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IN THE

# Supreme Court of Pennsylvania
Middle District 159 MM 2017 LE

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, ET AL.,

Petitioners,

v.

THE COMMONWEALTH OF PENNSYLVANIA, ET AL., Respondents.

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

**APPLICATION FOR LEAVE TO FILE AN AMICUS BRIEF IN RESPONSE TO THE CONGRESSIONAL MAP PROPOSED BY PRESIDENT PRO TEMPORE JOSEPH B. SCARNATI, III AND SPEAKER MICHAEL C. TURZAI BY AMICUS BRIEF BY AMICUS CURIAE CONCERNED CITIZENS FOR DEMOCRACY**

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Amicus Curiae Concerned Citizens for Democracy respectfully requests leave to file a second amicus brief in this matter.

Concerned Citizens for Democracy (CCFD) is a think-tank composed of lawyers, computer scientists, and engineers dedicated to developing non-partisan, judicially-manageable standards for redistricting in Pennsylvania.[1]

This brief responds to the Proposed Congressional Map and Brief filed by Senate President Pro Tempore Joseph B. Scarnati and the Speaker of the House Michael C. Turzai on February 9, 2018 and adds new ideas and insights about redistricting process not previously presented to the Court.

We believe this brief will aid the Court and the parties by:

(1)     Demonstrating how the Court's criteria for redistricting can be applied to detect and reject more subtle forms of gerrymandering as demonstrated by the proposed Scarnati-Turzai Map.

(2)     Demonstrating how the Court's criteria for redistricting can be applied to remedy a partisan Congressional map.

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[1] CCFD is a non-profit unincorporated association organized under the laws of Pennsylvania pursuant to 15 P.S. 9111 et seq. Since February of 2017, CCFD has been studying the same criteria for Congressional redistricting recognized by this Court on January 22, 2018. A similar set of criteria, based on Article II, Section 16 of the Pa Constitution was presented by CCFD's expert Anne Hanna in the matter of *Agre v. Wolf*, USDC EDPA No 17-4392.

(3)     Explaining the importance of strictly applying the Court's criteria for redistricting in order to maintain a judicially manageable standard to evaluate proposed maps.

We appreciate the opportunity to contribute to this important topic. The health of our democracy depends on the successful resolution of this issue.

Respectfully submitted,

/s/ Brian A. Gordon

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# CERTIFICATE OF SERVICE

I, the undersigned, certify that a true and correct copy of the foregoing Analysis of the Proposed Remedial Map by Legislative Respondents by Amicus Curiae Concerned Citizens for Democracy was served upon all counsel of record, via electronic service, on this date.

February 15, 2018                    /s/ Brian A. Gordon

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## CERTIFICATE OF SERVICE

I, the undersigned, certify that a true and correct copy of the foregoing Application for Leave to File and Amicus Brief in Response to the Scarnati-Turzai Proposed Remedial Map and Brief by Concerned Citizens for Democracy was served upon all counsel of record, via electronic service, on this date.

February 15, 2018          /s/ Brian A. Gordon

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**AN ANALYSIS OF THE PENNSYLVANIA CONGRESSIONAL MAP PROPOSED BY
PRESIDENT PRO TEMPORE JOSEPH B. SCARNATI, III
AND SPEAKER MICHAEL C. TURZAI**

**AN AMICUS BRIEF BY AMICUS CURIAE CONCERNED CITIZENS FOR DEMOCRACY**

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**Introduction**

On Friday evening February 9, 2018 Legislative Respondents President Pro Tempore of the PA Senate, Joseph B. Scarnati, and the Speaker of the PA House, Michael C. Turzai submitted a Congressional Map (herein "Turzai-Scarnati Map"), attached as Appendix A, that continues to violate the PA Supreme Court's January 22, 2018 Order. While visually improved, the proposed Map is more subtle in its discrimination against Democratic voters and in favor of Republican voters. Specifically, the proposed Map continues the pattern of the 2011 Map of packing Democrats into a limited number of districts, cleansing Democratic voters from suburban Congressional Districts, and cracking remaining concentrations of Democratic voters to allocate those voters into overwhelmingly Republican Districts. As set forth in the Court's Majority Opinion, each of these techniques is an impermissible dilution of an opposing party's voters in violation of the Elections Clause in Article I, Section 5 of the Pennsylvania Constitution.

This brief is not an argument for a gerrymander in favor of Democrats. It is an argument to apply the Court's traditional neutral redistricting criteria strictly, which will preserve a neutral redistricting process and maintain a neutral, judicially manageable standard to evaluate and accept or reject proposed Congressional maps.

