRIEF OF CAMPAIGN LEGAL CENTER
IN SUPPORT OF PETITIONERS**

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STATEMENT OF IDENTITY AND INTEREST¹

Amicus curiae, Campaign Legal Center (“CLC”), is a nonpartisan, nonprofit organization that works to protect and strengthen the U.S. democratic process across all levels of government by generating public policy and participating in state and federal court litigation throughout the nation regarding voting rights and redistricting. CLC has served as counsel or *amicus curiae* in numerous voting rights and redistricting cases, including *Gill v. Whitford*, No. 16-1161 (U.S. 2017); *League of Women Voters of N.C. v. Rucho*, No. 1:16-cv-01164 (M.D.N.C. 2017); *Vesilind v. Va. State Bd. of Elections*, No. 170697 (Va. 2017); *LULAC v. Reagan*, No. 2:17-cv-04102 (D. Ariz. 2017); *Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016); *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016); *Hooker v. Ill. State Bd. of Elections*, 63 N.E.3d 824 (Ill. 2016); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652 (2015); and *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), among others. CLC’s mission includes working to ensure that all eligible voters have the opportunity and information they need to exercise their right to vote. CLC has a demonstrated interest in voting rights and redistricting law.

¹ No one other than the *Amici*, their members, or their counsel paid for the preparation of this brief or authored this brief, in whole or in part.

INTRODUCTION

Petitioners challenged the 2011 Pennsylvania congressional redistricting plan (“2011 Plan”) as an unconstitutional partisan gerrymander under the Pennsylvania Constitution’s Free Expression and Association Clauses, Art. I, §§ 7, 20, as well as its Equal Protection guarantees, Art. I, §§ 1, 26, and the Free and Equal Clause, Art. I, § 5. Pet. ¶¶ 114-20. At trial, Petitioners presented overwhelming (and largely undisputed) evidence that the 2011 Plan is an extreme and durable partisan gerrymander, created with the explicit intent of maximizing partisan advantage for the party that controlled the redistricting process. Despite this mountain of evidence, the Commonwealth Court recommended upholding the 2011 Plan, finding that the Petitioners “have not articulated a judicially manageable standard” to determine when partisanship goes too far under the Pennsylvania Constitution. Findings ¶ 61.

Contrary to the Commonwealth Court’s recommended findings, this Court should find the 2011 Plan unconstitutional, as the standard utilized by Petitioners provides a judicially discernible and manageable approach for identifying district plans that violate the Pennsylvania Constitution. Part I of this brief addresses the danger extreme partisan gerrymandering poses to our democratic system, as its harmful effects have multiplied and grown more extreme than ever before. Part II establishes the egregious nature of the 2011 Plan. And Part III explains that the Petitioners’ proposed test provides a discernible and judicially manageable standard.

ARGUMENT

I. Partisan Gerrymandering Poses an Acute and Intensifying Risk to Our Democratic System.

A. Extreme Partisan Gerrymandering Is Incompatible with Representative Democracy and Inflicts Grave Constitutional Harms.

Extreme partisan gerrymanders are inherently undemocratic, and undermine the basic premise that our republican form of government is representative. It is a founding principle of American democracy that the power of government over the people derives from the people themselves. *The Declaration of Independence* para. 2 (U.S. 1776) (“Governments are instituted among Men, deriving their just powers from the consent of the governed.”). Under our representative system, the people have the right not only to determine who should represent them, but also to hold their representatives accountable to the will of the electorate. *See Powell v. McCormack*, 395 U.S. 486, 540-41 (1969) (“[T]he true principle of a republic is, that the people should choose whom they please to govern them.”)(quoting Alexander Hamilton, 2 Debates on the Federal Constitution 257 (J. Elliot ed. 1876)). Partisan gerrymandering is fundamentally “incompatible” with these principles. *Ariz. State Legislature*, 135 S. Ct. at 2658 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 316 (2004) (Kennedy, J., concurring in the judgment)).

Partisan gerrymandering, the practice of drawing legislative districts to “subordinate adherents of one political party and entrench a rival party in power,”

id., occurs when one party intentionally marginalizes the other party’s voters by either “‘cracking’—‘dividing a party’s supporters among multiple districts so that they fall short of a majority in each one’” or “‘packing’—‘concentrating one party’s backers in a few districts that they win by overwhelming margins,’” *Whitford v. Gill*, 218 F. Supp. 3d 837, 854 (W.D. Wis. 2016). By drawing districts with specific levels of partisanship in the voter population, the party in charge of the districting process can essentially predetermine electoral results in each district. As a result, elections are determined not by the will of the people, but instead by the will of the map drawer.

