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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 159 MM 2017

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, ET AL.,

Petitioners,

v.

THE COMMONWEALTH OF PENNSYLVANIA, ET AL.,

Respondents.

BRIEF OF *AMICUS CURIAE* THE PITTSBURGH FOUNDATION IN SUPPORT OF PETITIONERS

Review of the Commonwealth Court's Recommended Findings of Fact and Conclusions of Law, No. 261 M.D. 2017 (Dec. 29, 2017)

James C. Martin (PA ID 204336)
Traci S. Rea (PA ID 76258)
Colin E. Wrabley (PA ID 84414)
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
Telephone: (412) 288.3546/4184
Facsimile: (412) 288.3063

Attorneys for Amicus Curiae
The Pittsburgh Foundation

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STATEMENT OF INTEREST OF AMICUS CURIAE
THE PITTSBURGH FOUNDATION

At the core of our representative democracy is the right of all citizens "to participate in electing our political leaders[.]" *McCutcheon v. FEC*, 134 S. Ct. 1434, 1440-41 (2014) (plurality opinion). "The right to vote freely for the candidate of one's choice is . . . the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). This right to vote—and the democratic system of government to which the right is essential—"is premised on responsiveness" to the will of the people. *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Kennedy, J. concurring); *see also Reynolds*, 377 U.S. at 565 (explaining that the right to vote is intended to ensure that the political branches "are collectively responsive to the popular will").

Extreme partisan gerrymandering—by any political party—is squarely "incompatible" with these fundamental "democratic principles." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) (internal quotation marks omitted). As Petitioners starkly illustrate in their brief, the General Assembly's 2011 congressional redistricting plan (the "2011 Plan") crosses the line as an extreme, partisan-motivated gerrymander that, by one respected measure, has earned Pennsylvania the ignominious title of "worst

offender" of the laws against partisan gerrymandering.[1] Under the Commonwealth Court's December 29, 2017 Recommended Findings of Fact and Conclusion of Law, however, the 2011 Plan would remain intact and unscathed, despite its draconian infringement of the constitutional rights of Pennsylvania citizens.

Given its longstanding commitment to advancing the public good of this Commonwealth and ensuring government accountability to the citizenry, *Amicus Curiae* The Pittsburgh Foundation cannot sit idly by. The Foundation is a non-profit organization committed to promoting public trust in the political process, civic engagement in government, and honesty and integrity in the Commonwealth's institutions and political branches. The Pittsburgh Foundation firmly believes that ensuring a fair, responsive, and representative electoral system is essential to success in fulfilling its mission to improve the quality of life in the Pittsburgh region by evaluating and addressing community issues and engaging in responsible philanthropy. A fair, responsive and representative electoral system fosters public confidence in Pennsylvania's elected officials, increases civic engagement, and promotes the representative goals that form the bedrock of our democratic system of government.

The factual record in this action establishes that the 2011 Plan is a direct affront to these values. The Foundation respectfully submits this amicus brief—

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[1] Laura Roden & Michael Li, Extreme Maps, Brennan Center for Justice, at 1, 9 (2017), available at https://www.brennancenter.org/publication/extreme-maps.

from a wholly non-partisan perspective—to defend these values and urge the Court to develop a principled and appropriate legal standard, consistent with the Pennsylvania Constitution, under which the 2011 Plan may be fairly evaluated.

ARGUMENT

It is uniformly accepted that extreme partisan gerrymandering is unconstitutional. It also is undeniably the constitutional prerogative and obligation of this Court to protect the constitutional rights of Pennsylvanians and ensure the type of responsive, democratically-elected government to which the citizens of this Commonwealth are entitled. To date, however, courts in Pennsylvania and throughout the country have lacked a fair, discernible, and appropriate legal standard to test the constitutionality of partisan gerrymandering and to invalidate those extreme partisan plans that cross the constitutional line.

