

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

JACOB CORMAN, in his official
capacity as Majority Leader of the
Pennsylvania Senate, *et al.*,

Plaintiffs

v.

ROBERT TORRES, in his official
capacity as Acting Secretary of the
Commonwealth, *et al.*,

Defendants

and

CARMEN FEBO SAN
MIGUEL, *et al.*,

Intervenor-Defendants.

CIVIL ACTION NO.
1:18-CV-443-CCC-KAJ-JBS

Three-Judge Panel Convened
Pursuant to 28 U.S.C. § 2284(a)

***AMICUS CURIAE* BRIEF OF THE AMERICAN CIVIL RIGHTS
UNION**

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST	1
INTRODUCTION	2
FACTS	3
ARGUMENT	4
I. THE PENNSYLVANIA SUPREME COURT’S REDISTRICTING PLAN VIOLATED ITS OWN STANDARDS.	4
A. The Pennsylvania court’s map is a partisan map.	4
B. The court’s map did not maximize its own criteria.	11
II. THE PENNSYLVANIA SUPREME COURT ACTED LIKE A LEGISLATURE, NOT A COURT.	14
A By imposing proportional representation, the court made political — not remedial — choices.	14
B. In creating the map, the Pennsylvania Supreme Court employed highly flawed procedures.	19
CONCLUSION	21
CERTIFICATION OF COMPLIANCE WITH WORD LIMIT	23
CERTIFICATE OF SERVICE	23

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Chapman v. Meier</i> , 420 U.S. 1 (1975).....	18
<i>City of Mobile v. Bolden</i> , 446 U.S. 55 (1980)	18
<i>Gaffney v. Cummings</i> , 412 U.S. 735 (1973)	16
<i>League of United Latin American Citizens v. Perry</i> , 548 U.S. 399 (2006)	18
<i>League of Women Voters of Pennsylvania, et al. v. Pennsylvania, et al.</i> , No. 159 MM 2017 (Pa. Feb. 7, 2018).....	4
<i>Perry v. Perez</i> , 565 U.S. 388 (2012)	17
<i>Upham v. Seamon</i> , 456 U.S. 37 (1982)	17
<i>Vieth v. Jubelirer</i> , 541 U.S. 267 (2004)	18
<i>White v. Regester</i> , 412 U.S. 755 (1973)	18
Constitutional Authorities	
United States Constitution Article I, § 4.....	2, 3
Other Authorities	
Andrew Prokop, <i>What Pennsylvania’s new congressional map means for 2018</i> , Vox (February 21, 2018), https://www.vox.com/policy-and-politics/2018/2/21/17032936/pennsylvania-congressional-districts-2018	9

David Wasserman, <i>New Pennsylvania Map Is a Major Boost for Democrats</i> , The Cook Political Report, February 20, 2018, https://www.cookpolitical.com/analysis/house/pennsylvania-house/new-pennsylvania-map-major-boost-democrats	10, 14
David Wasserman, Twitter, (February 19, 2018), https://twitter.com/Redistrict	15
Elena Schneider, <i>New Pennsylvania map gives Democrats big boost in midterms</i> , Politico (February 19, 2018), https://www.politico.com/story/2018/02/19/pennsylvania-redistrict-democrats-midterms-354432	10
Nate Cohn, <i>Democrats Didn't Even Dream of This Pennsylvania Map. How Did It Happen?</i> , The New York Times: The Upshot (February 21, 2018), https://www.nytimes.com/2018/02/21/upshot/gerrymandering-pennsylvania-democrats-republicans-court.html	<i>passim</i>
Nate Cohn, <i>Hundreds of Simulated Maps Show How Well Democrats Fared in Pennsylvania</i> , The New York Times: The Upshot (February 26, 2018), https://www.nytimes.com/2018/02/26/upshot/democrats-did-better-than-on-hundreds-of-simulated-pennsylvania-maps.html (last visited March 4, 2018)	5, 6
Nate Cohn, Matthew Bloch, and Kevin Quealy, <i>The New Pennsylvania Congressional Map, District by District</i> , The New York Times: The Upshot (February 19, 2018), https://www.nytimes.com/interactive/2018/02/19/upshot/pennsylvania-new-house-districts-gerrymandering.html	10
Steven Wolf, <i>Pennsylvania's groundbreaking new congressional map isn't just nonpartisan—it's fair</i> , The Daily Kos (February 19, 2018). https://www.dailykos.com/stories/2018/2/19/1742930/-Pennsylvania-Supreme-Court-implements-fair-congressional-map-after-striking-down-GOP-gerrymander	15
United States Census Bureau, <i>Geographic Terms and Concepts - Voting Districts</i> , https://www.census.gov/geo/reference/gtc/gtc_vtd.html	13

STATEMENT OF INTEREST

Amicus Curiae American Civil Rights Union (ACRU) is a non-partisan 501(c)(3) tax-exempt organization dedicated to protecting the civil rights of all Americans by publicly advancing a Constitutional understanding of our essential rights and freedoms. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed amicus curiae briefs on various constitutional and election issues in cases nationwide, including redistricting cases.

The ACRU's Policy Board sets the ACRU's priorities. The Board's members include some of the nation's most distinguished statesmen and practitioners on matters of election law. The Board's members are former U.S. Attorney General Edwin Meese III; former Assistant Attorney General for Civil Rights William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University Walter E. Williams; former Ambassador to Costa Rica Curtin Winsor, Jr.; former Ohio Secretary of State J. Kenneth Blackwell; former Voting Rights Section attorney, U.S.

Department of Justice, J. Christian Adams; former Counsel to the Assistant Attorney General for Civil Rights and former member of the Federal Election Commission Hans von Spakovsky. Chris Coates is a member of the Policy Board as is Doug Bandow, former Special Assistant for Policy Development in the Reagan Administration.

INTRODUCTION

This case involves a fundamental question of legislative versus judicial authority in the redistricting context. After overturning the Pennsylvania legislature's 2011 redistricting map, the Pennsylvania Supreme Court gave the legislature extremely limited time to develop a new map. And because the legislature was unable to meet the court's timeline, the court took it upon itself to draw a map for Pennsylvania's congressional districts.

It is valuable for this Court to understand what the Pennsylvania Supreme Court did in drawing a new map. Redistricting is a legislative process under Article I, § 4 of the United States Constitution. For well over two centuries, state legislatures have been frequently criticized for using partisan considerations and for having deficient procedures — and redistricting is no different.

But while taking it upon itself to develop a redistricting map, the Pennsylvania Supreme Court's exhibited these same deficiencies. That court did not follow to its own standards to refrain from partisan gerrymandering, and it

did not adhere to its own redistricting criteria for drawing a new map. It made political decisions in order to impose proportional representation, and alarmingly it disregarded efforts to rely upon admissible evidence, refused to allow parties to comment on its map, and refused to explain how it arrived at such a momentous decision. In short, these procedures did not befit a court of law.

The Pennsylvania Supreme Court's map was not a judicial remedy in any traditional sense, but rather grew from activity similar to a legislative process.

FACTS

On February 22, 2018, multiple plaintiffs filed a *Verified Complaint* in this Court, seeking relief under U.S. Const. Art. I § 4. On that same day, the plaintiffs filed their *Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction*, and the next day they filed a *Memorandum of Law* in support of their *Motion*. Also on February 23, 2018, this Court scheduled a hearing on *Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction* for March 9, 2018. Over the next week, multiple parties filed motions to join as intervenors or motions to file amicus briefs, many of which this Court granted. On March 2, 2018 several parties and intervenors filed; (1) motions opposing *Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction*, (2) motions to dismiss, and (3) motions for judgment on the pleadings. Currently the plaintiffs may file their opposition to any *Motion to Dismiss*, opposition to the pending

Motion for Judgment on the Pleadings, and a reply in support of their *Motion for Preliminary Injunction*, no later than 12:00 noon, March 7, 2018. A hearing is scheduled for plaintiffs' *Motion for Preliminary Injunction* on March 9, 2018.

ARGUMENT

I. THE PENNSYLVANIA SUPREME COURT'S REDISTRICTING PLAN VIOLATED ITS OWN STANDARDS.

A. The Pennsylvania court's map is a partisan map.

In striking down the Pennsylvania General Assembly's redistricting map, the Pennsylvania Supreme Court relied heavily on the analysis of an expert, Dr. Jowei Chen; "Perhaps the most compelling evidence concerning the 2011 Plan derives from Dr. Chen's expert testimony."¹ Briefly stated, Dr. Chen ran two simulated series of 500 redistricting plans each, one of which used only the "traditional criteria" of population equality, compactness and minimization of county and municipality splits. (The other simulation included incumbency protection).² From the first simulated series, Dr. Chen answered three questions:

(1) whether partisan intent was the predominant factor in the drawing of the Plan; (2) if so, what was the effect of the Plan on the number of congressional Democrats and Republicans elected from Pennsylvania; and (3) the effect of the Plan on the ability of the 18 individual Petitioners to elect a Democrat or Republican

¹ *League of Women Voters of Pennsylvania, et al. v. Pennsylvania, et al.*, No. 159 MM 2017, Op. at 125 (Pa. Feb. 7, 2018).

² *League of Women Voters of Pa.*, Op. at 40 (Pa. Feb. 7, 2018).

candidate for congress from their respective districts.³

The court rejected the 2011 legislative map because it was an extreme outlier that advantaged Republicans. But the court's own plan also fails Dr. Chen's analysis.

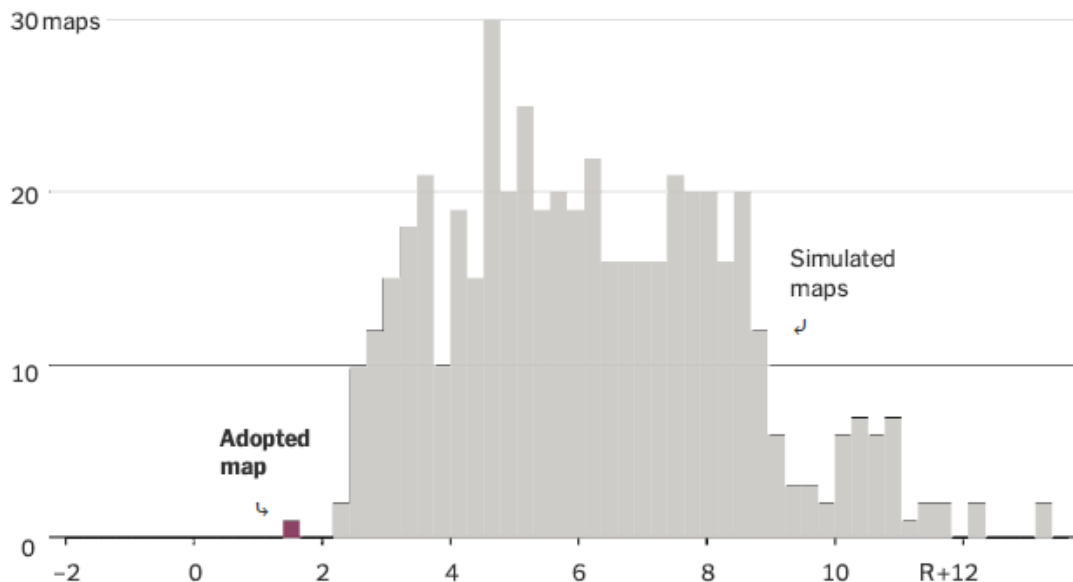
After the court made its plan available to the public, analysis showed that the court's map failed the second and third prong of Dr. Chen's analysis. The plan produced "overall Democratic performance" that "arguably would have been better than" every single one of Dr. Chen's simulations, as shown by the following chart (the court's plan is labeled "adopted plan"):⁴

³ *League of Women Voters of Pa.*, Op. at 39-40 (Pa. Feb. 7, 2018).