Under the federal Constitution, partisan gerrymandering raises many serious constitutional concerns. First, it impinges on First Amendment rights by classifying, burdening, and penalizing citizens on the basis of their political views and associations. *See Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment) (“After all, these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views.”). Districting plans that are intentionally “employed ‘to minimize or cancel out the voting strength of . . . political elements of the voting population’” also invite scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *Id.*; *Whitford* at 867 (quoting *Gaffney v. Cummings*, 412 U.S. 735, 751-52 (1973)).

Partisan gerrymanders violate the Equal Protection Clause by discriminating against the targeted party's voters, preventing their ballots from translating into "fair and effective representation." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

In Pennsylvania, the state constitutional rights of Free Expression and Association, Art. I, §§ 7, 20, have been held to be even more capacious than their federal counterparts. *Pap's A.M v. City of Erie*, 812 A.2d 591, 605 (Pa. 2002). As Petitioners comprehensively demonstrated at trial, the 2011 Plan was intended to—and did—disfavor Petitioners and other Democratic voters for their political views and past voting histories. Kennedy Rep. at 6; Pet. ¶¶ 100-107.

The Pennsylvania Constitution likewise guarantees equal protection of the law as well as free and equal elections. Pa. Const. Art. I, §§ 1, 26; Pa. Const. Art. I, § 5. The equal protection guarantees provide that "[a]ll men are born equally free and independent," Pa. Const. Art. I, § 1, and that "[n]either the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right," Pa. Const. Art. I, § 26. The state equal protection guarantees have been held to be coterminous with the Equal Protection Clause of the Fourteenth Amendment. *Erfer v. Com.*, 794 A.2d 325, 332 (Pa. 2002).

In Pennsylvania, therefore, as this Court has recognized, the General Assembly is not "free to construct political gerrymanders with impunity." *Id.* at 334.

The state constitution's equal protection guarantees demand a judicial corrective wherever partisan gerrymanders exceed the bounds of permissible partisanship; for the "most egregious abuses" of the legislative reapportionment power, like the 2011 Plan at issue in this case, there must be a remedy. *Id.* (citing *Bandemer v. Davis*, 478 U.S. 109, 143 (1986)). Because the most extreme gerrymanders are impervious to normal political processes, judicial intervention is plainly needed to prevent further subversion of the democratic process.

B. Partisan Gerrymanders Are More Severe and More Durable than at Any Other Time in American History.

1. Sophisticated Technological Tools Now Enable Legislators to Gerrymander Their Districts with Clinical Precision, Creating Near-Certain Partisan Outcomes and Entrenching Political Majorities.

Gerrymandering has played a role in American politics since the early eighteenth century. Elmer C. Griffith, *The Rise and Development of the Gerrymander* 26-28 (1907). However, the severity and resilience of recent partisan gerrymanders is without historical precedent. While the majority of legislators have always had the power to draw districts, and thus some ability to control who their voters are, they have never before been able to do so with such sophistication, or confidence in their success. Until recently, the practice of redistricting for partisan advantage was relatively unsophisticated. Districts had to be created by hand, with paper maps and protractors. David Daley, *Ratf***ked: The True Story*

Behind the Secret Plan to Steal America's Democracy 51-60 (2016). To draw conclusions about the partisan effect of a particular districting plan, map drawers had to review electoral results and demographic data manually, allowing for only rough predictions about potential outcomes. *Id.*

Today, map drawers have at their fingertips a wealth of data that allows them to predict the performance of a particular districting plan with pinpoint accuracy, all accessible and manipulable with only a few computer keystrokes. Using sophisticated mapping software, complex statistical models, and algorithms that allow for the rapid and iterative creation of district plans tailored to particular criteria and desired outcomes, map-drawers can determine with confidence how a particular plan will perform for the duration of an entire decennial redistricting period. *Id.*; see also *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment) (“Computer assisted districting has become so routine and sophisticated that legislatures, experts, and courts can use databases to map electoral districts in a matter of hours, not months.”).

These technological advances allow map-drawers to target voters with minute precision. By drilling down to “smaller and more complicated geographic units,” and analyzing the voters who live in those units on the basis of their demographics, voting history, and party affiliation, redistricting professionals are able to move *individual voters* into and out of districts in order to achieve partisan ends. See Royce

Crocker, *Congressional Redistricting: An Overview 2*, Cong. Research Serv. (Nov. 21, 2012). Unlike the blunt instruments used to gerrymander districts in the past, today's map-drawers are armed with precision scalpels, allowing them to delicately transplant voters from one district to another to maximize their political gain.