The Court has ample tools at its disposal, drawn from historic and well-established constitutional principles, to craft a standard that will fairly test the constitutionality of the 2011 Plan. Any such standard should be based on, and limited to, whether the 2011 Plan: (1) was intentionally designed predominately to attain a partisan result; (2) largely disregards traditional and accepted districting criteria; and (3) has been demonstrated (or is reliably predicted) to have an actual disparate and unfair impact on a substantial number of Pennsylvania voters.

The Commonwealth Court's Recommended Findings of Fact and Conclusions of Law would allow the 2011 Plan to stand under a legal standard that is outdated, unworkable, and that would impose a bar so high that no redistricting plan, however egregious, would ever fail constitutional scrutiny. In fact, if the 2011 Plan does not rise to the level of unconstitutional gerrymandering under the record established in this action, it is hard to imagine a plan that would. Given that extreme partisan gerrymandering offends core constitutional rights, that cannot and should not be the law in Pennsylvania. This Court, in this case, has the power and obligation to make sure it is not.

I. Extreme Partisan Gerrymandering Violates The Pennsylvania Constitution.

There is no personal or individual right more fundamental to our democratic society than the right to vote. It defines us as a nation and is deeply rooted in the Pennsylvania and U.S. Constitutions. The right to vote means much more than simply granting each individual the ability to cast a ballot—it ensures a representative government, protects free expression, and guarantees that each individual vote will be counted equally and fairly.

The Pennsylvania Constitution protects this right through several of its provisions. Article I, Section 5 of the Pennsylvania Constitution mandates that "Elections shall be free and equal; and no power, civil or military, shall at any time

interfere to prevent the free exercise of the right of suffrage." As this Court has explained:

> [E]lections are free and equal within the meaning of the Constitution when they are public and open to all qualified electors alike; when every voter has the same right as any other voter; ***when each voter under the law has the right to cast his ballot and have it honestly counted*** . . . and when no constitutional right of the qualified elector is subverted or denied him.

In re 1991 Reapportionment, 609 A.2d 132, 142 (Pa. 1992) (quoting *City Council of City of Bethlehem v. Marcincin*, 515 A.2d 1320, 1323 (Pa. 1986)) (emphasis supplied).

Article I, Sections 7 and 20 of the Pennsylvania Constitution protect free speech and assembly. Political beliefs and association—particularly as expressed through voting—are at the heart of protected activities under these provisions. *See DePaul v. Commw.*, 969 A.2d 536, 548 (Pa. 2009) ("political" expression entitled to heightened protected status under Pennsylvania Constitution); *accord Elrod v. Burns*, 427 U.S. 347, 356 (1976) ("[P]olitical belief and association constitute the core of those activities protected by the First Amendment.").[2] These constitutional guarantees provide each citizen an "equally effective voice in the election" of their government representatives. *Reynolds*, 377 U.S. at 565; *see also Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("[N]o right is more precious in a free country than that of having a voice in the election of those who make the laws."). The right to

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2 Pennsylvania's Constitution provides greater protection of speech and associational rights than the U.S. Constitution. *See DePaul*, 969 A.2d at 546.

cast an ***effective*** vote is inherent in these constitutionally protected freedoms. *See Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983).

Article I, Sections 1 and 26 of the Pennsylvania Constitution (together the Equal Protection Guarantee) ensure that the Commonwealth shall not deprive any individual of the civil rights and liberties afforded by its Constitution. Indeed, the concept of equal justice under the law compels the Commonwealth to govern impartially and in conformance with constitutional mandates. *See Romer v. Evans*, 517 U.S. 620, 635-36 (1996).

Constitutional challenges to reapportionment are based on the individual right to vote and the right to have that vote fairly counted. *See Erfer v. Commw.*, 794 A.2d 325, 330 (Pa. 2002). The legitimate and laudable goals of districting are to establish fair and effective representation for ***all*** citizens. *Reynolds*, 377 U.S. at 565-568. This, in turn, fosters the "[c]onfidence in the integrity of our electoral processes [that] is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (*per curiam*).

