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

THE UNIVERSITY OF PITTSBURGH – OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION, *Plaintiff,* v. KRYO, INC. and EBB THERAPEUTICS, LLC, *Defendants*.	Civil Action No. 2:21-cv-1724 Hon. William S. Stickman IV

ORDER OF RECUSAL

AND NOW, this 15th day of February 2022, in accordance with the provisions of 28 U.S.C. § 455, IT IS HEREBY ORDERED that Judge Stickman recuses himself from the above-captioned matter. The Clerk of Court is directed to reassign this case to another member of this Court.

BY THE COURT:

s/ William S. Stickman IV
WILLIAM S. STICKMAN IV
UNITED STATES DISTRICT JUDGE

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IN THE SUPREME COURT OF PENNSYLVANIA

Carol Ann Carter, Monica Parrilla, Rebecca Poyourow, William Tung, Roseanne Milazzo, Burt Siegel, Susan Cassanelli, Lee Cassanelli, Lynn Wachman, Michael Guttman, Maya Fonkeu, Brady Hill, Mary Ellen Balchunis, Tom DeWall, Stephanie McNulty and Janet Temin, Petitioners	:	**CASES CONSOLIDATED**
v.	:	No. 7 MM 2022
Leigh M. Chapman, in her official capacity as the Acting Secretary of the Commonwealth of Pennsylvania; Jessica Mathis, in her official capacity as Director for the Pennsylvania Bureau of Election Services and Notaries, Respondents	:	
Philip T. Gressman, Ron Y. Donagi; Kristopher R. Tapp; Pamela Gorkin; David P. Marsh; James L. Rosenberger; Amy Myers; Eugene Boman; Gary Gordon; Liz McMahon; Timothy G. Feeman; and Garth Isaak, Petitioners	:	
v.	:	
Leigh M. Chapman, in her official capacity as the Acting Secretary of the Commonwealth of Pennsylvania; Jessica Mathis, in her official capacity as Director for the Pennsylvania Bureau of Election Services and Notaries, Respondents	:	

EXCEPTIONS OF DRAW THE LINES PA AMICUS PARTICIPANTS TO THE FEBRUARY 7, 2022 REPORT AND RECOMMENDATION

AND NOW, this 14th day of February, 2022, pursuant to the Court's Order of February 2, 2022, Amicus Participants Adam Dusen, Sara Stroman, Mike Walsh, Myra Forrest, Athan Biss, Michael Skros, Susan Wood, Jean Handley, Daniel Mallinson, Jesse Stowell, Sandra Strauss, Rick Bryant, Jeffrey Cooper, Kyle Hynes, Priscilla McNulty and Joseph Amodei, each of whom is affiliated in some manner with the Draw the Lines PA project (the "DTL Amicus Participants"), take the following exceptions to the February 7, 2022 Report Containing Proposed Findings of Fact and Conclusions of Law Supporting Recommendation of Congressional Redistricting Plan and Proposed Revision to the 2022 Election Calendar/Schedule (the "Report"):

1. The DTL Amicus Participants take exception to the Report's inappropriate deference to the House Bill 2146 ("H.B. 2146") Plan proposed by the Republican Legislative Intervenors, a map that was vetoed by Governor Wolf in accordance with the Pennsylvania Constitution and has not been adopted into law. See Pa. Const. art. IV, § 15. According to the United States Supreme Court, a plan that has been vetoed is not entitled to deference or owed any more than "thoughtful consideration." *Sixty-Seventh Minnesota State Sen. v. Beens*, 406 U.S. 187, 197 (1972); *see also O'Sullivan v. Brier*, 540 F. Supp. 1200, 1202 (D. Kan. 1982) (citing *Beens*, 406 U.S. at 197, for the proposition that deference is not owed to "any plan

that has not survived the full legislative process to become law"). While the Report ostensibly "review[ed] [H.B. 2146] along with the other plans submitted to the Court to assess its compliance with the constitutional . . . [and] non-constitutional factors," Report at 43, the Report improperly accorded deference to H.B. 2146 as "functionally tantamount to the *voice and will of the People*, . . . a device of monumental import [that] should be honored and respected by all means necessary, *id*. at 214 (emphasis added). In the same vein, the Report erroneously concluded that "the Court must find that the decisions and policy choices expressed by the legislative branch are presumptively reasonable and legitimate, absent a showing of an unconstitutional defect or deficiency." *Id.* at 213. In contrast, the Report did not accord any deference to the plan proposed by Governor Wolf, who is himself a representative chosen by a majority of statewide electors (and not solely a particular subset of the state population). Thus, this Court should reject the Special Master's Report as improperly deferential to H.B. 2146.

2. The DTL Amicus Participants take exception to the Report's inappropriate focus on the treatment of one single municipality, the City of Pittsburgh, to the exclusion of consideration of other municipalities throughout the Commonwealth. In particular, the Report erroneously states that the Citizens' Map proposed by the DTL Amicus Participants and various other maps proposed by other parties and Amicus Participants would split the City of Pittsburgh across

congressional districts for the first time "in the history of the Commonwealth." *Id*. at 194. This is incorrect. To the contrary, Pittsburgh was regularly split among multiple Congressional districts until the 1980s redistricting cycle. *Id*. at 148; *see also* https://www.redistricting.state.pa.us/ for redistricting summaries from 1943, 1951, 1962 and 1972, each including splits of Pittsburgh). There are several legitimate reasons why it would be appropriate to split the City of Pittsburgh among two Congressional districts, such as achieving compactness, which the Report acknowledges is better achieved with a split of Pittsburgh, Report at 155, and political competitiveness, *see infra* ¶ 3. While the Report generally references H.B. 2146's jurisdictional splits, it provides no specific analysis of such splits, in contrast to extended discussion of the proposed split of Pittsburgh in several proposed maps. *See, e.g.*, Report at 144, 148–52. Of the four reasons cited in the Report for rejecting the Citizens' Plan, three concerned the Plan's proposed split of Pittsburgh. *Id.* at 201. Similarly, four of the five reasons cited in the Report for rejecting Governor Wolf's proposed map, and three of the five reasons cited for rejecting Senate Democratic Caucus Plans 1 and 2, concerned the maps' proposed split of Pittsburgh. *Id.* at 200-02. The Report's inappropriate focus on the treatment of a single municipality, the City of Pittsburgh, to the exclusion of analysis of the treatment of other municipalities warrants its rejection by this Court.

3. The DTL Amicus Participants take exception to the Report's recommendation that the Citizens' Map should not be adopted. *Id.* at 201. The Citizens' Map is superior to the other maps submitted to the Commonwealth Court in terms of the constitutional factors of "compactness, contiguity, minimization of the division of political subdivisions, and maintenance of population equality" recognized by this Court. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 816–17 (Pa. 2018). As noted in the Report, the Citizens' Map scores at or near the top of several compactness metrics, *see* Report at 141, tbl. 1 (depicting the high scores of the Citizens' Map—referred to therein as the "CitizensPlan"—in the Polsby-Popper, Reock and Pop-Polygon metrics), and, according to Governor Wolf's expert, Dr. Moon Duchin, ranks approximately third among all plans in terms of overall compactness, *id.* at 147. Although omitted from the Report's comparison, the Citizens' Map ties with the Senate Democratic Caucus 2 Plan for the least total number of jurisdictional divisions of any map submitted to the Court (46). *See id.* at 147. Finally, all districts in the Citizens' Map are composed of either 764,864 or 764,865 people—a deviation of one person, which the Report noted is "as nearly equal in population as practicable." *Id.* at 137. The Citizens' Map is compliant with the Voting Rights Act and, as Dr. Duchin noted, "[is] far superior at leveling the partisan playing field," particularly in comparison to H.B. 2146, which "consistently convert[s] close elections to heavy Republican representational advantages." *Id.* at

82 (internal citation omitted). The Citizens' Map, the final product of five public mapping competitions, was created with unprecedented public engagement and input and reflects the values that over 7,200 Pennsylvanians, representing 40 of Pennsylvania's 67 counties, have declared as important to them. For these reasons, the Court should reject the Report's recommendation that the Citizens' Map should not be adopted as the plan of the Commonwealth.

4. The DTL Amicus Participants take exception to each and every subsidiary question within the issues identified in these Exceptions.

Dated: February 14, 2022

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

By: */s/ John P. Lavelle, Jr.*

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IN THE SUPREME COURT OF PENNSYLVANIA

Carol Ann Carter, Monica Parrilla, Rebecca Poyourow, William Tung, Roseanne Milazzo, Burt Siegel, Susan Cassanelli, Lee Cassanelli, Lynn Wachman, Michael Guttman, Maya Fonkeu, Brady Hill, Mary Ellen Balchunis, Tom DeWall, Stephanie McNulty and Janet Temin, Petitioners	:	**CASES CONSOLIDATED**
	:	No. 7 MM 2022
v.	:	**BRIEF OF DRAW THE LINES PA AMICUS PARTICIPANTS IN SUPPORT OF THEIR EXCEPTIONS TO THE FEBRUARY 7, 2022 REPORT AND RECOMMENDATION**
Leigh M. Chapman, in her official capacity as the Acting Secretary of the Commonwealth of Pennsylvania; Jessica Mathis, in her official capacity as Director for the Pennsylvania Bureau of Election Services and Notaries, Respondents	:	
Philip T. Gressman, Ron Y. Donagi; Kristopher R. Tapp; Pamela Gorkin; David P. Marsh; James L. Rosenberger; Amy Myers; Eugene Boman; Gary Gordon; Liz McMahon; Timothy G. Feeman; and Garth Isaak, Petitioners	:	John P. Lavelle, Jr. (Pa. ID No. 54279) MORGAN, LEWIS & BOCKIUS LLP 1701 Market Street Philadelphia, PA 19103-2921 +1.215.963.4824 john.lavelle@morganlewis.com
v.	:	*Counsel for the DTL Amicus Participants*
Leigh M. Gressman, in her official capacity as the Acting Secretary of the Commonwealth of Pennsylvania; Jessica Mathis, in her official capacity as Director for the Pennsylvania Bureau of Election Services and Notaries, Respondents	:	

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(CONTINUED)

Page(s)

OTHER AUTHORITIES

Statement of Interest of Draw the Lines Amicus Curiae Participants

The Draw the Lines ("DTL") Amicus Participants are members of Draw the Lines PA, a civic engagement project founded in 2016 and developed and hosted by the Committee of Seventy, Pennsylvania's oldest and largest 501(c)3 nonpartisan good government organization. Draw the Lines PA is a nonpartisan education and engagement initiative that has attempted to demonstrate that ordinary Pennsylvanians, when given the same digital tools and data used in the political redistricting process, can, through a fair and transparent process, produce voting districts that are objectively better by standard mapping metrics.

Draw the Lines PA created the Citizens' Map with the input of more than 7,200 Pennsylvania citizens. To do so, Draw the Lines PA hosted competitions open to anyone in Pennsylvania and compiled more than 1,500 maps drawn by individuals and teams throughout the state to create the Citizens' Map.

The DTL Amicus Participants have a direct interest in the outcome of this case, as they have submitted the Citizen's Map to the Court and believe it to be the best plan the Court will consider. The Citizen's Map has not only scored at or near the top in every metric compared to the other maps submitted, but also best reflects the priorities of everyday Pennsylvania citizens.

SUMMARY OF ARGUMENT

Amicus Participants Adam Dusen, Sara Stroman, Mike Walsh, Myra Forrest, Athan Biss, Michael Skros, Susan Wood, Jean Handley, Daniel Mallinson, Jesse Stowell, Sandra Strauss, Rick Bryant, Jeffrey Cooper, Kyle Hynes, Priscilla McNulty and Joseph Amodei, each of whom is affiliated in some manner with the Draw the Lines PA project (the "DTL Amicus Participants"), respectfully submit this brief pursuant to the Court's Order of February 2, 2022 in support of their three exceptions to the Special Master's February 7, 2022 Report Containing Proposed Findings of Fact and Conclusions of Law Supporting Recommendation of Congressional Redistricting Plan and Proposed Revision to the 2022 Election Calendar/Schedule (the "Report"). First, the Report erroneously accorded deference to the plan proposed in House Bill 2146 ("H.B. 2146"). Second, the Report inappropriately made splitting the City of Pittsburgh disqualifying and failed to conduct the proper constitutional analysis, which would have demonstrated that the Citizens' Map proposed by the DTL Amicus Participants (also referred to as the "Draw the Lines' Plan") was the most successful plan in minimizing splits of political subdivisions. Third, the Report failed to recognize that in consideration of all of the constitutional factors of compactness, contiguity, minimization of the division of political subdivisions and maintenance of population equality, the Citizens' Map is superior to the other maps submitted.

ARGUMENT

I. The Plan Proposed In House Bill 2146 is Entitled to No Deference.

The Special Master erroneously afforded the plan proposed in H.B. 2146, a bill that was vetoed by the Governor and never signed into law, special and deferential treatment to which it was not entitled. There is no precedent that suggests partisan proposals are somehow more authoritative than congressional redistricting plans that have been thoroughly and thoughtfully authored with comment and participation from non-partisan groups and individual citizens. The Report acknowledges extensive precedent recognizing that redistricting maps that were merely proposed by a branch of government but not adopted into law are owed no deference. Report at 42. However, the Report nevertheless accords substantial deference to the plan proposed in H.B. 2146 as purportedly "functionally tantamount to the voice and will of the People", and in doing so disregards Supreme Court precedent on point, and the weight of authority to the contrary. In deciding that the plan proposed in H.B. 2146 was entitled to deference, the Special Master circumvented, and failed to conduct, the proper constitutional analysis of determining which map is the best proposal for Pennsylvania voters. If that had been done, the Citizens' Map would have been selected, for the reasons discussed, *infra*.

A. **The Report Failed to Follow the Applicable Legal Precedent.**

First, in concluding that the plan proposed by the Republican Legislative Intervenors -- H.B. 2146 – was entitled to deference the Report ignored extensive relevant precedent. According to the United States Supreme Court, a plan that has been vetoed is not owed any more than "thoughtful consideration[.]" *Sixty-Seventh Minnesota State Sen. v. Beens*, 406 U.S. 187, 197 (1972); *see also O'Sullivan v. Brier*, 540 F. Supp. 1200, 1202 (D. Kan. 1982) (citing *Beens*, 406 U.S. at 197, for the proposition that deference is not owed to "any plan that has not survived the full legislative process to become law."); *Johnson v. Wisconsin Elections Comm'n*, 967 N.W.2d 469, 490 n.8 (Wis. 2021); *Hartung v. Bradbur*y, 33 P.3d 972, 979 (Or. 2001) (rejecting the argument that deference is owed to the Legislative Assembly's plan of reapportionment vetoed by the Governor); *Wilson v. Eu*, 823 P.2d 545, 576 (Cal. 1992) (rejecting argument that "special deference be given to the various plans passed by the Legislature but vetoed by the Governor.").

The Report's efforts to avoid this substantial authority are unavailing and should be rejected. The Report erroneously cited *Upham v. Seamon*, 456 U.S. 37 (1982) and *Perry v. Perez*, 132 S. Ct. 934, 941 (2012) for the propositions that district courts are not free to disregard the political program of state legislatures when fashioning reapportionment plans and legislative backed plans deserve deference. Report at 43. But *Upham* and *Perry* did not involve partisan

redistricting bills that had been vetoed by the Governor, and in fact, involved a very different process whereby under Texas law the district court had to pre-clear the legislature's plan. Furthermore, the U.S. Supreme Court has recognized that, under the Elections Clause, "legislative action in districting the state for congressional elections shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power." *See Smiley v. Holm*, 285 U.S. 355, 372-73 (1932); *see also Arizona State Legis. v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 806 (2015) (reaffirming *Smiley*). In this Commonwealth, the Governor has the authority under the Commonwealth's constitution to veto election-related legislation. The Governor exercised that authority to veto H.B. 2146. Thus, the Report erred in ignoring the Supreme Court's guidance in *Beems* that vetoed reapportionment plans are entitled to no more than "thoughtful consideration."

B. The Report Erred in According Deference to the Plan Proposed In H.B. 2146.

The Report is deferential to the plan proposed in H.B. 2146 not because it is a superior plan but simply because it was proposed by the General Assembly – or, more specifically, by the Republican Legislative Intervenors whose caucus currently controls the General Assembly. The Report declared that it would analyze H.B. 2146 in the same manner as the other plans submitted. Report at 208, para. 61. However, the Report failed to follow its own proclamation and relied on

logical fallacy in its decision to treat H.B. 2146 more favorably than any other proposed redistricting plan.

First, the Report erroneously asserts that the legislative branch is entitled to greater deference than the executive branch and "the decisions and policy choices expressed by the legislative branch are presumptively reasonable and legitimate, absent a showing of an unconstitutional defect or deficiency." Report at 213, ¶ 90. There is no legal authority cited by the Report for the breathtaking and fallacious conclusion that "policy choices" incorporated in a bill passed by the General Assembly that is vetoed and not adopted into law "are presumptively reasonable and legitimate[.]" *Id.* The Report also states that "HB 2146 represents '[t]he policies and preference of the state,' … and constitutes a profound depiction of what the voters in the Commonwealth of Pennsylvania desire, through the representative model of our republic and democratic form of government, when compared to the Governor or any other of the parties or their *amici*." Report at 214, ¶ 93. The Report concludes that "the interests of the Commonwealth … would best be served by factoring in and considering that *HB 2146 is functionally tantamount to the voice and will of the People* … and should be honored and respected by all means necessary." Report at 214, ¶ 94 (emphasis added).

There is no basis, however, to assume that the policy choices of the legislative branch in drawing a redistricting plan are presumptively reasonable and

legitimate, while assuming the choice of the duly elected governor to reject the redistricting plan is not. Additionally, the Report offers no explanation why the plan proposed by Governor Wolf, who is himself a representative chosen by a majority of statewide electors (and not solely a particular subset of the state population), was not entitled to similar weight. Notably, Pennsylvania's Constitution provides a path for the General Assembly to override a Governor's veto and enact a vetoed plan into law—a path the Republican Legislative Intervenors have not attempted to take with respect to H.B. 2146. *See* Pa. Const. art. IV, § 15; *see also* Am. Post-Hearing Submission of Intervenor-Resp. Gov. Tom Wolf at 46 (explaining that, based upon the initial votes on H.B. 2146, the legislature would not be able to obtain the requisite supermajority required to override the Governor's veto). H.B. 2146, a bill that "never obtained the official status of a duly enacted statute" (Report at 213, ¶ 91), should be afforded no deference in judicial review and should stand on the same footing as the other plans submitted. Thus, this Court should reject the Report's recommendation that this Court adopt and implement HB-2146 because it was based on unwarranted deference.

II. The Report Inappropriately Gave Splitting the City of Pittsburgh Near-Dispositive Weight, And Ignored Overall Performance on Minimizing Splits of Political Subdivisions.

As discussed further below, the Citizens' Map was the best of all the maps on the constitutional criteria of minimizing the division of political subdivisions, with only 46 subdivisions. The Report, however, ignored this completely – not even mentioning this excellent performance in its summary. Report at 147 (FF39), 193 (¶ 23). Instead, the Report focused myopically on the City of Pittsburgh alone and, inexplicably, suggested that the parties had a burden (not found in the law) to prove why splitting the City of Pittsburgh was necessary. The Report then concluded that splitting the City of Pittsburgh was disqualifying and rendered the Citizens' Map less desirable than H.B. 2146 or other maps that kept together the City of Pittsburgh but split many more jurisdictions. Report at 201 (citing splitting the City of Pittsburgh as three of the four reasons for rejecting the Citizens' Plan); *see also* Report at 200-02 (citing splitting the City of Pittsburgh as three of the four reasons for rejecting the Governor's Plan and three of the five reasons for rejecting the Senate Democratic Caucus Plans 1 and 2). Nowhere does the Report offer an explanation as to why the City of Pittsburgh should be treated differently than other political subdivisions. Moreover, in connection with this improper focus on the City of Pittsburgh, the Report misstates the history of congressional redistricting.

A. The DTL Amicus Participants Were Not Required to Prove the "Necessity" of Splitting the City of Pittsburgh Specifically.

The Report reasoned that neither the DTL Amicus Participants nor any other party proposing a Pittsburgh split had produced "any credible evidence as to why it was 'necessary' to split [Pittsburgh][.]" Report at 194, ¶ 27. This requirement is not found anywhere in the law. Instead, it appears the Special Master arrived at this evidentiary requirement based on an erroneous reading of both the Pennsylvania Constitution and this Court's opinion in *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018) ("*LWV II*"). First, the Report cited to the Pennsylvania Constitution Article II, Section 16, which states that: "[u]nless absolutely necessary *no county, city, incorporated town, borough, township or ward shall be divided*…" Report at 148 (CL1) (emphasis added). However, the Pennsylvania Constitution creates no special burden to prove the necessity of splitting the City of Pittsburgh in particular, just as it would create no special burden for splitting any other specific individual municipality. Rather, as indicated by this Court in *League of Women Voters II*, any proposed redistricting plan must endeavor to minimize jurisdictional splits overall, which the Citizens' Map has done. *See LWV II*, 178 A.3d at 814-15.

Second, the Report concluded that splitting Pittsburgh was disqualifying because it was not necessary to "ensure equality of population." Report at 148

(CL1), citing *LWV II*, 178 A.3d at 816-717 (congressional districts shall not "divide any county, city, incorporated town, borough, township, or ward, *except where necessary to ensure equality of population*") (emphasis added). While it is true that some maps achieved population equality without splitting Pittsburgh, they did so by splitting more total political subdivisions. For example, the H.B. 2146 plan and the Gressman Plan both create 49 total splits, the Reschenthaler Plans 1 and 2 split 54 and 53 respectively, and the Carter Plan creates 57 total splits. Report at 143-146 (FF7-34); 157 (FF15). This Court's *League of Women Voters II* decision did not require that a proposed redistricting plan afford any special deference to the City of Pittsburgh in balancing the neutral criteria of achieving population equality while minimizing jurisdictional divisions. Further, nowhere does the Report address why the Republican Legislative Intervenors were not required to justify the necessity of splitting any of the 16 municipalities the H.B. 2146 plan would split. Here, it is undisputed that the Citizens' Map achieves the highest level of population equality (with a population deviation of only 1 person), and the lowest number of jurisdictional splits (46) of all plans proposed. *See infra* at p.19. In contrast, the H.B. 2146 plan would leave the City of Pittsburgh intact but create 49 total splits. The Report's focus on the City of Pittsburgh to the exclusion of consideration of other jurisdictional splits was inappropriate and should be rejected.

