No. 17-1339

IN THE

Supreme Court of the United States

LOUIS AGRE ET AL.,
Appellants,

v.

THOMAS W. WOLF, GOVERNOR OF PENNSYLVANIA, ET AL.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

MOTION TO DISMISS

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April 23, 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Where Appellants' lawsuit challenged the constitutionality of a congressional redistricting plan and sought its replacement, and that congressional redistricting plan has recently been invalidated and replaced by the Pennsylvania Supreme Court in a separate lawsuit, is this appeal moot?

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MOTION TO DISMISS

OPINION BELOW

The decision of the three-judge district court is reported at 284 F.Supp.3d 591.

JURISDICTION

The district court's order was entered on the docket on January 10, 2018. The notice of appeal was filed on January 18, 2018. Appellants invoke the jurisdiction of this Court under 28 U.S.C. § 1253. However, this Court lacks subject matter jurisdiction because the appeal is moot.

STATEMENT

In this lawsuit, Appellants challenged the congressional redistricting map enacted by the Pennsylvania General Assembly in 2011 (the "2011 Plan") as an unconstitutional partisan gerrymander. Appellants sought "injunctive relief, prior to the congressional elections scheduled for 2018, to bar defendants from implementing the 2011 plan" and requested "an order requiring [certain] defendants to submit for review by [the] Court any proposed revision of the 2011 Plan[.]" First Amended Complaint ("Am. Compl.") at ¶¶ 8-9 (attached hereto as Exhibit A). While Appellants' suit was unsuccessful, its goals were nevertheless achieved in January and February 2018 when the Supreme Court of Pennsylvania, deciding a parallel challenge to the 2011 Plan, struck the Plan as unconstitutional under state law, enjoined its use in any future elections, and implemented a remedial map. *See League of Women Voters of Pennsylvania v. Commonwealth*, No. 159 MM 2017 (Pa.). That remedial map will be used in Pennsylvania's 2018 congressional elections, which

will commence with the primary election on May 15, 2018. As a result, Appellants' challenge to the now-defunct 2011 Plan does not present a live case or controversy—the relief Appellants sought has already been granted, and this Court cannot offer anything beyond such relief. This Court should dismiss this appeal as moot.

1. On October 2, 2017, Appellants filed a complaint in the U.S. District Court for the Eastern District of Pennsylvania against Pennsylvania Governor Thomas Wolf and members of his administration, alleging that the congressional redistricting map enacted by the Pennsylvania General Assembly in 2011 constituted an unlawful partisan gerrymander.

2. A three-judge panel was convened to hear Appellants' case. Speaker of the Pennsylvania House of Representatives Michael Turzai and President Pro Tempore of the Pennsylvania Senate Joseph Scarnati ("Legislative Defendants") were granted leave to intervene as defendants on October 25, 2017, and filed a motion to dismiss, which the three-judge panel granted in part and denied in part.

3. Appellants filed an Amended Complaint, which alleged that the continued implementation of the 2011 Plan "deprived [Appellants] of their rights under the Privileges and Immunities Clause and the Equal Protection Clause of the Fourteenth Amendment, and of their rights under the First Amendment of the Constitution." Am. Compl. at ¶ 1.

4. Appellants requested declaratory and injunctive relief, asking the district court to bar implementation of the 2011 Plan. They also sought to put procedures in place to ensure that the 2011 Plan would be

replaced with a non-partisan alternative map in time for the 2018 elections, asking the district court to:

> Direct and order that prior to the 2018 Congressional elections the defendant State officers will submit for approval of the General Assembly one or more alternative districting plans[,] that defendant State officers develop such plans through a process that has reasonable safeguards against partisan influence[, and that] the defendant State officers develop such process for creating alternative plans with safeguards to ensure that they are within the authority of the state to adopt under the Elections Clause.

Am. Compl. at ¶¶ 63(B)-(C); 80(B)-(C).

5. Following a trial, on January 10, 2018, the district court dismissed Appellants' action in a split decision.

6. At the same time the Appellants' challenge to the 2011 Plan was ongoing, an action in Pennsylvania state court challenging the Plan was also in progress. *See League of Women Voters of Pennsylvania v. Commonwealth*, No. 159 MM 2017. The plaintiffs in *League of Women Voters* similarly sought to enjoin any further use of the 2011 Plan and to implement an alternative map in time for the 2018 elections.

7. On January 22, 2018, the *League of Women Voters* plaintiffs prevailed and the Pennsylvania Supreme Court struck down the 2011 Plan as a violation of the Pennsylvania constitution. *League of Women Voters of Pennsylvania v. Commonwealth*, 175 A.3d 282 (Pa. 2018). Thereafter, the Pennsylvania Supreme Court afforded the General Assembly an opportunity to enact a replacement map that would comply with the

requirements of the Commonwealth's constitution. After the General Assembly failed to do so, the court ordered the use of a remedial map drawn by a non-partisan court-appointed expert. *League of Women Voters of Pennsylvania v. Commonwealth*, No. 159 MM 2017, 2018 WL 936941, at *5 (Pa. Feb. 19, 2018).