As a threshold matter, the Legislative Respondents boast that their map "… retains 68.8% of the populations of existing districts in the same districts" in order to "help reduce overall voter confusion." (Brief of Legislative Respondents in Support of Remedial Map at 13.) This goal has little or no policy value and reinforces the 2011 Map, which was the product of the secretive, aggressively partisan gerrymandering. This goal also violates the Court's guidance that, while criteria other than the four traditional neutral redistricting principles may be legitimate, they must be subordinated to these principles. The Republican Leadership, including Mr. Turzai, demonstrated a studied lack of concern about voter confusion when they created shockingly confusing, tortured, and circuitously shaped districts in their 2011 Map in the $1^{st}$, $6^{th}$, $7^{th}$, $13^{th}$, $16^{th}$, $17^{th}$, $11^{th}$, $9^{th}$, $12^{th}$ and $18^{th}$ Districts. In each of those districts, a voter could go from block to block in the same city, borough, or township and not know the identity of their assigned Member of Congress. It seems rather far-fetched that the Legislative Respondents are now concerned about avoiding voter confusion. A more likely goal of keeping populations of existing districts in the same districts is retaining the partisan advantages achieved in the 2011 Map.

**District by District Analysis of the Scarnati-Turzai Congressional Map**

Below is a district by district analysis of the proposed Scarnati-Turzai Map, followed by a discussion of why strict adherence to the Court's January 22, 2018

Order that Congressional Districts shall be "composed of territory which is compact, contiguous, equal in population and does not split any county, city, incorporated town, borough, township or ward, except where necessary to ensure equality of population" is essential to preserving a neutral, judicially manageable redistricting standard.

**1st District:** The proposed 1st District continues to be non-compact by picking up Democratic performing territory in Chester, Swarthmore, and Nether Providence Township and other parts of Delaware County in order to pack these voters into a Democratic 1st District and cleanse Democratic voting territory from the neighboring 7th District. The designs of the 2nd and 13th Districts further contribute to the non-compactness of the 1st District. The argument that this shape is needed to accommodate the Voting Rights Acts (VRA) is just that: an argument without analysis or data. Furthermore, the addition of territory deep in Delaware County does not explain why the VRA cannot be satisfied by adding territory compactly with abutting municipalities including Upper Darby, Darby and Yeadon or why a tendril remains in high income and non diverse Democratic performing Swarthmore and Nether Providence Township. **Remedy:** Philadelphia, at 2.16 times the target district population, can be divided compactly between the 1st and the 2nd Districts, with a sliver of territory contiguous to the county boundary added to either Delaware or Bucks County as part of the 7th or 8th District.

**2nd District:** The proposed 2nd and 13th Districts are designed in a way that makes the 1st District non-compact. **Remedy:** Divide Philadelphia, at 2.16 times the population of an average district, between the 1st and the 2nd Districts, with a sliver of territory added to the Delaware or Bucks County district.

**13th District:** The proposed 13th District unnecessarily and non-compactly contributes to the split of Montgomery County into four pieces by pushing excess population from Philadelphia into Montgomery County, which is already 1.13 times the size of an ideal district. This addition of territory from Philadelphia packs inner-ring Democratic voting suburbs of Montgomery County into the 13th District, which allows the Republican drafters to carefully distribute the outer ring, Republican and less-Democratic suburbs of Montgomery County between the 6th and 7th Districts in order to improve the Republican vote share of those districts. **Remedy:** Restore the historical structure of the 13th District as a Montgomery County district by constructing the district from the bulk of Montgomery County (1.13 times the size of an ideal district) and subtracting townships along Montgomery County's northeastern border with Bucks County in a linear fashion to equalize populations with the 8th District.

**7th District:** The proposed7th District remains significantly non-compact. Democratic-voting municipalities in Delaware County are carefully carved out into the packed 1st District and a long tendril extends eastward to crack Democratic-

performing regions of Montgomery County, contributing to the unnecessary division of Montgomery County into four pieces. **Remedy:** Make the bulk of Montgomery County into its own Congressional District and construct a more compact 7th District in Chester and Delaware Counties.

**8th District:** The proposed 8th District impermissibly retains 2011's non-compact selection of territory from Montgomery County. Similar to the 2011 Map, the proposed 8th District takes Republican-performing territory from deep inside Montgomery County rather that territory along the Bucks-Montgomery border. This practice allows the designers to preferentially add Republican-voting territory in order to achieve a Republican majority in the 8th District. **Remedy:** Add territory along the border of the 8th District in linear fashion by choosing townships along the Bucks-Montgomery border first before taking territory deeper in Montgomery County.