⁴ Nate Cohn, *Hundreds of Simulated Maps Show How Well Democrats Fared in Pennsylvania*, The New York Times: The Upshot (February 26, 2018), <https://www.nytimes.com/2018/02/26/upshot/democrats-did-better-than-on-hundreds-of-simulated-pennsylvania-maps.html> (last visited March 4, 2018).

New Map Favored Democrats Compared With Simulations

Republican advantage in the median congressional district compared with the average 2016 statewide popular vote in 500 simulations and the map adopted by the court.



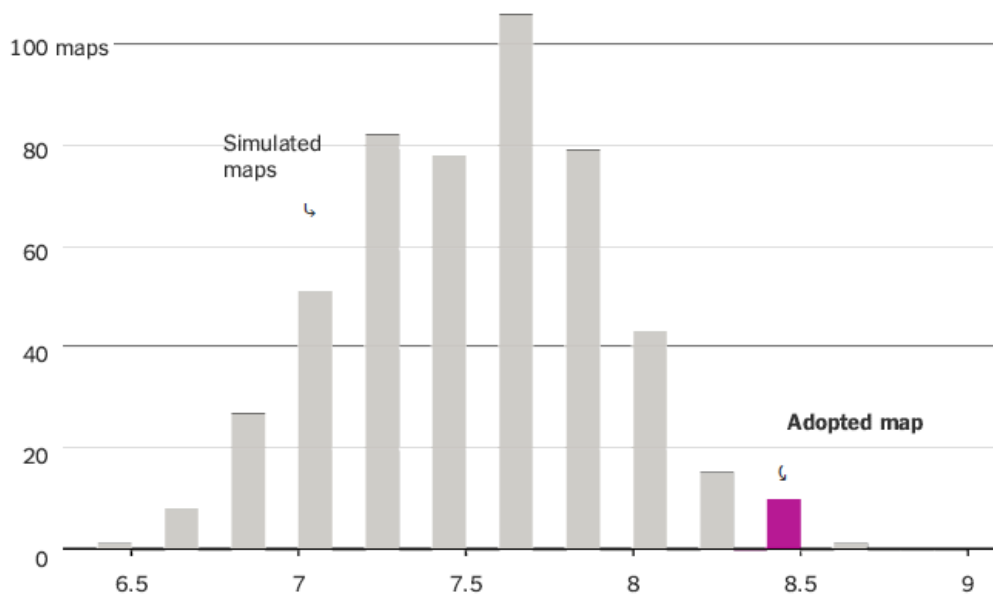
By The New York Times | Source: Upshot analysis of Jowei Chen simulations, election results from Nathaniel Kelso and Michal Migurski.

Furthermore, the same analysis shows that the court's plan resulted in a greater number of Democratic congressional victories than 499 out of 500 of Dr. Chen's simulations:⁵

⁵ *Id.*

How Many Districts Democrats Would Have Won.
 Democrats won more districts in only one simulation.

Number of Democratic wins in the average 2016 statewide election in 500 simulated maps and the new adopted map.



Source: Upshot analysis of Jowei Chen simulations, election results from Nathaniel Kelso and Michal Migurski.

Even though the court relied heavily on Dr. Chen’s statistical analysis to strike down the Pennsylvania legislature’s 2011 map, it failed to subject its own map to that same analysis – an analysis that shows the court’s map would likely fail under its own standards.

Following a discussion of Dr. Chen’s testimony, the court buttressed his conclusions by noting that “Dr. Chen’s testimony in this regard comports with a lay examination of the Plan,”⁶ By that same standard, the map’s heavy Democratic bias “widely comports with a lay examination.” In public, the

⁶ *League of Women Voters of Pa.*, Op. at 127 (Pa. Feb. 7, 2018).

court's map has been strongly condemned or praised as heavily tilting the playing field to create a partisan map. First, the court's map provides a better partisan advantage than the partisans themselves requested. "[T]he new map is better for Democrats — by nearly every measure — than the maps that Democrats themselves proposed."⁷ Indeed, the following chart illustrates how the court gifted an unexpected windfall to Democratic partisans:⁸

⁷ Nate Cohn, *Democrats Didn't Even Dream of This Pennsylvania Map. How Did It Happen?*, The New York Times: The Upshot (February 21, 2018), <https://www.nytimes.com/2018/02/21/upshot/gerrymandering-pennsylvania-democrats-republicans-court.html> (last visited on March 4, 2018).

⁸ *Id.*

The New Pennsylvania Map Is Even Better for Democrats Than the
Democratic Proposals

Districts won by Democrats in the ...	Current Map	Proposed Democratic Plans				New Map
		Governor	Lt. Gov.	Senate	House	
2016 pres. race	6	7	7	7	7	8
2016 Senate race	4	7	7	6	7	5
Any 2016 race	9	9	10	10	11	11
Average of all 2016 races	5.4	7.4	8.0	7.8	8.2	8.4
Median 2016 Democratic pres. margin	-8.9	-10.6	-9.7	-9.6	-7.8	-5.7

Second, respected commentators and articles have endorsed the identical conclusion – that the court’s map greatly helps Democrats:

- “And the new map is positively fantastic news for Democrats in their effort to take back the House this fall.”⁹
- “Democrats couldn’t have asked for much more from the new map. It’s arguably even better for them than the maps they proposed

⁹ Andrew Prokop, *What Pennsylvania’s new congressional map means for 2018*, Vox, (February 21, 2018), <https://www.vox.com/policy-and-politics/2018/2/21/17032936/pennsylvania-congressional-districts-2018>.

themselves.”¹⁰

- The map, drawn by a court-appointed special master, doesn't just undo the gerrymander that's produced a 13-5 seat GOP edge since 2012. It goes further, actively compensating for Democrats' natural geographic disadvantage in the state.¹¹
- “The new map left Democrats celebrating on Monday.”¹²

Finally, the Pennsylvania court criticized the 2011 legislative map because its congressional districts “often contain ‘isthmuses’ and ‘tentacles,’”¹³ Yet the court’s map was guilty of the same problems. “*Every* potentially competitive Republican-held district juts out to add Democratic areas, like adding York to the 10th District, Lansdale to the First District, Reading to the Sixth District, Stroudsburg to the Seventh District, South Philadelphia to the Fifth District, or Mount Lebanon and Penn Hills to the 17th.”¹⁴

¹⁰ Nate Cohn, Matthew Bloch, and Kevin Quealy, *The New Pennsylvania Congressional Map, District by District*, The New York Times: The Upshot (February 19, 2018), <https://www.nytimes.com/interactive/2018/02/19/upshot/pennsylvania-new-house-districts-gerrymandering.html>.

¹¹ David Wasserman, *New Pennsylvania Map Is a Major Boost for Democrats*, The Cook Political Report, February 20, 2018, <https://www.cookpolitical.com/analysis/house/pennsylvania-house/new-pennsylvania-map-major-boost-democrats>.

¹² Elena Schneider, *New Pennsylvania map gives Democrats big boost in midterms*, Politico (February 19, 2018), <https://www.politico.com/story/2018/02/19/pennsylvania-redistrict-democrats-midterms-354432>.

¹³ *League of Women Voters of Pa.*, Op. at 128 (Pa. Feb. 7, 2018).

¹⁴ Nate Cohn, *Democrats Didn't Even Dream of This Pennsylvania Map. How*

B. The court's map did not maximize its own criteria

And the Pennsylvania Supreme Court's map violates its standards in another way, by failing to meet its own standards for creating a new map.

According to the Pennsylvania Supreme Court:

any congressional districting plan shall consist of: congressional districts composed of compact and contiguous territory; as nearly equal in population as practicable; and which do not divide any county, city, incorporated town, borough, township, or ward, except where necessary to ensure equality of population.¹⁵

Accordingly the court required the parties to submit the following relevant information:

- b. A report detailing the compactness of the districts according to each of the following measures: Reock; Schwartzberg; Polsby-Popper; Population Polygon; and Minimum Convex Polygon.
- c. A report detailing the number of counties split by each district and split in the plan as a whole.
- d. A report detailing the number of municipalities split by each district and the plan as a whole.
- e. A report detailing the number of precincts split by each district and the plan as a whole.¹⁶

In its order dated February 19, 2018, the Pennsylvania Supreme Court stated that the remedial map is “superior or comparable” to all plans submitted

Did It Happen?, The New York Times: The Upshot (February 21, 2018) (emphasis supplied), <https://www.nytimes.com/2018/02/21/upshot/gerrymandering-pennsylvania-democrats-republicans-court.html>.

¹⁵ *League of Women Voters of Pa.*, Order at 3 (Pa. Jan. 22, 2018).

¹⁶ *League of Women Voters of Pa.*, Order at 2-3 (Pa. Jan. 26, 2018).

by the parties, intervenors, and *amici*.¹⁷ But ACRU respectfully disagrees. The court produced a map that did not optimize its traditional redistricting criteria, as demonstrated by comparing the court's map to the map submitted by ACRU in its amicus brief before the Pennsylvania Supreme Court. (**Exhibit B**).

In developing its map, ACRU did not include *any* political or partisan data. It disregarded entirely partisan voting performance and voters' partisan affiliation — whether voters were Republicans, Democrats, or unaffiliated. As a result, the ACRU map effectively optimized the court's published criteria, and it outperforms the court's map. Both the ACRU and court maps achieved population equality and contiguity. But in the critical factors — compactness and splits of political subdivisions — the ACRU map is plainly a better map.