8. The Legislative Defendants in *League of Women Voters* twice applied to this Court seeking an emergency stay of the Pennsylvania Supreme Court's orders and a reversion to the 2011 Plan for the 2018 election cycle; both applications were denied. *See* Emergency Application for Stay Pending Resolution of Appeal, *Turzai v. League of Women Voters of Pennsylvania*, No. 17A795 (Jan. 26, 2018) (denied Feb. 5, 2018); Emergency Application for Stay Pending Resolution of Appeal, *Turzai v. League of Women Voters of Pennsylvania*, No. 17A909 (Feb. 27, 2018) (denied Mar. 19, 2018).

9. Other Pennsylvania legislators, along with several U.S. Congressmen, filed suit in the Middle District of Pennsylvania seeking to enjoin enforcement of the Pennsylvania Supreme Court's orders. Their complaint was dismissed with prejudice for lack of standing. *See Corman v. Torres*, No. 1:18-cv-004433 (M.D. Pa.) (dismissed Mar. 19, 2018, ECF No. 137).

10. As of the date of this filing, no petition for certiorari has been filed in *League of Women Voters v. Commonwealth*. On April 16, 2018, Justice Alito granted an application by Speaker Turzai and Senate President Pro Tempore Scarnati, the Legislative Defendants in *League of Women Voters*, seeking extension of the deadline to file such a petition until June 22, 2018. *Turzai v. League of Women Voters of Pennsylvania*, No. 17A1120, Application for Extension of Time to File Petition for Writ of Certiorari (Apr. 16, 2018).

11. Since the Pennsylvania Supreme Court's February 19, 2018 order, the Pennsylvania Department of State has duly implemented the remedial map. Candidate petitioning and nomination periods have already occurred under the remedial map, and the primary election scheduled to occur on May 15, 2018 will proceed under the remedial map. The 2011 Plan is inoperative, and per the order of the Pennsylvania Supreme Court, "its further use in elections for Pennsylvania seats in the United States House of Representatives . . . is . . . enjoined." 175 A.3d at 284.

ARGUMENT

The stated purpose of Appellants' lawsuit was to replace the 2011 Plan in time for the 2018 elections. That outcome is precisely what has occurred: The 2011 Plan is dead. The Pennsylvania Supreme Court has enjoined its use in the 2018 (or any other) election and replaced it with a remedial map devised by a non-partisan, court-appointed expert. The relief that Appellants sought has been granted—albeit not by the court from which they sought it. Nevertheless, they have attempted to revive their challenge to the now-voided Plan by bringing the instant appeal, erroneously contending that the controversy over the map remains "live" and asserting claims for relief beyond what was prayed for in their Amended Complaint.

The Constitution permits this Court "to decide legal questions only in the context of actual 'Cases' or 'Controversies.'" *Alvarez v. Smith*, 558 U.S. 87, 92 (2009) (internal quotation marks omitted) (*citing* U.S. Const., Art. III, § 2; *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the

outcome.'" *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (*quoting Murphy v. Hunt*, 455 U.S. 478, 481 (1982)).

The "case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate[,]" meaning that "it is not enough that a dispute was very much alive when suit was filed[.]" *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78 (1990). Thus, "if an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed," *Church of Scientology of Cal. v. United State*s, 506 U.S. 9, 12 (1992), because "federal courts may not 'decide questions that cannot affect the rights of litigants in the case before them' or give 'opinion[s] advising what the law would be upon a hypothetical state of facts.'" *Chafin v. Chafin*, 568 U.S. 165, 172 (2013).

This appeal lies outside of the jurisdiction of this Court, having been rendered moot by the events which have transpired since the district court dismissed Appellants' action. Accordingly, this Court should dismiss the appeal.

I. BECAUSE THE 2011 PLAN HAS BEEN REPLACED, NO EFFECTUAL RELIEF REMAINS TO BE GRANTED AND APPELLANTS' SUIT NO LONGER CONSTITUTES A "LIVE" CONTROVERSY.