**6th District:** The proposed 6th District combines carefully-selected portions of Chester, Montgomery, and Berks Counties in a sprawling, non-compact fashion designed to keep this district safely Republican. Democratic-performing Chester County is split, and its western portion is attached to Republican performing townships at the western end of Montgomery County, participating in the unnecessary 4-way split of that county. These territories are then combined with a highly non-compact section of Berks County, which, rather than adding

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municipalities contiguous to the county border, carefully swerves around the Democratic-performing city of Reading to collect primarily Republican-performing portions of the county and ensure Republican dominance in the district. **Remedy:** Expand the 6th district to the west rather than to the north, in order avoid the unnecessary 4-way split of Montgomery County. Select territory to attach in a compact manner, adding all municipalities along the shared boundary before proceeding inward, layer by layer.

**16th District:** The proposed 16th District carefully selects Democratic-performing territory from deep in Berks County rather than contiguous to its border, in order to cleanse Democratic-performing Reading and many of its suburbs from the 6th District. This choice also perpetuates, to some extent, the cracking of the Reading area that was present in the 2011 map, combining it with heavily-Republican Lancaster County to dilute its vote. **Remedy:** Select municipalities contiguous to the boundary first before permitting selection of territory deeper inside the county. Note that requiring territory at the border of a county to be used first to equalize population will protect its county seat – often located toward the center of a county – from being cherry-picked and added to a neighboring, politically opposed district to purposefully dilute the influence of its voters.

**17<sup>th</sup> and 11<sup>th</sup> Districts:** The long, sprawling structure of the 11<sup>th</sup> District carefully combines a chain of Republican-performing counties with Democratic-performing Harrisburg, in order to dilute Harrisburg's influence. Additionally, Democratic-performing portions of Luzerne County are carefully selected for packing into the 17<sup>th</sup> District, without adhering to the Luzerne-Lackawanna county border, in order to ensure maximum Republican advantage in the 11<sup>th</sup> District. **Remedy:** When dividing Luzerne County, select municipalities linearly along the Luzerne-Lackawanna county border, and select a more compact cluster of counties into the 11<sup>th</sup> District.

**14<sup>th</sup> District:** The proposed 14<sup>th</sup> District remains an intentionally packed Democratic district. By retaining a tendril along the Ohio River in the 14<sup>th</sup> District, Democratic voters are cleansed from the 12<sup>th</sup> District. By not following the boundary of Allegheny County and instead taking in more inner-ring suburbs of Pittsburgh, Allegheny County (1.73 times the size of an ideal district) is unnecessarily divided between 3 districts (the 12<sup>th</sup>, the 14<sup>th</sup>, and the 18<sup>th</sup>) rather than 2. This technique adds outer-ring Republican-performing Pittsburgh suburbs to the 12<sup>th</sup> and 18<sup>th</sup> Districts to make them more Republican-leaning, while packing inner-ring Democratic-performing suburbs into the 14<sup>th</sup> District. **Remedy:** Require Allegheny County to be divided between only 2 districts, one of which is completely contained in the county. This can be done by drawing a single dividing

line through the county, with a compact 14th District (including Pittsburgh) on one side and a region 0.73 times the size of a district on the other side. The remainder can be combined with bordering counties to form a single additional district. An example of how to do this is provided in our exemplar map (Attached as Appendix B). The long tendrils should also be removed from the 14th district.

**18th District:** By making the non-compact choice of adding Westmoreland rather than Fayette County to the 18th District, the Republican legislators have cracked the Democratic-performing Monongahela River Valley and made Democratic voters of Fayette County "disappear" into the strongly Republican 9th District. **Remedy:** Add Fayette County to the 18th District instead of the 9th District and choose neighboring territory compactly to fully populate the 18th District. This reconfiguration would make both the 18th and the 9th Districts more compact.

**3rd District:** In the 3rd District, the legislative drafters seem to have realized that they could no longer get away with cracking the city of Erie, as in the 2011 map. To compensate for having to keep Erie County whole, which brings additional Democratic territory into the district, they chose to modify the 2011 map's 3rd District by splitting Crawford County and removing more-Democratic Lawrence County from the district, while retaining consistently and strongly Republican-performing Armstrong and Butler Counties. In doing so, the drafters

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both make their proposed 3<sup>rd</sup> District less compact and mock their own stated goal of keeping voters in familiar districts. This design keeps the 3<sup>rd</sup> District Republican leaning but less compact. **Remedy:** Do not split Crawford County. Move Armstrong and Butler Counties into the proposed 5<sup>th</sup> District, rather than the 3<sup>rd</sup> District. Select neighboring counties into the 3<sup>rd</sup> District in a more compact fashion.