The results of some of the most extreme partisan gerrymanders from the current redistricting cycle demonstrate the success with which map-drawers are able to predict the electoral outcomes of a particular redistricting plan. For example, after its 2011 Congressional plan was struck down as a racial gerrymander in 2016, the Republican-controlled North Carolina legislature was ordered to redraw its congressional districts in 2016. The legislators in charge of the redistricting process explicitly set out to draw a map that maximized their political advantage, with ten Republican-controlled and three Democratic-controlled districts. *See League of Women Voters of N.C. v. Rucho*, No. 1:16-cv-1164, 2017 WL 876307, at *4 (M.D.N.C. March 3, 2017). Precisely as predicted by the proponents of the map, North Carolina elected ten Republican Congressional representatives and three Democratic Congressional representatives in November 2016. *Id.* The success of these gerrymanders, created using the advanced technological methods described

above, demonstrates the effectiveness of drawing district lines to ensure partisan advantage.²

2. Legislative Efforts to Permanently Entrench Partisan Majorities Are More Brazen than Ever Before, and Impose Increasing Costs on the Democratic Process.

State legislators are increasingly open about manipulating district maps for political gain, despite the clear anti-democratic nature of their actions. Justice Kennedy voiced his concern with this phenomenon in 2004—“[w]hether spoken with concern or pride, it is unfortunate that our legislators have reached the point of declaring that, when it comes to apportionment: ‘We are in the business of rigging elections.’” *Vieth*, 541 U.S. at 317 (Kennedy, J., concurring in the judgment) (citation omitted). Despite this, legislators have continued to engage in extreme partisan gerrymandering, and to flaunt the fact that they are doing so.

In Pennsylvania, lawmakers went to uncommon lengths to conceal their gerrymandered plan from other lawmakers—and from the general public—during the bill’s consideration, in an effort to cut off any avenue of debate or scrutiny. *Petrs.*

² The practice of partisan gerrymandering is not limited to either party. Democrats are just as guilty of drawing districts for partisan gain in states where they retain control over map-drawing. While Republican gerrymandering is slightly more prominent after the wave election of 2010 allowed Republicans to dominate the districting process in several states, Democrats have also drawn gerrymandered maps in states like Rhode Island and Maryland. *See, e.g., Benisek v. Lamone*, No. 17-333 (pending before the U.S. Supreme Court regarding a challenge to Democratic partisan gerrymandering in Maryland).

Exs. 178-79. Republican leadership in the General Assembly used an empty “shell” bill to push their plan through the legislative process, and Republican Senators suspended the ordinary rules of procedure to speed its passage. *See, e.g.*, Senate Bill 1249 at 2:7-3:12, <http://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2011&sessInd=0&billBody=S&billTyp=B&billNbr=1249&pn=1520>. All of these efforts were undertaken by a single party for a single purpose: to entrench as many of its partisans as possible, for as long as possible.

The growth and intensification of extreme partisan gerrymanders, made possible by the technological advances discussed above, has deepened the electorate’s loss of faith in elections and public institutions. Partisan gerrymandering is increasingly in the public consciousness,³ in part because gerrymandering efforts are much more effective now than they have been in the past. Indeed, congressional redistricting plans from the current decennial cycle present a larger total partisan advantage than at any time during the last 40 years. Warshaw Rep. at 9; Nicholas O.

³ *See, e.g.*, Nicholas Stephanopoulos, *What Virginia Tells Us, and Doesn’t Tell Us, about Gerrymandering*, L.A. TIMES (Nov. 10, 2017), <http://beta.latimes.com/opinion/op-ed/la-oe-stephanopoulos-gerrymander-waves-virginia-20171110-story.html>; Robert Barnes, *Supreme Court to Hear Potentially Landmark Case on Partisan Gerrymandering*, WASH. POST (June 19, 2017), https://www.washingtonpost.com/politics/courts_law/supreme-court-to-hear-potentially-landmark-case-on-partisan-gerrymandering/2017/06/19/d525237e-5435-11e7-b38e-35fd8e0c288f_story.html.

Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 872, 876 (2015) (Since 1972, “the scale and skew of today’s gerrymanders are unprecedented in modern history.”). At the same time, public trust in government is at a historical low. *See, e.g., Public Trust in Government 1958-2017*, Pew Res. Ctr. (May 3, 2017), <http://www.people-press.org/2017/05/03/public-trust-in-government-1958-2017/>. This lack of trust is only exacerbated as citizens become increasingly frustrated with the naked partisan ambition on display in the districting process.

The loss of “public confidence in the integrity of the democratic process [itself] has independent significance” for the proper functioning of our democratic institutions because lost confidence discourages “citizen participation in the electoral process.” *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008) (lead opinion); *see also Vieth*, 541 U.S. at 316-17 (Kennedy, J., concurring in the judgment). Especially in states such as Pennsylvania, where citizens are unable to address the harms of partisan gerrymandering themselves through direct democracy, there is no simple political solution that can repair the damage done to public faith in the democratic process.

Courts should not condone excessive partisanship in the electoral process, and should ensure that legal standards meaningfully hold legislatures accountable to the

public. This Court has an opportunity to curb the threat of extreme gerrymandering in Pennsylvania.

II. Pennsylvania’s 2011 Plan Is an Extreme Partisan Gerrymander and an “Egregious Abuse” of the Legislative Reapportionment Power.

In 2011, the desire for partisan advantage motivated the Pennsylvania legislature to enact one of the worst partisan gerrymanders on record. Social scientists have developed measures of partisan asymmetry that can accurately and reliably quantify the partisan advantage bestowed upon the party in control of redistricting. Partisan symmetry is the intuitive idea that “the electoral system [should] treat similarly-situated parties equally” so that they are able to translate their popular support into legislative representation with approximately equal ease. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 466 (2006) (Stevens, J., concurring in part and dissenting in part) (citation omitted). At trial, Petitioners offered evidence of multiple measures of partisan asymmetry, all of which clearly point to the same conclusion: the 2011 plan is the most asymmetric plan enacted in Pennsylvania’s history, and also one of the most asymmetric plans enacted in modern U.S. history. Warshaw Rep. at 11-15; Chen Rep. at 20-22. This brief will mainly focus on one measure of partisan asymmetry presented by the Petitioners, the efficiency gap.

A. Measuring Partisan Asymmetry: The Efficiency Gap

The efficiency gap quantifies the severity of partisan asymmetry in a redistricting map by measuring the difference in the number of votes wasted by each party as a percentage of the total number of votes cast. A vote is wasted when it does not contribute to a candidate's victory. That is, all votes cast for the losing candidates in a jurisdiction are wasted because they do not contribute to the candidate's victory, while all votes in excess of the amount needed for the winning candidate to win (50% plus one) are wasted because they are not necessary for a candidate's victory. Warshaw Rep. at 5.

This metric reflects the very techniques used to gerrymander a map: packing and cracking. In order to gain advantage for a favored party through a redistricting plan, one should *crack* the disfavored party's supporters among many districts, so that their preferred candidates lose by relatively narrow margins, and then *pack* the remaining disfavored party's supporters into a few districts, in which their preferred candidates win by enormous margins. *Id.* at 4. In each case, the disfavored party's supporters are *inefficiently distributed* compared to the favored party's supporters. Under a symmetric redistricting plan, both parties would waste a near-equal number of votes and the efficiency gap would be close to zero. As the efficiency gap becomes larger, the redistricting plan evidences greater advantage for the favored party over the disfavored party.

B. The Efficiency Gap of the 2011 Plan Establishes its Severity.

The 2011 Plan shows an alarming departure from the average historical efficiency gap in Pennsylvania, and in the country overall. From 1972 to 2010, neither party in Pennsylvania was consistently advantaged and the efficiency gap often remained in the single digits. Warshaw Rep. at 12. The 2012 election brought about a sea change in this decades-long trend. Despite only winning 49% of statewide vote, Republican candidates won 72% of Pennsylvania’s congressional seats, resulting in an efficiency gap score of more than *double* the highest efficiency gap from the previous 28 years. *Id.* The 2011 Plan’s efficiency gap score in 2012 was the most Republican-leaning of all plans that year, “and the second largest one in history.” *Id.* at 15. In the 2014 and 2016 cycles, Republicans kept control of 13 out of 18 congressional seats despite receiving only a slim majority of the total votes. *Id.* at 13.

