

**In the
Supreme Court of the United States**

Michael C. Turzai, in his capacity as Speaker of the Pennsylvania House of Representatives, and Joseph B. Scarnati III, in his capacity as Pennsylvania Senate President Pro Tempore,
Applicants,

v.

League of Women Voters of Pennsylvania, *et al.*,
Respondents.

**MOTION FOR LEAVE TO FILE AMICUS BRIEF, MOTION FOR LEAVE
TO FILE BRIEF ON 8 ½ BY 11 INCH PAPER, AMICUS BRIEF FOR
AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF
EMERGENCY APPLICATION FOR STAY**

To the Honorable Samuel A. Alito, Jr.
Associate Justice of the United States and
Circuit Justice for the Third Circuit

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MOTION OF THE AMERICAN CIVIL RIGHTS UNION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR STAY

The American Civil Rights Union (the “ACRU”) moves the Court for leave to file the accompanying amicus brief in support of the *Emergency Application for Stay Pending Resolution of Appeal to this Court*. This amicus brief will contribute to a fuller understanding of the important issues facing this Court, as follows:

First, the amicus brief discusses whether the remedial map in fact follows the standards articulated by the Pennsylvania Supreme Court – both the standards the court used to find a partisan gerrymander, as well as the court’s adherence to its articulated redistricting standards. Indeed, the ACRU submitted an amicus brief and proposed redistricting map to the

Pennsylvania Supreme Court, and this amicus brief uses that earlier proposal as a baseline to measure the Pennsylvania court's adherence to its articulated redistricting criteria.

Second, the amicus brief discusses the Pennsylvania Supreme Court's unusual approach to developing a remedial map. The map effectively imposes proportional political representation, and the amicus brief discusses the justification and legal authority for this approach. Additionally, the amicus brief discusses the novel and highly unusual procedures the court followed in developing its remedial map.

Respectfully moved and submitted on this 5th day of March 2018,



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MOTION OF THE AMERICAN CIVIL RIGHTS UNION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR STAY ON 8 1/2 X 11 PAPER

The American Civil Rights Union (the “ACRU”) moves the Court for leave to file their amicus brief in support of the *Emergency Application for Stay Pending Resolution of Appeal to this Court* on 8 ½ by 11-inch paper. The extremely compressed time frame in which the ACRU had to draft and file its brief prevented the ACRU from having it finalized in sufficient time to allow it to be printed and filed in booklet form. The Applicants filed their *Emergency Application for Stay* on February 27, 2018, only one week before ACRU seeks to file its amici brief. Requiring ACRU to file its brief in booklet form will prevent the ACRU from being heard in this matter.

Respectfully moved and submitted on this 5th day of March 2018,



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AMICUS BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR STAY FOR THE AMERICAN CIVIL RIGHTS UNION

INTEREST OF AMICUS CURIAE

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. It also filed an amicus brief, with a proposed redistricting plan, before the Pennsylvania Supreme Court in this case.

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.¹

ARGUMENT

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

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

In striking down the Pennsylvania General Assembly's redistricting map, the

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae made a monetary contribution to its preparation or submission.

Pennsylvania Supreme Court relied heavily on the analysis of Dr. Jowei Chen. According to the court, “[p]erhaps the most compelling evidence concerning the 2011 Plan derives from Dr. Chen’s expert testimony.” *League of Women Voters of Pennsylvania, et al. v. Pennsylvania, et al.*, No. 159 MM 2017, Op. at 125 (Pa. Feb. 7, 2018). 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). *League of Women Voters of Pa.*, Op. at 40 (Pa. Feb. 7, 2018). 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 candidate for congress from their respective districts.