**5<sup>th</sup> District:** The proposed 5<sup>th</sup> District is gerrymandered to complement the contorted shape of the Scarnati-Turzai proposed 3<sup>rd</sup> District. **Remedy:** Remove Armstrong and Butler Counties from the proposed 3<sup>rd</sup> District and add them to the 5<sup>th</sup> District. Do not split Crawford County. Select neighboring counties in a more compact fashion.

In sum, the "Remedial" map proposed by President Pro Tempore Scarnati and Speaker Turzai continues to pick and choose territory with three goals in mind: packing Democrats into a limited number of districts, cracking remaining concentrations of Democratic voters, and distributing Republican territory to maintain a partisan Republican advantage. The design of the proposed Republican map causes unnecessary breaks of county boundaries in the 1<sup>st</sup>, 2<sup>nd</sup>, 13<sup>th</sup>, 7<sup>th</sup>, 6<sup>th</sup>, 12<sup>th</sup>, 18<sup>th</sup>, 14<sup>th</sup>, 3<sup>rd</sup>, and 5<sup>th</sup> Districts. The Counties with unnecessary breaks are almost uniformly those with large concentrations of Democratic voters: Allegheny, Fayette, Delaware, and Montgomery Counties. The purpose of cracking these

Democratic-performing counties is to make Democratic votes "disappear" into Republican-majority Districts.

The design of the proposed Republican map also causes unnecessarily non-compact shapes in the 1$^{st}$, 13$^{th}$, 7$^{th}$, 6$^{th}$, 8$^{th}$, 11$^{th}$, 3$^{rd}$, 12$^{th}$, 14$^{th}$, 18$^{th}$, and 9$^{th}$ Districts. In each case, Republican drafters continued to pick and choose territory to maintain a partisan advantage in as many districts as possible.

It is this more subtle "stealth gerrymandering" which makes the techniques used in the Scarnati-Turzai proposed map so subversive to the goal of ending partisan gerrymandering.

**An Answer to More Subtle Forms of Gerrymandering: Strict adherence to the Court's Redistricting Criteria**

There is an answer to these more subtle forms of gerrymandering: all of these residual attempts to gerrymander by President Pro Tempore Scarnati and Speaker Turzai can be addressed by strictly applying the Court's January 22, 2018 criteria to each Congressional district.

This can be done by: (1) prohibiting breaking any county amongst any more districts than is absolutely necessary to ensure equal population districts; and (2) understanding the requirement for compact districts with minimal county splits to mandate that drafters assemble districts from compact assemblages of whole counties first and then add or subtract entire townships and boroughs at the borders

of counties in a linear fashion before adding or subtracting territory further toward

the center of a county.  A sample Map, applying these criteria, is attached as

Appendix B.  The shapefiles and block equivalency file associated with the sample

map submitted by Concerned Citizens for Democracy on February 4, 2018 can be

accessed by all parties and the public at:

https://drive.google.com/open?id=1QkCWAMhIPGSM62SME5qql5vnEcfjN_T7

For ease of reference, we reiterate a step-by-step approach to create

Congressional Districts which fully comply with this Court's January 22, 2018

Order as follows[1]:

**Step 1**:  Throw out the current unconstitutional partisan-gerrymandered

2011 Map, in which the Legislature selected the voters, instead of allowing

the voters to elect their Members of Congress.

**Step 2**:  Using the 2010 Census, assemble smaller population counties

(below the target population of 705,688 persons) into groupings and divide

larger population counties (above the target population of 705,688 persons) a

minimum number of times to create 18 roughly equal-size Congressional

districts. For example, Philadelphia County, with a population of 2.16

Congressional districts may be divided ONLY 2 times; Montgomery

County, with a population of 1.13 Congressional districts, may be divided

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[1]     See Amicus Brief of Concerned Citizens for Democracy filed in this matter on February 4, 2018 at pp 7-10 and accompanying exhibits.

ONLY 1 time; and Allegheny County, with a population of 1.73

Congressional districts, may be divided ONLY 1 time. This step will yield

an initial map with a population deviation between 5% and 10%.