Appellants' case is moot because the relief they sought in their Amended Complaint—replacement of the 2011 Plan in time for the 2018 elections—has already been granted by the Pennsylvania Supreme Court. To determine whether a case is moot, courts look to the relief sought in the complaint. *See*

Diffenderfer v. Central Baptist Church of Miami, Florida, Inc., 404 U.S. 412, 414-15 (1972) (concluding that constitutional challenge to repealed statute was moot because no court could grant "[t]he only relief sought in the complaint[,]" a declaratory judgment that the statute was unconstitutional and an injunction barring its application to a certain property); *Watkins v. Mabus*, 502 U.S. 954 (1991) (finding that claim seeking to enjoin election from using unlawful absentee ballot procedures was "moot with regard to the relief sought" after election had already occurred); *Craig v. Boren,* 429 U.S. 190, 192 (1976) (challenge to statute rendered moot where "only declaratory and injunctive relief against enforcement . . . [was] sought" and statute could no longer be enforced against plaintiff); *see also Akiachak Native Cmty. v. United States Dep't of Interior*, 827 F.3d 100, 106 (D.C. Cir. 2016) ("[T]he scope of a federal court's jurisdiction to resolve a case or controversy is defined by the affirmative claims to relief sought in the complaint[.]").

Appellants filed the instant action as a constitutional challenge to the 2011 Plan, contending that the continued implementation of the Plan—an unlawful partisan gerrymander—deprived them of their constitutional rights. Am. Compl. at ¶ 1. The entirety of the Amended Complaint was concerned with the harms wrought by the 2011 Plan, which Appellants alleged burdened their rights to free speech and to choose "the party affiliations of their Representatives in Congress." Am. Compl. at ¶¶ 6-7. Their prayers for relief were *solely* concerned with securing a declaration that "continuing to implement the *2011 Plan*" violated their rights and obtaining a court order that "*prior to the 2018 Congressional elections*[,]" the 2011 Plan would be replaced by an "alternative" map safeguarded from

"partisan influence." *See* Am. Compl. at ¶¶ 63(A)-(C), 80(A)-(C) (emphasis added).

Appellants make three arguments against a finding of mootness; none of them stands up to scrutiny. First, Appellants attempt to rewrite their original claims by reframing this case as a challenge to the general "process" of enacting and implementing congressional redistricting maps. But the relief Appellants sought in their Amended Complaint bears no resemblance whatsoever to the "supplemental relief" they now request: "an evenhanded process by which the state legislature . . . can develop a map" not only to replace the 2011 Plan, but to develop all redistricting maps "now and in the future[.]" Juris. Stmt. at 30, 34. While Appellants contend that the Amended Complaint reflected their goal of wholesale, permanent reform of the structure of the redistricting process, in fact the relief requested was narrowly confined to the development of alternatives to *the 2011 Plan* prior to the 2018 elections. *See* Am. Compl. at ¶¶ 63(B)-(C); 80(B). Appellants cannot now enlarge the scope of the relief they seek in order to avoid the conclusion that this case is moot. *Cf. Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1996) (holding that suit was moot and noting that "claim for nominal damages, extracted late in the day from [plaintiff's] general prayer for relief and asserted solely to avoid otherwise certain mootness, bore close inspection"). Now that the Pennsylvania Supreme Court has invalidated the 2011 Plan on state constitutional grounds and adopted a remedial plan, none of the relief sought by the Amended Complaint remains to be granted. If Appellants are concerned that any redistricting map that might be used in a future election—or the "process" used to devise such a map—will be unconstitutional, then the proper recourse will be to

file a new lawsuit. Those entirely hypothetical problems simply are not at issue in this case.

Because this Court cannot provide any additional relief beyond what Appellants sought in the Amended Complaint, the cases Appellants rely upon in support of their arguments against mootness are unavailing. *See* Juris. Stmt. at 31-32. Several of Appellants' cited cases involved instances where, unlike here, the requested relief had *not* been fully granted or otherwise rendered unnecessary by another court's decision. *See Vitek v. Jones*, 445 U.S. 480, 486 (1980) (prisoner's challenge to constitutionality of transfer to a mental hospital not moot despite his release because release was conditional and he remained under threat of another transfer); *Allee v. Medrano*, 416 U.S. 802, 810 (1974) (striking laborers case not moot where "limited" and "temporary" state court injunction did not fully protect efforts to unionize); *Church of Scientology of California v. United States*, 506 U.S. 9, 18 (1992) (appeal of order to compel production of evidence was not moot where, if production had been wrongfully ordered, court could order receiving party to destroy or return all copies of produced material).[1]

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[1] The remaining case Appellants cite, *Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298 (2012), is also inapposite because the court found the case not moot based upon the "voluntary cessation" exception to the mootness doctrine. Under the exception, "[t]he voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Id.* at 307. The exception is inapplicable here because the Legislative Defendants did not voluntarily cease implementing the 2011 Plan and, thanks to the order of the Pennsylvania Supreme Court, are not free to resume its use in the future. While Appellants complain that the Legislative Defendants "are free to put in another gerrymandered map in 2020[,]" the instant case does not concern any

Unlike the plaintiffs in *Vitek*, *Allee*, and *Church of Scientology*, no further harm can be imposed upon Appellants by the subject of their challenge—the 2011 Plan—and this Court cannot provide any additional relief with regard to a plan that has already been invalidated and replaced.