First, with respect to compactness tests, the ACRU proposal outperforms the court's map on four out of five measures, when taking the average of all districts. ACRU's map scores higher on the two most widely accepted measures of compactness (Polsby-Popper and Roeck), scores higher on the two polygon-based measures (Population Polygon and Minimum Convex Polygon), and scores slightly lower on the perimeter-based test (Schwartzberg), as shown by the following chart (better scores are highlighted in bold):

¹⁷ *League of Women Voters of Pa.*, Order at 5-6 (Pa. Feb. 19, 2018).

Compactness Test	Court Map Average	ACRU Map Average
Polsby-Popper	0.3344	0.3722
Roeck	0.4583	0.4694
Population Polygon	0.7433	0.7789
Minimum Convex Polygon	0.7911	0.8128
Schwartzberg	1.6672	1.5761

These measurements take the average of each test, and importantly four out of five tests show that ACRU's map better meets the court's criteria.

Second, the ACRU map also scores better with respect to political subdivision splits. The ACRU map has fewer overall splits; it splits fewer municipalities and Voting Districts.¹⁸ The court plan splits one less county than the ACRU map, as shown by the following chart (better scores are highlighted in bold):

Political Subdivision	Number of splits, court map	Number splits, ACRU map
Counties	14	15
Municipalities	19	17
Voting Districts	33	17
Total	66	49

¹⁸ "Voting Districts (VTDs) refer to the generic name for geographic entities, such as precincts, wards, and election districts, established by state governments for the purpose of conducting elections." United States Census Bureau, *Geographic Terms and Concepts - Voting Districts*, https://www.census.gov/geo/reference/gtc/gtc_vtd.html.

To be fair, the court in its order argues that it only split 13 counties.¹⁹ This does not, however, change the above analysis. Overall, the ACRU map has substantially fewer total splits, outperforming the court's plan.

II. THE PENNSYLVANIA SUPREME COURT ACTED LIKE A LEGISLATURE, NOT A COURT.

A. By imposing proportional representation, the court made political — not remedial — choices.

The court had before it ACRU's map (and many other maps), yet it developed a map that did not optimize the traditional criteria. Further, it repeatedly made choices that consistently benefited one political party over another. That means the court was not limited to the traditional criteria that it published, but rather something else drove the process.

That something else was proportional representation.

Pennsylvania currently has 18 congressional seats, and the universal consensus is that the court's map does not merely undo a perceived political gerrymander. Rather,

[i]t goes further, actively compensating for Democrats' natural geographic disadvantage in the state. Under the new lines, Democrats have an excellent chance to win at least half the state's 18 seats.²⁰

¹⁹ *League of Women Voters of Pa.*, Order at 6, n. 10 (Pa. Feb. 19, 2018).

²⁰ David Wasserman, *New Pennsylvania Map is a Major Boost for Democrats*, The Cook Political Report (February 20, 2018), <https://www.cookpolitical.com/analysis/house/pennsylvania-house/new-pennsylvania-map-major-boost-democrats>.

As the same analyst made clear, the court map:

is a ringing endorsement of the ‘partisan fairness’ doctrine: that parties should be entitled to same proportion of seats as votes. However, in PA (and many states), achieving that requires conscious pro-Dem mapping choices.²¹

Those who support the court’s map readily recognize that it imposes proportional representation on Pennsylvania’s congressional delegation:

But most interestingly, the court appears to have deliberately adopted a map that should give both parties a shot at winning an equitable number of seats, as befits Pennsylvania’s swing-state status.²²

And those who neither cheer nor condemn the court’s map have also concluded that the court imposed proportional representation; “Over all, the new court-ordered map comes very close to achieving partisan symmetry in an evenly divided state.”²³

The court’s imposition of proportional representation was a political decision, without legal authority. A legislature may freely develop a redistricting map that achieves proportional representation (provided the map adheres to

²¹ David Wasserman, Twitter, (February 19, 2018), <https://twitter.com/Redistrict>.

²² Steven Wolf, *Pennsylvania's groundbreaking new congressional map isn't just nonpartisan—it's fair*, The Daily Kos (February 19, 2018), <https://www.dailykos.com/stories/2018/2/19/1742930/-Pennsylvania-Supreme-Court-implements-fair-congressional-map-after-striking-down-GOP-gerrymander>.

²³ Nate Cohn, *Democrats Didn't Even Dream of This Pennsylvania Map. How Did It Happen?*, The New York Times: The Upshot (February 21, 2018), <https://www.nytimes.com/2018/02/21/upshot/gerrymandering-pennsylvania-democrats-republicans-court.html>.

federal law). Indeed, a state may “allocate political power to the parties in accordance with their voting strength.”²⁴ These types of political compromises and political decisions often occur within state legislatures. Redistricting is fundamentally a political process, subject to the political give and take in our representative democracy.

To be sure, some believe proportional representation is a worthy goal, and that all redistricting should reflect that principle. Others firmly believe that local communities of interest — particularly those expressed within political subdivisions — should take precedence over a statewide proportional scheme. Ultimately, any governing body must make these policy choices and resolve conflicting values. And elected legislatures do just that. Voters send representatives that share their policy objectives. A legislature often achieves political compromise, and legislators face accountability through frequent, local district elections. In short, whether a state should redistrict to achieve proportional representation is an issue for the legislature, not a court.

By contrast, courts do not have any legal authority to impose proportional representation, absent guidance from the legislature. Here, neither the Pennsylvania constitution nor the Pennsylvania statute gives any court authority to impose proportional representation through the redistricting process. The Pennsylvania Supreme Court itself recognized that the state

²⁴ *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973).

constitution provided no standards for redistricting,²⁵ and it could point to no statute.

Next, the Pennsylvania Supreme Court disregarded entirely the legislature's 2011 map. But a court needs to ground its decision in some standards, and a legislative map provides those standards. Indeed, the U.S. Supreme Court has stated that a court:

should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature.²⁶

Accordingly, a legislative map, even if defective:

provides important guidance that helps ensure that the district court appropriately confines itself to drawing interim maps that comply with the Constitution and the Voting Rights Act, without displacing legitimate state policy judgments with the court's own preferences.²⁷

But the Pennsylvania Supreme Court's map did not follow any policies contained in the legislature's 2011 map, and the legislature's map certainly did not endorse proportional representation.

Further, U.S. Supreme Court decisions make clear that federal law provides no authority to allow a court to impose proportional representation. Plainly stated, a group is not constitutionally entitled to a redistricting map that

²⁵ *League of Women Voters of Pa.*, Op. at 119 (Pa. Feb. 7, 2018).

²⁶ *Upham v. Seamon*, 456 U.S. 37, 41 (1982).

²⁷ *Perry v. Perez*, 565 U.S. 388, 394 (2012).

grants it “legislative seats in proportion to its voting potential.”²⁸ Likewise, the Constitution “nowhere says that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers.”²⁹ The Court has been clear: “there is no constitutional requirement of proportional representation,”³⁰ “there is no constitutional requirement of proportional representation,”³¹ and:

“[t]he Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization. . . . [P]olitical groups [do not] themselves have an independent constitutional claim to representation . . .”³²

The Pennsylvania Supreme Court had no state constitutional or state statutory authority to impose proportional representation. It had no federal authority to impose proportional representation. In short, it acted like a legislature, making policy and political choices to implement a proportional representation scheme.

Finally, even beyond a proportional representation scheme, the court made other policy choices. To be sure, the court relied on several traditional redistricting standards, such as compactness and minimizing political subdivision splits. These are relatively uncontroversial standards. But the court

²⁸ *White v. Regester*, 412 U.S. 755, 765-66 (1973).

²⁹ *Vieth v. Jubelirer*, 541 U.S. 267, 288 (2004) (plurality op.).

³⁰ *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 419 (2006) (plurality op.).

³¹ *Chapman v. Meier*, 420 U.S. 1, 17 (1975).

³² *City of Mobile v. Bolden*, 446 U.S. 55, 75-76 (1980).

rejected other traditional standards, such as incumbency protection, solely because the court viewed them as “wholly subordinate” to other, “neutral” criteria.³³ Beyond this short phrase, the court offered no evidence, no rational, and no explanation for its policy choices.

B. In creating the map, the Pennsylvania Supreme Court employed highly flawed procedures.

As noted above, the Pennsylvania Supreme Court did not adhere to its own standards, made blatantly political choices, and picked and chose among the standards it would follow. But the court made several other, flawed choices.

First, it refused to explain how it arrived at its map, beyond saying it was “superior or comparable” to other maps. It did not explain which parties’ or *amici* briefs it found helpful. It did not explain how its map was “comparable” to others. It did not explain why it made certain political choices and not others. And it did not explain why it arrived at the map it did. This is particularly problematic in a high-profile, important, and controversial case like this.

Creating even more suspicion, however, the Pennsylvania court has barred its special master from even discussing the map he drew for the court.³⁴

³³ *League of Women Voters of Pa.*, Op. at 123 (Pa. Feb. 7, 2018).

³⁴ Nate Cohn, *Democrats Didn’t Even Dream of This Pennsylvania Map. How Did It Happen?*, The New York Times: The Upshot (February 21, 2018), <https://www.nytimes.com/2018/02/21/upshot/gerrymandering->

This has thrust litigants and the American public into the position of former Sovietologists, searching two sentences in the middle pages of the latest issue of *Pravda* to infer the true motives behind a decision.

Second, the court did not accept evidence — such as testimony or expert analysis — to develop a record to support its decisions. To be sure, the court accepted proposals. But this is much different than developing a record based on admissible evidence, subject to cross examination and close scrutiny. Courts do not — and should not — simply take in proposals and make decisions absent evidence. It is within a legislature’s plenary power to do just that. But the Pennsylvania Supreme Court did the same thing. It could have deferred to the lower trial court to develop a remedial plan based upon evidence. And the commonwealth court was capable of moving quickly — it worked with “commendable speed, thoroughness, and efficiency” to develop a record for the gerrymandering claims.³⁵ That same court could — and should — have held appropriate hearings to develop a map, which the Pennsylvania Supreme Court could then review.

Finally, the court was overly eager to exercise control over mapmaking. Following an application from petitioners, the Pennsylvania Supreme Court

pennsylvania-democrats-republicans-court.html (last visited on March 4, 2018).

³⁵ *League of Women Voters of Pa.*, Op. at 34 (Pa. Feb. 7, 2018).

exercised “extraordinary jurisdiction” over the proceeding.³⁶ It did not allow the district court to develop a remedial map. It did not allow extensive party input into the new remedial map. In developing a remedial map, it acted as the fact-finder, the adjudicator, and the reviewer, all rolled into one.