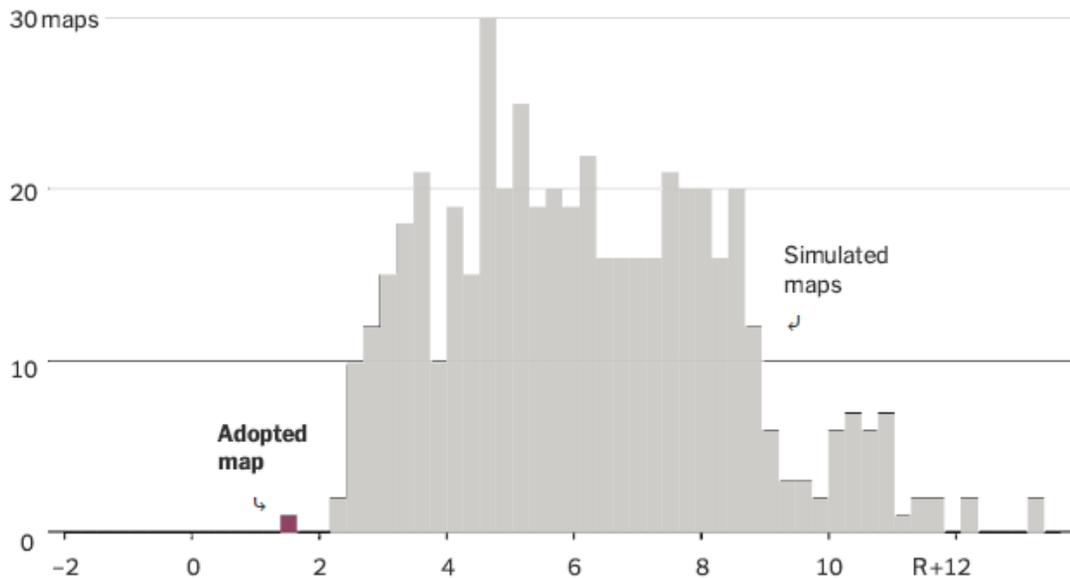
League of Women Voters of Pa., Op. at 39-40 (Pa. Feb. 7, 2018).

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

After the court published its plan, analysis showed that the plan failed the second and third prong of Dr. Chen’s analysis. In short, the court’s 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”):

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.



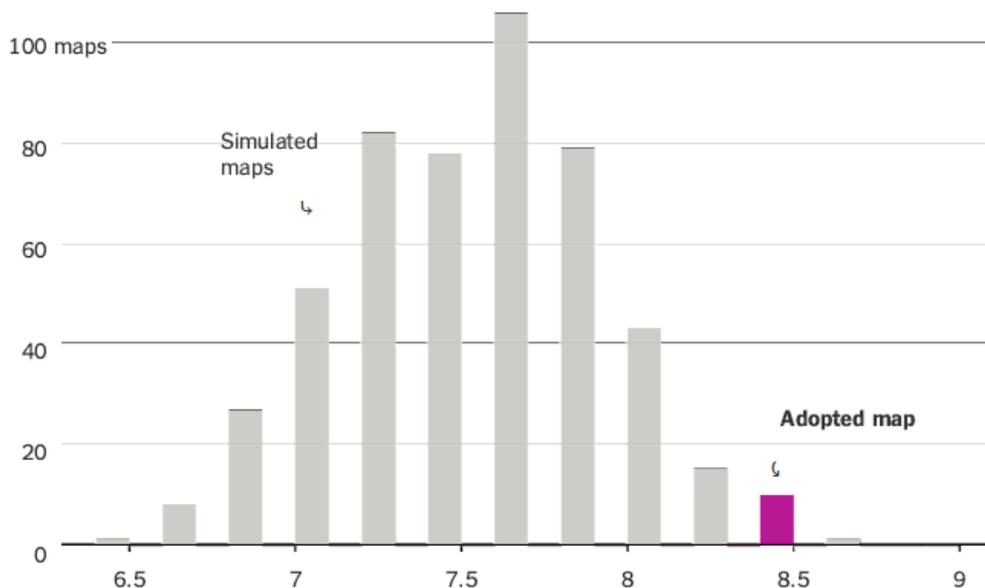
By The New York Times | Source: Upshot analysis of Jowei Chen simulations, election results from Nathaniel Kelso and Michal Migurski.

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>.

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:

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.

Id.

Even though the court relied heavily on Dr. Chen’s statistical analysis to strike down the 2011 map developed by the Pennsylvania legislature, 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.