But when voting patterns are used to entrench one particular party, constitutional principles are "defeated" and the public "ill-served." *Erfer*, 794 A.2d 325 (Zappala, J., dissenting). The dilution of citizens' votes through partisan gerrymandering abrogates their rights to have an equally effective voice in the election of their representatives. *See Shapiro v. McManus*, 203 F. Supp. 3d

579, 595-97 (D. Md. 2016) (quoting *Reynolds*, 377 U.S. at 565). Partisan gerrymandering likewise infringes the rights to free speech and association that are essential to a properly functioning democracy. *See Rutan v. Republican Party of Illinois*, 497 U.S. 62, 70 (1990) (quoting *Elrod*, 427 U.S. at 368-70). In short, "extreme partisan gerrymandering leads to a system in which the representative chooses their constituents, rather than vise-versa," undermining the core values of our representative and democratic government. *Session v. Perry*, 298 F. Supp. 2d 451, 516 (E.D. Tex. 2004) (Ward, J., concurring in part and dissenting in part), *vacated sub nom*, *Travis Cnty., Tex. v. Perry*, 543 U.S. 841 (2004).

Both this Court and the U.S. Supreme Court have recognized that extreme forms of political gerrymandering violate the Pennsylvania and U.S. Constitutions by infringing upon fundamental constitutional rights. *See generally 1991 Reapportionment*, 609 A.2d at 142; *Baker v. Carr*, 369 U.S. 186, 201, 234-37 (1962); *Vieth v. Jubelirer*, 541 U.S. 267, 293 (2004) (plurality acknowledging that severe partisan gerrymandering is incompatible with democratic principles); *Erfer*, 794 A.2d at 334 (recognizing in a redistricting case that judicial intervention is appropriate for "the most egregious abuses of . . . power" by the General Assembly). The question then is not whether a redistricting plan can be unconstitutional, but rather whether the plan has crossed the constitutional line by

employing partisan gerrymandering that has "gone too far." *Vieth*, 541 U.S. at 291.

II. This Court Has A Constitutional Duty To Scrutinize The 2011 Plan And Ensure Its Compliance With The Pennsylvania Constitution.

Just as there can be no doubt that extreme partisan gerrymandering is unconstitutional, there can be no doubt that the Court has a duty to remedy such gerrymandering when it occurs within the Commonwealth. This Court expressly has recognized that a challenge to the constitutionality of apportionment decisions presents:

> [O]ne of the most important constitutional questions ever raised in the history of this Commonwealth. It involves the basic rights of the citizens of Pennsylvania in the election of their state lawmakers. Historically and logically, this Court is the most appropriate forum to determine the issues presented and to fashion suitable remedies.

Butcher v. Bloom, 203 A.2d 556, 559-60 (Pa. 1964).

While redistricting obviously has a legislative, and therefore a political, aspect, the "constitutional commands and restrictions of the process exist precisely as a brake on the most overt of potential excesses and abuse." *Holt v. 2011 Legislative Reapportionment Commission*, 38 A.3d 711, 745 (Pa. 2012). State redistricting plans—no less than any other regulation of the electoral process—thus must ensure "a just framework within which diverse political groups in our society may fairly compete…." *Hunter v. Erickson*, 393 U.S. 385, 393 (1969) (Harlan, J., concurring).

It is the sole province and duty of this Court to interpret the Pennsylvania Constitution and evaluate legislation pursuant to its provisions. *See Holt*, 38 A.3d at 734 ("'[E]qually well settled . . . is the rule that a law repugnant to the constitution is void and that it is not only the right but the duty of a court so to declare when the violation unequivocally appears.'") (citations omitted). Given the well-established principle that partisan gerrymandering may run afoul of the rights and privileges afforded by the Pennsylvania Constitution, it is this Court's obligation, as a co-equal branch of government and the sole gate-keeper of those rights, to determine whether the 2011 Plan has "gone too far." *Vieth*, 541 U.S. at 291, 301 ("[I]t is [the Court's] job, not the plaintiffs', to explicate the standard that makes the facts alleged by the plaintiffs adequate or inadequate to state a claim.").