Second, Appellants suggest that the case is not moot because the Pennsylvania Supreme Court did not use Appellants' preferred methodology to put a remedial map in place. According to Appellants, rather than having the Pennsylvania Supreme Court create a remedial map, they would have chosen to have the federal district court "require[e] a neutral process," designed by "state legislative and executive leaders," that would apply "in the coming months, for the 2020 elections, and during the map-making thereafter." Juris. Stmt. at 30, 32. Even if Plaintiffs had sought adoption of such a long-term, neutral process in their Amended Complaint (as discussed above, they did not), their philosophical disagreement with the Pennsylvania Supreme Court's methodology does not mean that this appeal presents a live controversy.[2]

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hypothetical 2020 redistricting plan. Nor could it: federal courts may not issue advisory opinions based upon entirely hypothetical sets of facts. *Lewis*, 494 U.S. at 477.

[2] Plaintiffs state that they "in no way seek to interfere with the action of the Pennsylvania Supreme Court," Juris. Stmt. at 34 n.10, but also suggest that the law on that court's authority to draw a remedial map is "not entirely settled" and that its decision was "controversial" and not quite "appropriate." Juris. Stmt. at 32-33, 35. Contrary to Appellants' intimations, the law is "entirely settled" that state courts may draw redistricting maps where—as here—the state legislature has failed to draft a constitutional plan. "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the

The harm that Plaintiffs alleged in their Amended Complaint stemmed solely from the 2011 Plan, and the 2011 Plan is no longer in effect.

Finally, Appellants argue that the specter of this Court's review of the Pennsylvania Supreme Court's decision rescues this appeal from mootness. Notwithstanding their present efforts to rewrite the Amended Complaint, however, Appellants only ever sought replacement of the 2011 Plan with an alternative, fairer map in time for the 2018 elections. There remains no "live" controversy here because, as a practical matter, no court—including this Court—will revive the 2011 Plan in time for this year's elections cycle, which will begin on May 15. In fact, no petition for certiorari in *League of Women Voters* need even be *filed*, let alone granted, until June 22, 2018—over a month after the date of the primary election. Furthermore, this Court has twice already rejected requests to reinstate the invalidated 2011 Plan for the current election cycle. *See* Emergency Application for Stay Pending Resolution of Appeal, *Turzai v. League of Women Voters of Pennsylvania*, No. 17A795 (Jan. 26, 2018) (denied Feb. 5, 2018); Emergency Application for Stay Pending

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States in such cases has been specifically encouraged." *Scott v. Germano*, 381 U.S. 407, 409 (1965) (per curiam). Indeed, in *Growe v. Emison*, where a federal district court sought to interfere with the implementation of a state court's redistricting plan, this Court stayed the lower court's hand and noted that the state court's appointment of a redistricting panel to devise a plan "was precisely the sort of state judicial supervision of redistricting we have encouraged." 507 U.S. 25, 34, 42 (1993) (holding that "District Court erred in not deferring to the state court's efforts to redraw Minnesota's state legislative and federal congressional districts").

Resolution of Appeal, *Turzai v. League of Women Voters of Pennsylvania*, No. 17A909 (Feb. 27, 2018) (denied Mar. 19, 2018). With the primary set to take place under the remedial map in less than a month, the time for challenges to the now-irrelevant 2011 Plan has plainly passed. Accordingly, Appellants' case is moot.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed as moot and the district court's order should be vacated.

Respectfully submitted,

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April 23, 2018

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 2:17-cv-4392

LOUIS AGRE, WILLIAM EWING, FLOYD MONTGOMERY,
JOY MONTGOMERY, RAYMAN SOLOMON,
JOHN GALLAGHER, ANI DIAKATOS, JOSEPH ZEBROWITZ,
SHAWNDRA HOLMBERG, CINDY HARMON,
HEATHER TURNAGE, LEIGH ANN CONGDON,
REAGAN HAUER, JASON MAGIDSON, JOE LANDIS,
JAMES DAVIS, ED GRAGERT, GINNY MAZZEI,
DANA KELLERMAN, BRIAN BURYCHKA, MARINA KATS,
DOUGLAS GRAHAM, JEAN SHENK, KRISTIN POLSTON,
TARA STEPHENSON, AND BARBARA SHAH,

Plaintiffs,

v.

THOMAS W. WOLF, GOVERNOR OF PENNSYLVANIA,
ROBERT TORRES, SECRETARY OF STATE OF
PENNSYLVANIA, AND JONATHAN MARKS,
COMMISSIONER OF THE BUREAU OF ELECTIONS,
IN THEIR OFFICIAL CAPACITIES,

Defendants.