Overall, these three flaws are not minor procedural errors. They go to the heart of what a court system should do. The Pennsylvania Supreme Court should articulate standards for all litigants to follow. A trial court should take those standards, develop evidence, and craft a remedy. Then the Pennsylvania Supreme Court should have the opportunity to review that remedy for legal error. But instead, this court eagerly short-circuited the very procedures and policies that result in good decision-making and engender public respect for our courts. It then imposed a proportional representation map, without evidence, without explanation, and without legal authority.

³⁶ *League of Women Voters of Pa.*, Op. at 33 (Pa. Feb. 7, 2018).

CONCLUSION

ACRU respectfully requests that this court grant the relief requested by plaintiffs in this matter.

Respectfully submitted this 7th day of March 2018,

s/Linda A. Kerns

Linda A. Kerns, Esquire

LAW OFFICES OF LINDA A. KERNS, LLC

1420 Locust Street, Suite 200

Philadelphia, PA 19102

PA Atty ID 84495

Tel: (215) 731-1400

Fax: (215) 701-4154

linda@lindakernslaw.com

*General admission scheduled for March 9, 2018

Attorney for Amicus Curiae,

The American Civil Rights Union

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I hereby certify that this brief complies with L.R. 7.8(b)(2) because the total word count for the body of the brief, including headings and footnotes is 3,891.

Dated this 7th day of March, 2018.

s/Linda A. Kerns
Linda A. Kerns

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of March, 2018, the foregoing ***AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION*** was electronically filed with the Clerk of the Court via the CM/ECF system, which will send notice of the electronic filing to all counsel of record.

Dated this 7th day of March, 2018.

s/Linda A. Kerns
Linda A. Kerns

**[J-1-2018]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

LEAGUE OF WOMEN VOTERS OF : No. 159 MM 2017
PENNSYLVANIA, CARMEN FEBO SAN :
MIGUEL, JAMES SOLOMON, JOHN :
GREINER, JOHN CAPOWSKI, :
GRETCHEN BRANDT, THOMAS :
RENTSCHLER, MARY ELIZABETH :
LAWN, LISA ISAACS, DON LANCASTER, :
JORDI COMAS, ROBERT SMITH, :
WILLIAM MARX, RICHARD MANTELL, :
PRISCILLA MCNULTY, THOMAS :
ULRICH, ROBERT MCKINSTRY, MARK :
LICHTY, LORRAINE PETROSKY, :

Petitioners

v.

THE COMMONWEALTH OF :
PENNSYLVANIA; THE PENNSYLVANIA :
GENERAL ASSEMBLY; THOMAS W. :
WOLF, IN HIS CAPACITY AS :
GOVERNOR OF PENNSYLVANIA; :
MICHAEL J. STACK III, IN HIS CAPACITY :
AS LIEUTENANT GOVERNOR OF :
PENNSYLVANIA AND PRESIDENT OF :
THE PENNSYLVANIA SENATE; :
MICHAEL C. TURZAI, IN HIS CAPACITY :
AS SPEAKER OF THE PENNSYLVANIA :
HOUSE OF REPRESENTATIVES; :
JOSEPH B. SCARNATI III, IN HIS :
CAPACITY AS PENNSYLVANIA SENATE :
PRESIDENT PRO TEMPORE; ROBERT :
TORRES, IN HIS CAPACITY AS ACTING :
SECRETARY OF THE :
COMMONWEALTH OF PENNSYLVANIA; :
JONATHAN M. MARKS, IN HIS :
CAPACITY AS COMMISSIONER OF THE :
BUREAU OF COMMISSIONS, :
ELECTIONS, AND LEGISLATION OF :



THE PENNSYLVANIA DEPARTMENT OF :
STATE, :
:
Respondents :

ORDER

PER CURIAM

AND NOW, this 26th day of January, 2018, in furtherance of this Court's Order of January 22, 2018, and in anticipation of the possible eventuality that the General Assembly and the Governor do not enact a remedial congressional districting plan by the time periods specified in that Order, the Court orders as follows.

Pursuant to Paragraph "Third" of our Order of January 22, 2018:

First, this Court appoints Professor Nathaniel Persily as an advisor to assist the Court in adopting, if necessary, a remedial congressional redistricting plan.

Second, the Pennsylvania General Assembly shall submit to the Court, or direct the Legislative Data Processing Center to submit to the Court, no later than **January 31, 2018 at noon**, ESRI shape files that contain the current boundaries of all Pennsylvania municipalities and precincts.

Third, any redistricting plan the parties or intervenors choose to submit to the Court for its consideration shall include the following:

a. A 2010 Census block equivalency and ESRI shape file expressing the plan.

b. A report detailing the compactness of the districts according to each of the following measures: Reock; Schwartzberg; Polsby-Popper; Population Polygon; and Minimum Convex Polygon.

c. A report detailing the number of counties split by each district and split in the plan as a whole.

d. A report detailing the number of municipalities split by each district and the plan as a whole.

e. A report detailing the number of precincts split by each district and the plan as a whole.

f. A statement explaining the proposed plan's compliance with this Court's Order of January 22, 2018.

Fourth, the parties and intervenors shall submit to the Court, no later than **January 31, 2018 at noon**, a 2010 Census block equivalency and ESRI shape file for the maps which formed the basis for the expert testimony and reports offered into evidence in the proceedings before the Commonwealth Court. All such maps shall be labeled consistently with the parties' or intervenors' exhibits and descriptions therein.

Justice Baer files a Concurring and Dissenting Statement.

Chief Justice Saylor and Justice Mundy dissent.

IN THE

Supreme Court of Pennsylvania

Middle District 159 MM 2017 LE

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, CARMEN FEBO SAN MIGUEL, JAMES SOLOMON, JOHN GREINER, JOHN CAPOWSKI, GRETCHEN BRANDT, THOMAS RENTSCHLER, MARY ELIZABETH LAWN, LISA ISAACS, DON LANCASTER, JORDI COMAS, ROBERT SMITH, WILLIAM MARX, RICHARD MANTELL, PRISCILLA MCNULTY, THOMAS ULRICH, ROBERT MCKINSTRY, MARK LICHTY, LORRAINE PETROSKY, Petitioners,

v.

THE COMMONWEALTH OF PENNSYLVANIA; THE PENNSYLVANIA GENERAL ASSEMBLY; THOMAS W. WOLF, IN HIS CAPACITY AS GOVERNOR OF PENNSYLVANIA; MICHAEL J. STACK III, IN HIS CAPACITY AS LIEUTENANT GOVERNOR OF PENNSYLVANIA AND PRESIDENT OF THE PENNSYLVANIA SENATE; MICHAEL C. TURZAI, IN HIS CAPACITY AS SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES; JOSEPH B. SCARNATI III, IN HIS CAPACITY AS PENNSYLVANIA SENATE PRESIDENT PRO TEMPORE; ROBERT TORRES, IN HIS CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA; JONATHAN M. MARKS, IN HIS CAPACITY AS COMMISSIONER OF THE BUREAU OF COMMISSIONS, ELECTIONS, AND LEGISLATION OF THE PENNSYLVANIA DEPARTMENT OF STATE, Respondents.

On Appeal from the Commonwealth Court of Pennsylvania at No. 261 MD 2017

PETITION TO FILE AMICUS CURIAE BRIEF NUNC PRO TUNC ON BEHALF OF THE AMERICAN CIVIL RIGHTS UNION

LINDA A. KERNS (I.D. NO. 84495)
LAW OFFICES OF LINDA A. KERNS, LLC
1420 Locust Street, Suite 200
Philadelphia, PA 19102
(215) 731-1400
Counsel for American Civil Rights Union



The American Civil Rights Union ("ACRU"), through undersigned counsel, respectfully requests this Court to allow it to file an amicus brief that contains a proposed plan for Congressional Districts in the Commonwealth of Pennsylvania. ACRU submits this request nunc pro tunc.

ACRU respectfully submits that the redistricting map contained in the attached amicus brief will substantially assist the court in developing a final congressional redistricting map. First and foremost, the map was drawn using 2010 census data and 2010 census geography only. It was not drawn using any political affiliation criteria. Second, the proposed map does not protect incumbents or challengers. Third, the map maximizes compactness, using a variety of mathematical tests. Fourth, the map minimizes splits in political subdivisions. This is extremely important, because a minimal number of splits in political subdivisions reduces the ability of any party to politically gerrymander a redistricting plan. In short, the proposed map optimizes traditional redistricting criteria, using only fair, neutral redistricting map.

To ACRU's knowledge, the proposed map presents a plan that has not yet been proposed or presented to the Court by any party. Accordingly, ACRU

submits that its proposal will assist the Special Master in evaluating all other maps, creating a map that minimizes (or eliminates) the use of political data, and, and maximizing, to the extent possible, fair and neutral redistricting criteria.

As noted in its Statement of Interest, ACRU has been actively involved in election matters in the Commonwealth of Pennsylvania for several years. Indeed, undersigned counsel has represented ACRU on a variety of election law matters spanning that time, and she has not been retained solely to weigh in on this redistricting matter. Undersigned counsel has monitored the redistricting proceedings, and recently ACRU determined that it could contribute to the redistricting process by submitting a redistricting map to the Court.

The proposed Amicus Brief is attached at Exhibit 1.

Respectfully submitted,

February 15, 2018

/s/ Linda A. Kerns

Linda A. Kerns, Esquire (ID 84495)
Law Offices of Linda A. Kerns, Esquire
1420 Locust Street, Suite 200
Philadelphia, PA 19102
215-731-1400
Attorney for American Civil Rights Union

CERTIFICATE OF SERVICE

I, the undersigned, certify that a true and correct copy of the foregoing Brief of Amicus Curiae American Civil Rights Union was served upon all counsel of record, via electronic service, on this date, February 15, 2018.

/s/ Linda A. Kerns

Linda A. Kerns, Esquire (ID 84495)
Law Offices of Linda A. Kerns, Esquire
1420 Locust Street, Suite 200
Philadelphia, PA 19102
215-731-1400
Attorney for American Civil Rights Union

EXHIBIT 1

IN THE

Supreme Court of Pennsylvania

Middle District 159 MM 2017 LE

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, CARMEN FEBO SAN MIGUEL, JAMES SOLOMON, JOHN GREINER, JOHN CAPOWSKI, GRETCHEN BRANDT, THOMAS RENTSCHLER, MARY ELIZABETH LAWN, LISA ISAACS, DON LANCASTER, JORDI COMAS, ROBERT SMITH, WILLIAM MARX, RICHARD MANTELL, PRISCILLA MCNULTY, THOMAS ULRICH, ROBERT MCKINSTRY, MARK LICHTY, LORRAINE PETROSKY, Petitioners,

v.