The need for this Court's guidance is particularly acute today given the evolving practices and technology which have rendered precise and highly-effective political gerrymandering as simple as pushing a button. Computer assisted districting has become so sophisticated that legislatures can use databases to map electoral districts in a matter of hours, rather than months. *See Larios v. Cox*, 305 F. Supp. 2d 1335, 1342 (N.D. Ga. 2004) (*per curiam*). Jurists and commentators alike have noted that political gerrymandering has progressively gotten worse in the wake of increased technological advances. *See generally Vieth*, 541 U.S. at 345-46 (Justice Kennedy pointing to "a good many voices

saying . . . the increasing efficiency of partisan redistricting has damaged the democratic process to a degree that our predecessors only began to imagine."); *see also* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593, 624 (2002) (noting that the "pattern of incumbent entrenchment has gotten worse as the computer technology for more exquisite gerrymandering has improved."); Pamela S. Karlan, *The Fire Next Time: Reapportionment After The 2000 Census*, 50 Stan. L. Rev. 731, 736 (1998) ("Finer-grained census data, better predictive methods, and more powerful computers allow for increasingly sophisticated equipopulous gerrymanders."). In this rapidly changing and evolving landscape, the Court's role as the primary protector of voters' constitutional rights becomes even more vital.

Pennsylvania's dire need for the Court to step forward at this time and exercise that role in a fair and meaningful manner is further evident based on the egregious factual record in this case. It is unacceptable for Pennsylvania to be showcased as one of the most extreme partisan gerrymandering examples in the country. The Commonwealth Court's specific findings that "A lot can be said about the 2011 Plan, much of which is unflattering, but justified," coupled with its recommendation that the Court do nothing about its unconstitutional implications, undermines public confidence and trust in both the legislature and the judiciary. The Court has the opportunity to transform Pennsylvania from a Commonwealth

tainted with the image of a non-representative government to a prime example of a properly functioning democracy, with a judiciary unwilling to side-step political issues that have serious constitutional ramification for its citizens. The Pittsburgh Foundation respectfully urges the Court to take that opportunity by establishing a fair and reasoned standard by which the constitutionality of political gerrymandering in Pennsylvania appropriately can be measured.

III. The Court Can Draw Ample Guidance From Established Sources To Fashion A Workable Legal Standard For Assessing The Constitutionality Of Legislative Redistricting.

The Court last addressed a constitutional challenge to congressional redistricting in *Erfer*. There, the Court relied heavily on, and applied the standard set forth in, the U.S. Supreme Court's plurality decision in *Davis v. Bandemer*, 478 U.S. 109 (1986). As the Court noted in *Erfer*, however, *Bandemer's* splintered decision is less than a model of clarity, and it has "bedeviled both commentators and courts, obscuring via its labyrinthian twists and turns of logic the precise nature of the standard to be employed." *Erfer*, 794 A.2d at 332 (citations omitted).

In fact, subsequent to *Erfer*, the Justices of the U.S. Supreme Court resoundingly rejected the *Bandemer* plurality standard as "misguided when proposed" and "wrongly decided." *Vieth*, 541 U.S. at 281, 283.[3] As noted by Justice Souter, *Bandemer's* principal flaw was the required showing that the

[3] While *Vieth* itself was a plurality decision, not one of the nine Justices embraced, endorsed or defended the *Bandemer* plurality standard.

aggrieved group had "essentially been shut out of the political process." *Id.* at 344 (Souter, J., dissenting) (internal quotation marks omitted). This element demanded a demonstration of such pervasive devaluation as to raise substantial doubt that any redistricting plan could ever be found unconstitutional. *Id.* Coupled with the vagueness of *Bandemer's* "devaluation" standard, this element rendered the *Bandemer* test amorphous and unworkable as evidenced by the fact that in nearly 20 years, virtually no redistricting plan was struck down by any court under *Bandemer*.