The Honorable D. Brooks Smith
The Honorable Patty Schwartz
The Honorable Michael D. Baylson

FIRST AMENDED COMPLAINT –
INJUNCTIVE RELIEF REQUESTED

Introduction

1. In violation of 42 U.S.C. § 1983, the defendant Pennsylvania Governor and other State officer defendants are engaged in implementing a Congressional districting plan ("2011 Plan") which was beyond the authority of the General Assembly to adopt under the Elections Clause of the Constitution, Article I, Section 4. By continuing to implement the 2011 Plan, the State officer defendants have deprived the plaintiffs of their rights under the Privileges and Immunities Clause and the Equal Protection Clause of the Fourteenth Amendment, and of their rights under the First Amendment of the Constitution. The 2011 Plan adopted by the General Assembly seeks to influence or control the party affiliations of those who will represent the people of Pennsylvania in the Congress. Because the Elections Clause is a source of only neutral procedural rules, it does not give the General Assembly the authority to draw Congressional districts based on the likely voting preferences of plaintiffs and other citizens. By doing so, the 2011 Plan has deprived plaintiffs of their constitutional rights as set forth below.

2. As set out in Article I, Section 4, the Elections Clause reads as follows:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of Chusing Senators.

3. The Elections Clause is a limited grant of authority to enact neutral procedural rules. As

Justice Kennedy stated in his concurring opinion in *Cook v. Gralike*, 531 U.S. 510, 527 (2010):

> A State is not permitted to interpose itself between the people and their National Government. . . [T]he Elections Clause is a grant of authority to issue procedural regulations, and not a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates . . . [This] dispositive principle . . . is fundamental to the Constitution.

4. Under the Tenth Amendment the States cannot purport to have or "reserve" a power to intentionally influence the outcome of U.S. House elections, since no such "reserved" power could have logically existed before adoption of the Constitution. Nor did Congress confer a power upon state legislatures to engage in political gerrymandering of any kind when it enacted 2 U.S.C. § 2, requiring the states to create single member districts and precluding at-large elections.

5. Plaintiffs recognize that *Gill, et al. v. Whitford, et al.* (16-1161) is now pending before the United States Supreme Court. The present action raises a different type of legal claim not at issue in *Whitford*. While plaintiffs support the holding of the three-judge court in *Whitford*, that holding does not consider the effect of the Elections Clause on elections to the United States Congress. None of the three counts set out below duplicates the particular issue pending before the Court in *Whitford*.

6. As set out in Count I, the 2011 Plan denies the rights of plaintiffs as federal citizens to be free of this intentional interference by the General Assembly in

choosing the party affiliations of their Representatives in the Congress. The 2011 Plan thereby deprives plaintiffs of their rights of federal citizenship under the Privileges and Immunities Clause of the Fourteenth Amendment. The 2011 Plan seeks to interfere with this free choice and right of federal citizenship by concentrating plaintiffs and other likely Democratic voters in the fewest possible Congressional districts. It also seeks to strategically place likely Republican voters in all other districts so as to constitute effective voting majorities for Republican candidates for Congress. In violation of 42 U.S.C. § 1983, the defendant State officers are continuing to implement this 2011 Plan which unlawfully deprives or interferes with their decisions as federal citizens as to the party affiliation of their Representatives to Congress.

7. As set out in Count II, the 2011 Plan denies plaintiffs' right to free speech under the First Amendment by burdening their right to vote on the basis of the content and viewpoint of their speech. Moreover, such burden cannot be justified by the State's power to engage in time, place, and manner regulations under the Elections Clause because it is a content regulation with a partisan purpose that is not authorized by the Elections Clause. The 2011 Plan limits where and in what forum voters and candidates can speak based on the viewpoint they have expressed in past elections and that which they are likely to express in future elections. The 2011 Plan also attempts to stifle the effectiveness of some voters' speech, namely Democrats, including many of the plaintiffs, based on their viewpoint.

8. Plaintiffs seek injunctive relief, prior to the Congressional elections scheduled for 2018, to bar defendants from implementing the 2011 Plan.

9. Plaintiffs also seek an order requiring the State officer defendants to submit for review by this Court any proposed revision of the 2011 Plan designed to confine it to procedural regulations in compliance with the Elections Clause.

Parties

10. Plaintiff Louis Agre is a citizen of Pennsylvania and a resident of Pennsylvania's 2nd Congressional district.

11. Plaintiff William Ewing is a citizen of Pennsylvania and a resident of Pennsylvania's 2nd Congressional district.

12. Plaintiff Floyd Montgomery is a citizen of Pennsylvania and a resident of Pennsylvania's 16th Congressional district.