**Step 3**: To get closer to exactly equal population districts, add or subtract

territory consisting of whole townships, boroughs, towns, or cities, along the

whole border of each divided County in a linear fashion before moving into

or out of a neighboring county. (This is an extremely important step as it

will prohibit picking and choosing territory based on past partisan voting

performance and will help to form very compact districts from the start.)

The drafter must use up ALL of the district-to-district abutting whole

townships, boroughs, towns, and cities before adding the next row of

abutting townships, boroughs, towns, and cities (one municipality removed

from the border municipalities). Continue this process down to the last

whole township, borough or city along the border of each of the 18 districts.

This step will yield an initial map with population deviations of about 2%.

**Step 4**: Then choose one and only one township, borough, town, or ward

along each common border between two districts to divide in order to

equalize population using census block data down to a single person. This

step will allow the drafter to get to ensure districts have equal populations to

within + or – one person (5 districts comprised of 705,687 and 13 districts comprised of 705,688 persons).

**Step 5**:  Look at concentrations of minority voters in any relevant region of Pennsylvania.  Adjust the division of wards or other political subdivisions to ensure that minority votes are not diluted in violation of the Voting Rights Act, 42 U.S.C. §1973 et seq.

Notes:  A drafter may not consider partisan data in forming districts or drawing any boundary lines and must be able to articulate a neutral non-discriminatory reason for any choice made in the redistricting process.  This step-by-step approach is 100% compliant with the Court's January 22, 2018 Order (the "Court's 4-Rule Set").  All 4 criteria are met.

**The Voting Rights Act**

While the Legislative Respondents contend in their Brief in Support of their Proposed Remedial Congressional District Map that the structure of their proposed 1st and 2nd Districts was "necessary as a matter of law to minimize the risk to the Commonwealth of a racial gerrymandering claim under the 14th Amendment and the Voting Rights Act," they fail to engage in the slightest analysis to determine whether there is a necessity to create a second minority-majority district.

In *Thornburg v. Gingles* (1986), the U.S. Supreme Court established a legal framework for assessing such claims of racial gerrymandering under Section 2 of

the Act.[2]  None of these criteria are ever discussed by the Respondents, much less

established as holding true for carefully-specified minority groups in the region.

This suggests that, rather than being a good faith attempt to protect minority voting

rights, the design of these districts is instead an attempt to use the Voting Rights

Act to justify an impermissible political gerrymander.  Instead of protecting

minority influence, these districts are structured to pack Democratic voters,

especially racial minority Democratic voters in the Philadelphia region into as few

districts as possible to preserve the Republican lean of the 7th District. The

Legislative Respondents provide no demographic information to justify this highly

partisan gerrymander.

## Subordination of Traditional Neutral Criteria to Other Ostensibly Neutral Factors

The Legislative Respondents note, in support of their proposed Map, that

they do not pair any incumbent members of Congress seeking re-election in 2018

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[2]     Under the *Gingles* test, plaintiffs must show the existence of three
preconditions:

1.  The racial or language minority group "is sufficiently numerous and
    compact to form a majority in a single-member district";
2.  The minority group is "politically cohesive" (meaning its members tend to
    vote similarly); and
3.  The "majority votes sufficiently as a bloc to enable it... usually to defeat the
    minority's preferred candidate."

in the same district, and that the majority of the existing population of each 2011 district is retained in the same district.

By attempting to preserve district populations as much as possible between the 2011 Map and the proposed Map, the Legislative Respondents plainly and palpably continue to violate the Free and Equal Elections clause of the Pennsylvania Constitution.  The 2011 districts subordinate the traditional neutral principles of compactness and avoidance of county splits in order to dilute Democratic votes, packing Democratic-performing territory into a few districts and cracking and distributing Democratic votes into Republican majority districts where voters will have a reduced chance of electing a Member of Congress who reflects their policy views and political values.  In retaining "68.8% of the populations of existing districts in the same districts" (Brief of Legislative Respondents in Support of Remedial Map at 13), this subordination of compactness and avoidance of county splits to partisan factors is perpetuated in the proposed Map.

In addition, the traditional neutral criteria of compactness and avoiding unnecessary county splits is in several places in this map impermissibly subordinated to the goal of avoiding incumbent contests.[3]  The non-compact shape

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3 Note that technically putting two incumbents' homes into the same district does not force them to either compete for the same seat or move, as there is no legal requirement for a candidate

of the 13th District and its participation in the cracking of Montgomery County are explained, in part, by a desire to avoid pairing 13th District Democratic incumbent Brendan Boyle (residing in northeastern Philadelphia) with either 2nd District Democratic incumbent Dwight Evans (north central Philadelphia) or 8th District Republican incumbent Brian Fitzpatrick (southeastern Bucks County). The 5th District non-compactly incorporates Bradford County rather than allowing this county to be compactly added to the 10th District in order to avoid compactly incorporating a larger section of Lycoming County, which would include the home of 10th District Republican incumbent Tom Marino. This prevents a contest between Marino and 5th District Republican incumbent Glenn Thompson. Similarly, on the western end of the 5th District, Butler County is non-compactly incorporated into the 3rd District, instead of a more geographically natural assignment to the 5th District, in part to avoid a contest between Thompson and 3rd District Republican incumbent Mike Kelly.