While each of the U.S. Supreme Court Justices in *Vieth* firmly rejected the *Bandemer* plurality standard, they were unable to develop a majority consensus as to the appropriate standard to employ in a constitutional challenge to political redistricting. The opacity of prior U.S. Supreme Court precedent, and the notable void created by *Vieth,* has effectively granted legislatures *carte blanche* to engage with impunity in the most extreme partisan gerrymandering imaginable. With no concrete guidance from the U.S. Supreme Court, this Court is now at an opportune juncture to revisit *Erfer,* unconstrained by *Bandemer*, and devise a fair and workable standard to test congressional redistricting under the Pennsylvania Constitution and check any instances of extreme partisan gerrymandering.

While there have been several standards discussed by courts and jurists post-*Vieth*, the foundation for a constitutionally appropriate standard consists of three

historically and constitutionally significant elements.[4] A congressional redistricting plan cannot pass constitutional muster if, when viewed *in toto*, it: (1) was intentionally designed predominately to attain a partisan result; (2) largely disregards traditional and accepted districting criteria; and (3) has been demonstrated (or is reliably predicted) to have an actual disparate and unfair impact on a substantial number of Pennsylvania voters.

The first and third criteria align with the Court's decision in *Erfer*. The major components of the *Erfer* test, consistent with the mandates of the Equal Protection Guarantee of the Pennsylvania Constitution, require both intentional discrimination and an actual discriminatory effect. *Erfer*, 794 A.2d at 332-333. These are the basic and historic touchstones of a constitutional violation under the Equal Protection Clause. *See Bandemer*, 478 U.S. at 127 (to succeed on an Equal Protection challenge, petitioners must show both intentional discrimination and

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[4] In *Vieth* itself, the three dissenting opinions offered competing standards to determine the constitutionality of political redistricting. Justice Stevens proposed a standard similar to that employed in redistricting cases based on race, which turns on whether the legislature allowed partisan considerations to dominate and disregarded neutral and acceptable districting principles. Justice Souter, joined by Justice Ginsburg, proposed a five-step *prima facie* test similar to a Title VII analysis which would look to whether traditional districting principles were respected, whether there was an actual discriminatory impact, and whether the defendants intentionally acted to dilute an opposing party's vote. Justice Breyer's proffered standard would examine whether the plan unjustifiably entrenches a minority party in power. Currently before the U.S. Supreme Court is the district court's decision in *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wisc. 2016). The *Gill* court adopted a three-part standard requiring a petitioner to show that the challenged redistricting plan: "(1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation; (2) has that effect; and (3) cannot be justified on other, legitimate legislative grounds." *Id.* at 884. The *Gill* standard reflects the values underlying the tests proposed by Justice Stevens, Souter and Ginsburg, and is consistent with the three-pronged test proposed herein.

actual discriminatory effect); *see also Vieth*, 541 U.S. at 326 (Stevens, J., dissenting) ("State action that discriminates against a political minority for the sole and unadorned purposes of maximizing the power of the majority plainly violates the decisionmaker's duty to remain impartial.").

The second prong also finds substantial support in both Pennsylvania and U.S. Supreme Court jurisprudence. The districting principles that the U.S. Supreme Court has deemed legitimate over the years include "contiguity, compactness, respect for political subdivisions, and conformity with geographic features." *See Vieth*, 541 U.S. at 348; *see also Holt*, 38 A.3d at 745-56 (quoting Ken Gormley, *Racial Mind-Games and Reapportionment*, 4 U. Pa. J. Const. L. 735, 779-81 (2002)). Many of these same criteria are specifically set forth in Pennsylvania's Constitution with respect to reapportionment of the General Assembly and local municipalities. *See* Pennsylvania Constitution, Article II, Section 16 (General Assembly) and Article IX, Section 11 (local municipalities).[5] This Court has repeatedly embraced these criteria as legitimate considerations in the context of redistricting. *See Holt*, 38 A.3d at 756 ("We have always recognized