These large scores demonstrate the severity of Pennsylvania’s partisan gerrymander. That the 2011 Plan has produced historically large asymmetries in the three elections held under the plan, more than half the redistricting cycle, also establishes the 2011 Plan’s durable partisan tilt. In other words, Democratic voters will be consistently and significantly disadvantaged in their ability to translate their votes into seats throughout the remainder of the decade (and Republican voters will be consistently and significantly advantaged). *Id.* at 4 (“Democratic voters whose

votes are wasted in Pennsylvania are unlikely to see their preferences represented in our nation's capital. They effectively have no political voice.”). In short, this evidence illustrates the extreme and durable discriminatory effect of the 2011 Plan, which results in discrimination against one party's voters, preventing their ballots from translating into “fair and effective representation.” *Reynolds*, 377 U.S. 533, 565-66 (1964).

C. The 2011 Plan Was Intended to Give Republicans a Large and Durable Advantage.

The trial below produced voluminous evidence that the 2011 Plan's architects intended to advantage their party when drawing the map. As mentioned above, Republicans went to great lengths to create a secretive redistricting process, shielding the map from scrutiny by excluding Democrats and the public, and even changing the normal rules of procedure to help them secure partisan gain. Legislators involved in the map drawing, including Speaker Turzai, analyzed and considered troves of partisan data, including past voting histories, to measure the partisan performance of different political subdivisions in order to gauge the electoral outcomes of maps. Tr. 304:3-21, 301:10-302:19, 309:6-15. Further, Professor Chen's expert testimony showed that partisan intent played a large role in the drawing of the 2011 Plan. Professor Chen simulated 500 plans using a computer algorithm that adhered to traditional redistricting criteria, and not one of the simulated plans remotely resembled the partisan outcomes of the redistricting map

enacted by the Pennsylvania legislature, and most produced only 7-10 Republican districts. Chen Rep. at 2-3. In fact, even the Commonwealth Court concluded that “the 2011 Plan was intentionally drawn so as to grant Republican candidates an advantage in certain districts within the commonwealth.” Findings ¶ 51. And undisputed evidence at trial also demonstrated that those likely to vote for Democratic congressional candidates are an identifiable political group. Warshaw Rep. at 19-22; Chen Rep. at 38-41.

III. The Petitioners’ Proposed Test and Evidence Provides a Judicially Manageable Standard under the Pennsylvania Constitution.

This Court has unequivocally held that partisan gerrymandering claims are justiciable under the Pennsylvania Constitution. *See Erfer*, 794 A.2d at 331; *In re 1991 Reapportionment*, 609 A.2d 132 (Pa. 1992). As discussed in Part II, the 2011 Plan’s partisan asymmetry is an extreme outlier, and the record evidence leaves no doubt that it was a deliberate and unlawful partisan gerrymander. Nevertheless, the Commonwealth Court concluded that the plan was constitutional, because—in its estimation, “petitioners have not articulated a judicially manageable standard by which th[e] Court can discern whether the 2011 Plan crosses the line between permissible partisan considerations and unconstitutional partisan gerrymandering under the Pennsylvania Constitution.” Findings ¶ 61.

On the contrary, the petitioners’ test is manageable because (1) its intent prong is well accepted and standard throughout equal protection law; (2) its effect prong is

easy to administer due to its reliance on an established metrics of partisan asymmetry; (3) the test reflects political realities; (4) the test's implications are neutral and limited; and (5) compliance with the test is straightforward.

A. Intent Is a Prerequisite to Equal Protection Claims and Is a Common Standard within Equal Protection Law.

Intent is the *sine qua non* of all equal protection litigation. As this Court and the Commonwealth Court have recognized, in these cases, “intentional discrimination is . . . not difficult to show since as long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of reapportionment were intended.” Findings ¶ 50 (quoting *Erfer*, 794 A.2d at 332) (internal quotation marks omitted). Plaintiffs can prove intent by offering direct or circumstantial evidence about the map drawers’ motives. There is no question that this standard is manageable in practice, and courts are well within their competence to take evidence of intent while keeping in mind a presumption that a legislature will intend to advantage the controlling party.

In *Erfer*, this Court stated that not only does there need to be an intent to discriminate, but also an intent to discriminate against an “identifiable political group.” *Erfer*, 794 A.2d at 332-33. This Court also acknowledged that “future plaintiffs” might “adduce sufficient evidence to establish that such an identifiable class [of Democratic voters] exists,” “particularly since the field of information technology is advancing at a breakneck speed.” *Erfer*, 794 A.2d at 333. That future

has arrived. The evidence at trial in this case definitively established that Democratic voters are an identifiable political group—and were targeted as such, thanks to transformative technological advances in statistics and data modeling. Even the map drawers themselves considered Democrats an identifiable political group, as demonstrated by their reliance on voting data to accurately predict future electoral outcomes. *See* Chen Rep. at 38-41; Warshaw Rep. at 19-22.