Curiously, the 18th District takes an opposite approach to the avoidance of incumbent contests seen elsewhere in the proposed Map. While there is currently no incumbent in this district, the home of Republican special election candidate Richard Saccone (R-Elizabeth Township) is carefully (albeit barely) retained in the 18th District, while the home of Democratic candidate Conor Lamb (D-Mount

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for or member of Congress to live in their district. Congresspersons need only reside in the state they represent.

Lebanon Township) is equally carefully packed into the proposed 14th District. Similarly, the non-compact structure of the 7th District and its participation in the unnecessary 4-way split of Montgomery County serve in part to avoid pairing of the current 6th District Republican incumbent, Ryan Costello, with an announced and strong 6th District Democratic challenger, Chrissy Houlahan.

While the Court has stated that other non-partisan factors may be applied to the creation of Congressional Districts, those factors must be subordinate to the neutral criteria of compactness, contiguity, and minimization of the division of political subdivision.

As the Court stated in its Majority Opinion:

> We recognize that other factors have historically played a role in the drawing of legislative districts, such as the preservation of prior district lines, protection of incumbents, or the maintenance of the political balance which existed after the prior reapportionment. … However, we view these factors to be wholly subordinate to the neutral criteria of compactness, contiguity, minimization of the division of political subdivisions, and the maintenance of population equality among congressional districts. These neutral criteria provide a "floor" of protection for an individual against the dilution of his or her vote in the creation of such districts.

Majority Opinion, February 7, 2018 at 123. Allowing this map to be implemented would therefore permit an unconstitutional gerrymander under Article I Section 5 of the Pennsylvania Constitution.

**Incomplete and Inadequate Reporting of the Statistical Properties of the Proposed Map**

The Legislative Respondents defend their proposed map as complying with the Court's guidelines in part on the basis of the similarity of its proposed statistics to those of the hundreds of randomly-generated maps produced in simulations run by Petitioners' expert Professor Jowei Chen. While it is true that some of the statistical properties of the proposed Map are comparable to, or even, in one case, superior to those of the maps produced in Professor Chen's simulations, some of these statistics are misleadingly presented and interpreted, and statistics which the Legislative Respondents' map fails to satisfactorily match are not reported. It should also be noted that, while an analysis like Chen's can be extremely useful for detecting extreme gerrymandering, it cannot serve as proof that a map was not gerrymandered. This is particularly true when analytical results for the plan in question are misleadingly or incompletely presented.