B. The Special Master's Report Inappropriately Overweighted Secondary Factors in Concluding that Splitting Pittsburgh Into Two Congressional Districts was a Dispositive Issue

The Citizens' Map was superior to H.B. 2146 and other maps which propose to keep Pittsburgh in a single Congressional district because, *inter alia*, it had substantially fewer splits of political subdivisions – a key constitutional neutral criteria. Despite this, the Report concluded that three other secondary factors weighed against plans that proposed splitting Pittsburgh: eschewing proportionality, preserving historical practice, and preserving Pittsburgh as a "community of interest[.]" Report at 201. Though the Report recognized that these factors should be viewed as secondary to the constitutional neutral criteria, it not only afforded these issues substantial weight, but also relied on erroneous conclusions of law, incorrect factual statements, and uncredible expert opinion to justify rejecting any plan that proposed to split Pittsburgh into two Congressional districts.

1. *The Citizens' Map Does Not Propose to Impermissibly Create Proportional Political Representation by Splitting Pittsburgh.*

The Pennsylvania Citizens' Map is the result of 7,200 Pennsylvanians sharing their opinions and priorities about the best way to create new congressional districts in their state. In addition to optimizing for constitutionally required criteria, the Citizens' Map's creators identified increasing political competitiveness within a congressional district as one of Pennsylvanians' top priorities. Report at

201 (citing Villere Report at 4). Splitting the City of Pittsburgh not only achieves lower jurisdictional splits and increased overall compactness without sacrificing population equality, it also increases political competitiveness by creating two competitive districts where one non-competitive Democratic district had existed. *Id.* To the extent increasing political competitiveness (and therefore *decreasing* the likelihood that one part or another has a guaranteed advantage) is a "political factor," this Court has explicitly stated that these "political factors can operate at will" so long as they do not contravene constitutional requirements. *Holt v. 2011 Legis. Reapportionment Comm'n*, 67 A. 3d 1211, 1235-36 (Pa. 2013). However, in an effort to frame splitting Pittsburgh as an impermissibly political recommendation, the Report mischaracterizes both Pennsylvania and federal law to reach the conclusion that increasing political competitiveness constitutes an unlawful "balancing the representation of the political parties[.]" Report at 176.

The Report confuses the Citizens' Plan's goal of creating more competition within a single congressional district with an effort to advantage the Democratic Party state-wide. This is incorrect. Some level of partisan consideration is permissible in redistricting. *See Holt,* 67 A.3d at 1235-36. Notably, the H.B. 2146 plan is far *more* partisan than the Citizens' Map: H.B. 2146 advantages Republicans by 6.3% according to Dr. DeFord (Report at 173) while the Citizens' Map advantages Republicans by only 3.5% as discussed *infra*). The Special Master

nevertheless concludes with no evidence that the Citizens' Map's motivations for splitting Pittsburgh are impermissibly partisan. Report at 178. The Report also cites *Vieth v. Jubelirer* for the principle that "the Constitution guarantees no right to proportional representation." 541 U.S. 267, 352 fn7 (2004) (citations omitted). However, the Report neglects to explain that in this decision the Supreme Court defines "proportional representation" as "a set of procedural mechanisms used to guarantee, with more or less precision, that a political party's *seats in the legislature* will be proportionate to its share of the vote." *Id.* (emphasis added). Plainly, this definition does not encompass increasing political competitiveness within a single congressional district. In fact, increasing competitiveness actually *decreases* the likelihood of proportional representation by decreasing the number of congressional seats guaranteed to be won by one party or another.

2. *Splitting Pittsburgh Among Two Congressional Districts Aligns with Historical Pennsylvania Redistricting Maps.*

The Report also erroneously stated that the Citizens' Map proposed by the DTL Amicus Participants and four other maps proposed by other parties and Amicus Participants would split the City of Pittsburgh across congressional districts "apparently for the first time in the history of the Commonwealth." Report at 194, 201. While it is true that "preservation of prior district lines" is a legitimate "subordinate" factor (Report at 161), the notion that Pittsburgh has "remained within a single congressional district in all previous districting plans" is

factually incorrect. To the contrary, the City of Pittsburgh was routinely split into multiple congressional districts up until the 1980s. Report at 148; *see also* https://www.redistricting.state.pa.us/maps/ (redistricting summaries from 1943, 1951, 1962 and 1972, each including splits of Pittsburgh). Thus, to the extent historical practice be given any consideration, in recent history the City of Pittsburgh has been split into multiple Congressional districts at least as often as not. The Report's reliance on the erroneous conclusion that splitting Pittsburgh is a "novel proposition" should be given no weight in this Court's decision.

3. *The Special Master's Unsupported Conclusion that Pittsburgh is a "Community of Interest" Cannot Be the Basis for Rejecting the Citizens' Map.*

Finally, as further justification that Pittsburgh should not be split, the Report wrongfully elevated the goal of preserving communities of interest above constitutional criteria. To do this, the Report concluded without citation to any precedent that "although compactness, contiguity, and respect for municipal boundaries are undoubtedly the primary tool for evaluating the constitutionality of a redistricting plan, we understand these principles serve to advance the Free and Equal Elections Clause's overarching goal of protecting the interest of communities." Report at 153. Even if the preservation of communities of interest generally were a dispositive factor in evaluating redistrict plans, it is anything but clear that the City of Pittsburgh constitutes one singular community of interest.

The Special Master relies on the testimony of Dr. Keith Naughton, who gave analysis on how the different maps under considerations addressed communities of interest. Dr. Naughton "has 'no particular experience in redistricting,' and has never served as an expert in redistricting litigation before." Report at 93 (FF215). Further, "Dr. Naughton explained that 'much of [his] professional career has been dedicated to helping Republican candidates in Pennsylvania win their seats." *Id.* at 94 (FF218). Given this lack of expertise and potential for partisan bias, the Court should accord Dr. Naughton's opinion that the City of Pittsburgh constitutes a community of interest the same weight as the lay opinion of any other Pennsylvanian.

There is not a uniform legal definition in this Commonwealth of a "community of interest." The Report recognizes that the term encompasses "school districts, religious communities, ethnic communities, geographic communities which share a common bond due to locations of rivers, mountains and highways[.]" Report at 153, quoting *Holt,* 38 A.3d at 746. Michigan's Constitution provides an alternate definition, stating that "communities of interest may include, but shall not be limited to populations that share cultural or historical characteristics or economic interests." Mich. Const. art. IV, § 6(13)(c). Both definitions leave room for interpretation of what groups or neighborhoods have shared interests.

One person may feel strongly that Pittsburgh's municipal boundaries are sacrosanct and must be held together in a single Congressional District. But another person may believe that as soon as you cross the Monongahela River and go through the Fort Pitt Tunnel, you may technically still be in Pittsburgh but you have entered an entirely new community, with different needs and a different culture.

Ultimately, Draw the Lines leaned on the weight of its mappers, particularly those from Allegheny County, that were drawing their own districts. From the 1,500 maps submitted to the Draw the Lines competition, a plurality of them used the three rivers confluence as a natural dividing line around Pittsburgh. Thus, what makes the Citizens' Map so strong is that it was developed using input from 7,200 Pennsylvanians, each of whose opinions are just as credible as Dr. Naughton's on something as basic as Pennsylvania culture and what their neighborhood should be like.

In the end, the Report's conclusion that it was impermissible to split the City of Pittsburgh into two Congressional Districts arose from numerous legal and factual errors. Here, the Citizens' Plan split less political subdivisions than any other plan, and under the neutral constitutional criteria, that is much more important than whether any one jurisdiction was split.

III. The Citizens' Map is Superior to the Other Maps Submitted.

The Report erroneously failed to give sufficient weight to the constitutional neutral factors that this Court has explained govern congressional redistricting. Instead, it focused on partisan fairness, but turned this analysis on its head to require that Republican majorities be preserved. When the correct constitutional analysis is applied, it is clear that the Citizens' Map proposed by the DTL Amicus Participants is superior to the other maps submitted. In addition to excelling in all the constitutional criteria, the Citizens' Map was created with unprecedented public engagement and input and reflects the values that over 7,200 Pennsylvanians, representing 40 of Pennsylvania's 67 counties, have declared as important to them.

A. Neutral Constitutional Criteria Favor the Citizens' Map.

In *League of Women Voters II*, this Court laid out the congressional redistricting standards that are necessary to comply with the Free and Equal Elections Clause in the Pennsylvania Constitution, Article I, Section 5. Specifically, this Court explained that the key factors were "the neutral criteria of compactness, contiguity, minimization of the division of political subdivisions, and maintenance of population equality among congressional districts." *LWV II*, 178 A.3d at 817. The evidence demonstrates that the Citizens' Map for congressional

redistricting is far superior to the H.B. 2146 Plan that the Report recommended when evaluated under these criteria.

Dr. Moon Duchin, an expert retained by Governor Wolf, is a Professor of Mathematics and a Senior Fellow at Tufts University who has published numerous scholarly works on redistricting. Report at 74-75 (FF112-13). Dr. Duchin also runs an interdisciplinary research lab focused on geometric and computational and analytical aspects of redistricting. Report at 75 (FF114). Dr. Duchin placed the Draw the Lines Plan in the top tier (Tier One) on neutral criteria (along with Governor's Plan, Voters of the Commonwealth and Reschenthaler I). Report at 79-80 (F138) (recognizing it as meeting "a high excellence standard for traditional criteria"). H.B. 2146, in contrast, was not in either Dr. Duchin's "high excellence standard" tier of plans or the lower "excellence standard" tier. *Id.* at 79-80 (FF138-39).

Looking at the neutral criteria one by one yields the same result. In each category, the Citizens' Map is either equal or superior to the H.B. 2146 plan. First, the Citizens' Map satisfied the contiguity requirement, as did the other proposed maps. Report at 137 (CL1-3). Second, as to population equality, Citizens' Map met the standard that districts be created "as nearly equal in population as practicable," with a deviation of only 1 person, consistent with most other plans, and better than the Carter Plan and House Democratic Plan. Report at 138 (CL1-

2). However, with respect to the other two neutral factors, the Citizens' Map is clearly superior. As to compactness, the Citizens' Map scores at or near the top of several compactness metrics (Polsby-Popper, Reock, Pop-Polygon metrics) and is superior to HB-2146 in four out of five of these metrics. Report at 141(FF4 tbl 1). According to Dr. Duchin, the Citizens' Map ranks approximately third or fourth among all maps submitted in terms of overall compactness, while the H.B. 2146 plan was not ranked as highly. Report at 147 (FF1-3). And as to minimization of the division of political subdivisions, the Citizens' Map was at the top -- tied with the Senate Democratic Caucus 2 Map for the least total number of jurisdictional divisions of any map submitted to the Court. Report at 145 (FF23-24) (concluding that the Citizens' Map had 46 subdivisions); Report at 144 (FF19) (Senate Democratic Caucus 2 Map had 46 subdivisions); Report at 147 (FF39) and 193 (¶ 23) (stating that the plan which divided the fewest political subdivisions was the Senate Democratic Caucus 2 with 46 subdivisions, but failing to mention the Citizens' Map). Thus, under the constitutional factors the Citizens' Map should be adopted as the plan of the Commonwealth.

B. Partisan Fairness Also Favor the Citizens' Map.

In addition to the neutral factors, "partisan gerrymandering" is impermissible under the Pennsylvania Constitution because it "dilutes the votes of those who in prior elections voted for the party not in power to give the party in

power a lasting electoral advantage[.]" *LVW II,* 178 A.3d at 813-14, 817 (where the neutral criteria are subordinated to "gerrymandering for unfair partisan political advantage" the congressional districting plan violates the Pennsylvania Constitution). When examining the Citizens' Map properly under the lens of partisan fairness, it is superior to H.B. 2146 and the other alternate plans.

As Dr. Duchin explained, the Governor's Plan and the Draw the Lines' Plan "are far superior at leveling the partisan playing field," whereas H.B. 2146 "consistently convert[ed] close elections to heavy Republican representational advantages." Report at 82 (FF151). The Report erred in discounting this testimony and instead reasoning that due to the geographic clustering of Democrats in Pennsylvania, it is a *fait accompli* that any map that attempts to minimize the inherent advantage awarded to the Republican Party is a partisan gerrymander. *Id.* at 197, ¶ 40 (concluding it was partisan gerrymandering when the lines drawn "negate a natural and undisputed Republican tilt that results from the objective, traditional, and historical practice whereby Democratic voters are clustered in dense and urban areas"). Yet, there is no law that says a political party is guaranteed a certain share of representation based simply on such geographic distribution. Rather, maps must minimize partisan bias for either party to the greatest extent possible under Pennsylvania's Free and Equal Elections Clause, consistent with the other Constitutional criteria. *See LWV II,* 178 A.3d at 817.

That is what the Citizens' Map accomplishes. In selecting the H.B. 2146 map, the Report improperly concluded that a map giving "heavy Republican representational advantages" was permissible, but a map that was superior in all constitutional criteria was not because it attempted to neutralize that advantage.

The Report also erred in concluding that "based on its credited efficiency gap score, [the Citizens' Map] provides a partisan advantage to the Democratic party in contravention to the natural state of political voting behavior and bias towards Republicans in Pennsylvania." Report at 201. In fact, the publicly available website PlanScore gives the Citizens' Map an efficiency gap of 3.5% in favor of Republicans when not factoring in the power of incumbency. *See* https://planscore.campaignlegal.org/plan.html? 20220112T114256 .829958524Z; *see also* Report at 113-14 (FF335) (explaining the 3.5% efficiency gap in favor of Republicans). This means Republicans would win an extra 3.5% of 17 seats, or an extra half-seat. *Id.* (FF335) When factoring incumbency, there is a 0.2% gap in favor of Republicans. Report at 114 (FF336). Moreover, when analyzing the Citizen Map's mean-median difference, Dr. DeFord concluded that it was 1.6% in favor of Republicans. Report at 170-71 (FF20).

To conclude that the Citizens' Map provides a partisan advantage to Democrats, the Report also relied heavily on an unreliable analysis from Dr. Michael Barber. Dr Barber agreed that his analysis did not consider a number of

variables, including the voting results of all recent statewide elections, Voting Rights Act requirements, equal population requirements (his simulations improperly allowed for a variance of 30), the splitting of wards, or communities of interest concerns. Report at 92-93 (FF212). Moreover, Dr. Barber does not have the proper credentials to serve as a reliable expert. As Legislative Reapportionment Commission Chairman Mark Nordenberg noted, Dr. Barber "has not published a single academic article in the areas for which his expert testimony was being presented." *See* Meeting of the Pennsylvania Legislative Reapportionment Commission Approval of a Final Plan, at p. 18 (Feb. 4, 2022) (available at www.redistricting.state.pa.us/resources/Press/2022-02-04%20Chairmans%20 Statement.pdf.) Chairman Nordenberg largely dismissed Dr. Barber's analysis on the legislative maps because other academics could not accurately replicate his work. *Id.* The Court should do the same here.

Lastly, the Report erroneously concluded that Draw the Lines' incumbent pairings showed greater partisan influence.[1] Specifically, the Report noted that since Pennsylvania lost one seat in the U.S. House of Representatives, one set of incumbents must be paired in a single district, and that how these incumbents are

[1] The Report acknowledged that protection of incumbents is not "a constitutionally required, or necessarily dispositive consideration," and "wholly subordinate" to the constitutional criteria as stated in *LVW II*, 178 A.3d at 817, but still considered this factor. Report at 178 (CL1).

paired could be used to assess whether a proposed plan was partisan. Report at 178-79 (FF1-2). The Report concluded that it would be most non-partisan and desirable if the two Democratic incumbents who were not seeking re-election (Lamb and Doyle) were paired with each other or other Democratic incumbents. Report at 179 (FF4-5). Because Draw the Lines did not do so, but paired three Republican incumbents with one Democrat, the Report wrongly concluded that its map was more partisan. Report at 181 (FF24-25). In fact, six Republican-held districts require adding people to meet the new population target (764,865), while all but two Democratic-held districts will need to shed population to meet the target population.[2] This will require more Republican-held districts to expand geographically. Thus, it makes more sense to pair Republican incumbents together in light of the neutral constitutional criteria, as the Citizens' Map has done.

In conclusion, the Citizens' Map is superior to the H.B. 2146 Republican map selected by the Report both on the constitutional neutral criteria, and the additional metrics that are important to Pennsylvanians, like competitiveness, and limiting partisan bias (as discussed further below).[3] Moreover, it was created with

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[2] *See* https://data.census.gov/cedsci/table?g=0400000US42%245000000&y=2020&d=DEC%20Redistricting%20Data%20%28PL%2094-171%29&tid=DECENNIALPL2020.P1 (2020 census data reflecting total population in each PA district).

[3] In addition, the Report acknowledges that the Citizens' Map has the same number of majority-minority districts as H.B. 2146 (and most of the other maps) and that it

unprecedented public engagement and input. It is a composite map that incorporates what over 7,200 Pennsylvanians, representing 40 of Pennsylvania's 67 counties, collectively mapped through public Draw the Lines competitions over the last four years, and reflects the values that mappers declared as important to them. The Citizens' Map, in effect, represents the everyday Pennsylvania, and the Special Master erred in not recommending it.

IV. CONCLUSION

For the foregoing reasons, the Exceptions of the DTL Amicus Participants should be granted, and this Court should adopt the Citizens' Map as the final Congressional redistricting plan.

Dated: February 14, 2022

Respectfully submitted,

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was likely to be compliant with Section 2 of the Voting Rights Act. Report at 182-183.

CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing of confidential information and documents differently than non-confidential information and documents.

/s/ John P. Lavelle, Jr.
John P. Lavelle, Jr. (Pa. ID No. 5427)

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service by PACFile eService as follows:

All counsel of record

Dated: February 14, 2022

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

RUCHO ET AL. *v.* COMMON CAUSE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

No. 18–422. Argued March 26, 2019—Decided June 27, 2019*

Voters and other plaintiffs in North Carolina and Maryland filed suits challenging their States' congressional districting maps as unconstitutional partisan gerrymanders. The North Carolina plaintiffs claimed that the State's districting plan discriminated against Democrats, while the Maryland plaintiffs claimed that their State's plan discriminated against Republicans. The plaintiffs alleged violations of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, and Article I, §2. The District Courts in both cases ruled in favor of the plaintiffs, and the defendants appealed directly to this Court.

Held: Partisan gerrymandering claims present political questions beyond the reach of the federal courts. Pp. 6–34.

(a) In these cases, the Court is asked to decide an important question of constitutional law. Before it does so, the Court "must find that the question is presented in a 'case' or 'controversy' that is . . . 'of a Judiciary Nature.'" *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 342. While it is "the province and duty of the judicial department to say what the law is," *Marbury* v. *Madison*, 1 Cranch 137, 177, sometimes the law is that the Judiciary cannot entertain a claim because it presents a nonjusticiable "political question," *Baker* v. *Carr*, 369 U. S. 186, 217. Among the political question cases this Court has identified are those that lack "judicially discoverable and manageable standards for resolving [them]." *Ibid.* This Court's partisan gerrymandering cases have left unresolved the question whether such claims are claims of *legal* right, resolvable according to *legal* princi-

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*Together with No. 18–726, *Lamone et al.* v. *Benisek et al.*, on appeal from the United States District Court for the District of Maryland.

ples, or political questions that must find their resolution elsewhere. See *Gill* v. *Whitford*, 585 U. S. ___, ___.

Partisan gerrymandering was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution. They addressed the election of Representatives to Congress in the Elections Clause, Art. I, §4, cl. 1, assigning to state legislatures the power to prescribe the "Times, Places and Manner of holding Elections" for Members of Congress, while giving Congress the power to "make or alter" any such regulations. Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering. But the Framers did not set aside all electoral issues as questions that only Congress can resolve. In two areas—one-person, one-vote and racial gerrymandering—this Court has held that there is a role for the courts with respect to at least some issues that could arise from a State's drawing of congressional districts. But the history of partisan gerrymandering is not irrelevant. Aware of electoral districting problems, the Framers chose a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress, with no suggestion that the federal courts had a role to play.

Courts have nonetheless been called upon to resolve a variety of questions surrounding districting. The claim of population inequality among districts in *Baker* v. *Carr*, for example, could be decided under basic equal protection principles. 369 U. S., at 226. Racial discrimination in districting also raises constitutional issues that can be addressed by the federal courts. See *Gomillion* v. *Lightfoot*, 364 U. S. 339, 340. Partisan gerrymandering claims have proved far more difficult to adjudicate, in part because "a jurisdiction may engage in constitutional political gerrymandering." *Hunt* v. *Cromartie*, 526 U. S. 541, 551. To hold that legislators cannot take their partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities. The "central problem" is "determining when political gerrymandering has gone too far." *Vieth* v. *Jubelirer*, 541 U. S. 267, 296 (plurality opinion). Despite considerable efforts in *Gaffney* v. *Cummings*, 412 U. S. 735, 753; *Davis* v. *Bandemer*, 478 U. S. 109, 116–117; *Vieth,* 541 U. S., at 272–273; and *League of United Latin American Citizens* v. *Perry*, 548 U. S. 399, 414 (*LULAC*), this Court's prior cases have left "unresolved whether . . . claims [of legal right] may be brought in cases involving allegations of partisan gerrymandering," *Gill,* 585 U. S., at ___. Two "threshold questions" remained: standing, which was addressed in *Gill*, and "whether [such] claims are justiciable." *Ibid.* Pp. 6–14.