B. The Efficiency Gap Is an Easily Administrable Measure of Effect.

Among social scientists, partisan asymmetry measures such as the efficiency gap, partisan bias, and the mean-median difference are widely accepted metrics, the results of which are rarely contested.⁴ Here, the Petitioners presented virtually undisputed evidence of two such measures, the mean-median difference and the efficiency gap, which is the focus of this brief. Warshaw Rep. at 11-15; Chen Rep. at 20-22. The efficiency gap can be reliably calculated using easily obtained electoral results, as shown by Professor Warshaw’s report, which calculated efficiency gap scores for all congressional maps with over six seats between 1972 and 2016. Warshaw Rep. at 5-7. Accordingly, to determine if the effect prong is satisfied, all a

⁴ Note that partisan symmetry is *not* a measure of whether parties receive a proportion of seats equal to their number of votes. Rather, it is a measure of the extent to which the map gives each party the same number of seats when it wins the same number of votes. For instance, in a plan where Republicans win 100% of the seats with 75% of the votes, the plan would be symmetrical if Democrats also received 100% of the seats with 75% of the votes.

court must do is ascertain the challenged plan's asymmetry and then compare it to historical norms. This is a straightforward quantitative exercise, akin to determining a plan's total population deviation and then comparing it to the 10% threshold. *See In re Mun. Reapportionment of Twp. of Haverford*, 873 A.2d 821, 836 (Pa. Commw. Ct. 2005) (applying 10% threshold under the Pennsylvania Constitution).

The Commonwealth Court and the Respondents expressed concerns regarding the efficacy of the efficiency gap. However, these concerns are easily addressed. First, the Commonwealth Court was concerned that there is no established threshold for determining actionable efficiency gap scores. Findings ¶ 61, n.24. However, this Court does not need to set a specific threshold in this case. Given the extremely large asymmetry here, this Court could hold the plan unconstitutional and develop a threshold over time, like the development of a threshold in the one person, one vote case law. Petitioners' expert, Professor Warshaw, has shown that the 2011 Plan's efficiency gap is the largest in the state's history, and the second most Republican-leaning efficiency gap for congressional plans across the country from 2012-2016 (-19%). Warshaw Rep. at 14-15. Professor Chen also found that the 2011 Plan exhibits a large mean-median difference of 5.9%. Chen Rep. at 20. Thus, according to multiple metrics of partisan asymmetry, the 2011 Plan is a clear outlier.

The Commonwealth Court was also concerned that constitutionally prescribed redistricting principles may impact the efficiency gap, and that this may

constitute a problem for comparisons of efficiency gaps across states. Findings at ¶ 391. However, the Commonwealth Court later acknowledged that Pennsylvania in fact has no state constitutional principles applicable to congressional districting, Findings ¶¶ 1-6, which makes Pennsylvania's large partisan asymmetry even more striking.

The Respondents also argue that districts compelled by the Voting Rights Act (VRA) or "political geography" may force the state's hand and lead to a higher efficiency gap. Leg. Resp. at 88-89. However, Petitioners' evidence at trial showed that neither of these factors caused the 2011 Plan's astronomical efficiency gap score. Professor Chen found that the 2011 Plan's large asymmetry was not caused by VRA concerns or racial goals. Chen Rep. at 33-35. In addition, both Professors Chen and Pegden found that Pennsylvania's political geography did not explain the 2011 Plan's large partisan skew. Chen Rep. at 14-24; Pegden Rep. at 2. Furthermore, if in a future case the state could show that a plan's large asymmetry was a result of state constitutional provisions, the VRA, or political geography, rather than discriminatory intent, this would undermine petitioners' ability to show the intentional discrimination necessary to prove a claim.

The Commonwealth Court was also concerned about comparisons between states that have different apportionment methods, in particular whether the lines are drawn by a legislature or a commission. Findings ¶ 391. However, Professor

Warshaw accounted for who controls the redistricting process by analyzing how party control impacts efficiency gap scores in the 2010 redistricting cycle. He found that unified partisan control of government is “highly correlated with changes in, and magnitude of, the efficiency gap.” Warshaw Rep. at 10. In particular, he found that states with Republican or Democratic unified control had shifts in the efficiency gap towards their party, while “States with courts or non-partisan commissions running the redistricting process tended to have a mix of different outcomes, and little net advantage for either side.” *Id.* This evidence shows that states with commissions are not skewing the comparison.