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[5] These criteria find additional historic support in the early Apportionment Acts enacted by Congress. *See, e.g.*, Apportionment Act of 1842, 5 Stat. 491(requiring that Representatives must be elected from single-member districts "composed of contiguous territory"); Apportionment Act of 1862, 12 Stat. 572 (requiring that districts "contain[n] as nearly as practicable an equal number of inhabitants); Apportionment Act of 1901, 31 Stat. 733 (imposing a compactness requirement).

the independent vitality of the requirement of contiguity, compactness, and the integrity of political subdivisions").

In evaluating any legislation for constitutionality, permissible government goals and criteria are pivotal in assessing such issues as whether the legislation is rational and legitimate (by furthering permissible goals) or arbitrary and violative of fundamental rights. *See, e.g. Reynolds*, 377 U.S. 584; *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 320 (1976) ("Time and again, met with cases touching upon the prized rights and burdened classes of our society, the Court has acted only after a reasonably probing look at the legislative goals and means, and at the significance of the personal rights and interests involved."). A redistricting plan that is intentionally designed predominately to attain a partisan result, largely disregards traditional and accepted districting criteria, and has been demonstrated (or is reliably predicted) to have an actual disparate and unfair impact on a substantial number of Pennsylvania voters cannot survive constitutional scrutiny.

These key principles are tried and tested, and they are rooted in decades of constitutional precedent. Courts have consistently managed to apply these standards to constitutional challenges for decades. Adoption of a reasonable standard founded upon of these three principles would address and rectify the major shortcomings of *Bandemer* and *Erfer,* as articulated by the Justices in *Vieth,* while maintaining *Erfer's* general adherence to well-established constitutional

mandates. This Court has the unique ability to restore voter confidence in the Commonwealth's legislature and judiciary by adopting such a standard. The Pittsburgh Foundation respectfully urges the Court to do so.

CONCLUSION

The Court should seize this opportunity to enunciate a reasoned and fair standard that will eliminate unconstitutional partisan gerrymandering in Pennsylvania—by any political party—and restore voter confidence as outlined above. Allowing the 2011 Plan to stand under the feeble legal standard applied by the Commonwealth Court would further undermine public confidence and trust in both the legislature and the judiciary. This is an unacceptable result and one The Pittsburgh Foundation urges the Court to reject.

Dated: January 5, 2018

<u>/s/ Colin E. Wrabley</u>
Colin E. Wrabley (PA ID 84414)
James C. Martin (PA ID 204336)
Traci S. Rea (PA ID 76528)
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
Telephone: (412) 288.3131
Facsimile: (412) 288.3063

Attorneys for Amicus Curiae
The Pittsburgh Foundation

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the word limit of Pennsylvania Rule of Appellate Procedure 531(b)(3). Specifically, it contains 3,706 words based on the word count of Microsoft Word 2010, the word processing system used to prepare the brief.

/s/ *Colin E. Wrabley*
Attorney for *Amicus Curiae*
The Pittsburgh Foundation

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SUPPLEMENTAL STATEMENT OF INTEREST OF *AMICUS CURIAE* THE PITTSBURGH FOUNDATION

I hereby certify on behalf of *amicus curiae* The Pittsburgh Foundation, pursuant to Pennsylvania Rule of Appellate Procedure 531(b)(2)(i) and (ii), that no other person or entity other than the *amicus curiae*, its members, or counsel have (1) paid in whole or in part for the preparation of the *amicus curiae* brief, or (2) authored in whole or in part the *amicus curiae* brief.

Dated: January 5, 2018

/s/ *Colin E. Wrabley*

Counsel for *amicus curiae*
The Pittsburgh Foundation