Syllabus

(b) Any standard for resolving partisan gerrymandering claims must be grounded in a "limited and precise rationale" and be "clear, manageable, and politically neutral." *Vieth,* 541 U. S., at 306–308 (Kennedy, J., concurring in judgment). The question is one of degree: How to "provid[e] a standard for deciding how much partisan dominance is too much." *LULAC*, 548 U. S., at 420 (opinion of Kennedy, J.). Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. Such claims invariably sound in a desire for proportional representation, but the Constitution does not require proportional representation, and federal courts are neither equipped nor authorized to apportion political power as a matter of fairness. It is not even clear what fairness looks like in this context. It may mean achieving a greater number of competitive districts by undoing packing and cracking so that supporters of the disadvantaged party have a better shot at electing their preferred candidates. But it could mean engaging in cracking and packing to ensure each party its "appropriate" share of "safe" seats. Or perhaps it should be measured by adherence to "traditional" districting criteria. Deciding among those different visions of fairness poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments. And it is only after determining how to define fairness that one can even begin to answer the determinative question: "How much is too much?"

The fact that the Court can adjudicate one-person, one-vote claims does not mean that partisan gerrymandering claims are justiciable. This Court's one-person, one-vote cases recognize that each person is entitled to an equal say in the election of representatives. It hardly follows from that principle that a person is entitled to have his political party achieve representation commensurate to its share of statewide support. Vote dilution in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. That requirement does not extend to political parties; it does not mean that each party must be influential in proportion to the number of its supporters. The racial gerrymandering cases are also inapposite: They call for the elimination of a racial classification, but a partisan gerrymandering claim cannot ask for the elimination of partisanship. Pp. 15–21.

(c) None of the proposed "tests" for evaluating partisan gerrymandering claims meets the need for a limited and precise standard that is judicially discernible and manageable. Pp. 22–30.

(1) The *Common Cause* District Court concluded that all but one of the districts in North Carolina's 2016 Plan violated the Equal Protection Clause by intentionally diluting the voting strength of Demo-

crats. It applied a three-part test, examining intent, effects, and causation. The District Court's "predominant intent" prong is borrowed from the test used in racial gerrymandering cases. However, unlike race-based decisionmaking, which is "inherently suspect," *Miller* v. *Johnson*, 515 U. S. 900, 915, districting for some level of partisan advantage is not unconstitutional. Determining that lines were drawn on the basis of partisanship does not indicate that districting was constitutionally impermissible. The *Common Cause* District Court also required the plaintiffs to show that vote dilution is "likely to persist" to such a degree that the elected representatives will feel free to ignore the concerns of the supporters of the minority party. Experience proves that accurately predicting electoral outcomes is not simple, and asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise. The District Court's third prong—which gave the defendants an opportunity to show that discriminatory effects were due to a "legitimate redistricting objective"—just restates the question asked at the "predominant intent" prong. Pp. 22–25.

(2) The District Courts also found partisan gerrymandering claims justiciable under the First Amendment, coalescing around a basic three-part test: proof of intent to burden individuals based on their voting history or party affiliation, an actual burden on political speech or associational rights, and a causal link between the invidious intent and actual burden. But their analysis offers no "clear" and "manageable" way of distinguishing permissible from impermissible partisan motivation. Pp. 25–27.

(3) Using a State's own districting criteria as a baseline from which to measure how extreme a partisan gerrymander is would be indeterminate and arbitrary. Doing so would still leave open the question of how much political motivation and effect is too much. Pp. 27–29.

(4) The North Carolina District Court further held that the 2016 Plan violated Article I, §2, and the Elections Clause, Art. I, §4, cl. 1. But the *Vieth* plurality concluded—without objection from any other Justice—that neither §2 nor §4 "provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting." 541 U. S., at 305. Any assertion that partisan gerrymanders violate the core right of voters to choose their representatives is an objection more likely grounded in the Guarantee Clause of Article IV, §4, which "guarantee[s] to every State in [the] Union a Republican Form of Government." This Court has several times concluded that the Guarantee Clause does not pro-

Syllabus

vide the basis for a justiciable claim. See, *e.g., Pacific States Telephone & Telegraph Co.* v. *Oregon*, 223 U. S. 118. Pp. 29–30.

(d) The conclusion that partisan gerrymandering claims are not justiciable neither condones excessive partisan gerrymandering nor condemns complaints about districting to echo into a void. Numerous States are actively addressing the issue through state constitutional amendments and legislation placing power to draw electoral districts in the hands of independent commissions, mandating particular districting criteria for their mapmakers, or prohibiting drawing district lines for partisan advantage. The Framers also gave Congress the power to do something about partisan gerrymandering in the Elections Clause. That avenue for reform established by the Framers, and used by Congress in the past, remains open. Pp. 30–34.

318 F. Supp. 3d 777 and 348 F. Supp. 3d 493, vacated and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, and KAVANAUGH, JJ., joined. KAGAN, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined.

SUPREME COURT OF THE UNITED STATES

Nos. 18–422, 18–726

ROBERT A. RUCHO, ET AL., APPELLANTS
18–422 *v.*
COMMON CAUSE, ET AL.; AND

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

LINDA H. LAMONE, ET AL., APPELLANTS
18–726 *v.*
O. JOHN BENISEK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

[June 27, 2019]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Voters and other plaintiffs in North Carolina and Maryland challenged their States' congressional districting maps as unconstitutional partisan gerrymanders. The North Carolina plaintiffs complained that the State's districting plan discriminated against Democrats; the Maryland plaintiffs complained that their State's plan discriminated against Republicans. The plaintiffs alleged that the gerrymandering violated the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, and Article I, §2, of the Constitution. The District Courts in both cases ruled in favor

of the plaintiffs, and the defendants appealed directly to this Court.

These cases require us to consider once again whether claims of excessive partisanship in districting are "justiciable"—that is, properly suited for resolution by the federal courts. This Court has not previously struck down a districting plan as an unconstitutional partisan gerrymander, and has struggled without success over the past several decades to discern judicially manageable standards for deciding such claims. The districting plans at issue here are highly partisan, by any measure. The question is whether the courts below appropriately exercised judicial power when they found them unconstitutional as well.

I

A

The first case involves a challenge to the congressional redistricting plan enacted by the Republican-controlled North Carolina General Assembly in 2016. *Rucho* v. *Common Cause*, No. 18–422. The Republican legislators leading the redistricting effort instructed their mapmaker to use political data to draw a map that would produce a congressional delegation of ten Republicans and three Democrats. 318 F. Supp. 3d 777, 807–808 (MDNC 2018). As one of the two Republicans chairing the redistricting committee stated, "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country." *Id.*, at 809. He further explained that the map was drawn with the aim of electing ten Republicans and three Democrats because he did "not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats." *Id.*, at 808. One Democratic state senator objected that entrenching the 10–3 advantage for Republicans was not "fair, reasonable, [or] balanced" because, as recently as 2012, "Democratic con-

gressional candidates had received more votes on a statewide basis than Republican candidates." *Ibid.* The General Assembly was not swayed by that objection and approved the 2016 Plan by a party-line vote. *Id.*, at 809.

In November 2016, North Carolina conducted congressional elections using the 2016 Plan, and Republican candidates won 10 of the 13 congressional districts. *Id.*, at 810. In the 2018 elections, Republican candidates won nine congressional districts, while Democratic candidates won three. The Republican candidate narrowly prevailed in the remaining district, but the State Board of Elections called a new election after allegations of fraud.

This litigation began in August 2016, when the North Carolina Democratic Party, Common Cause (a nonprofit organization), and 14 individual North Carolina voters sued the two lawmakers who had led the redistricting effort and other state defendants in Federal District Court. Shortly thereafter, the League of Women Voters of North Carolina and a dozen additional North Carolina voters filed a similar complaint. The two cases were consolidated.

The plaintiffs challenged the 2016 Plan on multiple constitutional grounds. First, they alleged that the Plan violated the Equal Protection Clause of the Fourteenth Amendment by intentionally diluting the electoral strength of Democratic voters. Second, they claimed that the Plan violated their First Amendment rights by retaliating against supporters of Democratic candidates on the basis of their political beliefs. Third, they asserted that the Plan usurped the right of "the People" to elect their preferred candidates for Congress, in violation of the requirement in Article I, §2, of the Constitution that Members of the House of Representatives be chosen "by the People of the several States." Finally, they alleged that the Plan violated the Elections Clause by exceeding the State's delegated authority to prescribe the "Times,

Places and Manner of holding Elections" for Members of Congress.

After a four-day trial, the three-judge District Court unanimously concluded that the 2016 Plan violated the Equal Protection Clause and Article I of the Constitution. The court further held, with Judge Osteen dissenting, that the Plan violated the First Amendment. *Common Cause* v. *Rucho*, 279 F. Supp. 3d 587 (MDNC 2018). The defendants appealed directly to this Court under 28 U. S. C. §1253.

While that appeal was pending, we decided *Gill* v. *Whitford*, 585 U. S. ___ (2018), a partisan gerrymandering case out of Wisconsin. In that case, we held that a plaintiff asserting a partisan gerrymandering claim based on a theory of vote dilution must establish standing by showing he lives in an allegedly "cracked" or "packed" district. *Id.*, at ___ (slip op., at 17). A "cracked" district is one in which a party's supporters are divided among multiple districts, so that they fall short of a majority in each; a "packed" district is one in which a party's supporters are highly concentrated, so they win that district by a large margin, "wasting" many votes that would improve their chances in others. *Id.*, at ___–___ (slip op., at 3–4).

After deciding *Gill*, we remanded the present case for further consideration by the District Court. 585 U. S. ___ (2018). On remand, the District Court again struck down the 2016 Plan. 318 F. Supp. 3d 777. It found standing and concluded that the case was appropriate for judicial resolution. On the merits, the court found that "the General Assembly's predominant intent was to discriminate against voters who supported or were likely to support non-Republican candidates," and to "entrench Republican candidates" through widespread cracking and packing of Democratic voters. *Id.*, at 883–884. The court rejected the defendants' arguments that the distribution of Republican and Democratic voters throughout North Carolina and the

interest in protecting incumbents neutrally explained the 2016 Plan's discriminatory effects. *Id.*, at 896–899. In the end, the District Court held that 12 of the 13 districts constituted partisan gerrymanders that violated the Equal Protection Clause. *Id.*, at 923.

The court also agreed with the plaintiffs that the 2016 Plan discriminated against them because of their political speech and association, in violation of the First Amendment. *Id.*, at 935. Judge Osteen dissented with respect to that ruling. *Id.*, at 954–955. Finally, the District Court concluded that the 2016 Plan violated the Elections Clause and Article I, §2. *Id.*, at 935–941. The District Court enjoined the State from using the 2016 Plan in any election after the November 2018 general election. *Id.*, at 942.

The defendants again appealed to this Court, and we postponed jurisdiction. 586 U. S. ___ (2019).

B

The second case before us is *Lamone* v. *Benisek*, No. 18–726. In 2011, the Maryland Legislature—dominated by Democrats—undertook to redraw the lines of that State's eight congressional districts. The Governor at the time, Democrat Martin O'Malley, led the process. He appointed a redistricting committee to help redraw the map, and asked Congressman Steny Hoyer, who has described himself as a "serial gerrymanderer," to advise the committee. 348 F. Supp. 3d 493, 502 (Md. 2018). The Governor later testified that his aim was to "use the redistricting process to change the overall composition of Maryland's congressional delegation to 7 Democrats and 1 Republican by flipping" one district. *Ibid.* "[A] decision was made to go for the Sixth," *ibid.*, which had been held by a Republican for nearly two decades. To achieve the required equal population among districts, only about 10,000 residents needed to be removed from that district. *Id.*, at 498. The 2011 Plan accomplished that by moving roughly 360,000

voters out of the Sixth District and moving 350,000 new voters in. Overall, the Plan reduced the number of registered Republicans in the Sixth District by about 66,000 and increased the number of registered Democrats by about 24,000. *Id.*, at 499–501. The map was adopted by a party-line vote. *Id.*, at 506. It was used in the 2012 election and succeeded in flipping the Sixth District. A Democrat has held the seat ever since.

In November 2013, three Maryland voters filed this lawsuit. They alleged that the 2011 Plan violated the First Amendment, the Elections Clause, and Article I, §2, of the Constitution. After considerable procedural skirmishing and litigation over preliminary relief, the District Court entered summary judgment for the plaintiffs. 348 F. Supp. 3d 493. It concluded that the plaintiffs' claims were justiciable, and that the Plan violated the First Amendment by diminishing their "ability to elect their candidate of choice" because of their party affiliation and voting history, and by burdening their associational rights. *Id.*, at 498. On the latter point, the court relied upon findings that Republicans in the Sixth District "were burdened in fundraising, attracting volunteers, campaigning, and generating interest in voting in an atmosphere of general confusion and apathy." *Id.*, at 524.

The District Court permanently enjoined the State from using the 2011 Plan and ordered it to promptly adopt a new plan for the 2020 election. *Id.*, at 525. The defendants appealed directly to this Court under 28 U. S. C. §1253. We postponed jurisdiction. 586 U. S. ___ (2019).

II

A

Article III of the Constitution limits federal courts to deciding "Cases" and "Controversies." We have understood that limitation to mean that federal courts can address only questions "historically viewed as capable of

resolution through the judicial process." *Flast* v. *Cohen*, 392 U. S. 83, 95 (1968). In these cases we are asked to decide an important question of constitutional law. "But before we do so, we must find that the question is presented in a 'case' or 'controversy' that is, in James Madison's words, 'of a Judiciary Nature.'" *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 342 (2006) (quoting 2 Records of the Federal Convention of 1787, p. 430 (M. Farrand ed. 1966)).

Chief Justice Marshall famously wrote that it is "the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). Sometimes, however, "the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights." *Vieth* v. *Jubelirer*, 541 U. S. 267, 277 (2004) (plurality opinion). In such a case the claim is said to present a "political question" and to be nonjusticiable—outside the courts' competence and therefore beyond the courts' jurisdiction. *Baker* v. *Carr*, 369 U. S. 186, 217 (1962). Among the political question cases the Court has identified are those that lack "judicially discoverable and manageable standards for resolving [them]." *Ibid.*

Last Term in *Gill* v. *Whitford*, we reviewed our partisan gerrymandering cases and concluded that those cases "leave unresolved whether such claims may be brought." 585 U. S., at ___ (slip op., at 13). This Court's authority to act, as we said in *Gill*, is "grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff's particular claim of legal right." *Ibid.* The question here is whether there is an "appropriate role for the Federal Judiciary" in remedying the problem of partisan gerrymandering—whether such claims are claims of *legal* right, resolvable according to *legal* principles, or political questions that must find their resolution elsewhere. *Id.*, at ___ (slip op., at 8).

B

Partisan gerrymandering is nothing new. Nor is frustration with it. The practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution. See *Vieth*, 541 U. S., at 274 (plurality opinion). During the very first congressional elections, George Washington and his Federalist allies accused Patrick Henry of trying to gerrymander Virginia's districts against their candidates—in particular James Madison, who ultimately prevailed over fellow future President James Monroe. Hunter, The First Gerrymander? 9 Early Am. Studies 792–794, 811 (2011). See 5 Writings of Thomas Jefferson 71 (P. Ford ed. 1895) (Letter to W. Short (Feb. 9, 1789)) ("Henry has so modelled the districts for representatives as to tack Orange [county] to counties where he himself has great influence that Madison may not be elected into the lower federal house").

In 1812, Governor of Massachusetts and future Vice President Elbridge Gerry notoriously approved congressional districts that the legislature had drawn to aid the Democratic-Republican Party. The moniker "gerrymander" was born when an outraged Federalist newspaper observed that one of the misshapen districts resembled a salamander. See *Vieth*, 541 U. S., at 274 (plurality opinion); E. Griffith, The Rise and Development of the Gerrymander 17–19 (1907). "By 1840, the gerrymander was a recognized force in party politics and was generally attempted in all legislation enacted for the formation of election districts. It was generally conceded that each party would attempt to gain power which was not proportionate to its numerical strength." *Id.*, at 123.

The Framers addressed the election of Representatives to Congress in the Elections Clause. Art. I, §4, cl. 1. That provision assigns to state legislatures the power to prescribe the "Times, Places and Manner of holding Elec-

tions" for Members of Congress, while giving Congress the power to "make or alter" any such regulations. Whether to give that supervisory authority to the National Government was debated at the Constitutional Convention. When those opposed to such congressional oversight moved to strike the relevant language, Madison came to its defense:

> "[T]he State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local coveniency or prejudices. . . . Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." 2 Records of the Federal Convention of 1787, at 240–241.

During the subsequent fight for ratification, the provision remained a subject of debate. Antifederalists predicted that Congress's power under the Elections Clause would allow Congress to make itself "omnipotent," setting the "time" of elections as never or the "place" in difficult to reach corners of the State. Federalists responded that, among other justifications, the revisionary power was necessary to counter state legislatures set on undermining fair representation, including through malapportionment. M. Klarman, The Framers' Coup: The Making of the United States Constitution 340–342 (2016). The Federalists were, for example, concerned that newly developing population centers would be deprived of their proper electoral weight, as some cities had been in Great Britain. See 6 The Documentary History of the Ratification of the Constitution: Massachusetts 1278–1279 (J. Kaminski & G. Saladino eds. 2000).

Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering. The Apportionment Act of 1842, which required single-

member districts for the first time, specified that those districts be "composed of contiguous territory," Act of June 25, 1842, ch. 47, 5 Stat. 491, in "an attempt to forbid the practice of the gerrymander," Griffith, *supra*, at 12. Later statutes added requirements of compactness and equality of population. Act of Jan. 16, 1901, ch. 93, §3, 31 Stat. 733; Act of Feb. 2, 1872, ch. 11, §2, 17 Stat. 28. (Only the single member district requirement remains in place today. 2 U. S. C. §2c.) See *Vieth*, 541 U. S., at 276 (plurality opinion). Congress also used its Elections Clause power in 1870, enacting the first comprehensive federal statute dealing with elections as a way to enforce the Fifteenth Amendment. Force Act of 1870, ch. 114, 16 Stat. 140. Starting in the 1950s, Congress enacted a series of laws to protect the right to vote through measures such as the suspension of literacy tests and the prohibition of English-only elections. See, *e.g.*, 52 U. S. C. §10101 *et seq*.

Appellants suggest that, through the Elections Clause, the Framers set aside electoral issues such as the one before us as questions that only Congress can resolve. See *Baker*, 369 U. S., at 217. We do not agree. In two areas—one-person, one-vote and racial gerrymandering—our cases have held that there is a role for the courts with respect to at least some issues that could arise from a State's drawing of congressional districts. See *Wesberry* v. *Sanders*, 376 U. S. 1 (1964); *Shaw* v. *Reno*, 509 U. S. 630 (1993) (*Shaw I*).

But the history is not irrelevant. The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress. As Alexander Hamilton explained, "it will . . . not be denied that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded that there were only three ways in which this power could

have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter, and ultimately in the former." The Federalist No. 59, p. 362 (C. Rossiter ed. 1961). At no point was there a suggestion that the federal courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing.

C

Courts have nevertheless been called upon to resolve a variety of questions surrounding districting. Early on, doubts were raised about the competence of the federal courts to resolve those questions. See *Wood* v. *Broom*, 287 U. S. 1 (1932); *Colegrove* v. *Green*, 328 U. S. 549 (1946).

In the leading case of *Baker* v. *Carr*, voters in Tennessee complained that the State's districting plan for state representatives "debase[d]" their votes, because the plan was predicated on a 60-year-old census that no longer reflected the distribution of population in the State. The plaintiffs argued that votes of people in overpopulated districts held less value than those of people in less-populated districts, and that this inequality violated the Equal Protection Clause of the Fourteenth Amendment. The District Court dismissed the action on the ground that the claim was not justiciable, relying on this Court's precedents, including *Colegrove*. *Baker* v. *Carr*, 179 F. Supp. 824, 825, 826 (MD Tenn. 1959). This Court reversed. It identified various considerations relevant to determining whether a claim is a nonjusticiable political question, including whether there is "a lack of judicially discoverable and manageable standards for resolving it." 369 U. S., at 217. The Court concluded that the claim of population inequality among districts did not fall into that category, because such a claim could be decided under basic equal protection principles. *Id.*, at 226. In *Wesberry* v. *Sanders*,

the Court extended its ruling to malapportionment of congressional districts, holding that Article I, §2, required that "one man's vote in a congressional election is to be worth as much as another's." 376 U. S., at 8.

Another line of challenges to districting plans has focused on race. Laws that explicitly discriminate on the basis of race, as well as those that are race neutral on their face but are unexplainable on grounds other than race, are of course presumptively invalid. The Court applied those principles to electoral boundaries in *Gomillion* v. *Lightfoot*, concluding that a challenge to an "uncouth twenty-eight sided" municipal boundary line that excluded black voters from city elections stated a constitutional claim. 364 U. S. 339, 340 (1960). In *Wright* v. *Rockefeller*, 376 U. S. 52 (1964), the Court extended the reasoning of *Gomillion* to congressional districting. See *Shaw I*, 509 U. S., at 645.

Partisan gerrymandering claims have proved far more difficult to adjudicate. The basic reason is that, while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, "a jurisdiction may engage in constitutional political gerrymandering." *Hunt* v. *Cromartie*, 526 U. S. 541, 551 (1999) (citing *Bush* v. *Vera*, 517 U. S. 952, 968 (1996); *Shaw* v. *Hunt*, 517 U. S. 899, 905 (1996) (*Shaw II*); *Miller* v. *Johnson*, 515 U. S. 900, 916 (1995); *Shaw I*, 509 U. S., at 646). See also *Gaffney* v. *Cummings*, 412 U. S. 735, 753 (1973) (recognizing that "[p]olitics and political considerations are inseparable from districting and apportionment").

To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities. The "central problem" is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is "determining when political gerry-

mandering has gone too far." *Vieth*, 541 U. S., at 296 (plurality opinion). See *League of United Latin American Citizens* v. *Perry*, 548 U. S. 399, 420 (2006) (*LULAC*) (opinion of Kennedy, J.) (difficulty is "providing a standard for deciding how much partisan dominance is too much").