In addition, the Commonwealth Court seemed particularly concerned about whether competitive districts could undermine the efficiency gap as an effective metric. Findings ¶¶ 391, 61 n.24. It is true that a large number of contested elections may produce a high efficiency gap score in a single election. However, if a plan had many competitive districts, then there likely would be no claim that the plaintiffs were “disadvantaged at the polls,” *Erfer*, 794 A.2d at 332, because the gerrymander would not be durable (it would be reactive to voters’ choices). Further, if a plan’s drafters sought to create competitive districts, it would likely be hard to prove the required discriminatory intent. But, again, a goal of creating competitive districts is not at issue in this case, where Petitioners have strong evidence that the 2011 Plan’s

partisan skew will durably persist throughout the decade, Warshaw Rep. at 11, and that partisan advantage was a large motivation behind the district lines.

Respondents and the Commonwealth Court also argue that factors such as candidate quality, incumbency status, and campaign finance could impact efficiency gap scores. However, all of Professor Warshaw's efficiency gap calculations are based on actual congressional results from 1972 to 2016, which include races with all of these various factors at play. Warshaw Rep. at 7. Thus, individual factors such as candidate quality and incumbency are *already* accounted for as part of Professor Warshaw's efficiency gap scores and analysis.

Respondents also complain that the efficiency gap changes from election to election. Leg. Resp. at 90. This argument is less a point about the efficiency gap and more one about the nature of elections themselves. Parties' votes and seats vary from year to year; the efficiency gap simply registers this variation because it is calculated using vote and seat data. Since the last round of redistricting in Pennsylvania, the efficiency gap has changed, to some degree, from election to election, but in each case has remained historically abnormally large. Warshaw Rep. at 11-15. Although the efficiency gap changes depending on electoral conditions, there is no reason to think that it could swing all the way back to zero, as Respondents argue. In fact, Petitioners' expert has submitted undisputed evidence showing that the efficiency

gap is likely to be durable over a range of expected electoral outcomes. Warshaw Rep. at 11.

C. The Test Reflects Political Realities.

The Petitioners' test is also manageable because it corresponds to the realities of modern American politics. At both the state legislative and congressional levels, redistricting plans currently in effect have exhibited the worst asymmetries in modern times. Anthony J. McGann et al., *Gerrymandering in America* 4-5, 97-98 (2016). Pennsylvania is an outlier even in this current period of extreme gerrymandering. Warshaw Rep. at 15. And, current voter behavior in a district is a strong predictor of that district's partisan affiliation in the future. *Id.* at 15-21.

Modern gerrymandering is able to be so effective for two main reasons. First, “[t]echnological advances have allowed gerrymanderers to gain better information about voters . . . and draw boundaries with a finer pen.” John N. Friedman & Richard T. Holden, *Optimal Gerrymandering*, 98 Am. Econ. Rev. 113, 135 (2008). These advances include individual-level data from enhanced voter files, automated redistricting algorithms, and rigorous sensitivity testing. Second, voters are increasingly partisan. Split-ticket voting is rarer now than in earlier eras, and voters change their party preferences less from year to year. *See, e.g.*, Corwin D. Smidt, *Polarization and the Decline of the American Floating Voter*, 61 Am. J. Pol. Sci.

365 (2017). This means that gerrymanderers can identify the partisanship of voters *ex ante* and know how a district map will perform throughout the decade.

As voters have become more partisan, legislators have grown more polarized. Both in state legislatures and in Congress, there is now virtually no ideological overlap between Democratic and Republican legislators. *See, e.g.*, Warshaw Rep. at 16-18; Boris Shor & Nolan McCarty, *The Ideological Mapping of American Legislatures*, 105 *Am. Pol. Sci. Rev.* 530, 540 (2011). Extreme polarization exacerbates the effects of partisan gerrymandering. As one recent study shows, an efficiency gap in a party's favor causes both the legislature's ideological midpoint and the state's enacted laws to become significantly more extreme, even holding voters' preferences constant. Just by drawing clever lines—without persuading a single voter—a party thus pulls policy outcomes toward its preferred pole. *See* Devin Caughey et al., *Partisan Gerrymandering and the Political Process*, 16 *Election L.J.* (forthcoming 2017) (manuscript at 17-23), http://cwarshaw.scripts.mit.edu/papers/CTW_efficiency_gap_170515.pdf.