First, the Legislative Respondents proudly claim that their Map splits only 15 counties, within the range of Chen's "Set One" simulations (those which ignored incumbency protection). They fail, however, to note that 15 county splits is more than were present in the vast majority of Chen's simulated maps (as shown in Figure 3 on page 18 of his expert report). In addition, neither the Legislative Respondents' proposed Map nor any of Chen's maps abide by the best practice of
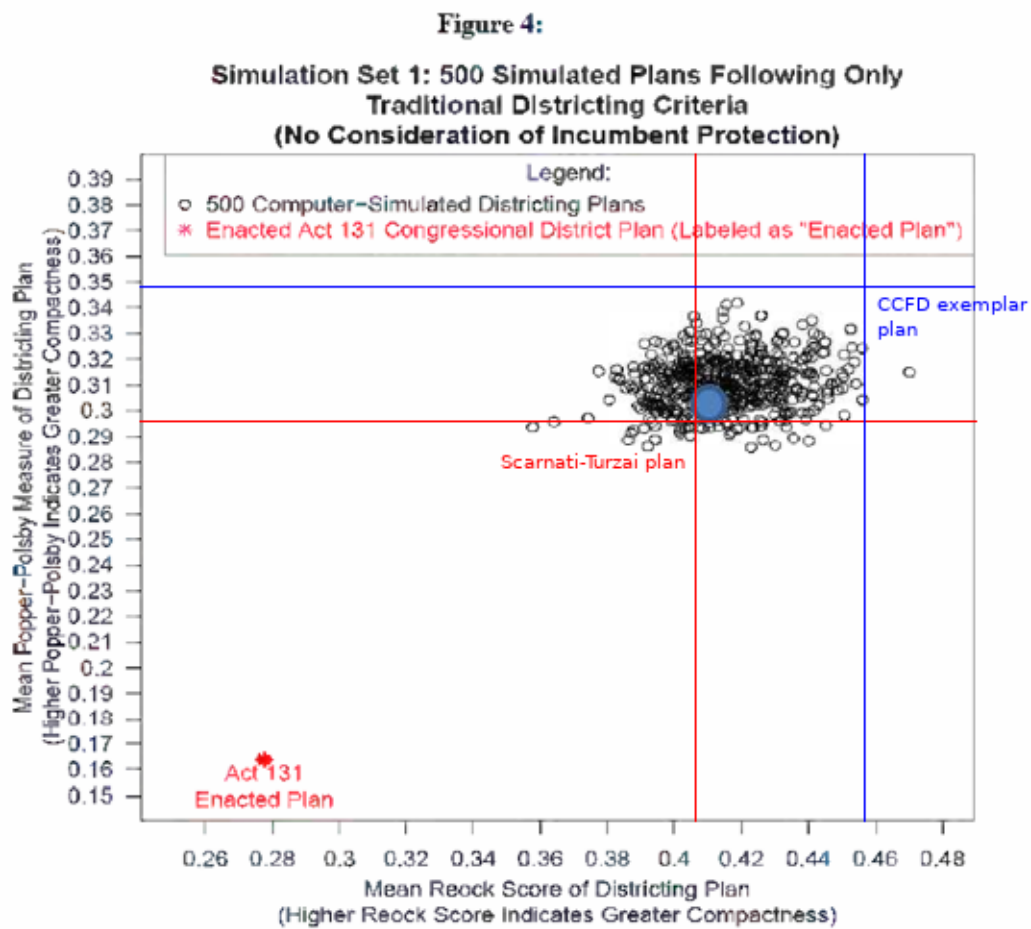
not splitting counties between any more Districts than absolutely necessary.  This reduces the significance of minimization of the number of split counties, since it is often possible to decrease the number of counties split in a map by inappropriately dividing already-split counties amongst too many districts. Either practice allows the drafter to choose territory based of voting patterns for partisan purposes.

Second, the Legislative Respondents observe that their proposed Map splits only 17 municipalities, compared to the 40-58 municipalities split in Chen's "Set One" maps.  While not misleading with respect to Chen's analysis, they vastly overstate the significance of their achievement – as our exemplar map and the associated methodological explanation show, it is not only possible but easy to split only 17 (single-county) municipalities in creating an equal-population districting plan for Pennsylvania with 18 districts. See: Concerned Citizens Amicus brief filed on February 4, 2018 Appendix B 1, 2, and 3. A drafter can simply choose a single municipality to split to equalize populations between each pair of adjacent districts, with Philadelphia being split twice due to its size and so counting as only a single split municipality.  While reducing the municipal split count to this degree certainly reduced the refinement of the gerrymandering in the Legislative Respondents' proposed map, it did not significantly constrain the coarser-grained gerrymandering enabled by their free choice of which municipalities to include in each district without respect for county boundaries, as

well as their free choice of which counties to include in each district without respect for compactness.

Third, the Legislative Respondents present a copy of one of Professor Chen's figures (page 11 of their brief), along with a table of district compactness values (Attachment C to their brief). This figure and table purport to show that their proposed map falls well within the range of compactness scores for Professor Chen's "Set One" simulations. Unfortunately, the results in this figure and table are misleadingly represented. While it is true that the average Reock score of all the districts in their plan is somewhat reasonably within Chen's range, albeit lower than average, this is not true of their average Polsby-Popper score, which is lower than that of the vast majority of Chen's maps. This misrepresentation of their plan's Polsby-Popper score is achieved in a subtle way – all of the reported district compactness scores in their table (Attachment C) are rounded to two digits. This allows them to report their plan's average Polsby-Popper compactness score as 0.30, which they then show on the plot as being just barely within the bulk of the distribution of Chen's plans. However, a more careful computation shows that the Polsby-Popper compactness of their plan is actually slightly lower than this – 0.296, which, given the narrowness of the range of scores amongst Chen's plans (0.286-0.342), is a significant difference. Moreover, careful examination of their plot shows that the center of the blue oval representing the location of their plan in

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Chen's distribution is not even located at their reported score of 0.30 on the

vertical axis of the graph, but is instead very slightly above the value they claim.