THE COMMONWEALTH OF PENNSYLVANIA; THE PENNSYLVANIA GENERAL ASSEMBLY; THOMAS W. WOLF, IN HIS CAPACITY AS GOVERNOR OF PENNSYLVANIA; MICHAEL J. STACK III, IN HIS CAPACITY AS LIEUTENANT GOVERNOR OF PENNSYLVANIA AND PRESIDENT OF THE PENNSYLVANIA SENATE; MICHAEL C. TURZAI, IN HIS CAPACITY AS SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES; JOSEPH B. SCARNATI III, IN HIS CAPACITY AS PENNSYLVANIA SENATE PRESIDENT PRO TEMPORE; ROBERT TORRES, IN HIS CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA; JONATHAN M. MARKS, IN HIS CAPACITY AS COMMISSIONER OF THE BUREAU OF COMMISSIONS, ELECTIONS, AND LEGISLATION OF THE PENNSYLVANIA DEPARTMENT OF STATE, Respondents.

On Appeal from the Commonwealth Court of Pennsylvania at No. 261 MD 2017

BRIEF FOR AMICUS CURIAE THE AMERICAN CIVIL RIGHTS UNION

LINDA A. KERNS (I.D. NO. 84495)
LAW OFFICES OF LINDA A. KERNS, LLC
1420 Locust Street, Suite 200
Philadelphia, PA 19102
(215) 731-1400
Counsel for Amicus Curiae
American Civil Rights Union

TABLE OF CONTENTS

	Page
I. Statement of Interest	4
II. DESCRIPTION OF AMICUS' REDISTRICTING MAP	5
A. Introduction	5
B. Compactness	6
C. Population	6
D. Political Subdivision Splits	7
III. Conclusion	9

TABLE OF AUTHORITIES

Page

Statutes

52 U.S.C. §20507(I)	5
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IN THE SUPREME COURT OF PENNSYLVANIA

LEAGUE OF WOMEN VOTERS ET AL	:	No. 159 MM 2017
	:	
Petitioners	:	
	:	
v.	:	
	:	
THE COMMONWEALTH OF	:	
PENNSYLVANIA, ET AL.	:	

AMICUS BRIEF BY THE AMERICAN CIVIL RIGHTS UNION

I. STATEMENT OF INTEREST

Amicus Curiae American Civil Rights Union ("ACRU") is a non-partisan 501(c)(3) tax-exempt organization dedicated to protecting the civil rights of all Americans by publicly advancing a Constitutional understanding of our essential rights and freedoms. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed amicus curiae briefs on various constitutional and election issues in cases nationwide, including redistricting cases.

ACRU has been active in the Commonwealth of Pennsylvania, litigating the Commonwealth's compliance with Section 8 of the NVRA, specifically 52 U.S.C. §20507(I). Additionally, ACRU has been working with Pennsylvania state senators and representatives on election integrity issues. The undersigned counsel has been retained by ACRU since 2016 with regard to election integrity issues and has continuously worked with ACRU since that time. ACRU's attorneys (both undersigned counsel and ACRU-retained counsel located in Denver, Colorado) authored this amicus brief. Furthermore, ACRU is solely responsible for paying an expert to develop the proposed map.

II. DESCRIPTION OF AMICUS' REDISTRICTING MAP

A. Introduction

The American Civil Rights Union ("ACRU") respectfully submits the attached redistricting map to assist the Court and Special Master in drawing Congressional districts for the Commonwealth of Pennsylvania. For purposes of brevity, this amicus brief will merely describe the map.

The attached map has been designed to maximize the criteria described by

the Pennsylvania Supreme Court. The map does not take into account the residency of incumbent members of Congress or the residency of candidates for Congress. It does not create potential Voting Rights Act issues. A printed copy of the statewide map is contained at Exhibit A. A printed copy of the southeastern portion of the Commonwealth is contained at Exhibit B. In addition, ACRU has submitted electronic files for the Special Master to examine more carefully.

B. Compactness

This map maximizes compactness across Pennsylvania:

- Under Reock measurements, 14 of 18 districts measure approximately 0.4. Five are above 0.5, and two are above 0.6.
- Under Polsby-Popper measurements, seven districts are above 0.4.
- Under the Population Polygon scores, 12 districts are above 0.8, and three are over 0.9.
- Under the Minimum Convex Polygon measurements, 13 districts score 0.8 or above.

A report containing the compactness scores is contained at Exhibit C.

C. Population

Thirteen districts contain 705,688 residents, and five districts contain 705,687 residents, based upon the 2010 Census.

D. Political Subdivision Splits

The map leaves 53 counties whole, and splits 14 counties. Of the 14 split counties, 11 are only split once, and three are split three times. All three of the counties containing three splits (Philadelphia, Allegheny, and Montgomery) are the largest three counties in the Commonwealth, are large enough to have at least one wholly contained congressional district within their borders, and are split in such a way that each has the maximum number of districts possible contained within them.

Out of the 20 largest counties in Pennsylvania this map keeps Bucks, Delaware, Lancaster, Chester, York, Northampton, Erie, Lackawanna, Washington, Butler, and Beaver counties whole. It only splits Berks, Westmoreland, Lehigh, Luzerne, Dauphin, and Cumberland once. Amicus' proposed plan splits only three boroughs: Dormont in Allegheny County, Nanty Glo in Cambria County, and Larksville in Luzerne. The proposed plan

splits 11 townships: Spring in Berks, South Newton in Cumberland, Lower Swatara in Dauphin, Shirley in Huntingdon, Little Beaver in Lawrence, Upper Saucon in Lehigh, Chestnuthill in Monroe, Hatfield and Lower Merion in Montgomery, Coal in Northumberland, and Hempfield in Westmoreland.

The City of Philadelphia has two districts wholly contained within it. The balance of Philadelphia is combined with Delaware County in the newly formed 7th district.

Only one Census Bureau Voting District ("VTD") in each of the above townships and boroughs is split, and two VTDs in Philadelphia are split. In all, only 16 VTDs are split statewide.

A report summarizing political subdivision splits is contained at Exhibit D.

In lieu of uploading the DBF and SHP files, which were not accepted by the PACFILE system, these files can be found at the following links:

DBF: <https://www.dropbox.com/s/r3lrlva85bp3omd/ACRU%20MAP.DBF?dl=0>

SHP: <https://www.dropbox.com/s/dbnd77n8bniumc7/ACRU.shp?dl=0>

III. Conclusion

We respectfully request that this Honorable Court accepts our proposal.

Respectfully submitted,

/s/ Linda A. Kerns

Linda A. Kerns, Esquire (ID 84495)

Law Offices of Linda A. Kerns, Esquire

1420 Locust Street, Suite 200

Philadelphia, PA 19102

215-731-1400

Attorney for American Civil Rights Union

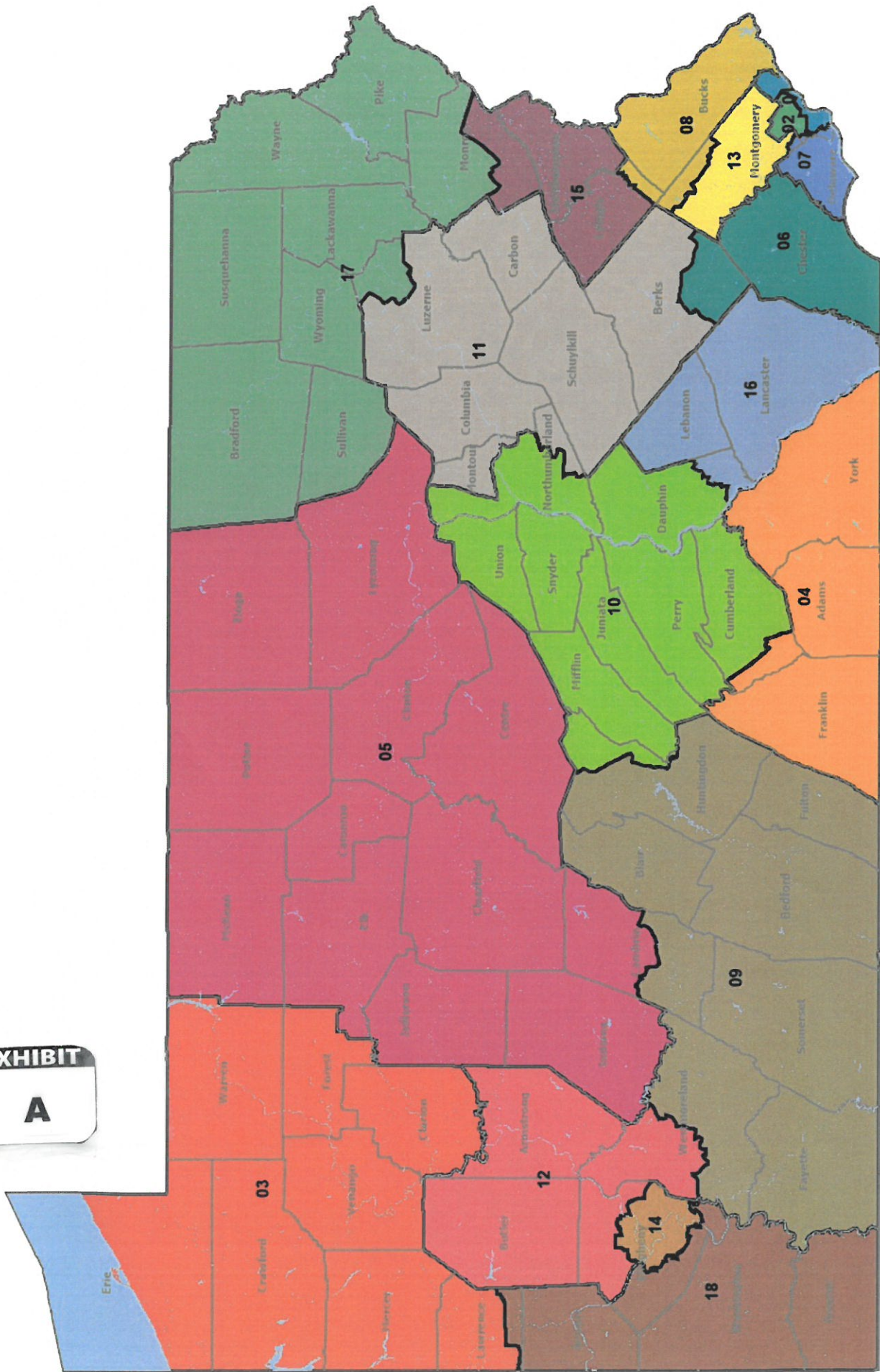
CERTIFICATE OF SERVICE

I, the undersigned, certify that a true and correct copy of the foregoing Brief of Amicus Curiae American Civil Rights Union was served upon all counsel of record, via electronic service, on this date, February 15, 2018.