13. Plaintiff Joy Montgomery is a citizen of Pennsylvania and a resident of Pennsylvania's 16th Congressional district.

14. Plaintiff Rayman Solomon is a citizen of Pennsylvania and a resident of Pennsylvania's 2nd Congressional district.

15. Plaintiff John Gallagher is a citizen of Pennsylvania and a resident of Pennsylvania's 1st Congressional district.

16. Plaintiff Ani Diakatos is a citizen of Pennsylvania and a resident of Pennsylvania's 1st Congressional district.

17. Plaintiff Joseph Zebrowitz is a citizen of Pennsylvania and a resident of Pennsylvania's 2nd Congressional district.

18. Plaintiff Shawndra Holmberg is a citizen of Pennsylvania and a resident of Pennsylvania's 3rd Congressional district.

19. Plaintiff Cindy Harmon is a citizen of Pennsylvania and a resident of Pennsylvania's 3rd Congressional district.

20. Plaintiff Heather Turnage is a citizen of Pennsylvania and a resident of Pennsylvania's 4th Congressional district.

21. Plaintiff Leigh Ann Congdon is a citizen of Pennsylvania and a resident of Pennsylvania's 5th Congressional district.

22. Plaintiff Reagan Hauer is a citizen of Pennsylvania and a resident of Pennsylvania's 6th Congressional district.

23. Plaintiff Jason Magidson is a citizen of Pennsylvania and a resident of Pennsylvania's 7th Congressional district.

24. Plaintiff Joe Landis is a citizen of Pennsylvania and a resident of Pennsylvania's 8th Congressional district.

25. Plaintiff James Davis is a citizen of Pennsylvania and a resident of Pennsylvania's 9th Congressional district.

26. Plaintiff Ed Gragert is a citizen of Pennsylvania and a resident of Pennsylvania's 10th Congressional district.

27. Plaintiff Ginny Mazzei is a citizen of Pennsylvania and a resident of Pennsylvania's 11th Congressional district.

28. Plaintiff Dana Kellerman is a citizen of Pennsylvania and a resident of Pennsylvania's 12th Congressional district.

29. Plaintiff Brian Burychka is a citizen of Pennsylvania and a resident of Pennsylvania's 13th Congressional district.

30. Plaintiff Marina Kats is a citizen of Pennsylvania and a resident of Pennsylvania's 13th Congressional district.

31. Plaintiff Douglas Graham is a citizen of Pennsylvania and a resident of Pennsylvania's 14th Congressional district.

32. Plaintiff Jean Shenk is a citizen of Pennsylvania and a resident of Pennsylvania's 15th Congressional district.

33. Plaintiff Kristin Polston is a citizen of Pennsylvania and a resident of Pennsylvania's 17th Congressional district.

34. Plaintiff Tara Stephenson is a citizen of Pennsylvania and a resident of Pennsylvania's 17th Congressional district.

35. Plaintiff Barbara Shah is a citizen of Pennsylvania and a resident of Pennsylvania's 18th Congressional district.

36. Defendant Thomas W. Wolf is the Governor of Pennsylvania and is charged with execution of its laws.

37. Defendant Robert Torres[1] is the Acting Secretary of State of Pennsylvania and is charged with administration of the election laws.

38. Defendant Jonathan Marks, is the Commissioner of the Bureau of Elections of Pennsylvania and is charged with administration of the election laws.

39. The Defendants are all sued in their official capacities.

Jurisdiction and Venue

40. The Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331 because plaintiffs' claims arise under the Constitution and laws of the United States, namely the First and Fourteenth Amendments to the Constitution, and 42 U.S.C. § 1983. The Court also has jurisdiction over the case pursuant to 28 U.S.C. § 1343 because plaintiffs seek relief from the deprivation of civil rights, including the right to vote, the right to equal protection of the laws, and the right to free speech. The Court has jurisdiction over this case pursuant to 28 U.S.C. § 2284 because it is a challenge to the constitutionality of the apportionment of congressional districts. Pursuant to 28 U.S.C. § 2284(a), plaintiffs request the appointment of a three-judge district court.

41. Venue is proper in this judicial district because some of the defendants reside in this district and many of the events and omissions giving rise to the claims occurred in this district.

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[1] Since the filing of plaintiffs' original complaint, Defendant Torres has taken over the office of the previously named Defendant Pedro Cortes as Acting Secretary of State and has been substituted as a defendant pursuant to Rule 25(d), Fed. R. Civ. P.

Facts

42. There has been a long history of gerrymandering in Pennsylvania and as demonstrated by past legal court challenges. The practice has become part of the political culture of the state.

43. In 2011, following the 2010 National Census, the Republican National Committee sponsored and launched a nationwide project known as REDMAP, to be undertaken by national and state Republican party leaders and officials, including some or all of the defendants, to draw up and adopt Congressional districting plans that favored the election of Republicans over Democrats.

44. As explained on the home page of REDMAP, as a result of 2010 state legislative victories, Republican-dominated state legislatures had "an opportunity to create 2025 new Republican Congressional Districts through the redistricting process . . . solidifying a Republican majority [in the U.S. House]."