The correct location of their plan on this plot is shown as the intersection of the red

lines in the figure below.  The corresponding compactness scores of our exemplar

map (0.349 and 0.457) are also shown for reference as the intersection of the blue

lines.  Note that the true location of the Legislative Respondents' plan shows it as

having a significantly lower Polsby-Popper compactness than the vast majority of

Chen's plans.



**Figure 4:**

Simulation Set 1: 500 Simulated Plans Following Only
Traditional Districting Criteria
(No Consideration of Incumbent Protection)

Finally, the Legislative Respondents notably fail to

mention those analyses on which their plan remains an undeniable outlier relative to Chen's maps: the mean-median test and its partisan balance. Replication of these two analyses, using the partisan information in the official legislative redistricting dataset made public in *Agre v. Wolf*, ED PA 17-4392, shows a mean-median gap of 4.4%, far greater than that of the vast majority of Chen's simulated plans, which ranged from 0.1% to 4.5%. The plan's 12/6 partisan balance in favor of Republicans was also an extremely rare outcome in Chen's analyses, never occurring at all in his "Set One" plans and occurring less than 1% of the time in his "Set Two" (incumbent-protecting) plans.

In short, despite the Legislative Respondents' claims that their map passes Chen's tests, it is still a significant outlier with respect to almost every test and clearly does not satisfy the Court's January 22, 2018 order.

**Argument that Democrats Naturally Congregate in Cities**

While one could argue that Democrats naturally congregate in cities, by the same token one could argue that rural Pennsylvania territory creates Republican districts. Both claims are correct! The issue in avoiding gerrymandering is what happens in suburban districts and mixed rural territory, such as Fayette, Green and Washington Counties in southwestern Pennsylvania; Luzerne, Lackawanna, and Monroe Counties in northeastern Pennsylvania; and Chester, Delaware, Montgomery, and Bucks Counties in southeastern Pennsylvania, when lines are

manipulated for partisan purposes.  The answer is that deviations from the criteria of compactness, contiguity, equal populations, and avoiding the division of municipalities will always allow the drafter who is intent on partisan manipulation of districts to cheat by picking and choosing desired voters for each district.

**Conclusion**

It is for all of the above reasons that courts must look carefully at deviations from the four neutral districting principles to ensure that elections are, indeed, free and equal.  When a proposed map is examined in light of strict application of these neutral criteria, partisan gerrymandering is often clearly apparent even without reference to underlying partisan data and easily provable when partisan data is examined.

Strict adherence to the Court's criteria will create uniform redistricting standards, whether Democrats or Republicans are in control of the redistricting process or even if an independent commission is created.

If exceptions are carved out in the Court's criteria by subordinating them to one additional factor after another, their utility as a neutral judicially manageable standard for the courts to apply in a neutral manner will be eroded or lost.

In Pennsylvania we would never allow one football team to start their drive on the 50 yard line, or one basketball team to shoot at a hoop slightly larger than their opponent, or an ice hockey team to defend a net that is slightly narrower than

their opponent's.[4]  The standards we demand for fair play in sports should be no less stringent that the standards we demand for fair play in elections.

We appreciate that this Court has recognized that rules are needed to protect and preserve our democracy, where citizens truly elect their Members of Congress and correspondingly are not alienated from running for office, supporting candidates or voting. The rules selected by this Court will also restore respect for municipalities and help make representatives more accessible and accountable to their constituents' views and values. By forbidding the polarization of Congressional Districts designed for partisan intent, the Court will help restore peaceful and constructive dialogue where all votes count, and hopefully, civility among Members of Congress.

Finally, while this Court can and should only concern itself with the people of Pennsylvania, the neutral criteria for redistricting, strictly applied, can be a model to the nation.  These rules work in any state with any number of districts. The Pennsylvania Constitution was a light to the young national government in 1776.  So too, can the traditional neutral criteria for redistricting recognized by this

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[4]      This is true whether you are a Steelers or Penguins fan, or an Eagles, Sixers, or Flyers fan.

Court be a light to the nation in restoring democratic elections to the American

People.

Respectfully submitted,


/s/ Brian A. Gordon

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## CERTIFICATE OF SERVICE

I, the undersigned, certify that a true and correct copy of the foregoing Analysis of the Proposed Remedial Map by Legislative Respondents by Amicus Curiae Concerned Citizens for Democracy was served upon all counsel of record, via electronic service, on this date.


February 15, 2018                    /s/ Brian A. Gordon

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