We first considered a partisan gerrymandering claim in *Gaffney* v. *Cummings* in 1973. There we rejected an equal protection challenge to Connecticut's redistricting plan, which "aimed at a rough scheme of proportional representation of the two major political parties" by "wiggl[ing] and joggl[ing] boundary lines" to create the appropriate number of safe seats for each party. 412 U. S., at 738, 752, n. 18 (internal quotation marks omitted). In upholding the State's plan, we reasoned that districting "inevitably has and is intended to have substantial political consequences." *Id.*, at 753.

Thirteen years later, in *Davis* v. *Bandemer*, we addressed a claim that Indiana Republicans had cracked and packed Democrats in violation of the Equal Protection Clause. 478 U. S. 109, 116–117 (1986) (plurality opinion). A majority of the Court agreed that the case was justiciable, but the Court splintered over the proper standard to apply. Four Justices would have required proof of "intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Id.*, at 127. Two Justices would have focused on "whether the boundaries of the voting districts have been distorted deliberately and arbitrarily to achieve illegitimate ends." *Id.*, at 165 (Powell, J., concurring in part and dissenting in part). Three Justices, meanwhile, would have held that the Equal Protection Clause simply "does not supply judicially manageable standards for resolving purely political gerrymandering claims." *Id.*, at 147 (O'Connor, J., concurring in judgment). At the end of the day, there was "no 'Court' for a standard that properly should be applied in determining whether a challenged redistricting

plan is an unconstitutional partisan political gerrymander." *Id.*, at 185, n. 25 (opinion of Powell, J.). In any event, the Court held that the plaintiffs had failed to show that the plan violated the Constitution.

Eighteen years later, in *Vieth*, the plaintiffs complained that Pennsylvania's legislature "ignored all traditional redistricting criteria, including the preservation of local government boundaries," in order to benefit Republican congressional candidates. 541 U. S., at 272–273 (plurality opinion) (brackets omitted). Justice Scalia wrote for a four-Justice plurality. He would have held that the plaintiffs' claims were nonjusticiable because there was no "judicially discernible and manageable standard" for deciding them. *Id.*, at 306. Justice Kennedy, concurring in the judgment, noted "the lack of comprehensive and neutral principles for drawing electoral boundaries [and] the absence of rules to limit and confine judicial intervention." *Id.*, at 306–307. He nonetheless left open the possibility that "in another case a standard might emerge." *Id.*, at 312. Four Justices dissented.

In *LULAC*, the plaintiffs challenged a mid-decade redistricting map approved by the Texas Legislature. Once again a majority of the Court could not find a justiciable standard for resolving the plaintiffs' partisan gerrymandering claims. See 548 U. S., at 414 (noting that the "disagreement over what substantive standard to apply" that was evident in *Bandemer* "persists").

As we summed up last Term in *Gill*, our "considerable efforts in *Gaffney*, *Bandemer*, *Vieth*, and *LULAC* leave unresolved whether . . . claims [of legal right] may be brought in cases involving allegations of partisan gerrymandering." 585 U. S., at ___ (slip op., at 13). Two "threshold questions" remained: standing, which we addressed in *Gill*, and "whether [such] claims are justiciable." *Ibid.*

III

A

In considering whether partisan gerrymandering claims are justiciable, we are mindful of Justice Kennedy's counsel in *Vieth*: Any standard for resolving such claims must be grounded in a "limited and precise rationale" and be "clear, manageable, and politically neutral." 541 U. S., at 306–308 (opinion concurring in judgment). An important reason for those careful constraints is that, as a Justice with extensive experience in state and local politics put it, "[t]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States." *Bandemer*, 478 U. S., at 145 (opinion of O'Connor, J.). See *Gaffney*, 412 U. S., at 749 (observing that districting implicates "fundamental 'choices about the nature of representation'" (quoting *Burns* v. *Richardson*, 384 U. S. 73, 92 (1966))). An expansive standard requiring "the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process," *Vieth*, 541 U. S., at 306 (opinion of Kennedy, J.).

As noted, the question is one of degree: How to "provid[e] a standard for deciding how much partisan dominance is too much." *LULAC*, 548 U. S., at 420 (opinion of Kennedy, J.). And it is vital in such circumstances that the Court act only in accord with especially clear standards: "With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Vieth*, 541 U. S., at 307 (opinion of Kennedy, J.). If federal courts are to "inject [themselves] into the most heated partisan issues" by adjudicating partisan gerrymandering claims, *Bandemer*, 478 U. S., at 145 (opinion of O'Connor, J.), they must be armed with a standard that can reliably differen-

tiate unconstitutional from "constitutional political gerrymandering." *Cromartie*, 526 U. S., at 551.

B

Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. Explicitly or implicitly, a districting map is alleged to be unconstitutional because it makes it too difficult for one party to translate statewide support into seats in the legislature. But such a claim is based on a "norm that does not exist" in our electoral system—"statewide elections for representatives along party lines." *Bandemer*, 478 U. S., at 159 (opinion of O'Connor, J.).

Partisan gerrymandering claims invariably sound in a desire for proportional representation. As Justice O'Connor put it, such claims are based on "a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes." *Ibid.* "Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *Id.*, at 130 (plurality opinion). See *Mobile* v. *Bolden*, 446 U. S. 55, 75–76 (1980) (plurality opinion) ("The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization.").

The Founders certainly did not think proportional representation was required. For more than 50 years after ratification of the Constitution, many States elected their congressional representatives through at-large or "general ticket" elections. Such States typically sent single-party delegations to Congress. See E. Engstrom, Partisan Gerrymandering and the Construction of American Democracy

43–51 (2013). That meant that a party could garner nearly half of the vote statewide and wind up without any seats in the congressional delegation. The Whigs in Alabama suffered that fate in 1840: "their party garnered 43 percent of the statewide vote, yet did not receive a single seat." *Id.*, at 48. When Congress required single-member districts in the Apportionment Act of 1842, it was not out of a general sense of fairness, but instead a (mis)calculation by the Whigs that such a change would improve their electoral prospects. *Id.*, at 43–44.

Unable to claim that the Constitution requires proportional representation outright, plaintiffs inevitably ask the courts to make their own political judgment about how much representation particular political parties *deserve*—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end. But federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so. As Justice Scalia put it for the plurality in *Vieth*:

> "'Fairness' does not seem to us a judicially manageable standard. . . . Some criterion more solid and more demonstrably met than that seems to us necessary to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking." 541 U. S., at 291.

The initial difficulty in settling on a "clear, manageable and politically neutral" test for fairness is that it is not even clear what fairness looks like in this context. There is a large measure of "unfairness" in any winner-take-all system. Fairness may mean a greater number of competitive districts. Such a claim seeks to undo packing and

cracking so that supporters of the disadvantaged party have a better shot at electing their preferred candidates. But making as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party. As Justice White has pointed out, "[i]f all or most of the districts are competitive . . . even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature." *Bandemer*, 478 U. S., at 130 (plurality opinion).

On the other hand, perhaps the ultimate objective of a "fairer" share of seats in the congressional delegation is most readily achieved by yielding to the gravitational pull of proportionality and engaging in cracking and packing, to ensure each party its "appropriate" share of "safe" seats. See *id.*, at 130–131 ("To draw district lines to maximize the representation of each major party would require creating as many safe seats for each party as the demographic and predicted political characteristics of the State would permit."); *Gaffney*, 412 U. S., at 735–738. Such an approach, however, comes at the expense of competitive districts and of individuals in districts allocated to the opposing party.

Or perhaps fairness should be measured by adherence to "traditional" districting criteria, such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents. See Brief for Bipartisan Group of Current and Former Members of the House of Representatives as *Amici Curiae*; Brief for Professor Wesley Pegden et al. as *Amici Curiae* in No. 18–422. But protecting incumbents, for example, enshrines a particular partisan distribution. And the "natural political geography" of a State—such as the fact that urban electoral districts are often dominated by one political party—can itself lead to inherently packed districts. As Justice Kennedy has explained, traditional criteria such as compactness and contiguity "cannot promise political neutrality

when used as the basis for relief. Instead, it seems, a decision under these standards would unavoidably have significant political effect, whether intended or not." *Vieth*, 541 U. S., at 308–309 (opinion concurring in judgment). See *id.*, at 298 (plurality opinion) ("[P]acking and cracking, whether intentional or no, are quite consistent with adherence to compactness and respect for political subdivision lines").

Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is "fair" in this context would be an "unmoored determination" of the sort characteristic of a political question beyond the competence of the federal courts. *Zivotofsky* v. *Clinton*, 566 U. S. 189, 196 (2012).

And it is only after determining how to define fairness that you can even begin to answer the determinative question: "How much is too much?" At what point does permissible partisanship become unconstitutional? If compliance with traditional districting criteria is the fairness touchstone, for example, how much deviation from those criteria is constitutionally acceptable and how should mapdrawers prioritize competing criteria? Should a court "reverse gerrymander" other parts of a State to counteract "natural" gerrymandering caused, for example, by the urban concentration of one party? If a districting plan protected half of the incumbents but redistricted the rest into head to head races, would that be constitutional? A court would have to rank the relative importance of those traditional criteria and weigh how much deviation from each to allow.

If a court instead focused on the respective number of seats in the legislature, it would have to decide the ideal

number of seats for each party and determine at what point deviation from that balance went too far. If a 5–3 allocation corresponds most closely to statewide vote totals, is a 6–2 allocation permissible, given that legislatures have the authority to engage in a certain degree of partisan gerrymandering? Which seats should be packed and which cracked? Or if the goal is as many competitive districts as possible, how close does the split need to be for the district to be considered competitive? Presumably not all districts could qualify, so how to choose? Even assuming the court knew which version of fairness to be looking for, there are no discernible and manageable standards for deciding whether there has been a violation. The questions are "unguided and ill suited to the development of judicial standards," *Vieth*, 541 U. S., at 296 (plurality opinion), and "results from one gerrymandering case to the next would likely be disparate and inconsistent," *id.*, at 308 (opinion of Kennedy, J.).

Appellees contend that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims. But the one-person, one-vote rule is relatively easy to administer as a matter of math. The same cannot be said of partisan gerrymandering claims, because the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly. It hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support.

More fundamentally, "vote dilution" in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. In other words, each representative must be accountable to (approximately) the same number of constituents. That requirement does not extend to political parties. It does not mean that each party must be influen-

tial in proportion to its number of supporters. As we stated unanimously in *Gill*, "this Court is not responsible for vindicating generalized partisan preferences. The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it." 585 U. S., at ___ (slip op., at 21). See also *Bandemer*, 478 U. S., at 150 (opinion of O'Connor, J.) ("[T]he Court has not accepted the argument that an 'asserted entitlement to group representation' . . . can be traced to the one person, one vote principle." (quoting *Bolden*, 446 U. S., at 77)).*

Nor do our racial gerrymandering cases provide an appropriate standard for assessing partisan gerrymandering. "[N]othing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting—as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race—would seem to compel the opposite conclusion." *Shaw I*, 509 U. S., at 650 (citation omitted). Unlike partisan gerrymandering claims, a racial gerrymandering claim does not ask for a fair share of political power and influence, with all the justiciability conundrums that entails. It asks instead for the elimination of a racial classification. A partisan gerrymandering claim cannot ask for the elimination of partisanship.

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*The dissent's observation that the Framers viewed political parties "with deep suspicion, as fomenters of factionalism and symptoms of disease in the body politic" *post*, at 9, n. 1 (opinion of KAGAN, J.) (internal quotation marks and alteration omitted), is exactly right. Its inference from that fact is exactly wrong. The Framers would have been amazed at a constitutional theory that guarantees a certain degree of representation to political parties.

IV

Appellees and the dissent propose a number of "tests" for evaluating partisan gerrymandering claims, but none meets the need for a limited and precise standard that is judicially discernible and manageable. And none provides a solid grounding for judges to take the extraordinary step of reallocating power and influence between political parties.

A

The *Common Cause* District Court concluded that all but one of the districts in North Carolina's 2016 Plan violated the Equal Protection Clause by intentionally diluting the voting strength of Democrats. 318 F. Supp. 3d, at 923. In reaching that result the court first required the plaintiffs to prove "that a legislative mapdrawer's predominant purpose in drawing the lines of a particular district was to 'subordinate adherents of one political party and entrench a rival party in power.'" *Id.*, at 865 (quoting *Arizona State Legislature* v. *Arizona Independent Redistricting Comm'n*, 576 U. S. ___, ___ (2015) (slip op., at 1)). The District Court next required a showing "that the dilution of the votes of supporters of a disfavored party in a particular district—by virtue of cracking or packing—is likely to persist in subsequent elections such that an elected representative from the favored party in the district will not feel a need to be responsive to constituents who support the disfavored party." 318 F. Supp. 3d, at 867. Finally, after a prima facie showing of partisan vote dilution, the District Court shifted the burden to the defendants to prove that the discriminatory effects are "attributable to a legitimate state interest or other neutral explanation." *Id.*, at 868.

The District Court's "predominant intent" prong is borrowed from the racial gerrymandering context. In racial gerrymandering cases, we rely on a "predominant

intent" inquiry to determine whether race was, in fact, the reason particular district boundaries were drawn the way they were. If district lines were drawn for the purpose of separating racial groups, then they are subject to strict scrutiny because "race-based decisionmaking is inherently suspect." *Miller*, 515 U. S., at 915. See *Bush*, 517 U. S., at 959 (principal opinion). But determining that lines were drawn on the basis of partisanship does not indicate that the districting was improper. A permissible intent—securing partisan advantage—does not become constitutionally impermissible, like racial discrimination, when that permissible intent "predominates."

The District Court tried to limit the reach of its test by requiring plaintiffs to show, in addition to predominant partisan intent, that vote dilution "is likely to persist" to such a degree that the elected representative will feel free to ignore the concerns of the supporters of the minority party. 318 F. Supp. 3d, at 867. But "[t]o allow district courts to strike down apportionment plans on the basis of their prognostications as to the outcome of future elections . . . invites 'findings' on matters as to which neither judges nor anyone else can have any confidence." *Bandemer*, 478 U. S., at 160 (opinion of O'Connor, J.). See *LULAC*, 548 U. S., at 420 (opinion of Kennedy, J.) ("[W]e are wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs."). And the test adopted by the *Common Cause* court requires a far more nuanced prediction than simply who would prevail in future political contests. Judges must forecast with unspecified certainty whether a prospective winner will have a margin of victory sufficient to permit him to ignore the supporters of his defeated opponent (whoever that may turn out to be). Judges not only have to pick the winner—they have to beat the point spread.

The appellees assure us that "the persistence of a

party's advantage may be shown through sensitivity testing: probing how a plan would perform under other plausible electoral conditions." Brief for Appellees League of Women Voters of North Carolina et al. in No. 18–422, p. 55. See also 318 F. Supp. 3d, at 885. Experience proves that accurately predicting electoral outcomes is not so simple, either because the plans are based on flawed assumptions about voter preferences and behavior or because demographics and priorities change over time. In our two leading partisan gerrymandering cases themselves, the predictions of durability proved to be dramatically wrong. In 1981, Republicans controlled both houses of the Indiana Legislature as well as the governorship. Democrats challenged the state legislature districting map enacted by the Republicans. This Court in *Bandemer* rejected that challenge, and just months later the Democrats increased their share of House seats in the 1986 elections. Two years later the House was split 50–50 between Democrats and Republicans, and the Democrats took control of the chamber in 1990. Democrats also challenged the Pennsylvania congressional districting plan at issue in *Vieth*. Two years after that challenge failed, they gained four seats in the delegation, going from a 12–7 minority to an 11–8 majority. At the next election, they flipped another Republican seat.

Even the most sophisticated districting maps cannot reliably account for some of the reasons voters prefer one candidate over another, or why their preferences may change. Voters elect individual candidates in individual districts, and their selections depend on the issues that matter to them, the quality of the candidates, the tone of the candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations. Many voters split their tickets. Others never register with a political party, and vote for candidates from both major parties at different

points during their lifetimes. For all of those reasons, asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise.

It is hard to see what the District Court's third prong—providing the defendant an opportunity to show that the discriminatory effects were due to a "legitimate redistricting objective"—adds to the inquiry. 318 F. Supp. 3d, at 861. The first prong already requires the plaintiff to prove that partisan advantage predominates. Asking whether a legitimate purpose other than partisanship was the motivation for a particular districting map just restates the question.

B

The District Courts also found partisan gerrymandering claims justiciable under the First Amendment, coalescing around a basic three-part test: proof of intent to burden individuals based on their voting history or party affiliation; an actual burden on political speech or associational rights; and a causal link between the invidious intent and actual burden. See *Common Cause*, 318 F. Supp. 3d, at 929; *Benisek*, 348 F. Supp. 3d, at 522. Both District Courts concluded that the districting plans at issue violated the plaintiffs' First Amendment right to association. The District Court in North Carolina relied on testimony that, after the 2016 Plan was put in place, the plaintiffs faced "difficulty raising money, attracting candidates, and mobilizing voters to support the political causes and issues such Plaintiffs sought to advance." 318 F. Supp. 3d, at 932. Similarly, the District Court in Maryland examined testimony that "revealed a lack of enthusiasm, indifference to voting, a sense of disenfranchisement, a sense of disconnection, and confusion," and concluded that Republicans in the Sixth District "were burdened in fundraising, attracting volunteers, campaigning, and generating inter-

est in voting." 348 F. Supp. 3d, at 523–524.

To begin, there are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue. The plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district.

The plaintiffs' argument is that partisanship in districting should be regarded as simple discrimination against supporters of the opposing party on the basis of political viewpoint. Under that theory, any level of partisanship in districting would constitute an infringement of their First Amendment rights. But as the Court has explained, "[i]t would be idle . . . to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it." *Gaffney*, 412 U. S., at 752. The First Amendment test simply describes the act of districting for partisan advantage. It provides no standard for determining when partisan activity goes too far.

As for actual burden, the slight anecdotal evidence found sufficient by the District Courts in these cases shows that this too is not a serious standard for separating constitutional from unconstitutional partisan gerrymandering. The District Courts relied on testimony about difficulty drumming up volunteers and enthusiasm. How much of a decline in voter engagement is enough to constitute a First Amendment burden? How many door knocks must go unanswered? How many petitions unsigned? How many calls for volunteers unheeded? The *Common Cause* District Court held that a partisan gerrymander places an unconstitutional burden on speech if it has more than a "*de minimis*" "chilling effect or adverse impact" on any First Amendment activity. 318 F. Supp. 3d, at 930. The court went on to rule that there would be an adverse effect "even if the speech of [the plaintiffs] was not *in fact* chilled"; it was enough that the districting plan "makes it

easier for supporters of Republican candidates to translate their votes into seats," thereby "enhanc[ing] the[ir] relative voice." *Id.*, at 933 (internal quotation marks omitted).

These cases involve blatant examples of partisanship driving districting decisions. But the First Amendment analysis below offers no "clear" and "manageable" way of distinguishing permissible from impermissible partisan motivation. The *Common Cause* court embraced that conclusion, observing that "a judicially manageable framework for evaluating partisan gerrymandering claims need not distinguish an 'acceptable' level of partisan gerrymandering from 'excessive' partisan gerrymandering" because "the Constitution does not authorize state redistricting bodies to engage in such partisan gerrymandering." *Id.*, at 851. The decisions below prove the prediction of the *Vieth* plurality that "a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting," 541 U. S., at 294, contrary to our established precedent.

C

The dissent proposes using a State's own districting criteria as a neutral baseline from which to measure how extreme a partisan gerrymander is. The dissent would have us line up all the possible maps drawn using those criteria according to the partisan distribution they would produce. Distance from the "median" map would indicate whether a particular districting plan harms supporters of one party to an unconstitutional extent. *Post*, at 18–19, 25 (opinion of KAGAN, J.).

As an initial matter, it does not make sense to use criteria that will vary from State to State and year to year as the baseline for determining whether a gerrymander violates the Federal Constitution. The degree of partisan advantage that the Constitution tolerates should not turn on criteria offered by the gerrymanderers themselves. It

is easy to imagine how different criteria could move the median map toward different partisan distributions. As a result, the same map could be constitutional or not depending solely on what the mapmakers said they set out to do. That possibility illustrates that the dissent's proposed constitutional test is indeterminate and arbitrary.

Even if we were to accept the dissent's proposed baseline, it would return us to "the original unanswerable question (How much political motivation and effect is too much?)." *Vieth*, 541 U. S., at 296–297 (plurality opinion). Would twenty percent away from the median map be okay? Forty percent? Sixty percent? Why or why not? (We appreciate that the dissent finds all the unanswerable questions annoying, see *post*, at 22, but it seems a useful way to make the point.) The dissent's answer says it all: "This much is too much." *Post*, at 25–26. That is not even trying to articulate a standard or rule.

The dissent argues that there are other instances in law where matters of degree are left to the courts. See *post*, at 27. True enough. But those instances typically involve constitutional or statutory provisions or common law confining and guiding the exercise of judicial discretion. For example, the dissent cites the need to determine "substantial anticompetitive effect[s]" in antitrust law. *Post*, at 27 (citing *Ohio* v. *American Express Co.*, 585 U. S. ___ (2018)). That language, however, grew out of the Sherman Act, understood from the beginning to have its "origin in the common law" and to be "familiar in the law of this country prior to and at the time of the adoption of the [A]ct." *Standard Oil Co. of N. J.* v. *United States*, 221 U. S. 1, 51 (1911). Judges began with a significant body of law about what constituted a legal violation. In other cases, the pertinent statutory terms draw meaning from related provisions or statutory context. Here, on the other hand, the Constitution provides no basis whatever to guide the exercise of judicial discretion. Common experi-

ence gives content to terms such as "substantial risk" or "substantial harm," but the same cannot be said of substantial deviation from a median map. There is no way to tell whether the prohibited deviation from that map should kick in at 25 percent or 75 percent or some other point. The only provision in the Constitution that specifically addresses the matter assigns it to the political branches. See Art. I, §4, cl. 1.