The efficiency gap captures a key element of contemporary voting and representation, as it synthesizes into one number how current voter behavior is translated into seats in the legislature. It displays both current political reality (the extent of the skew of the outcome) and is a strong predictor of the realities in the future.

D. The Test's Implications Are Neutral and Limited.

The Petitioners' test is also manageable because it plays no favorites. It neither threatens nor shields one party's plans more than the other's. Assume that the political geography of certain states benefits Republicans because their voters are distributed more efficiently. This fact does not render pro-Republican plans in these states more legally vulnerable, so long as their skew is actually the result of political geography rather than the deliberate and disparate cracking and packing of voters. In such a case, defendants could avoid liability by invoking either the test's first prong, lack of discriminatory intent.

Historically as well, the measures of partisan asymmetry that underpin the Petitioners' test have not been slanted in either party's direction. As Professor Warshaw showed, the average efficiency gap nationwide between 1972 and 2016 was close to zero. Warshaw Rep. at 7. According to Professor Warshaw, there is "nothing intrinsic about Pennsylvania that makes it likely to have a pro-Republican Efficiency Gap." *Id.* This means that over the modern redistricting era, neither party has enjoyed a consistent edge over its opponent. And while the average efficiency gap nationwide has trended in a Republican direction in recent years, this shift is largely attributable to more plans being enacted by state governments under unified Republican control. Warshaw Rep. at 10. If Democrats had designed more maps, the average efficiency gap would have moved in the opposite direction. *Id.*

Further, the test would imperil relatively few plans. Between 1980 and 2000, Pennsylvania had only one congressional plan with over a 5% efficiency gap in any one election. *Id.* at 12. Between 1970 and 2000, no single election had a congressional plan with over a 10% efficiency gap. *Id.* A single election with a large efficiency gap would not imperil a plan if the plan's skew was not durable, and plaintiffs would still have to prove intent.

E. Compliance with the Test Is Straightforward.

Even if Petitioners' test is judicially manageable, the Court might still worry that *ex ante* compliance would be difficult. But it would not be hard for the State to avoid liability under the test, nor would doing so interfere with any of the State's other legal obligations.

First, a state could prevent a large and durable asymmetry by employing the same tools that all modern mapmakers already rely on: datasets of past election results, redistricting software, regression modeling, sensitivity testing, and so on. At present, these tools are often exploited to make plans severely and persistently asymmetric. But it would be just as easy to harness the tools for the opposite purpose: to curb rather than to enhance partisan unfairness.

A state could also eliminate any possibility of a finding of discriminatory intent by adopting a bipartisan or nonpartisan redistricting process. More than a dozen states currently use commissions to design their state legislative districts. *See*

National Conference of State Legislatures, *Redistricting Law 2010*, at 163-68 (2009). Plans enacted by divided state governments—and thus approved by elected officials from both parties—are even more common. In neither of these scenarios would there be any serious prospect of liability.

What if a state determines, over the course of its redistricting process, that it can avoid a large and durable asymmetry only by compromising its other legitimate goals? Petitioners' test would not compel the state to make this sacrifice—say, to draw bizarrely shaped districts, to divide more political subdivisions, or to disrupt districts protected by the Voting Rights Act. To the contrary, the state would be able to insulate itself from liability by pointing to these valid aims. These neutral intentions would completely undermine any claim of partisan intent.

In fact, conflict between partisan symmetry and other redistricting objectives is infrequent. Due to the near-infinite number of possible district configurations, it is generally possible for plans to be both symmetric and to satisfy all other criteria. Here, Professor Chen showed that there are hundreds of maps that hewed to traditional redistricting criteria (such as contiguity, compactness, avoiding splitting counties and municipalities and population equality) that are less skewed than the current map in Pennsylvania. *Chen Rep.* at 16.

Partisan gerrymandering is worse now than ever. This Court has firmly held that partisan gerrymandering is justiciable under the Pennsylvania Constitution. In

their challenge to the 2011 Plan, Petitioners propose and apply a judicially manageable and discernible standard that can help this Court determine when partisanship in redistricting goes too far.

CONCLUSION

This Court should find that the 2011 Plan is an unconstitutional partisan gerrymander under the Pennsylvania Constitution.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

Per Pa.R.A.P. 531(b)(1)(i) and 531(b)(3), I hereby certify that this Brief contains 6,515 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

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