/s/ Linda A. Kerns

Linda A. Kerns, Esquire (ID 84495)
Law Offices of Linda A. Kerns, Esquire
1420 Locust Street, Suite 200
Philadelphia, PA 19102
215-731-1400
Attorney for American Civil Rights Union

EXHIBIT
A



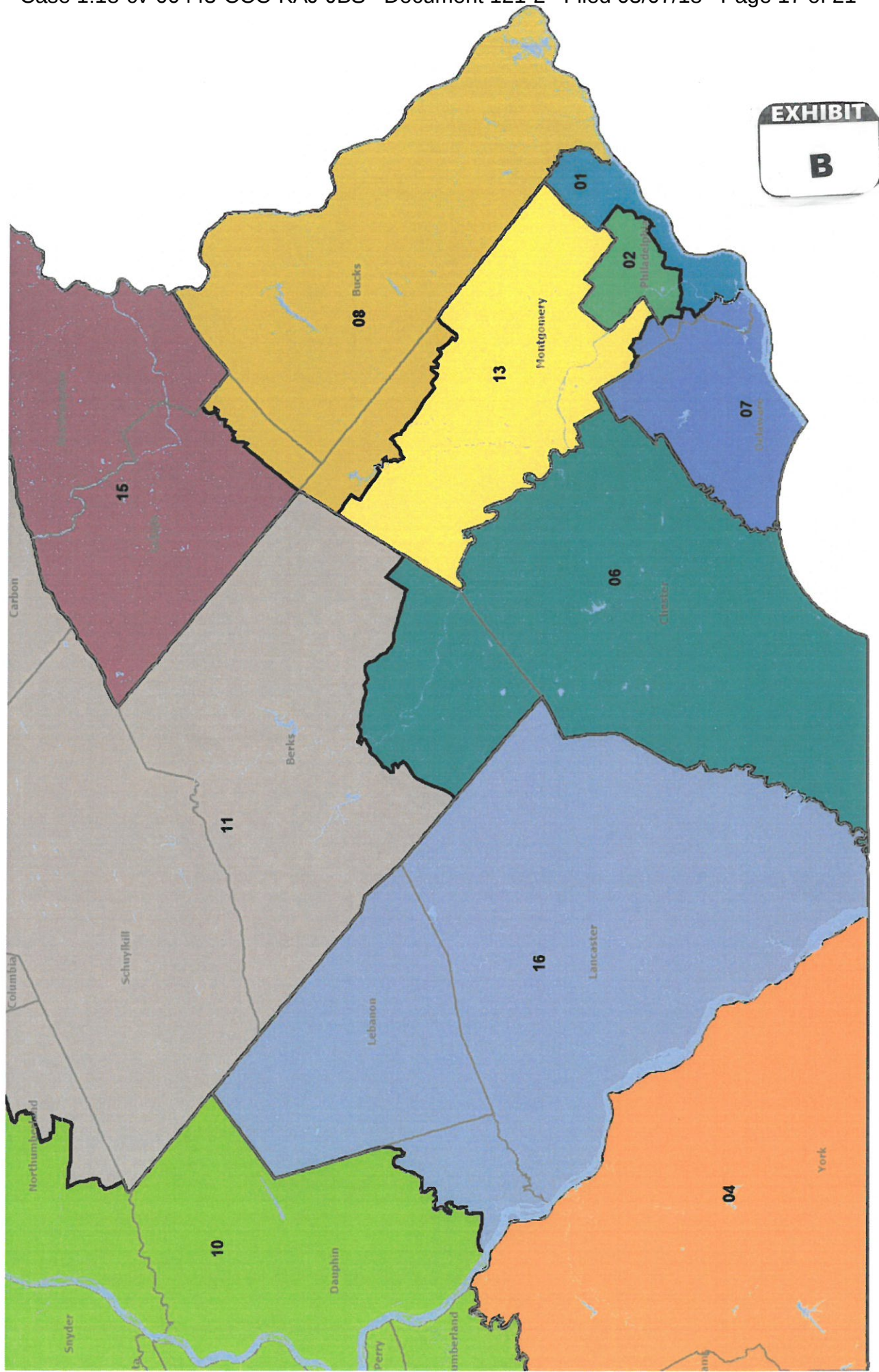


EXHIBIT
B

Plan Name: ACRU
 Plan Type: Congressional
 Date: 2/15/2018
 Time: 11:51:07AM
 Administrator:

Measures of Compactness

2/15/2018

Sum	N/A	N/A	N/A	N/A	N/A
Min	0.22	1.33	0.22	0.47	0.60
Max	0.66	2.08	0.49	0.93	0.89
Mean	0.47	1.57	0.37	0.78	0.81
Std. Dev.	0.11	0.18	0.07	0.14	0.06

DISTRICT	Reock	Schwartzberg	Polsby-Popper	Population Polygon	Min Convex Poly
01	0.22	2.08	0.22	0.60	0.60
02	0.51	1.58	0.40	0.85	0.78
03	0.53	1.33	0.43	0.93	0.81
04	0.30	1.59	0.36	0.83	0.82
05	0.47	1.37	0.49	0.85	0.88
06	0.47	1.68	0.30	0.81	0.75
07	0.53	1.42	0.45	0.89	0.87
08	0.41	1.52	0.40	0.71	0.79
09	0.46	1.52	0.39	0.81	0.87
10	0.58	1.55	0.37	0.89	0.84
11	0.61	1.61	0.37	0.59	0.82
12	0.58	1.61	0.32	0.54	0.80
13	0.39	1.74	0.31	0.68	0.81
14	0.66	1.69	0.29	0.89	0.84
15	0.43	1.56	0.39	0.92	0.79
16	0.48	1.34	0.48	0.93	0.89
17	0.43	1.43	0.43	0.83	0.85
18	0.37	1.70	0.32	0.47	0.82

EXHIBIT

C

Plan Name: ACRU
 Plan Type: Congressional
 Administrator:

Political Subdivisions Split Between Districts

Thursday February 15, 2018

11:55 AM

Number of subdivisions not split:

County 53
 Voting District 9,231

Number of subdivisions split into more than one district:

County 14
 Voting District 25

Number of subdivision splits which affect *no* population:

County 0
 Voting District 0

Split Counts

County

Cases where an area is split among 2 Districts: 11

Cases where an area is split among 3 Districts: 3

Voting District

Cases where an area is split among 2 Districts: 25

County	Voting District	District	Population
<i>Split Counties :</i>			
Allegheny PA		12	244,910
Allegheny PA		14	705,688
Allegheny PA		18	272,750
Berks PA		06	206,802
Berks PA		11	204,640
Cambria PA		05	40,707
Cambria PA		09	102,972
Cumberland PA		04	19,691
Cumberland PA		10	215,715
Dauphin PA		10	215,426
Dauphin PA		16	52,674
Huntingdon PA		09	39,477
Huntingdon PA		10	6,436
Lawrence PA		03	75,216
Lawrence PA		18	15,892
Lehigh PA		08	18,332
Lehigh PA		15	331,165

Plan Name:	H	Administrator:	
Plan Type:	Congressional	User:	
County	Voting District	District	Population
<i>Split Counties (continued):</i>			
Luzerne PA		11	173,595
Luzerne PA		17	147,323
Monroe PA		15	76,787
Monroe PA		17	93,055
Montgomery PA		07	32,079
Montgomery PA		08	62,107
Montgomery PA		13	705,688
Northumberland PA		10	66,175
Northumberland PA		11	28,353
Philadelphia PA		01	705,688
Philadelphia PA		02	705,688
Philadelphia PA		07	114,630
Westmoreland PA		09	157,194
Westmoreland PA		12	207,975
<i>Split VTDs :</i>			
Allegheny PA	DORMONT DIST 03	14	805
Allegheny PA	DORMONT DIST 03	18	501
Berks PA	SPRING TWP DIST 02	06	619
Berks PA	SPRING TWP DIST 02	11	1,777
Cambria PA	NANTY GLO WD 02 ED 02	05	203
Cambria PA	NANTY GLO WD 02 ED 02	09	757
Cumberland PA	SOUTH NEWTON TWP Voting District	04	822
Cumberland PA	SOUTH NEWTON TWP Voting District	10	561
Dauphin PA	LOWER SWATARA TWP DIST 01	10	2,026
Dauphin PA	LOWER SWATARA TWP DIST 01	16	221
Huntingdon PA	SHIRLEY TWP DIST MT. UNION	09	931
Huntingdon PA	SHIRLEY TWP DIST MT. UNION	10	686
Lawrence PA	LITTLE BEAVER TWP	03	1,057
Lawrence PA	LITTLE BEAVER TWP	18	354
Lehigh PA	UPPER SAUCON TWP DIST 01	08	1,082
Lehigh PA	UPPER SAUCON TWP DIST 01	15	1,313
Lehigh PA	UPPER SAUCON TWP DIST 02	08	1,162
Lehigh PA	UPPER SAUCON TWP DIST 02	15	1,308
Lehigh PA	UPPER SAUCON TWP DIST 04	08	5,486
Lehigh PA	UPPER SAUCON TWP DIST 04	15	16
Luzerne PA	LARKSVILLE WD 01	11	189
Luzerne PA	LARKSVILLE WD 01	17	1,345
Monroe PA	CHESTNUTHILL TWP DIST 02	15	1,726
Monroe PA	CHESTNUTHILL TWP DIST 02	17	2,732
Montgomery PA	HATFIELD TWP VTD 3-2	08	2,239
Montgomery PA	HATFIELD TWP VTD 3-2	13	91
Montgomery PA	HATFIELD TWP VTD 4-1	08	1,402
Montgomery PA	HATFIELD TWP VTD 4-1	13	166
Montgomery PA	HATFIELD TWP VTD 4-2	08	131
Montgomery PA	HATFIELD TWP VTD 4-2	13	1,390
Montgomery PA	HATFIELD TWP VTD 5-1	08	490
Montgomery PA	HATFIELD TWP VTD 5-1	13	963

Plan Name:	H	Administrator:	
Plan Type:	Congressional	User:	
County	Voting District	District	Population
<i>Split VTDs (continued):</i>			
Montgomery PA	LOWER MERION TWP WD 10 PCT 02	07	60
Montgomery PA	LOWER MERION TWP WD 10 PCT 02	13	1,295
Northumberland PA	COAL TWP WD 07	10	1,488
Northumberland PA	COAL TWP WD 07	11	128
Philadelphia PA	PHILADELPHIA WD 03 PCT 01	02	90
Philadelphia PA	PHILADELPHIA WD 03 PCT 01	07	687
Philadelphia PA	PHILADELPHIA WD 06 PCT 02	01	19
Philadelphia PA	PHILADELPHIA WD 06 PCT 02	02	623
Philadelphia PA	PHILADELPHIA WD 06 PCT 12	01	105
Philadelphia PA	PHILADELPHIA WD 06 PCT 12	02	525
Philadelphia PA	PHILADELPHIA WD 44 PCT 07	01	141
Philadelphia PA	PHILADELPHIA WD 44 PCT 07	02	694
Philadelphia PA	PHILADELPHIA WD 62 PCT 01	01	1,278
Philadelphia PA	PHILADELPHIA WD 62 PCT 01	02	216
Philadelphia PA	PHILADELPHIA WD 62 PCT 02	01	1,247
Philadelphia PA	PHILADELPHIA WD 62 PCT 02	02	29
Westmoreland PA	HEMPFIELD TWP VTD	09	627
	MIDDLETOWN		
Westmoreland PA	HEMPFIELD TWP VTD	12	364
	MIDDLETOWN		

The New York Times

Democrats Didn't Even Dream of This Pennsylvania Map. How Did It Happen?