D

The North Carolina District Court further concluded that the 2016 Plan violated the Elections Clause and Article I, §2. We are unconvinced by that novel approach.

Article I, §2, provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States." The Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Art. I, §4, cl. 1.

The District Court concluded that the 2016 Plan exceeded the North Carolina General Assembly's Elections Clause authority because, among other reasons, "the Elections Clause did not empower State legislatures to disfavor the interests of supporters of a particular candidate or party in drawing congressional districts." 318 F. Supp. 3d, at 937. The court further held that partisan gerrymandering infringes the right of "the People" to select their representatives. *Id.*, at 938–940. Before the District Court's decision, no court had reached a similar conclusion. In fact, the plurality in *Vieth* concluded—without objection from any other Justice—that neither §2 nor §4 of Article I "provides a judicially enforceable limit on the political considerations that the States and Congress may take into

account when districting." 541 U. S., at 305.

The District Court nevertheless asserted that partisan gerrymanders violate "the core principle of [our] republican government" preserved in Art. I, §2, "namely, that the voters should choose their representatives, not the other way around." 318 F. Supp. 3d, at 940 (quoting *Arizona State Legislature*, 576 U. S., at ___ (slip op., at 35); internal quotation marks omitted; alteration in original). That seems like an objection more properly grounded in the Guarantee Clause of Article IV, §4, which "guarantee[s] to every State in [the] Union a Republican Form of Government." This Court has several times concluded, however, that the Guarantee Clause does not provide the basis for a justiciable claim. See, *e.g.*, *Pacific States Telephone & Telegraph Co.* v. *Oregon*, 223 U. S. 118 (1912).

V

Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is "incompatible with democratic principles," *Arizona State Legislature*, 576 U. S., at ___ (slip op., at 1), does not mean that the solution lies with the federal judiciary. We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions. "[J]udicial action must be governed by *standard*, by *rule*," and must be "principled, rational, and based upon reasoned distinctions" found in the Constitution or laws. *Vieth*, 541 U. S., at 278, 279 (plurality opinion). Judicial review of partisan gerrymandering does not meet those basic requirements.

Today the dissent essentially embraces the argument that the Court unanimously rejected in *Gill*: "this Court

can address the problem of partisan gerrymandering because it *must*." 585 U. S., at ___ (slip op., at 12). That is not the test of our authority under the Constitution; that document instead "confines the federal courts to a properly judicial role." *Town of Chester* v. *Laroe Estates*, *Inc.*, 581 U. S. ___, ___ (2017) (slip op., at 4).

What the appellees and dissent seek is an unprecedented expansion of judicial power. We have never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years. The expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life. That intervention would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting, for state as well as federal representatives. Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role. See *post*, at 32–33.

Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. The States, for example, are actively addressing the issue on a number of fronts. In 2015, the Supreme Court of Florida struck down that State's congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution. *League of Women Voters of Florida* v. *Detzner*, 172 So. 3d 363 (2015). The dissent wonders why we can't do the same. See *post*, at 31. The answer is that there is no "Fair Districts Amendment" to the Federal Constitution. Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply. (We do not understand how the dissent can maintain that a provision saying that no districting plan "shall

be drawn with the intent to favor or disfavor a political party" provides little guidance on the question. See *post*, at 31, n. 6.) Indeed, numerous other States are restricting partisan considerations in districting through legislation. One way they are doing so is by placing power to draw electoral districts in the hands of independent commissions. For example, in November 2018, voters in Colorado and Michigan approved constitutional amendments creating multimember commissions that will be responsible in whole or in part for creating and approving district maps for congressional and state legislative districts. See Colo. Const., Art. V, §§44, 46; Mich. Const., Art. IV, §6. Missouri is trying a different tack. Voters there overwhelmingly approved the creation of a new position—state demographer—to draw state legislative district lines. Mo. Const., Art. III, §3.

Other States have mandated at least some of the traditional districting criteria for their mapmakers. Some have outright prohibited partisan favoritism in redistricting. See Fla. Const., Art. III, §20(a) ("No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent."); Mo. Const., Art. III, §3 ("Districts shall be designed in a manner that achieves both partisan fairness and, secondarily, competitiveness. 'Partisan fairness' means that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency."); Iowa Code §42.4(5) (2016) ("No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group."); Del. Code Ann., Tit. xxix, §804 (2017) (providing that in determining district boundaries for the state legislature, no district shall "be created so as to unduly favor any person or political party").

As noted, the Framers gave Congress the power to do something about partisan gerrymandering in the Elections

Clause. The first bill introduced in the 116th Congress would require States to create 15-member independent commissions to draw congressional districts and would establish certain redistricting criteria, including protection for communities of interest, and ban partisan gerrymandering. H. R. 1, 116th Cong., 1st Sess., §§2401, 2411 (2019).

Dozens of other bills have been introduced to limit reliance on political considerations in redistricting. In 2010, H. R. 6250 would have required States to follow standards of compactness, contiguity, and respect for political subdivisions in redistricting. It also would have prohibited the establishment of congressional districts "with the major purpose of diluting the voting strength of any person, or group, including any political party," except when necessary to comply with the Voting Rights Act of 1965. H. R. 6250, 111th Cong., 2d Sess., §2 (referred to committee).

Another example is the Fairness and Independence in Redistricting Act, which was introduced in 2005 and has been reintroduced in every Congress since. That bill would require every State to establish an independent commission to adopt redistricting plans. The bill also set forth criteria for the independent commissions to use, such as compactness, contiguity, and population equality. It would prohibit consideration of voting history, political party affiliation, or incumbent Representative's residence. H. R. 2642, 109th Cong., 1st Sess., §4 (referred to subcommittee).

We express no view on any of these pending proposals. We simply note that the avenue for reform established by the Framers, and used by Congress in the past, remains open.

* * *

No one can accuse this Court of having a crabbed view of

the reach of its competence. But we have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide us in the exercise of such authority. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 1 Cranch, at 177. In this rare circumstance, that means our duty is to say "this is not law."

The judgments of the United States District Court for the Middle District of North Carolina and the United States District Court for the District of Maryland are vacated, and the cases are remanded with instructions to dismiss for lack of jurisdiction.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 18–422, 18–726

ROBERT A. RUCHO, ET AL., APPELLANTS
18–422 *v.*
COMMON CAUSE, ET AL.; AND

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

LINDA H. LAMONE, ET AL., APPELLANTS
18–726 *v.*
O. JOHN BENISEK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

[June 27, 2019]

JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, dissenting.

For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities.

And not just any constitutional violation. The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives. In so doing, the partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people. These gerrymanders enabled politicians to entrench themselves in office as against voters' preferences. They promoted parti-

sanship above respect for the popular will. They encouraged a politics of polarization and dysfunction. If left unchecked, gerrymanders like the ones here may irreparably damage our system of government.

And checking them is *not* beyond the courts. The majority's abdication comes just when courts across the country, including those below, have coalesced around manageable judicial standards to resolve partisan gerrymandering claims. Those standards satisfy the majority's own benchmarks. They do not require—indeed, they do not permit—courts to rely on their own ideas of electoral fairness, whether proportional representation or any other. And they limit courts to correcting only egregious gerrymanders, so judges do not become omnipresent players in the political process. But yes, the standards used here do allow—as well they should—judicial intervention in the worst-of-the-worst cases of democratic subversion, causing blatant constitutional harms. In other words, they allow courts to undo partisan gerrymanders of the kind we face today from North Carolina and Maryland. In giving such gerrymanders a pass from judicial review, the majority goes tragically wrong.

I

Maybe the majority errs in these cases because it pays so little attention to the constitutional harms at their core. After dutifully reciting each case's facts, the majority leaves them forever behind, instead immersing itself in everything that could conceivably go amiss if courts became involved. So it is necessary to fill in the gaps. To recount exactly what politicians in North Carolina and Maryland did to entrench their parties in political office, whatever the electorate might think. And to elaborate on the constitutional injury those politicians wreaked, to our democratic system and to individuals' rights. All that will help in considering whether courts confronting partisan

gerrymandering claims are really so hamstrung—so unable to carry out their constitutional duties—as the majority thinks.

A

The plaintiffs here challenge two congressional districting plans—one adopted by Republicans in North Carolina and the other by Democrats in Maryland—as unconstitutional partisan gerrymanders. As I relate what happened in those two States, ask yourself: Is this how American democracy is supposed to work?

Start with North Carolina. After the 2010 census, the North Carolina General Assembly, with Republican majorities in both its House and its Senate, enacted a new congressional districting plan. That plan governed the two next national elections. In 2012, Republican candidates won 9 of the State's 13 seats in the U. S. House of Representatives, although they received only 49% of the statewide vote. In 2014, Republican candidates increased their total to 10 of the 13 seats, this time based on 55% of the vote. Soon afterward, a District Court struck down two districts in the plan as unconstitutional racial gerrymanders. See *Harris* v. *McCrory*, 159 F. Supp. 3d 600 (MDNC 2016), aff'd *sub nom. Cooper* v. *Harris*, 581 U. S. ___ (2017). The General Assembly, with both chambers still controlled by Republicans, went back to the drawing board to craft the needed remedial state map. And here is how the process unfolded:

- The Republican co-chairs of the Assembly's redistricting committee, Rep. David Lewis and Sen. Robert Rucho, instructed Dr. Thomas Hofeller, a Republican districting specialist, to create a new map that would maintain the 10–3 composition of the State's congressional delegation come what might. Using sophisticated technological tools and

precinct-level election results selected to predict voting behavior, Hofeller drew district lines to minimize Democrats' voting strength and ensure the election of 10 Republican Congressmen. See *Common Cause* v. *Rucho*, 318 F. Supp. 3d 777, 805–806 (MDNC 2018).

- Lewis then presented for the redistricting committee's (retroactive) approval a list of the criteria Hofeller had employed—including one labeled "Partisan Advantage." That criterion, endorsed by a party-line vote, stated that the committee would make all "reasonable efforts to construct districts" to "maintain the current [10–3] partisan makeup" of the State's congressional delegation. *Id.,* at 807.

- Lewis explained the Partisan Advantage criterion to legislators as follows: We are "draw[ing] the maps to give a partisan advantage to 10 Republicans and 3 Democrats because [I] d[o] not believe it['s] possible to draw a map with 11 Republicans and 2 Democrats." *Id.,* at 808 (internal quotation marks omitted).

- The committee and the General Assembly later enacted, again on a party-line vote, the map Hofeller had drawn. See *id.,* at 809.

- Lewis announced: "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country." *Ibid.* (internal quotation marks omitted).

You might think that judgment best left to the American people. But give Lewis credit for this much: The map has worked just as he planned and predicted. In 2016, Repub-

lican congressional candidates won 10 of North Carolina's 13 seats, with 53% of the statewide vote. Two years later, Republican candidates won 9 of 12 seats though they received only 50% of the vote. (The 13th seat has not yet been filled because fraud tainted the initial election.)

Events in Maryland make for a similarly grisly tale. For 50 years, Maryland's 8-person congressional delegation typically consisted of 2 or 3 Republicans and 5 or 6 Democrats. After the 2000 districting, for example, the First and Sixth Districts reliably elected Republicans, and the other districts as reliably elected Democrats. See R. Cohen & J. Barnes, Almanac of American Politics 2016, p. 836 (2015). But in the 2010 districting cycle, the State's Democratic leaders, who controlled the governorship and both houses of the General Assembly, decided to press their advantage.

- Governor Martin O'Malley, who oversaw the process, decided (in his own later words) "to create a map that was more favorable for Democrats over the next ten years." Because flipping the First District was geographically next-to-impossible, "a decision was made to go for the Sixth." *Benisek* v. *Lamone*, 348 F. Supp. 3d 493, 502 (Md. 2018) (quoting O'Malley; emphasis deleted).

- O'Malley appointed an advisory committee as the public face of his effort, while asking Congressman Steny Hoyer, a self-described "serial gerrymanderer," to hire and direct a mapmaker. *Id.,* at 502. Hoyer retained Eric Hawkins, an analyst at a political consulting firm providing services to Democrats. See *id.,* at 502–503.

- Hawkins received only two instructions: to ensure that the new map produced 7 reliable Democratic

seats, and to protect all Democratic incumbents. See *id.,* at 503.

- Using similar technologies and election data as Hofeller, Hawkins produced a map to those specifications. Although new census figures required removing only 10,000 residents from the Sixth District, Hawkins proposed a large-scale population transfer. The map moved about 360,000 voters out of the district and another 350,000 in. That swap decreased the number of registered Republicans in the district by over 66,000 and increased the number of registered Democrats by about 24,000, all to produce a safe Democratic district. See *id.,* at 499, 501.

- After the advisory committee adopted the map on a party-line vote, State Senate President Thomas Miller briefed the General Assembly's Democratic caucuses about the new map's aims. Miller told his colleagues that the map would give "Democrats a real opportunity to pick up a seventh seat in the delegation" and that "[i]n the face of Republican gains in redistricting in other states[,] we have a serious obligation to create this opportunity." *Id.,* at 506 (internal quotation marks omitted).

- The General Assembly adopted the plan on a party-line vote. See *id.,* at 506.

Maryland's Democrats proved no less successful than North Carolina's Republicans in devising a voter-proof map. In the four elections that followed (from 2012 through 2018), Democrats have never received more than 65% of the statewide congressional vote. Yet in each of those elections, Democrats have won (you guessed it) 7 of 8

House seats—including the once-reliably-Republican Sixth District.

B

Now back to the question I asked before: Is that how American democracy is supposed to work? I have yet to meet the person who thinks so.

"Governments," the Declaration of Independence states, "deriv[e] their just Powers from the Consent of the Governed." The Constitution begins: "We the People of the United States." The Gettysburg Address (almost) ends: "[G]overnment of the people, by the people, for the people." If there is a single idea that made our Nation (and that our Nation commended to the world), it is this one: The people are sovereign. The "power," James Madison wrote, "is in the people over the Government, and not in the Government over the people." 4 Annals of Cong. 934 (1794).

Free and fair and periodic elections are the key to that vision. The people get to choose their representatives. And then they get to decide, at regular intervals, whether to keep them. Madison again: "[R]epublican liberty" demands "not only, that all power should be derived from the people; but that those entrusted with it should be kept in dependence on the people." 2 The Federalist No. 37, p. 4 (J. & A. McLean eds. 1788). Members of the House of Representatives, in particular, are supposed to "recollect[ ] [that] dependence" every day. *Id.,* No. 57, at 155. To retain an "intimate sympathy with the people," they must be "compelled to anticipate the moment" when their "exercise of [power] is to be reviewed." *Id.,* Nos. 52, 57, at 124, 155. Election day—next year, and two years later, and two years after that—is what links the people to their representatives, and gives the people their sovereign power. That day is the foundation of democratic governance.

And partisan gerrymandering can make it meaningless. At its most extreme—as in North Carolina and Maryland—the practice amounts to "rigging elections." *Vieth* v. *Jubelirer*, 541 U. S. 267, 317 (2004) (Kennedy, J., concurring in judgment) (internal quotation marks omitted). By drawing districts to maximize the power of some voters and minimize the power of others, a party in office at the right time can entrench itself there for a decade or more, no matter what the voters would prefer. Just ask the people of North Carolina and Maryland. The "core principle of republican government," this Court has recognized, is "that the voters should choose their representatives, not the other way around." *Arizona State Legislature* v. *Arizona Independent Redistricting Comm'n*, 576 U. S. ___, ___ (2015) (slip op., at 35) (internal quotation marks omitted). Partisan gerrymandering turns it the other way around. By that mechanism, politicians can cherry-pick voters to ensure their reelection. And the power becomes, as Madison put it, "in the Government over the people." 4 Annals of Cong. 934.

The majority disputes none of this. I think it important to underscore that fact: The majority disputes none of what I have said (or will say) about how gerrymanders undermine democracy. Indeed, the majority concedes (really, how could it not?) that gerrymandering is "incompatible with democratic principles." *Ante,* at 30 (quoting *Arizona State Legislature*, 576 U. S., at ___ (slip op., at 1)). And therefore what? That recognition would seem to demand a response. The majority offers two ideas that might qualify as such. One is that the political process can deal with the problem—a proposition so dubious on its face that I feel secure in delaying my answer for some time. See *ante,* at 31–33*; infra,* at 29–31. The other is that political gerrymanders have always been with us. See *ante,* at 8, 24. To its credit, the majority does not frame that point as an originalist constitutional argument.

After all (as the majority rightly notes), racial and residential gerrymanders were also once with us, but the Court has done something about that fact. See *ante,* at 10.[1] The majority's idea instead seems to be that if we have lived with partisan gerrymanders so long, we will survive.

That complacency has no cause. Yes, partisan gerrymandering goes back to the Republic's earliest days. (As does vociferous opposition to it.) But big data and modern technology—of just the kind that the mapmakers in North Carolina and Maryland used—make today's gerrymandering altogether different from the crude linedrawing of the past. Old-time efforts, based on little more than guesses, sometimes led to so-called dummymanders—gerrymanders that went spectacularly wrong. Not likely in today's world. Mapmakers now have access to more granular data about party preference and voting behavior than ever before. County-level voting data has given way to precinct-level or city-block-level data; and increasingly, mapmakers avail themselves of data sets providing wide-ranging information about even individual voters. See Brief for Political Science Professors as *Amici Curiae* 20–22. Just as important, advancements in computing technology have enabled mapmakers to put that information to use with unprecedented efficiency and precision. See *id.,* at 22–25. While bygone mapmakers may have drafted three or four alternative districting plans, today's mapmakers can generate thousands of possibilities at the touch of a key—and then choose the one giving their party maximum advantage (usually while still meeting tradi-

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[1] And even putting that aside, any originalist argument would have to deal with an inconvenient fact. The Framers originally viewed political parties themselves (let alone their most partisan actions) with deep suspicion, as fomenters of factionalism and "symptom[s] of disease in the body politic." G. Wood, Empire of Liberty: A History of the Early Republic, 1789–1815, p. 140 (2009).

tional districting requirements). The effect is to make gerrymanders far more effective and durable than before, insulating politicians against all but the most titanic shifts in the political tides. These are not your grandfather's—let alone the Framers'—gerrymanders.

The proof is in the 2010 pudding. That redistricting cycle produced some of the most extreme partisan gerrymanders in this country's history. I've already recounted the results from North Carolina and Maryland, and you'll hear even more about those. See *supra,* at 4–6; *infra,* at 19–20. But the voters in those States were not the only ones to fall prey to such districting perversions. Take Pennsylvania. In the three congressional elections occurring under the State's original districting plan (before the State Supreme Court struck it down), Democrats received between 45% and 51% of the statewide vote, but won only 5 of 18 House seats. See *League of Women Voters* v. *Pennsylvania*, ___ Pa. ___, ___, 178 A. 3d 737, 764 (2018). Or go next door to Ohio. There, in four congressional elections, Democrats tallied between 39% and 47% of the statewide vote, but never won more than 4 of 16 House seats. See *Ohio A. Philip Randolph Inst.* v. *Householder*, 373 F. Supp. 3d 978, 1074 (SD Ohio 2019). (Nor is there any reason to think that the results in those States stemmed from political geography or non-partisan districting criteria, rather than from partisan manipulation. See *infra*, at 15, 31.) And gerrymanders will only get worse (or depending on your perspective, better) as time goes on—as data becomes ever more fine-grained and data analysis techniques continue to improve. What was possible with paper and pen—or even with Windows 95—doesn't hold a candle (or an LED bulb?) to what will become possible with developments like machine learning. And someplace along this road, "we the people" become sovereign no longer.

C

Partisan gerrymandering of the kind before us not only subverts democracy (as if that weren't bad enough). It violates individuals' constitutional rights as well. That statement is not the lonesome cry of a dissenting Justice. This Court has recognized extreme partisan gerrymandering as such a violation for many years.

Partisan gerrymandering operates through vote dilution—the devaluation of one citizen's vote as compared to others. A mapmaker draws district lines to "pack" and "crack" voters likely to support the disfavored party. See generally *Gill* v. *Whitford*, 585 U. S. ___, ___–___ (2018) (slip op., at 14–16). He packs supermajorities of those voters into a relatively few districts, in numbers far greater than needed for their preferred candidates to prevail. Then he cracks the rest across many more districts, spreading them so thin that their candidates will not be able to win. Whether the person is packed or cracked, his vote carries less weight—has less consequence—than it would under a neutrally drawn (non-partisan) map. See *id.,* at ___ (KAGAN, J., concurring) (slip op., at 4). In short, the mapmaker has made some votes count for less, because they are likely to go for the other party.

That practice implicates the Fourteenth Amendment's Equal Protection Clause. The Fourteenth Amendment, we long ago recognized, "guarantees the opportunity for equal participation by all voters in the election" of legislators. *Reynolds* v. *Sims*, 377 U. S. 533, 566 (1964). And that opportunity "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.,* at 555. Based on that principle, this Court in its one-person-one-vote decisions prohibited creating districts with significantly different populations. A State could not, we explained, thus "dilut[e] the weight of votes because of place of residence." *Id.,* at 566. The constitutional injury in a

partisan gerrymandering case is much the same, except that the dilution is based on party affiliation. In such a case, too, the districters have set out to reduce the weight of certain citizens' votes, and thereby deprive them of their capacity to "full[y] and effective[ly] participat[e] in the political process[]." *Id.,* at 565. As Justice Kennedy (in a controlling opinion) once hypothesized: If districters declared that they were drawing a map "so as most to burden [the votes of] Party X's" supporters, it would violate the Equal Protection Clause. *Vieth*, 541 U. S., at 312. For (in the language of the one-person-one-vote decisions) it would infringe those voters' rights to "equal [electoral] participation." *Reynolds*, 377 U. S., at 566; see *Gray* v. *Sanders*, 372 U. S. 368, 379–380 (1963) ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications").