45. REDMAP employed election-related data and projected demographic trends likely to be more successful in ensuring Republican victories than previous such efforts, because digital or computer models available by 2011 that employ voter registration and other data indicating the political preferences of citizens were more sophisticated than previous models in projecting population growth and population movement of likely Democratic and likely Republican voters over a ten-year period.

46. REDMAP focused on states such as and including Pennsylvania where relatively even vote totals for Democratic and Republican state-wide

candidates afforded the largest prospective partisan gains to be obtained from Congressional redistricting.

47. On information and belief, officials in the state Republican party in Pennsylvania and legislative leaders in the General Assembly in Pennsylvania, including the Republican defendants, actively participated in deploying and implementing REDMAP in Pennsylvania, employing the sophisticated digital or computer models that used voter registration and other data indicating the political preferences of citizens. Defendants' efforts resulted in the Congressional districting plan set out in Senate Bill 1249, adopted by the Pennsylvania General Assembly on December 14, 2011, that is the Plan which is the subject of this Complaint.

48. Based upon the use of such sophisticated digital or computer models that use voter registration and other data indicating the political preferences of citizens, the Plan divides Pennsylvania into 18 Congressional districts with the intent, purpose and effect of maximizing the number of Republican candidates elected to the U.S. House of Representatives from Pennsylvania.

49. A number of the 18 Congressional districts, such as the Sixth and Seventh Districts, have bizarre or crazy-quilt shapes that cannot be explained by districting criteria such as continuity, community of interest, historical division, or political or governmental boundaries, or by computer models employing criteria other than partisan data.

50. Based upon the use of such sophisticated digital or computer models that use voter registration and other data indicating the political preferences of citizens, a number of such 18 Congressional districts

were drawn with the use of "packing" and cracking" techniques, "packing" or concentrating likely Democratic voters in the smallest number of districts and "cracking" or spreading out likely Republican voters in the largest number of districts.

51. As found by various experts, such as Professor Sam Wang of Princeton University, no computer model using neutral or criteria other than partisan intent could have randomly produced the district boundaries in 2011 Plan.

52. The Plan was introduced—without notice by amendment to Senate Bill 1249, with no opportunity for review or comment by the citizens of the State or the Democratic members of the Assembly—on December 20, 2011, on which day the Plan was adopted.

53. Since then, the 2011 Plan has achieved its intended effect and made more likely the election of Republican candidates to Congress.

54. In both the 2014 and 2016 elections, the 2011 Plan secured the election of 13 Republican candidates to Congress in the 18 Congressional districts of the State, or 72% of the congressional seats.

55. At the same time, the votes for the Democratic and Republican candidates for Congress on a state wide basis were divided nearly equally, with Republicans winning just 55.5% of the statewide congressional vote in 2014, and 53.9% in 2016 .

Count I

Section 1983: Violation of Privileges and Immunities Clause

56. In violation of 42 U.S.C. § 1983, and by implementing the 2011 Plan which was beyond the

authority of the General Assembly to adopt under the Elections Clause, the defendant State officers have deprived the plaintiffs and other citizens of their rights as federal citizens to be free of State interference in the election of their Representatives to the National Legislature. In so doing, the defendant State officers have denied plaintiffs their rights under the Privileges and Immunities Clause of the Fourteenth Amendment and the Supremacy Clause of Article VI, section 2

57. Neither Clause permits the State to interpose itself between the citizens of the State and their Representatives in the National Legislature or otherwise to act beyond its authority under the Elections Clause.

58. The Elections Clause itself is a source of only neutral procedural rules.

59. In violation of 42 U.S.C. § 1983, and by continuing to implement the State's 2011 Plan, which seeks to determine the party affiliation of Representatives in the National Legislature, the State officer defendants have deprived plaintiffs of their rights of federal citizenship to be free of such interference under the Privileges and Immunities Clause

60. Furthermore, the Supremacy Clause prohibits the States from encroaching on the sovereignty of the United States or interfering with the fundamental design of the Constitution..

61. Under the Tenth Amendment to the Constitution, the General Assembly had no reserved power to influence or control the party affiliation of the Representatives to the National Legislature.

62. No such "reserved" power could have existed prior to the adoption of the Constitution and no such power can be "reserved."

63. Nor does 2 U.S.C. § 2 which requires single member Congressional districts confer any authority upon the State of Pennsylvania or the defendant State officers to influence or control the political viewpoint of persons elected to the Congress.