As part of its analysis striking down the legislative map, the court buttressed Dr. Chen’s conclusions by noting that “Dr. Chen’s testimony in this regard comports with a lay examination of the Plan,” *League of Women Voters of Pa.*, Op. at 127 (*Pa. Feb. 7, 2018*). By that same standard, the court’s heavy Democratic bias widely comports with lay examination. The 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." 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). Indeed, the following chart graphically illustrates how the court gifted an unexpected windfall to Democratic partisans:

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

Id.

Second, numerous 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.” 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>.
- “Democrats couldn’t have asked for much more from the new map. It’s

arguably even better for them than the maps they proposed themselves.” 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>.

- 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. 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>.
- “The new map left Democrats celebrating on Monday.” Elena Schneider, *New Pennsylvania map gives Democrats big boost in midterms*, Politico (February 19, 2018).

Finally, the Pennsylvania court criticized the 2011 legislative map because it “often contain ‘isthmuses’ and ‘tentacles,’” *League of Women Voters of Pa.*, Op. at 128 (*Pa. Feb. 7, 2018*). 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.” Nate Cohn, *Democrats Didn’t Even Dream of This Pennsylvania Map. How 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>.

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

But the 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.

Order, January 22, 2018. 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.

Order, January 26, 2018.

In its order dated February 19, 2018, the Pennsylvania Supreme Court

stated that the remedial map is “superior or comparable” to all plans submitted by the parties, intervenors, and *amici*. Order, February 19, p. 5-6. 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. (Appendix B).

In developing its map, ACRU did not include *any* political or partisan data. It completely ignored whether voters were Republicans, Democrats, or independents. 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):

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.² 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

To be fair, the court in its order argues that it only split 13 counties. February 19, 2018, Order at 6, n. 10. This does not, however, change the above analysis. Overall, the ACRU map has substantially fewer total splits, outperforming the court’s plan.

² “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 (accessed March 4, 2018).

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), but 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.

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-](https://www.cookpolitical.com/analysis/house/pennsylvania-house/new-pennsylvania-map-major-boost-democrats)

[pennsylvania-map-major-boost-democrats](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.

David Wasserman, Twitter, (February 19, 2018),

<https://twitter.com/Redistrict>.

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.

Steven Wolf, *Pennsylvania's groundbreaking new congressional map isn't just nonpartisan—it's fair*, The Daily Kos (February 19, 2018). 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.”

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>.

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 does not run afoul of federal law). Indeed, a state may “allocate political power to the parties in accordance with their voting strength.” In *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973). 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 constitution provided no standards for redistricting, *League of Women Voters of Pa.*, Op. at 119 (*Pa. Feb. 7, 2018*), and it could point to no statute.

Further, this Court's 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

grants it “legislative seats in proportion to its voting potential.” *White v. Regester*, 412 U.S. 755, 765-66 (1973). 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.” *Vieth v. Jubelirer*, 541 U.S. 267, 288 (2004) (plurality op.); see also *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 419 (2006) (plurality op.) (“there is no constitutional requirement of proportional representation”); *City of Mobile v. Bolden*, 446 U.S. 55, 75-76 (1980) (“[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”); *Chapman v. Meier*, 420 U.S. 1, 17 (1975) (“there is no constitutional requirement of proportional representation”).

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, by 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 rejected other traditional standards, such as incumbency protection, solely because the court viewed them as “wholly subordinate” to other, “neutral” criteria. *League of Women Voters of Pa.*, Op. at 123 (*Pa. Feb. 7, 2018*). Beyond this broad statement, the court offered no evidence, no rational, and no explanation.

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

As noted above, the 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 surprising 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. 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). This has

thrust litigants and the American public into the position of former Sovietologists, searching two sentences in the middle pages of 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. *League of Women Voters of Pa., Op. at 34 (Pa. Feb. 7, 2018)*. 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 exercised “extraordinary jurisdiction” over the proceeding. *League of Women Voters of Pa., Op. at 33 (Pa. Feb. 7, 2018)*. It did not allow the district court to develop a remedial map. It did not allow extensive party input into the new remedial map.

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.

CONCLUSION

This court should stay these proceedings until it has an opportunity to review the Pennsylvania Supreme Court's novel and unprecedented Congressional redistricting map.

Respectfully submitted this 5th day of March 2018,



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