And partisan gerrymandering implicates the First Amendment too. That Amendment gives its greatest protection to political beliefs, speech, and association. Yet partisan gerrymanders subject certain voters to "disfavored treatment"—again, counting their votes for less—precisely because of "their voting history [and] their expression of political views." *Vieth*, 541 U. S., at 314 (opinion of Kennedy, J.). And added to that strictly personal harm is an associational one. Representative democracy is "unimaginable without the ability of citizens to band together in [support of] candidates who espouse their political views." *California Democratic Party* v. *Jones*, 530 U. S. 567, 574 (2000). By diluting the votes of certain citizens, the State frustrates their efforts to translate those affiliations into political effectiveness. See *Gill*, 585 U. S., at ___ (KAGAN, J., concurring) (slip op., at 9) ("Members of the disfavored party[,] deprived of their natural political strength[,] may face difficulties fundraising, registering voters, [and] eventually accomplishing their

policy objectives"). In both those ways, partisan gerrymanders of the kind we confront here undermine the protections of "democracy embodied in the First Amendment." *Elrod* v. *Burns*, 427 U. S. 347, 357 (1976) (internal quotation marks omitted).

Though different Justices have described the constitutional harm in diverse ways, nearly all have agreed on this much: Extreme partisan gerrymandering (as happened in North Carolina and Maryland) violates the Constitution. See, *e.g., Vieth*, 541 U. S., at 293 (plurality opinion) ("[A]n excessive injection of politics [in districting] is unlawful" (emphasis deleted)); *id.*, at 316 (opinion of Kennedy, J.) ("[P]artisan gerrymandering that disfavors one party is [im]permissible"); *id.,* at 362 (BREYER, J., dissenting) (Gerrymandering causing political "entrenchment" is a "violat[ion of] the Constitution's Equal Protection Clause"); *Davis* v. *Bandemer*, 478 U. S. 109, 132 (1986) (plurality opinion) ("[U]nconstitutional discrimination" occurs "when the electoral system is arranged in a manner that will consistently degrade [a voter's] influence on the political process"); *id.*, at 165 (Powell, J., concurring) ("Unconstitutional gerrymandering" occurs when "the boundaries of the voting districts have been distorted deliberately" to deprive voters of "an equal opportunity to participate in the State's legislative processes"). Once again, the majority never disagrees; it appears to accept the "principle that each person must have an equal say in the election of representatives." *Ante,* at 20. And indeed, without this settled and shared understanding that cases like these inflict constitutional injury, the question of whether there are judicially manageable standards for resolving them would never come up.

II

So the only way to understand the majority's opinion is as follows: In the face of grievous harm to democratic

governance and flagrant infringements on individuals' rights—in the face of escalating partisan manipulation whose compatibility with this Nation's values and law no one defends—the majority declines to provide any remedy. For the first time in this Nation's history, the majority declares that it can do nothing about an acknowledged constitutional violation because it has searched high and low and cannot find a workable legal standard to apply.

The majority gives two reasons for thinking that the adjudication of partisan gerrymandering claims is beyond judicial capabilities. First and foremost, the majority says, it cannot find a neutral baseline—one not based on contestable notions of political fairness—from which to measure injury. See *ante,* at 15–19. According to the majority, "[p]artisan gerrymandering claims invariably sound in a desire for proportional representation." *Ante,* at 16. But the Constitution does not mandate proportional representation. So, the majority contends, resolving those claims "inevitably" would require courts to decide what is "fair" in the context of districting. *Ante,* at 17. They would have "to make their own political judgment about how much representation particular political parties *deserve*" and "to rearrange the challenged districts to achieve that end." *Ibid.* (emphasis in original). And second, the majority argues that even after establishing a baseline, a court would have no way to answer "the determinative question: 'How much is too much?'" *Ante,* at 19. No "discernible and manageable" standard is available, the majority claims—and so courts could willy-nilly become embroiled in fixing every districting plan. *Ante,* at 20; see *ante,* at 15–16.

I'll give the majority this one—and important—thing: It identifies some dangers everyone should want to avoid. Judges should not be apportioning political power based on their own vision of electoral fairness, whether proportional representation or any other. And judges should not

be striking down maps left, right, and center, on the view that every smidgen of politics is a smidgen too much. Respect for state legislative processes—and restraint in the exercise of judicial authority—counsels intervention in only egregious cases.

But in throwing up its hands, the majority misses something under its nose: What it says can't be done *has* been done. Over the past several years, federal courts across the country—including, but not exclusively, in the decisions below—have largely converged on a standard for adjudicating partisan gerrymandering claims (striking down both Democratic and Republican districting plans in the process). See also *Ohio A. Philip Randolph Inst.*, 373 F. Supp. 3d 978; *League of Women Voters of Michigan* v. *Benson*, 373 F. Supp. 3d 867 (ED Mich. 2019). And that standard does what the majority says is impossible. The standard does not use any judge-made conception of electoral fairness—either proportional representation or any other; instead, it takes as its baseline a State's *own* criteria of fairness, apart from partisan gain. And by requiring plaintiffs to make difficult showings relating to both purpose and effects, the standard invalidates the most extreme, but only the most extreme, partisan gerrymanders.

Below, I first explain the framework courts have developed, and describe its application in these two cases. Doing so reveals in even starker detail than before how much these partisan gerrymanders deviated from democratic norms. As I lay out the lower courts' analyses, I consider two specific criticisms the majority levels—each of which reveals a saddening nonchalance about the threat such districting poses to self-governance. All of that lays the groundwork for then assessing the majority's more general view, described above, that judicial policing in this area cannot be either neutral or restrained. The lower courts' reasoning, as I'll show, proves the opposite.

A

Start with the standard the lower courts used. The majority disaggregates the opinions below, distinguishing the one from the other and then chopping up each into "a number of 'tests.'" *Ante,* at 22; see *ante,* at 22–30. But in doing so, it fails to convey the decisions' most significant—and common—features. Both courts focused on the harm of vote dilution, see *supra,* at 11, though the North Carolina court mostly grounded its analysis in the Fourteenth Amendment and the Maryland court in the First. And both courts (like others around the country) used basically the same three-part test to decide whether the plaintiffs had made out a vote dilution claim. As many legal standards do, that test has three parts: (1) intent; (2) effects; and (3) causation. First, the plaintiffs challenging a districting plan must prove that state officials' "predominant purpose" in drawing a district's lines was to "entrench [their party] in power" by diluting the votes of citizens favoring its rival. *Rucho*, 318 F. Supp. 3d, at 864 (quoting *Arizona State Legislature*, 576 U. S., at ___ (slip op., at 1)). Second, the plaintiffs must establish that the lines drawn in fact have the intended effect by "substantially" diluting their votes. *Lamone*, 348 F. Supp. 3d, at 498. And third, if the plaintiffs make those showings, the State must come up with a legitimate, non-partisan justification to save its map. See *Rucho*, 318 F. Supp. 3d, at 867.[2] If you are a lawyer, you know that this test looks utterly ordinary. It is the sort of thing courts work with every day.

Turn now to the test's application. First, did the North Carolina and Maryland districters have the predominant

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[2] Neither North Carolina nor Maryland offered much of an alternative explanation for the evidence that the plaintiffs put forward. Presumably, both States had trouble coming up with something. Like the majority, see *ante,* at 25, I therefore pass quickly over this part of the test.

purpose of entrenching their own party in power? Here, the two District Courts catalogued the overwhelming direct evidence that they did. To remind you of some highlights, see *supra,* at 4–6: North Carolina's redistricting committee used "Partisan Advantage" as an official criterion for drawing district lines. And from the first to the last, that committee's chair (along with his mapmaker) acted to ensure a 10–3 partisan split, whatever the statewide vote, because he thought that "electing Republicans is better than electing Democrats." For their part, Maryland's Democrats—the Governor, senior Congressman, and State Senate President alike—openly admitted to a single driving purpose: flip the Sixth District from Republican to Democratic. They did not blanch from moving some 700,000 voters into new districts (when one-person-one-vote rules required relocating just 10,000) for that reason and that reason alone.

The majority's response to the District Courts' purpose analysis is discomfiting. The majority does not contest the lower courts' findings; how could it? Instead, the majority says that state officials' intent to entrench their party in power is perfectly "permissible," even when it is the predominant factor in drawing district lines. *Ante,* at 23. But that is wrong. True enough, that the intent to inject "political considerations" into districting may not raise any constitutional concerns. In *Gaffney* v. *Cummings*, 412 U. S. 735 (1973), for example, we thought it nonproblematic when state officials used political data to ensure rough proportional representation between the two parties. And true enough that even the naked purpose to gain partisan advantage may not rise to the level of constitutional notice when it is not the driving force in mapmaking or when the intended gain is slight. See *Vieth*, 541 U. S., at 286 (plurality opinion). But when political actors have a specific and predominant intent to entrench themselves in power by manipulating district lines, that goes

too far. Consider again Justice Kennedy's hypothetical of mapmakers who set out to maximally burden (*i.e.,* make count for as little as possible) the votes going to a rival party. See *supra,* at 12. Does the majority really think that goal is permissible? But why even bother with hypotheticals? Just consider the purposes here. It cannot be permissible and thus irrelevant, as the majority claims, that state officials have as their purpose the kind of grotesquely gerrymandered map that, according to all this Court has ever said, violates the Constitution. See *supra,* at 13.

On to the second step of the analysis, where the plaintiffs must prove that the districting plan substantially dilutes their votes. The majority fails to discuss most of the evidence the District Courts relied on to find that the plaintiffs had done so. See *ante,* at 23–24. But that evidence—particularly from North Carolina—is the key to understanding both the problem these cases present and the solution to it they offer. The evidence reveals just how bad the two gerrymanders were (in case you had any doubts). And it shows how the same technologies and data that today facilitate extreme partisan gerrymanders also enable courts to discover them, by exposing just how much they dilute votes. See *Vieth*, 541 U. S., at 312–313 (opinion of Kennedy, J.) (predicting that development).

Consider the sort of evidence used in North Carolina first. There, the plaintiffs demonstrated the districting plan's effects mostly by relying on what might be called the "extreme outlier approach." (Here's a spoiler: the State's plan was one.) The approach—which also has recently been used in Michigan and Ohio litigation—begins by using advanced computing technology to randomly generate a large collection of districting plans that incorporate the State's physical and political geography and meet its declared districting criteria, *except for* partisan gain. For each of those maps, the method then uses

actual precinct-level votes from past elections to determine a partisan outcome (*i.e.,* the number of Democratic and Republican seats that map produces). Suppose we now have 1,000 maps, each with a partisan outcome attached to it. We can line up those maps on a continuum—the most favorable to Republicans on one end, the most favorable to Democrats on the other.[3] We can then find the median outcome—that is, the outcome smack dab in the center—in a world with no partisan manipulation. And we can see where the State's actual plan falls on the spectrum—at or near the median or way out on one of the tails? The further out on the tail, the more extreme the partisan distortion and the more significant the vote dilution. See generally Brief for Eric S. Lander as *Amicus Curiae* 7–22.

Using that approach, the North Carolina plaintiffs offered a boatload of alternative districting plans—all showing that the State's map was an out-out-out-outlier. One expert produced 3,000 maps, adhering in the way described above to the districting criteria that the North Carolina redistricting committee had used, other than partisan advantage. To calculate the partisan outcome of those maps, the expert also used the same election data (a composite of seven elections) that Hofeller had employed when devising the North Carolina plan in the first instance. The results were, shall we say, striking. Every single one of the 3,000 maps would have produced at least one more Democratic House Member than the State's actual map, and 77% would have elected three or four more. See *Rucho*, 318 F. Supp. 3d, at 875–876, 894; App.

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[3] As I'll discuss later, this distribution of outcomes provides what the majority says does not exist—a neutral comparator for the State's own plan. See *ante,* at 16–19; *supra,* at 14; *infra*, at 22–25. It essentially answers the question: In a State with these geographic features and this distribution of voters and this set of districting criteria—but without partisan manipulation—what would happen?

276. A second expert obtained essentially the same results with maps conforming to more generic districting criteria (*e.g.,* compactness and contiguity of districts). Over 99% of that expert's 24,518 simulations would have led to the election of at least one more Democrat, and over 70% would have led to two or three more. See *Rucho,* 318 F. Supp. 3d, at 893–894. Based on those and other findings, the District Court determined that the North Carolina plan substantially dilutes the plaintiffs' votes.[4]

Because the Maryland gerrymander involved just one district, the evidence in that case was far simpler—but no less powerful for that. You've heard some of the numbers before. See *supra,* at 6. The 2010 census required only a minimal change in the Sixth District's population—the subtraction of about 10,000 residents from more than 700,000. But instead of making a correspondingly minimal adjustment, Democratic officials reconfigured the entire district. They moved 360,000 residents out and another 350,000 in, while splitting some counties for the first time in almost two centuries. The upshot was a district with 66,000 fewer Republican voters and 24,000 more Democratic ones. In the old Sixth, 47% of registered voters were Republicans and only 36% Democrats. But in the new Sixth, 44% of registered voters were Democrats and only 33% Republicans. That reversal of the district's partisan composition translated into four consecutive Democratic victories, including in a wave election year for

[4]The District Court also relied on actual election results (under both the new plan and the similar one preceding it) and on mathematical measurements of the new plan's "partisan asymmetry." See *Rucho*, 318 F. Supp. 3d, at 884–895. Those calculations assess whether supporters of the two parties can translate their votes into representation with equal ease. See Stephanopoulos & McGhee, The Measure of a Metric, 70 Stan. L. Rev. 1503, 1505–1507 (2018). The court found that the new North Carolina plan led to extreme asymmetry, compared both to plans used in the rest of the country and to plans previously used in the State. See *Rucho*, 318 F. Supp. 3d, at 886–887, 892–893.

Republicans (2014). In what was once a party stronghold, Republicans now have little or no chance to elect their preferred candidate. The District Court thus found that the gerrymandered Maryland map substantially dilutes Republicans' votes. See *Lamone,* 348 F. Supp. 3d, at 519–520.

The majority claims all these findings are mere "prognostications" about the future, in which no one "can have any confidence." *Ante,* at 23 (internal quotation marks omitted). But the courts below did not gaze into crystal balls, as the majority tries to suggest. Their findings about these gerrymanders' effects on voters—both in the past and predictably in the future—were evidence-based, data-based, statistics-based. Knowledge-based, one might say. The courts did what anyone would want a decisionmaker to do when so much hangs in the balance. They looked hard at the facts, and they went where the facts led them. They availed themselves of all the information that mapmakers (like Hofeller and Hawkins) and politicians (like Lewis and O'Malley) work so hard to amass and then use to make every districting decision. They refused to content themselves with unsupported and out-of-date musings about the unpredictability of the American voter. See *ante,* at 24–25; but see Brief for Political Science Professors as *Amici Curiae* 14–20 (citing chapter and verse to the contrary). They did not bet America's future—as today the majority does—on the idea that maps constructed with so much expertise and care to make electoral outcomes impervious to voting would somehow or other come apart. They looked at the evidence—at the facts about how these districts operated—and they could reach only one conclusion. By substantially diluting the votes of citizens favoring their rivals, the politicians of one party had succeeded in entrenching themselves in office. They had beat democracy.

B

The majority's broadest claim, as I've noted, is that this is a price we must pay because judicial oversight of partisan gerrymandering cannot be "politically neutral" or "manageable." *Ante,* at 19; see *supra,* at 14. Courts, the majority argues, will have to choose among contested notions of electoral fairness. (Should they take as the ideal mode of districting proportional representation, many competitive seats, adherence to traditional districting criteria, or so forth?) See *ante,* at 16–19. And even once courts have chosen, the majority continues, they will have to decide "[h]ow much is too much?"—that is, how much deviation from the chosen "touchstone" to allow? *Ante,* at 19–20. In answering that question, the majority surmises, they will likely go far too far. See *ante,* at 15. So the whole thing is impossible, the majority concludes. To prove its point, the majority throws a bevy of question marks on the page. (I count nine in just two paragraphs. See *ante,* at 19–20.) But it never tries to analyze the serious question presented here—whether the kind of standard developed below falls prey to those objections, or instead allows for neutral and manageable oversight. The answer, as you've already heard enough to know, is the latter. That kind of oversight is not only possible; it's been done.

Consider neutrality first. Contrary to the majority's suggestion, the District Courts did not have to—and in fact did not—choose among competing visions of electoral fairness. That is because they did not try to compare the State's actual map to an "ideally fair" one (whether based on proportional representation or some other criterion). Instead, they looked at the difference between what the State did and what the State would have done if politicians hadn't been intent on partisan gain. Or put differently, the comparator (or baseline or touchstone) is the result not of a judge's philosophizing but of the State's own

characteristics and judgments. The effects evidence in these cases accepted as a given the State's physical geography (*e.g.,* where does the Chesapeake run?) and political geography (*e.g.,* where do the Democrats live on top of each other?). So the courts did not, in the majority's words, try to "counteract 'natural' gerrymandering caused, for example, by the urban concentration of one party." *Ante,* at 19. Still more, the courts' analyses used the State's own criteria for electoral fairness—except for naked partisan gain. Under their approach, in other words, the State selected its own fairness baseline in the form of its other districting criteria. All the courts did was determine how far the State had gone off that track because of its politicians' effort to entrench themselves in office.

The North Carolina litigation well illustrates the point. The thousands of randomly generated maps I've mentioned formed the core of the plaintiffs' case that the North Carolina plan was an "extreme[] outlier." *Rucho*, 318 F. Supp. 3d, at 852 (internal quotation marks omitted); see *supra*, at 18–20. Those maps took the State's political landscape as a given. In North Carolina, for example, Democratic voters are highly concentrated in cities. That fact was built into all the maps; it became part of the baseline. See *Rucho*, 318 F. Supp. 3d, at 896–897. On top of that, the maps took the State's legal landscape as a given. They incorporated the State's districting priorities, excluding partisanship. So in North Carolina, for example, all the maps adhered to the traditional criteria of contiguity and compactness. See *supra,* at 19–20. But the comparator maps in another State would have incorporated different objectives—say, the emphasis Arizona places on competitive districts or the requirement Iowa imposes that counties remain whole. See Brief for Mathematicians et al. as *Amici Curiae* 19–20. The point is that the assemblage of maps, reflecting the characteristics and

judgments of the State itself, creates a neutral baseline from which to assess whether partisanship has run amok. Extreme outlier as to what? As to the other maps the State could have produced given its unique political geography and its chosen districting criteria. *Not* as to the maps a judge, with his own view of electoral fairness, could have dreamed up.

The Maryland court lacked North Carolina's fancy evidence, but analyzed the gerrymander's effects in much the same way—not as against an ideal goal, but as against an *ex ante* baseline. To see the difference, shift gears for a moment and compare Maryland and Massachusetts—both of which (aside from Maryland's partisan gerrymander) use traditional districting criteria. In those two States alike, Republicans receive about 35% of the vote in statewide elections. See Almanac of American Politics 2016, at 836, 880. But the political geography of the States differs. In Massachusetts, the Republican vote is spread evenly across the State; because that is so, districting plans (using traditional criteria of contiguity and compactness) consistently lead to an all-Democratic congressional delegation. By contrast, in Maryland, Republicans are clumped—into the Eastern Shore (the First District) and the Northwest Corner (the old Sixth). Claims of partisan gerrymandering in those two States could come out the same way if judges, à la the majority, used their own visions of fairness to police districting plans; a judge in each State could then insist, in line with proportional representation, that 35% of the vote share entitles citizens to around that much of the delegation. But those suits would not come out the same if courts instead asked: What would have happened, given the State's natural political geography and chosen districting criteria, had officials not indulged in partisan manipulation? And that is what the District Court in Maryland inquired into. The court did not strike down the new Sixth District because a judicial

ideal of proportional representation commanded another Republican seat. It invalidated that district because the quest for partisan gain made the State override *its own* political geography and districting criteria. So much, then, for the impossibility of neutrality.

The majority's sole response misses the point. According to the majority, "it does not make sense to use" a State's own (non-partisan) districting criteria as the baseline from which to measure partisan gerrymandering because those criteria "will vary from State to State and year to year." *Ante,* at 27. But that is a virtue, not a vice—a feature, not a bug. Using the criteria the State itself has chosen at the relevant time prevents any judicial predilections from affecting the analysis—exactly what the majority claims it wants. At the same time, using those criteria enables a court to measure just what it should: the extent to which the pursuit of partisan advantage—by these legislators at this moment—has distorted the State's districting decisions. Sure, different non-partisan criteria could result, as the majority notes, in different partisan distributions to serve as the baseline. *Ante,* at 28. But that in itself raises no issue: Everyone agrees that state officials using non-partisan criteria (*e.g.,* must counties be kept together? should districts be compact?) have wide latitude in districting. The problem arises only when legislators or mapmakers substantially deviate from the baseline distribution by manipulating district lines for partisan gain. So once again, the majority's analysis falters because it equates the demand to eliminate partisan gerrymandering with a demand for a single partisan distribution—the one reflecting proportional representation. See *ante,* at 16–17. But those two demands are different, and only the former is at issue here.

The majority's "how much is too much" critique fares no better than its neutrality argument. How about the following for a first-cut answer: This much is too much. By

any measure, a map that produces a greater partisan skew than any of 3,000 randomly generated maps (all with the State's political geography and districting criteria built in) reflects "too much" partisanship. Think about what I just said: The absolute worst of 3,001 possible maps. The *only one* that could produce a 10–3 partisan split even as Republicans got a bare majority of the statewide vote. And again: How much is too much? This much is too much: A map that without any evident non-partisan districting reason (to the contrary) shifted the composition of a district from 47% Republicans and 36% Democrats to 33% Republicans and 42% Democrats. A map that in 2011 was responsible for the largest partisan swing of a congressional district in the country. See *Lamone,* 348 F. Supp. 3d, at 519. Even the majority acknowledges that "[t]hese cases involve blatant examples of partisanship driving districting decisions." *Ante,* at 27. If the majority had done nothing else, it could have set the line here. How much is too much? At the least, any gerrymanders as bad as these.