They seemed not to believe that they would be allowed to strive for partisan balance in addressing Republican gerrymandering.

By Nate Cohn (<http://www.nytimes.com/by/nate-cohn>) Feb. 21, 2018

Few people expected that the Pennsylvania congressional map (<https://www.nytimes.com/interactive/2018/02/19/upshot/pennsylvania-new-house-districts-gerrymandering.html>), which the state Supreme Court ordered redrawn to undo Republican gerrymandering, would prove to be as favorable to Democrats as the one adopted by the court on Monday.

Perhaps the easiest way to convey the cause for surprise: The new map is better for Democrats — by nearly every measure — than the maps that Democrats themselves proposed.

The New Pennsylvania Map Is Even Better for Democrats Than the Democratic Proposals



Districts won by Democrats in the ...	Current Map	Proposed Democratic Plans				New Map
		Governor	Lt. Gov.	Senate	House	
2016 pres. race	6	7	7	7	7	8
2016 Senate race	4	7	7	6	7	5
Any 2016 race	9	9	10	10	11	11
Average of all 2016 races	5.4	7.4	8.0	7.8	8.2	8.4
Median 2016 Democratic pres. margin	-8.9	-10.6	-9.7	-9.6	-7.8	-5.7

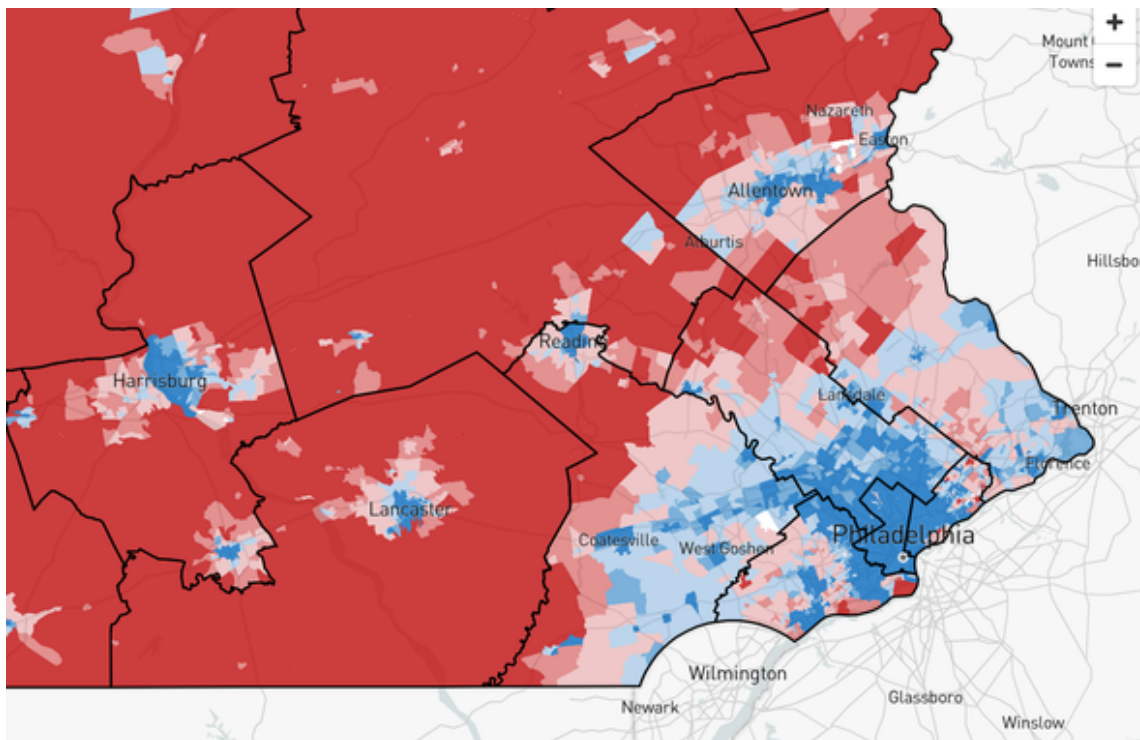
The 2016 races include those for president, Senate, attorney general, auditor general and treasurer.

How could that be?

It is hard to explain. Perhaps all four Democratic map proposals reflected an earnest effort to reach a compromise with Republicans. The more likely explanation is that Democrats did not believe it was realistic to demand such a favorable map, since it would require a series of Democratic-leaning choices. And the court order did not specify that the maps should aim for partisan balance, which might have justified a more Democratic map.

Apparently, a more favorable map was quite realistic; after all, it is now a reality, one that gives a significant boost to Democratic hopes of retaking the House. It's a reality because the newly adopted map consistently makes subtle choices that nudge districts in the direction of Democrats.

Many of those choices are easy to spot on a map. Every potentially competitive Republican-held district juts out to add Democratic areas, like adding York to the 10th District, Lansdale to the First District, Reading to the Sixth District, Stroudsburg to the Seventh District, South Philadelphia to the Fifth District, or Mount Lebanon and Penn Hills to the 17th.



The New Pennsylvania Congressional Map, District by District

Democrats couldn't have asked for much more from the new map.

Feb. 19, 2018

(<https://www.nytimes.com/interactive/2018/02/19/upshot/pennsylvania-new-house-districts-gerrymandering.html>)

There are also subtle choices that are harder to see. They're less about picking and choosing municipalities and more about how to group counties. These choices also often work to the advantage of Democrats, like the decision to center the 12th District in Beaver rather than in Butler County, or to have the Fifth District, rather than the Fourth or the First, take population in Philadelphia.

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Any of these decisions can be justified. It is also possible, although unlikely and unproven, that only this combination of choices yields the absolute minimum number of split counties or municipalities, the key criterion of the court order.

But in all of these cases, there were Republican-leaning alternatives of seemingly comparable merit. Collectively, it's a pattern of augmenting Democratic strength, inching the statewide map closer to partisan parity.

This does not necessarily mean the map amounts to a "Democratic gerrymander," as some have suggested. Over all, it admirably adheres to traditional nonpartisan redistricting criteria, like compactness and the avoidance of unnecessary county splits. But the map makes Democratic-tilting choices so consistently that it is hard not to wonder whether it was part of an intentional effort to achieve partisan balance in a state that is fairly evenly divided.

It would be somewhat surprising, at least to me, if the court drew this map without that goal in mind. Nathaniel Persily, the Stanford professor who helped draw the map, has been barred by the court from discussing it.

A series of pro-Democratic choices would be necessary to create statewide partisan balance, since lopsided winning margins in Philadelphia and Pittsburgh put Democrats at a considerable disadvantage in translating their votes to seats statewide. In fact, the new map still slightly advantages the Republicans with respect to the statewide popular vote.

Perhaps it shouldn't be a surprise if the court strove for partisan symmetry in the context of a partisan gerrymandering case. But the court order did not say that the maps should strive for partisan balance, and it seems that's the reason Democrats did not strive for it, either.

Michael McDonald, an associate professor at the University of Florida, suggests Democrats held back from greater ambition in part because they were protecting incumbents. But there was only one plausibly vulnerable Democratic incumbent to protect, Matt Cartwright, and there is little reason to believe the effort to protect him weakened the Democratic proposals.

Mr. Cartwright's new district voted for President Trump by 10 points; in the Democratic proposals, the district voted for Mr. Trump by an average of nine points. Just as important, even a concerted effort to protect him would have little effect on the overall statewide map. It would be enough to flip the old 15th

District from Mr. Trump to Hillary Clinton (going by 2016 results) but no more. And it wouldn't flip the 15th District in the other contests where Democrats generally fared better, like the 2012 presidential election.

The map comes close to maximizing the number of Democratic opportunities while complying with the court's order to minimize county, municipality or precinct splits except to make sure each district has about the same number of people. Perhaps the only plausible way to substantially improve Democratic chances from here would be to split the city of Pittsburgh, an unlikely choice given the requirement to avoid unnecessarily splitting municipalities.

Over all, it's a huge lift to Democrats' chances. In this political environment, they'd probably be favored to gain around four seats in the state, up from the two they were favored to carry before. They are overwhelming favorites to win the new versions of the old Seventh and modest favorites to win the old Sixth and 15th, with very good additional opportunities in the old Eighth and 12th, and two long-shot options in the old Third and Fourth.

Alone, the approximately two-seat shift toward the Democrats improves the party's chance of reclaiming the House by around 5 percent, and even more if the race remains so competitive heading into Election Day. It further diminishes the already deteriorating Republican structural advantages — including incumbency and geography — that have long been the key to G.O.P. hopes of surviving a so-called wave election in the House.

At the beginning of the cycle, it was hard to identify more than a dozen national races where Democrats would have a 50-50 or better chance to win in a wave election. After this decision — and months of strong Democratic recruitment and a wave of Republican retirements (<https://www.nytimes.com/interactive/2018/01/09/upshot/congress-retirements-tracker.html>) — it's a lot easier to come up with the two dozen seats they need to flip the House. Depending on how recruitment shakes out, five of the party's best 24 opportunities might now be in Pennsylvania.

Nate Cohn is a domestic correspondent for The Upshot. He covers elections, polling and demographics. Before joining The Times in 2013, he worked as a staff writer for The New Republic. @Nate_Cohn (https://twitter.com/Nate_Cohn)

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35

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The New York Times

Hundreds of Simulated Maps Show How Well Democrats Fared in Pennsylvania

The next big debate in gerrymandering may be whether nonpartisan maps should strive for partisan symmetry, or whether they should try to avoid political considerations altogether.