WHEREFORE plaintiffs pray this Court to:

A. Declare and adjudge that in violation of 42 U.S.C. § 1983 by continuing to implement the 2011 Plan beyond the authority of the State to adopt under the Elections Clause, the defendant State officers have deprived plaintiffs of their rights as federal citizens to have Representatives of their own choosing without the interference of the State and of their rights of federal citizenship under the Privileges and Immunities Clause of the Fourteenth Amendment

B. Direct and order that prior to the 2018 Congressional elections the defendant State officers will submit for approval of the General Assembly one or more alternative districting plans within the authority of the General Assembly under the Elections Clause and is consistent with plaintiffs' rights of federal citizenship under the the Privileges and Immunities Clause and the Supremacy Clause

C. Direct and order that defendant State officers develop such plans through a

process that has reasonable safeguards against partisan influence, including the consideration of voting preferences.

D. Retain continuing jurisdiction over the state defendants to comply with these requirements.

E. Grant plaintiffs their legal fees and costs and such other relief as may be appropriate.

Count II

Section 1983: Violation of the First Amendment

64. In the conduct of elections to Congress, the Elections Clause allows the state to pass "time, place, and manner" regulations that limit how plaintiffs and other citizens may vote.

65. The Elections Clause is a limited grant of authority for procedural regulations.

66. The Elections Clause is not a source of authority to dictate electoral outcomes, or favor or disfavor a class of candidates.

67. This authority is further circumscribed by the First Amendment, which subjects to strict judicial scrutiny any content based regulation of speech or any law like the 2011 Plan which discriminates against citizens based on their political viewpoints.

68. Both the Elections Clause and the First Amendment separately and together express a constitutional principle that in conducting federal elections, the states must use or employ procedural regulations that give the widest possible scope to plaintiffs and other citizens to elect their represent-

atives and have the least possible interference in their choices.

69. When First Amendment rights are violated, the courts have broad equitable authority to remedy such constitutional violations.

70. Furthermore, in determining the remedy for First Amendment violations, the courts may and should consider the particular limits on state authority under the Elections Clause, and the rights to direct election of members of Congress under Article I.

71. With respect to Congressional districting, plaintiffs are entitled to the use of a neutral or least restrictive process consistent with the limits on state authority under the Elections Clause to secure the rights of federal citizenship and the limits placed by the First Amendment to ensure the broadest possible freedom of choice without interference by any government.

72. Gerrymandering unlawfully interferes with rights of self-government and thereby undermines the purposes of both the Elections Clause and the First Amendment, and is inimical to both.

73. Gerrymandering like the 2011 Plan restricts the majority political processes and has the intent of making it harder for plaintiffs and other citizens to remove or replace their representatives in Congress or to hold those representatives accountable to them directly.

74. Furthermore, the 2011 Plan uses the techniques of packing and cracking to place certain plaintiffs in super Democratic districts where they are less likely to replace Republican incumbents or

reduce the Republican representation in the state Congressional delegation or they are spread out into other districts where they are unlikely to have any outcome determinative effect.

75. Such isolating techniques limit or deny other less invidious combinations of plaintiffs with other citizens of the state, and impede their right to associate with each other and communicate and act in concert together without being segregated based on political viewpoints.

76. Such isolating techniques are intended to discourage electoral competition and competitive electoral races and necessarily discourage the robust political debate which both the Elections Clause in federal elections and the First Amendment generally seeks to protect.

77. Such isolating techniques to ensure the same results are intended to or necessarily have the effect of discouraging participation in elections.

78. Gerrymandering like the 2011 Plan thereby deprives or diminishes the right of self government protected by First Amendment and the particular robust form of federal citizenship independent of state interference that is contemplated by the Elections Clause and Article I of the Constitution.

79. While any scheme of districting necessarily has some political effect and in that respect is inherently political process, it is therefore all the more necessary under the Elections Clause and the First Amendment to limit the state to neutral procedural regulations when it regulates federal elections.

80. Accordingly, in violation of 42 U.S.C. § 1983, by continuing to implement the 2011 Plan, and thereby enforcing a specific type regulation or speech-related districting scheme which is inherently destructive of plaintiffs' right of self-government protected in a particular way by the Elections Clause and more generally by the First Amendment, the defendant State officers have unlawfully deprived plaintiffs of their rights under the First Amendment

WHEREFORE plaintiffs pray this Court to:

A. Declare and adjudge that in violation of 42 U.S.C. § 1983 and by continuing to implement the 2011 Plan, the defendant State officers have deprived plaintiffs of their rights under the First Amendment.

B. Direct and order that prior to the 2018 Congressional elections the State defendants will submit for approval of the General Assembly one or more alternative districting plans that will affect the time place and manner for political speech under neutral rules that are within the authority of the State to adopt under the Elections Clause.

C. Direct and order that the defendant State officers develop such process for creating alternative plans with safeguards to ensure that they are within the authority of the State to adopt under the Elections Clause.

D. Retain continuing jurisdiction of this case for purposes of approval of the process described above.

E. Grant plaintiffs their legal fees and costs and such other relief as may be appropriate.

Dated: November 17, 2017

By: s/ Thomas H. Geoghegan
One of Plaintiffs' Attorneys

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