And if the majority thought that approach too case-specific, see *ante,* at 28, it could have used the lower courts' general standard—focusing on "predominant" purpose and "substantial" effects—without fear of indeterminacy. I do not take even the majority to claim that courts are incapable of investigating whether legislators mainly intended to seek partisan advantage. See *ante,* at 19–20 (focusing on the difficulty of measuring effects). That is for good reason. Although purpose inquiries carry certain hazards (which courts must attend to), they are a common form of analysis in constitutional cases. See, *e.g., Miller* v. *Johnson*, 515 U. S. 900, 916 (1995); *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 533 (1993); *Washington* v. *Davis*, 426 U. S. 229, 239 (1976). Those inquiries would be no harder here than in other contexts.

Nor is there any reason to doubt, as the majority does, the competence of courts to determine whether a district map "substantially" dilutes the votes of a rival party's supporters from the everything-but-partisanship baseline described above. (Most of the majority's difficulties here really come from its idea that ideal visions set the baseline. But that is double-counting—and, as already shown, wrong to boot.) As this Court recently noted, "the law is full of instances" where a judge's decision rests on "estimating rightly . . . some matter of degree"—including the "substantial[ity]" of risk or harm. *Johnson* v. *United States*, 576 U. S. ___, ___ (2015) (slip op., at 12) (internal quotation marks omitted); see, *e.g., Ohio* v. *American Express Co.*, 585 U. S. ___, ___ (2018) (slip op., at 9) (determining "substantial anticompetitive effect[s]" when applying the Sherman Act); *United States* v. *Davis*, *ante,* at 7–10 (KAVANAUGH, J., dissenting) (cataloging countless statutes requiring a "substantial" risk of harm). The majority is wrong to think that these laws typically (let alone uniformly) further "confine[] and guide[]" judicial decisionmaking. *Ante,* at 28. They do not, either in themselves or through "statutory context." *Ibid.* To the extent additional guidance has developed over the years (as under the Sherman Act), courts themselves have been its author—as they could be in this context too. And contrary to the majority's suggestion, see *ibid.*, courts all the time make judgments about the substantiality of harm without reducing them to particular percentages. If courts are no longer competent to do so, they will have to relinquish, well, substantial portions of their docket.

And the combined inquiry used in these cases set the bar high, so that courts could intervene in the worst partisan gerrymanders, but no others. Or to say the same thing, so that courts could intervene in the kind of extreme gerrymanders that nearly every Justice for decades has thought to violate the Constitution. See *supra,* at 13.

Illicit purpose was simple to show here only because politicians and mapmakers thought their actions could not be attacked in court. See *Rucho*, 318 F. Supp. 3d, at 808 (quoting Lewis's statements to that effect). They therefore felt free to openly proclaim their intent to entrench their party in office. See *supra,* at 4–6. But if the Court today had declared that behavior justiciable, such smoking guns would all but disappear. Even assuming some officials continued to try implementing extreme partisan gerrymanders,[5] they would not brag about their efforts. So plaintiffs would have to prove the intent to entrench through circumstantial evidence—essentially showing that no other explanation (no geographic feature or nonpartisan districting objective) could explain the districting plan's vote dilutive effects. And that would be impossible unless those effects were even more than substantial—unless mapmakers had packed and cracked with abandon in unprecedented ways. As again, they did here. That the two courts below found constitutional violations does not mean their tests were unrigorous; it means that the conduct they confronted was constitutionally appalling—by even the strictest measure, inordinately partisan.

The majority, in the end, fails to understand both the plaintiffs' claims and the decisions below. Everything in today's opinion assumes that these cases grew out of a "desire for proportional representation" or, more generally phrased, a "fair share of political power." *Ante,* at 16, 21. And everything in it assumes that the courts below had to (and did) decide what that fair share would be. But that is

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[5] A decision of this Court invalidating the North Carolina and Maryland gerrymanders would of course have curbed much of that behavior. In districting cases no less than others, officials respond to what this Court determines the law to sanction. See, *e.g.,* Charles & Fuentes-Rohwer, Judicial Intervention as Judicial Restraint, 132 Harv. L. Rev. 236, 269 (2018) (discussing how the Court's prohibition of racial gerrymanders affected districting).

not so. The plaintiffs objected to one specific practice—the extreme manipulation of district lines for partisan gain. Elimination of that practice could have led to proportional representation. Or it could have led to nothing close. What was left after the practice's removal could have been fair, or could have been unfair, by any number of measures. That was not the crux of this suit. The plaintiffs asked only that the courts bar politicians from entrenching themselves in power by diluting the votes of their rivals' supporters. And the courts, using neutral and manageable—and eminently legal—standards, provided that (and only that) relief. This Court should have cheered, not overturned, that restoration of the people's power to vote.

III

This Court has long understood that it has a special responsibility to remedy violations of constitutional rights resulting from politicians' districting decisions. Over 50 years ago, we committed to providing judicial review in that sphere, recognizing as we established the one-person-one-vote rule that "our oath and our office require no less." *Reynolds*, 377 U. S., at 566. Of course, our oath and our office require us to vindicate all constitutional rights. But the need for judicial review is at its most urgent in cases like these. "For here, politicians' incentives conflict with voters' interests, leaving citizens without any political remedy for their constitutional harms." *Gill*, 585 U. S., at ___ (KAGAN, J., concurring) (slip op., at 14). Those harms arise because politicians want to stay in office. No one can look to them for effective relief.

The majority disagrees, concluding its opinion with a paean to congressional bills limiting partisan gerrymanders. "Dozens of [those] bills have been introduced," the majority says. *Ante,* at 33. One was "introduced in 2005 and has been reintroduced in every Congress since." *Ibid.*

And might be reintroduced until the end of time. Because what all these *bills* have in common is that they are not *laws*. The politicians who benefit from partisan gerrymandering are unlikely to change partisan gerrymandering. And because those politicians maintain themselves in office through partisan gerrymandering, the chances for legislative reform are slight.

No worries, the majority says; it has another idea. The majority notes that voters themselves have recently approved ballot initiatives to put power over districting in the hands of independent commissions or other nonpartisan actors. See *ante,* at 32. Some Members of the majority, of course, once thought such initiatives unconstitutional. See *Arizona State Legislature,* 576 U. S., at ___ (ROBERTS, C. J., dissenting) (slip op., at 1). But put that aside. Fewer than half the States offer voters an opportunity to put initiatives to direct vote; in all the rest (including North Carolina and Maryland), voters are dependent on legislators to make electoral changes (which for all the reasons already given, they are unlikely to do). And even when voters have a mechanism they can work themselves, legislators often fight their efforts tooth and nail. Look at Missouri. There, the majority touts a voter-approved proposal to turn districting over to a state demographer. See *ante,* at 32. But before the demographer had drawn a single line, Members of the state legislature had introduced a bill to start undoing the change. See Mo. H. J. Res. 48, 100th Gen. Assembly, 1st Reg. Sess. (2019). I'd put better odds on that bill's passage than on all the congressional proposals the majority cites.

The majority's most perplexing "solution" is to look to state courts. *Ante,* at 30. "[O]ur conclusion," the majority states, does not "condemn complaints about districting to echo into a void": Just a few years back, "the Supreme Court of Florida struck down that State's congressional districting plan as a violation" of the State Constitution.

Ante, at 31; see *League of Women Voters of Florida* v. *Detzner*, 172 So. 3d 363 (2015). And indeed, the majority might have added, the Supreme Court of Pennsylvania last year did the same thing. See *League of Women Voters*, ___ Pa., at ___, 178 A. 3d, at 818. But what do those courts know that this Court does not? If they can develop and apply neutral and manageable standards to identify unconstitutional gerrymanders, why couldn't we?[6]

We could have, and we should have. The gerrymanders here—and they are typical of many—violated the constitutional rights of many hundreds of thousands of American citizens. Those voters (Republicans in the one case, Democrats in the other) did not have an equal opportunity to participate in the political process. Their votes counted for far less than they should have because of their partisan affiliation. When faced with such constitutional wrongs, courts must intervene: "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). That is what the courts below did. Their decisions are worth a read. They (and others that have recently remedied similar violations) are detailed, thorough, painstaking. They

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[6] Contrary to the majority's suggestion, state courts do not typically have more specific "standards and guidance" to apply than federal courts have. *Ante*, at 31. The Pennsylvania Supreme Court based its gerrymandering decision on a constitutional clause providing only that "elections shall be free and equal" and no one shall "interfere to prevent the free exercise of the right of suffrage." *League of Women Voters*, ___ Pa., at ___–___, 178 A. 3d, at 803–804 (quoting Pa. Const., Art. I, §5). And even the Florida "Free Districts Amendment," which the majority touts, says nothing more than that no districting plan "shall be drawn with the intent to favor or disfavor a political party." Fla. Const., Art. III, §20(a). If the majority wants the kind of guidance that will keep courts from intervening too far in the political sphere, see *ante,* at 15, that Amendment does not provide it: The standard is in fact a good deal less exacting than the one the District Courts below applied. In any event, only a few States have a constitutional provision like Florida's, so the majority's state-court solution does not go far.

evaluated with immense care the factual evidence and legal arguments the parties presented. They used neutral and manageable and strict standards. They had not a shred of politics about them. Contra the majority, see *ante,* at 34, this *was* law.

That is not to deny, of course, that these cases have great political consequence. They do. Among the *amicus* briefs here is one from a bipartisan group of current and former Members of the House of Representatives. They describe all the ways partisan gerrymandering harms our political system—what they call "a cascade of negative results." Brief as *Amicus Curiae* 5. These artificially drawn districts shift influence from swing voters to party-base voters who participate in primaries; make bipartisanship and pragmatic compromise politically difficult or impossible; and drive voters away from an ever more dysfunctional political process. See *id.,* at 5–6. Last year, we heard much the same from current and former state legislators. In their view, partisan gerrymandering has "sounded the death-knell of bipartisanship," creating a legislative environment that is "toxic" and "tribal." Brief as *Amicus Curiae* in *Gill* v. *Whitford*, O. T. 2016, No. 16–1161, pp. 6, 25. Gerrymandering, in short, helps create the polarized political system so many Americans loathe.

And gerrymandering is, as so many Justices have emphasized before, anti-democratic in the most profound sense. See *supra,* at 7–8. In our government, "all political power flows from the people." *Arizona State Legislature,* 576 U. S., at ___ (slip op., at 35). And that means, as Alexander Hamilton once said, "that the people should choose whom they please to govern them." 2 Debates on the Constitution 257 (J. Elliot ed. 1891). But in Maryland and North Carolina they cannot do so. In Maryland, election in and election out, there are 7 Democrats and 1 Republican in the congressional delegation. In North Carolina, however the political winds blow, there are 10

Republicans and 3 Democrats. Is it conceivable that someday voters will be able to break out of that prefabricated box? Sure. But everything possible has been done to make that hard. To create a world in which power does not flow from the people because they do not choose their governors.

Of all times to abandon the Court's duty to declare the law, this was not the one. The practices challenged in these cases imperil our system of government. Part of the Court's role in that system is to defend its foundations. None is more important than free and fair elections. With respect but deep sadness, I dissent.

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

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

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,	:	No. 159 MM 2017
	:	On the Recommended Findings of Fact and Conclusions of Law of the Commonwealth Court of Pennsylvania entered on 12/29/18 at No. 261 MD 2017
	:	ARGUED: January 17, 2018
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

OPINION

JUSTICE TODD **FILED: February 7, 2018**

It is a core principle of our republican form of government "that the voters should choose their representatives, not the other way around."[1] In this case, Petitioners allege that the Pennsylvania Congressional Redistricting Act of 2011[2] (the "2011 Plan") does the latter, infringing upon that most central of democratic rights – the right to vote. Specifically, they contend that the 2011 Plan is an unconstitutional partisan gerrymander. While federal courts have, to date, been unable to settle on a workable standard by which to assess such claims under the federal Constitution, we find no such barriers under our great Pennsylvania charter. The people of this Commonwealth should never lose sight of the fact that, in its protection of essential rights, our founding document is the ancestor, not the offspring, of the federal Constitution. We conclude that, in this matter, it provides a constitutional standard, and remedy, even if the federal charter does not. Specifically, we hold that the 2011 Plan violates Article I, Section 5 – the Free and Equal Elections Clause – of the Pennsylvania Constitution.

[1] Mitchell N. Berman, *Managing Gerrymandering*, 83 Tex. L. Rev. 781, 781 (2005), quoted in *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015).

[2] Act of Dec. 22, 2011, P.L. 599, No. 131, 25 P.S. §§ 3596.101 *et seq.*

The challenge herein was brought in June 2017 by Petitioners, the League of Women Voters[3] and 18 voters – all registered Democrats, one from each of our state's congressional districts – against Governor Thomas W. Wolf, Lieutenant Governor Michael J. Stack, III, Secretary Robert Torres, and Commissioner Jonathan M. Marks (collectively, "Executive Respondents"), and the General Assembly, Senate President Pro Tempore Joseph B. Scarnati, III, and House Speaker Michael C. Turzai (collectively, "Legislative Respondents").[4] [5] Petitioners alleged that the 2011 Plan violated several provisions of our state Constitution.

On January 22, 2018, this Court entered a *per curiam* order[6] agreeing with Petitioners, and deeming the 2011 Plan to "clearly, plainly and palpably violate[]" our state Constitution, and so enjoined its further use.[7] *See* Order, 1/22/18. We further

[3] On November 17, 2017, the Commonwealth Court dismissed the League of Women Voters from the case based on a lack of standing. On the presentations before us, *see* Petitioners' Brief at 41 n.5, and given our resolution of this matter, we do not revisit that decision.

[4] A similar challenge, under federal law, was brought by citizen-petitioners against the Governor, the Secretary, and the Commissioner in federal district court, contending that Plan violates the Elections Clause, Article I, Section 4, of the federal Constitution. Trial in that case was held in December, one week prior to the trial in the instant matter. In a 2-1 decision, on January 10, 2018, the three-judge panel of the United States District Court for the Eastern District of Pennsylvania rejected the petitioners' challenge. *See Agre v. Wolf*, No. 17-4392, 2018 WL 351603 (E.D. Pa. Jan. 10, 2018).

[5] On November 13, 2017, the Commonwealth Court permitted to intervene certain registered Republican voters from each district, including announced or potential candidates for Congress and other active members of the Republican Party (the "Intervenors").

[6] To our Order, Justice Baer filed a Concurring And Dissenting Statement, Chief Justice Saylor filed a Dissenting Statement, joined by Justice Mundy, and Justice Mundy filed a Dissenting Statement.

[7] In our order, we excepted the March 13, 2018 special election for Pennsylvania's 18th Congressional District. *See* Order, 1/22/18, ¶ "Sixth."

provided that, if the General Assembly and the Governor did not enact a remedial plan by February 15, 2018, this Court would choose a remedial plan. For those endeavors, we set forth the criteria to be applied in measuring the constitutionality of any remedial plan, holding that:

> 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, 1/22/18, ¶ "Fourth."[8] Our Order indicated that an opinion would follow. This is that Opinion, and we emphasize that, while explicating our rationale, nothing in this Opinion is intended to conflict with, or in any way alter, the mandate set forth in our Order of January 22, 2018.[9]

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[8] On January 23, 2018, Legislative Respondents filed with this Court an application for a stay of our Order, alleging the Order would have a chaotic effect on the 2018 elections, and arguing the Order implicated an important question of federal law on which they would base an appeal to the United States Supreme Court. Intervenors filed a similar application. Both applications were denied on January 25, 2018, with dissents noted by Chief Justice Saylor, and Justices Baer and Mundy. On January 26, 2018, Legislative Respondents filed with the United States Supreme Court an emergency application for a stay of this Court's January 22, 2018 Order; the application was denied on February 5, 2018.

[9] A brief description of the Court's process in issuing orders with opinions to follow is instructive. Upon agreement of the majority of the Court, the Court may enter, shortly after briefing and argument, a *per curiam* order setting forth the court's mandate, so that the parties are aware of the court's ultimate decision and may act accordingly. This is particularly so in election matters, where time is of the essence. Justices in the minority, or who disagree with any part of the order, may issue brief concurring or dissenting statements, or may simply note their concurrence with or dissent from the order.

The Court is, however, still a deliberative body, meaning there is a back-and-forth nature not only to decision-making, but to legal analysis. Many analyses, such as those in this case, are complex and nuanced. Thus, the Court's process involves, in the first instance, the drafting of an opinion by the majority author, and, of course, involves exhaustive research and multiple interactions with other Justices. Once a majority (continued…)

I. Background

A. Redistricting Mandate

Article I, Section 2 of the United States Constitution requires that a census be taken every 10 years for the purpose of apportioning the United States House of Representatives. Following the 2010 federal census, Pennsylvania's share in the House was reduced from 19 to 18 members.[10] As a result, the Commonwealth was required to redraw its congressional district map.

Pennsylvania's congressional districts are drawn by the state legislature as a regular statute, subject to veto by the Governor.[11] While this process is dictated by federal law, it is delegated to the states. The federal Constitution's Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof," unless Congress should "make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1. Pursuant to the Elections Clause, Congress passed 2 U.S.C. § 2a, which provides that,

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(…continued)
opinion is completed, it is circulated to all of the other Justices for their review and comment. At that point, each of the other Justices has the opportunity to write his or her own concurring or dissenting opinions, expressing that Justice's ultimate views on the issues presented. These responsive opinions are then circulated to the other Justices for their responses, if any. Only then, after every member of the Court has been afforded the time and opportunity to express his or her views, are the opinions finalized. At that point, a majority opinion, along with any concurring and dissenting opinions, are filed with our Prothonotary and released to the public. It is a process, and it is one to which this Court rigorously adheres.

[10] Public Law 94-171, enacted by Congress in 1975, requires the Census Bureau to deliver redistricting results to state officials for legislative redistricting. *See* 13 U.S.C. § 141. For the 2010 federal census, the Census Bureau was required to deliver redistricting data to the states no later than April 1, 2011.

[11] By contrast, the state legislative lines are drawn by a five-member commission pursuant to the Pennsylvania Constitution. *See* Pa. Const. art. II, § 17.

following the decennial census and reapportionment, the Clerk of the House of Representatives shall "send to the executive of each State a certificate of the number of Representatives to which such State is entitled" and the state shall be redistricted "in the manner provided by the law thereof." 2 U.S.C. § 2a. If the state does not do so, Representatives are to be elected as further provided in Section 2a.[12]

B. Plan Passage

The 2011 Plan, Senate Bill 1249, was enacted on December 22, 2011, setting forth Pennsylvania's 18 congressional districts.[13] In the November 2010 general election, voters elected Republicans to majorities in both houses of the General Assembly and elected a Republican, Tom Corbett, as Governor. Thus, in 2011, the Republican-led General Assembly was tasked with reconstituting Pennsylvania's congressional districts, reducing their number by one, and adjusting their borders in light of population changes reflected by the 2010 Census. On May 11, June 9, and June 14, 2011, the Pennsylvania House and Senate State Government Committees held hearings on the subject of redistricting, for the ostensible purpose of receiving testimony and public comment on the subject of redistricting generally. On September 14, 2011, Senate Bill 1249, Printer's Number 1520, principally sponsored by the Republican leadership, was introduced, but contained absolutely no information concerning the

[12] Both the Elections Clause and Section 2a have been interpreted as envisioning that the redistricting process will be subject to state law restrictions, including gubernatorial veto, judicial remedies, citizen referenda, and even the reconstitution, via citizen initiative, of the authority to redistrict into independent redistricting agencies. The role of courts generally, and this Court in particular, in fashioning congressional districts is a matter we discuss more fully below in Part VI, "Remedy."

[13] This history is based on the joint stipulation of the parties. *See* Joint Stipulation of Facts, 12/8/17.

boundaries of any congressional districts. On December 7, 2011, the bill was brought up for first consideration, and, on December 11, 2011, for second consideration.

Thereafter, the bill was referred to the Senate State Government Committee, where, on December 14, 2011, it was amended and reprinted as Senate Bill 1249, Printer's Number 1862, now providing proposed boundaries for each of Pennsylvania's 18 congressional districts, before being reported out of committee. The same day, the bill was referred to the Senate Appropriations Committee, where it was again amended and reprinted as Senate Bill 1249, Printer's Number 1869, and reported out of committee to the floor. There, Democratic Senator Jay Costa introduced an amendment to the bill he indicated would modify it to create 8 Republican-favorable districts, 4 Democrat-favorable districts, and 6 swing districts, but the Senate declined to adopt the amendment and passed Senate Bill 1249, Printer's Number 1869, in a 26-24 vote, with all Democrats voting against passage. The same day, Senate Bill 1249, Printer's Number 1869, proceeded to the House of Representatives, where it was referred to the House State Government Committee, and reported out of committee. The next day, on December 15, 2011, Senate Bill 1249, Printer's Number 1869, was brought up for first consideration, and, on December 19, 2011, second consideration. On December 20, 2011, the bill was referred to the House Appropriations Committee, reported out of the committee, and passed in a 136-61 vote, with 36 Democrats voting in favor of passage.[14] On December 22, 2011, Senate Bill 1249, Printer's Number 1869, proceeded to the governor's desk where then-Governor Corbett signed it into law as Act 131 of 2011, the 2011 Plan.

[14] Notably, 33 of the 36 Democrats who voted in favor of passage serve districts within the 1st, 2nd, 13th, 14th, or 17th Congressional Districts, which, as detailed herein, are safe Democratic districts under the 2011 Plan.