By Nate Cohn (<http://www.nytimes.com/by/nate-cohn>) Feb. 26, 2018

In the view (<http://www.mcall.com/opinion/muschick/mc-opi-pennsylvania-gerrymandering-data-muschick-20180212-story.html>) of the majority of the Pennsylvania Supreme Court, “perhaps the most compelling evidence” that Republicans sacrificed traditional redistricting criteria for partisan gain was a political scientist’s simulation of 500 possible congressional maps.

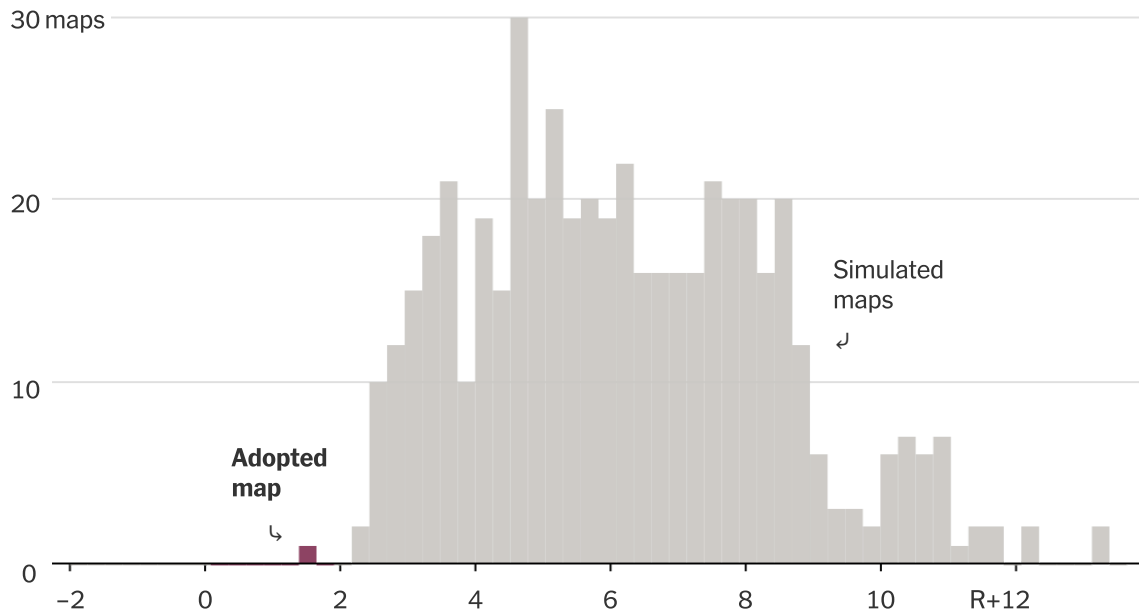
The Republican-drawn map was an extreme outlier compared with the simulations made (<https://www.wired.com/story/pennsylvania-partisan-gerrymandering-experts/>) by Jowei Chen of the University of Michigan, who has provided expert testimony in many redistricting cases. None of the simulations favored Republicans by anywhere near as much as the congressional map enacted in 2011, which gave the Republicans a 13-to-5 advantage. And partly on that basis, the court ruled that the map violated the state's constitution.

But what about the remedial map
(<https://www.nytimes.com/interactive/2018/02/19/upshot/pennsylvania-new-house-districts-gerrymandering.html?action=click&contentCollection=upshot®ion=rank&module=package&version=highlights&contentCollection=upshot>)
recently adopted by the court? It is not an outlier to the same extent as the Republican-drawn map. But if you look at what 2016 statewide results would have been with the new map, the overall Democratic performance arguably would have been better than in all 500 of Mr. Chen's simulations, according to an Upshot analysis.



New Map Favored Democrats Compared With Simulations

Republican advantage in the median congressional district compared with the average 2016 statewide popular vote in 500 simulations and the map adopted by the court.



By The New York Times | Source: Upshot analysis of Jowei Chen simulations, election results from Nathaniel Kelso and Michal Migurski.

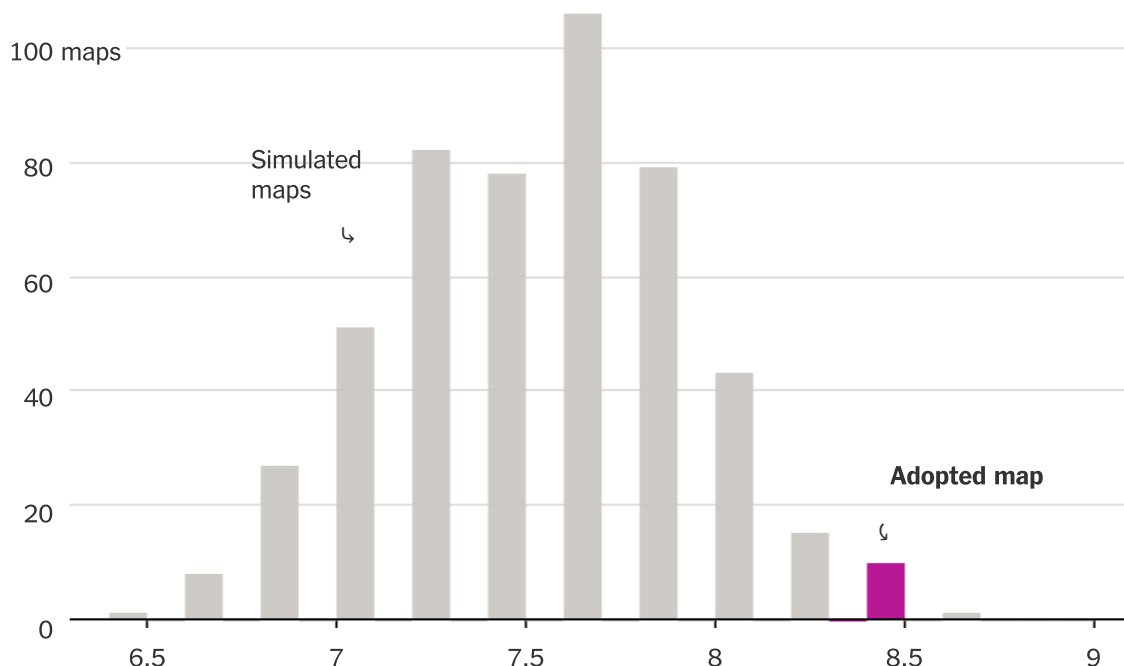
One common measure of a congressional map is to look at the result of the median congressional district in the average statewide election (here, the five contests in 2016). The larger the gap between the median and the average statewide popular vote, the harder it is to win a majority of seats despite winning the popular vote. By that measure, the new map was better for the Democrats than all 500 of Mr. Chen's simulations.

Another measure is simply how many districts the Democrats would have won in various statewide contests (here, the average of how many contests were won across the same five contests). Only one simulation was better for Democrats.

How Many Districts Democrats Would Have Won

Democrats won more districts in only one simulation.

Number of Democratic wins in the average 2016 statewide election in 500 simulated maps and the new adopted map.



Source: Upshot analysis of Jowei Chen simulations, election results from Nathaniel Kelso and Michal Migurski.

The strong Democratic showing compared with Mr. Chen’s simulations doesn’t necessarily indicate that the map is a Democratic gerrymander. For one, the simulations aren’t perfect. And they aren’t necessarily representative of realistic partisan-blind maps. To take a concrete example: The simulations often split the city of Pittsburgh, something few human map-drawers would choose to do given the requirement to avoid unnecessarily splitting municipalities.

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Perhaps more important, the remedial map still slightly favors the Republicans with respect to the statewide popular vote.

In the average 2016 contest on the new map, Democrats would have carried an average of 8.4 districts (out of 18), even though Democrats won the statewide popular vote in the average contest. The median congressional district favored the Republicans by a point in the average 2016 contest.

Over all, the new court-ordered map comes very close to achieving partisan symmetry in an evenly divided state.

The seeming contradiction between the analysis based on partisan symmetry and one based on simulated nonpartisan congressional districts gets at the heart of what may be the next big debate in gerrymandering: whether nonpartisan maps should strive for partisan symmetry, or whether they should try to avoid political considerations altogether.

The question is important because both methods of analysis are routinely employed to identify Republican gerrymanders.

And it is likely to continue to be a question, because it emerges when Democrats are at a geographic disadvantage, as they often tend to be. Just look at Pennsylvania. Democrats waste more votes than Republicans by carrying urban areas, like Pittsburgh or Philadelphia, by more lopsided margins than the Republicans carry their best areas. The result is that the rest of the state, and therefore the rest of its districts, tend to favor Republicans.

If one believes that partisan symmetry should be a goal in redistricting, the new map is eminently fair. It gives both parties a similar chance to translate their votes to seats, and makes no compromises to do so; it still admirably adheres to standard nonpartisan criteria like compactness or minimizing county splits.

The Upshot analysis also helps address a more arcane matter in the debate about the new court-ordered map: why many nonpartisan analysts thought it favored Democrats, even though it seemed to score well — it wasn't an outlier — by the measure of Mr. Chen's analysis. The reason is simple: Most nonpartisan analysts have judged the map by today's electoral landscape, while Mr. Chen's analysis used elections from 2008 and 2010.

Back then, Pennsylvania's political geography did not pose such a severe challenge to Democrats. But since then, the Democrats' geographic disadvantage has worsened. State and national Democrats lost ground in traditionally Democratic areas in western and northeastern Pennsylvania where the party still excelled as late as 2008 and 2010; they gained additional ground in

many urban and suburban areas where Democrats already had an advantage. As a result, Mr. Chen's simulations imply that Democrats were at a notable geographic disadvantage in 2016, but not 2008 or 2010.

Whatever the limitations of these simulations, the fact remains that the court seemed to find this sort of analysis persuasive. The strong Democratic performance on the remedial map adopted last week may imply that the map was drawn with consideration for attaining partisan symmetry, and perhaps even specifically by the measure of average Democratic performance in 2016 statewide elections.

Nate Cohn is a domestic correspondent for The Upshot. He covers elections, polling and demographics. Before joining The Times in 2013, he worked as a staff writer for The New Republic. @Nate_Cohn (https://twitter.com/Nate_Cohn)

A version of this article appears in print on February 26, 2018, on Page A9 of the New York edition with the headline: A Shift in the Political Scales. Order Reprints (<http://www.nytreprints.com/>) | Today's Paper (<http://www.nytimes.com/pages/todayspaper/index.html>) | Subscribe (<https://www.nytimes.com/subscriptions/Multiproduct/lp8HYKU.html?campaignId=48JQY>)

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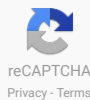
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