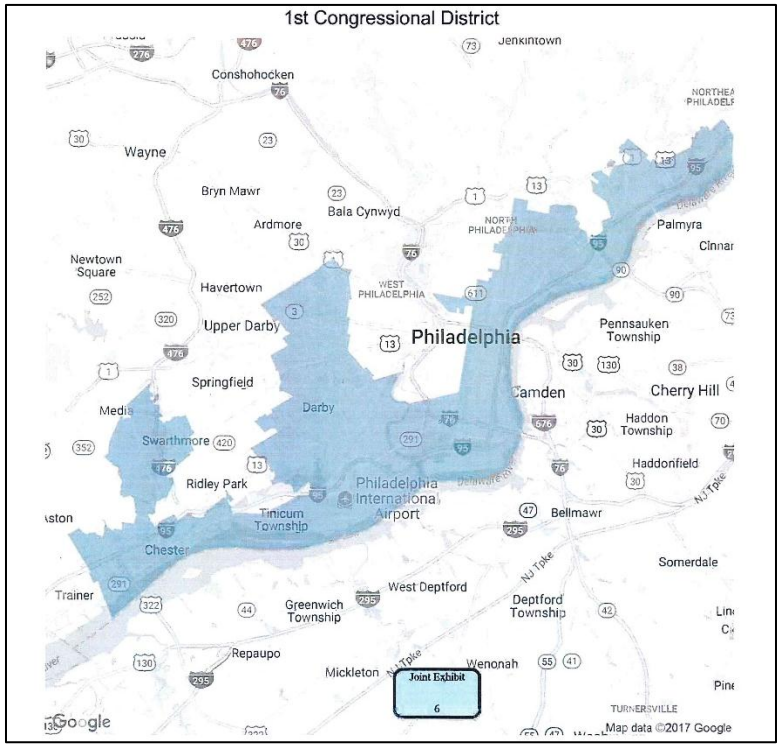
C. The 2011 Plan

A description of the 2011 Plan and some of its characteristics is appropriate.[15] A map of the entire 2011 Plan is attached as Appendix A.

1. The Districts

a. 1st Congressional District

The 1st Congressional District is composed of parts of Delaware and Philadelphia Counties, and appears as follows:

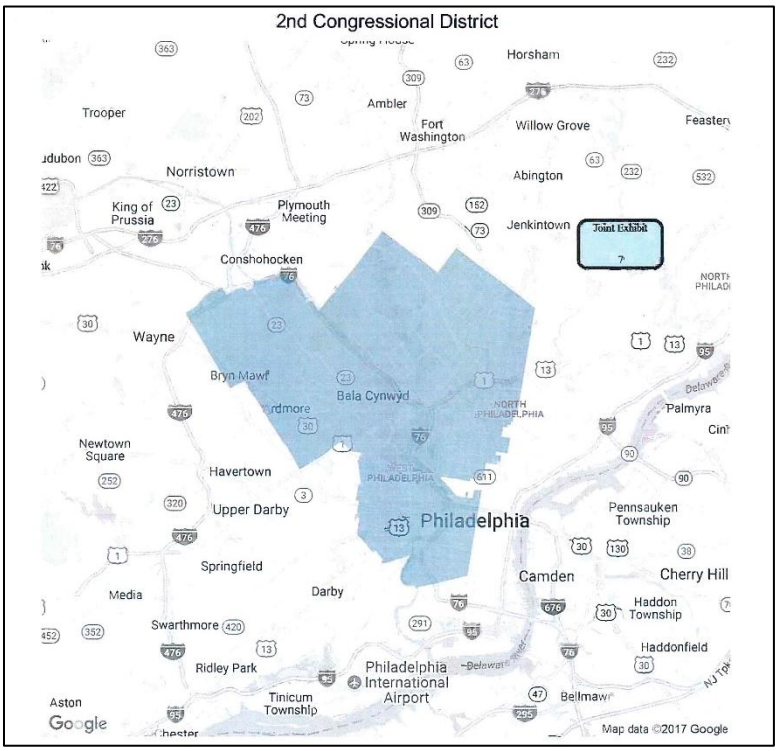


See Joint Exhibit 6.

[15] As with the legislative history of the 2011 Plan, this description is based upon the joint stipulation of the parties.

b. 2nd Congressional District

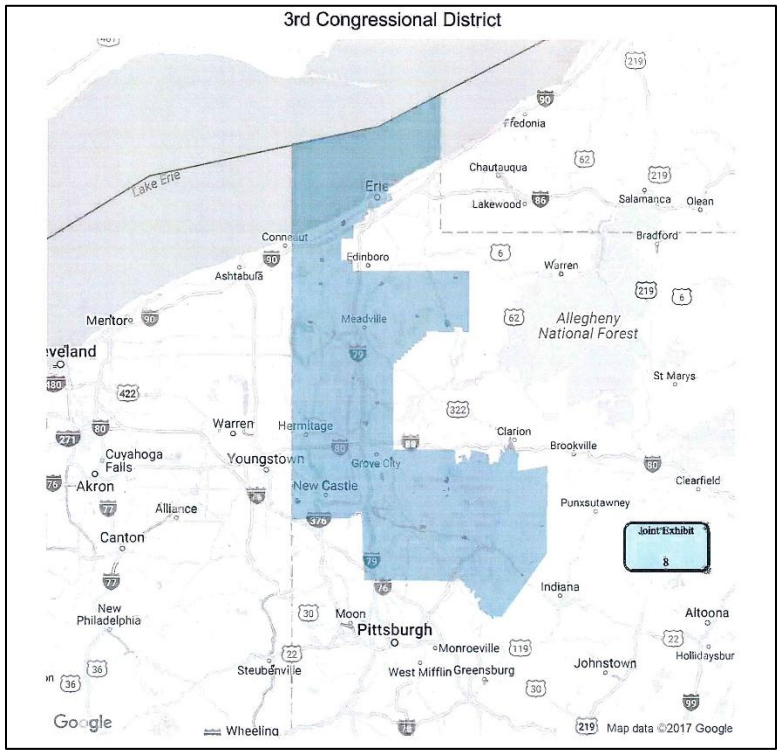
The 2nd Congressional District is composed of parts of Montgomery and Philadelphia Counties, and appears as follows:



See Joint Exhibit 7.

c. 3rd Congressional District

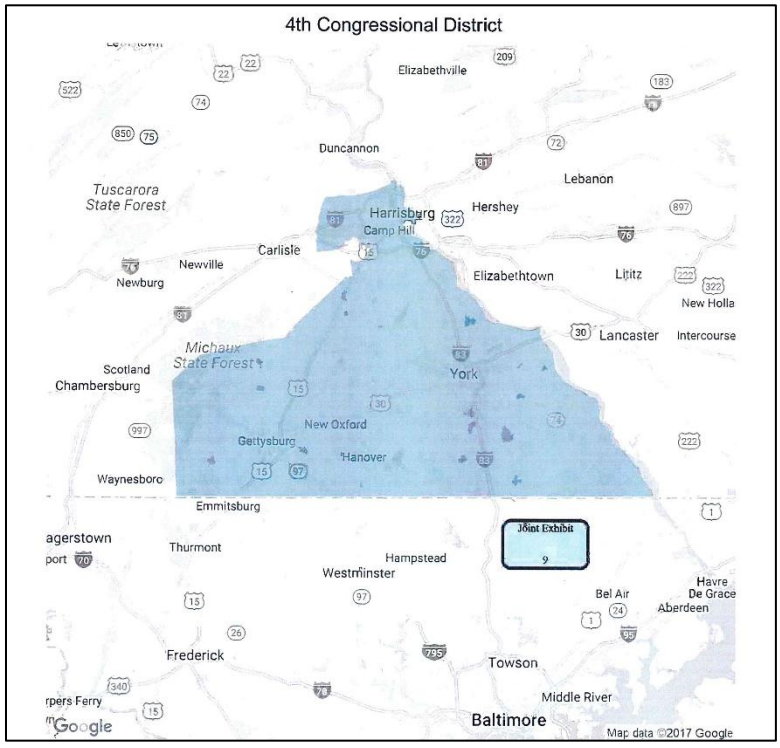
The 3rd Congressional District is composed of Armstrong, Butler, and Mercer Counties, together with parts of Clarion, Crawford, Erie, and Lawrence Counties, and appears as follows:



See Joint Exhibit 8.

d. 4th Congressional District

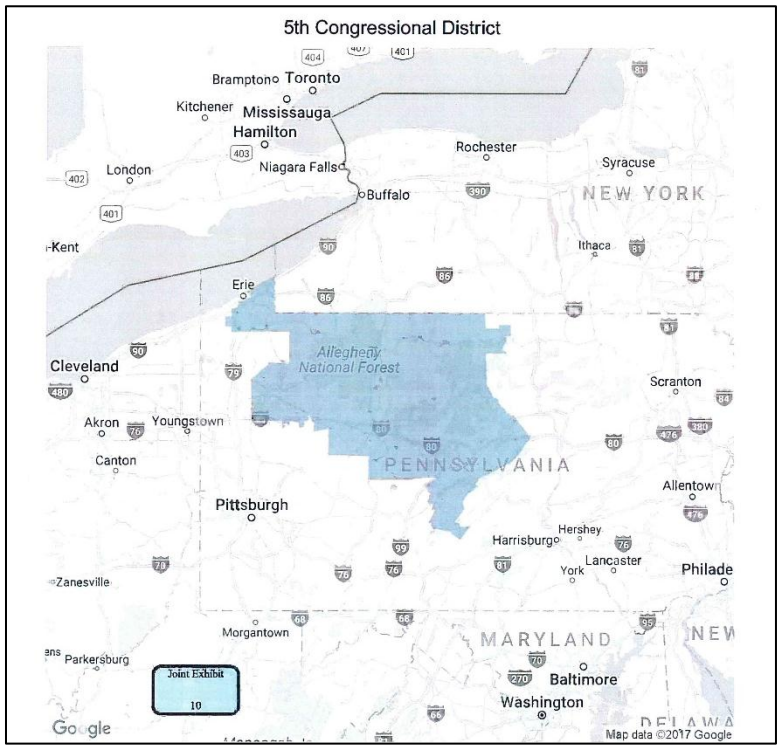
The 4th Congressional District is composed of Adams and York Counties, together with parts of Cumberland and Dauphin Counties, and appears as follows:



See Joint Exhibit 9.

e. 5th Congressional District

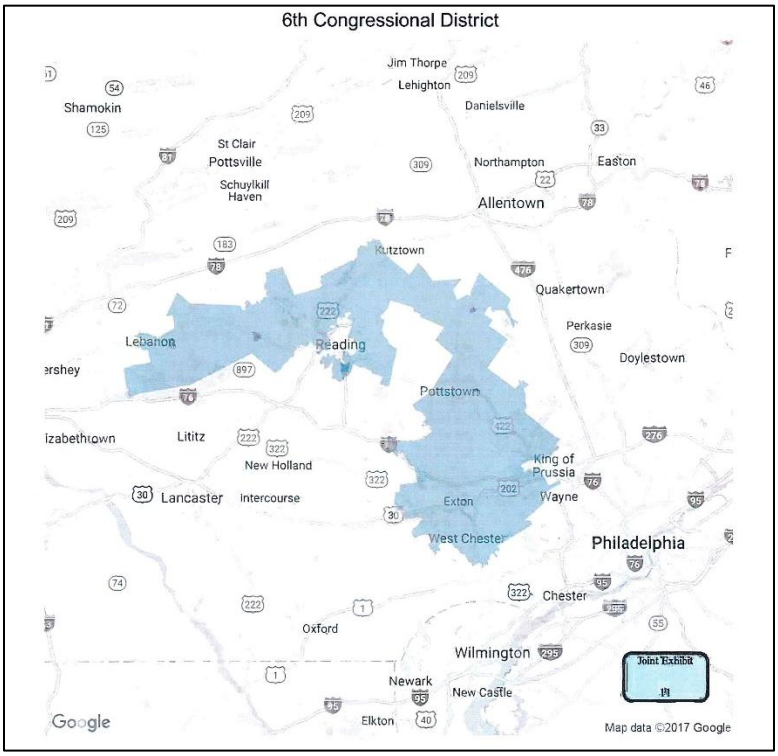
The 5th Congressional District is composed of Cameron, Centre, Clearfield, Clinton, Elk, Forest, Jefferson, McKean, Potter, Venango, and Warren Counties, together with parts of Clarion, Crawford, Erie, Huntingdon, and Tioga Counties, and appears as follows:



See Joint Exhibit 10.

f. 6th Congressional District

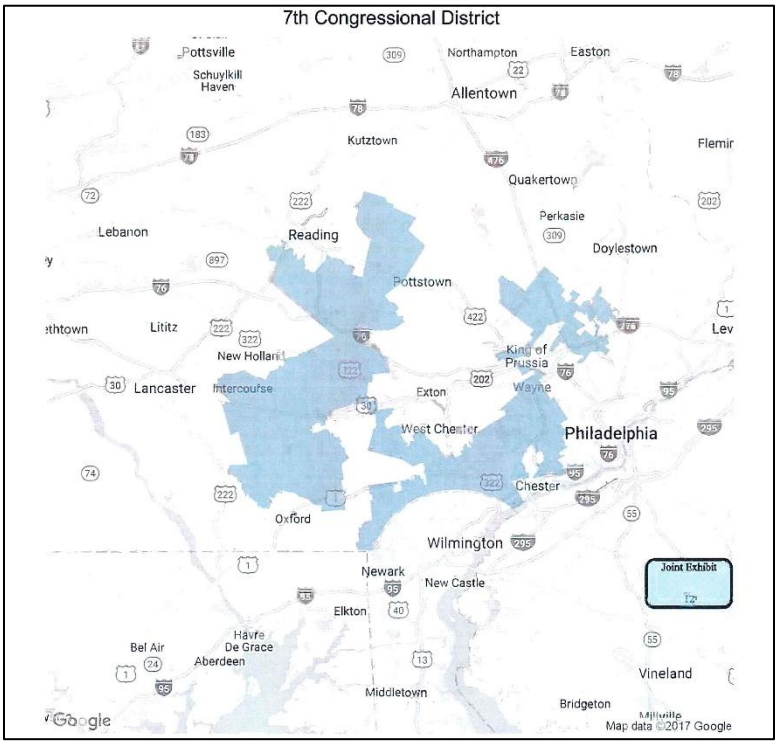
The 6th Congressional District is composed of parts of Berks, Chester, Lebanon, and Montgomery Counties, and appears as follows:



See Joint Exhibit 11.

g. 7th Congressional District

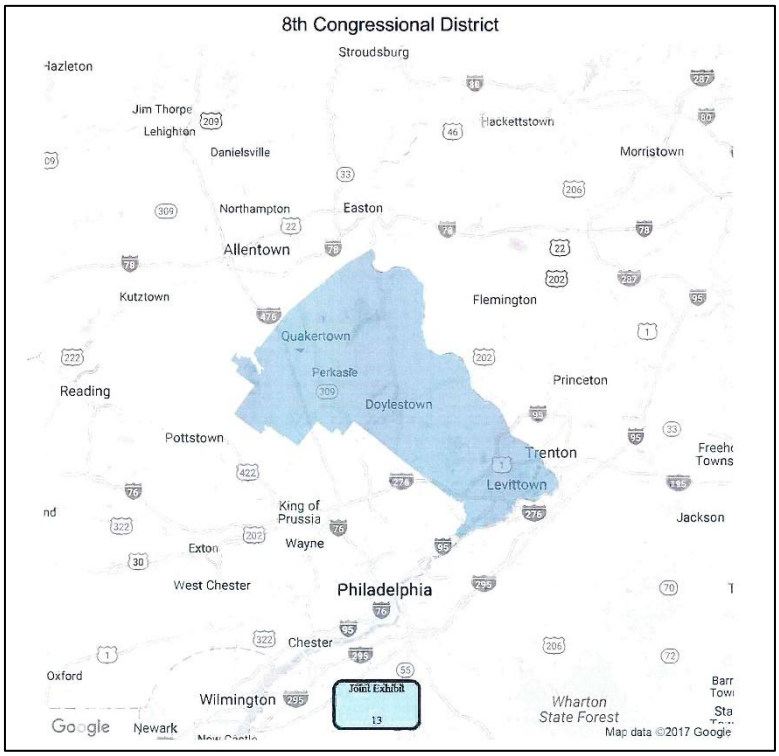
The 7th Congressional District is composed of parts of Berks, Chester, Delaware, Lancaster, and Montgomery Counties, and appears as follows:



See Joint Exhibit 12.

h. 8th Congressional District

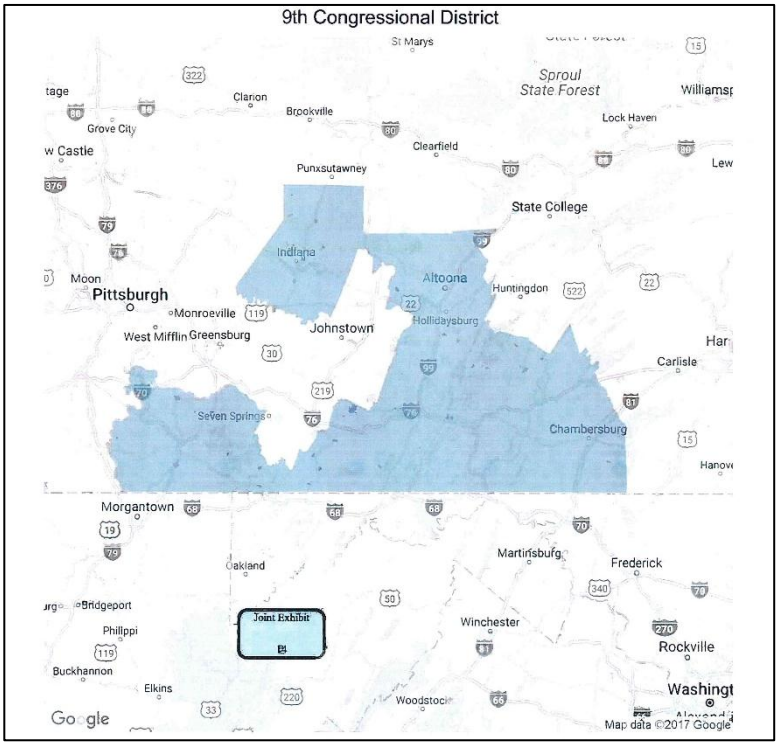
The 8th Congressional District is composed of Bucks County, together with parts of Montgomery County, and appears as follows:



See Joint Exhibit 13.

i. 9th Congressional District

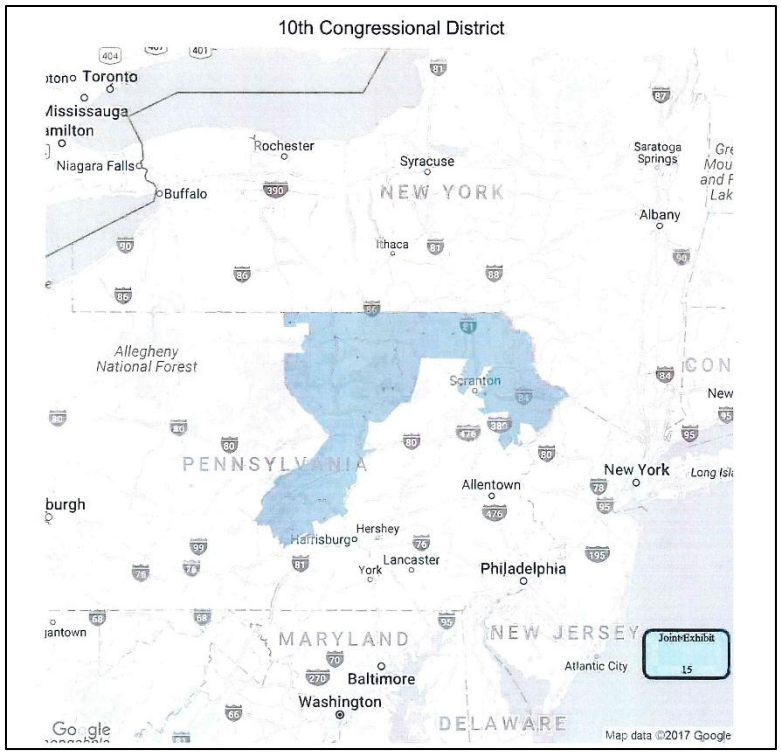
The 9th Congressional District is composed of Bedford, Blair, Fayette, Franklin, Fulton, and Indiana Counties, together with parts of Cambria, Greene, Huntingdon, Somerset, Washington, and Westmoreland Counties, and appears as follows:



See Joint Exhibit 14.

j. 10th Congressional District

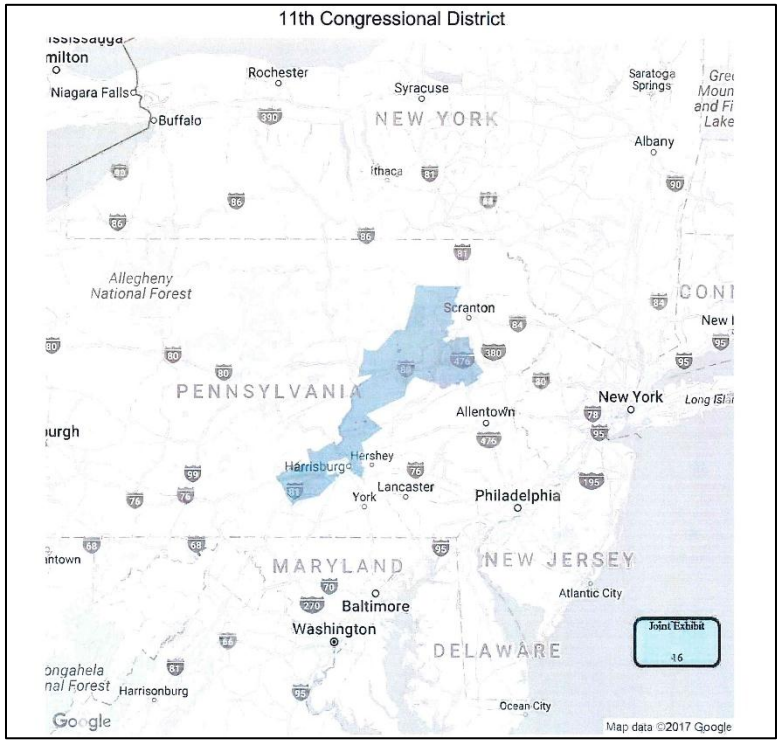
The 10th Congressional District is composed of Bradford, Juniata, Lycoming, Mifflin, Pike, Snyder, Sullivan, Susquehanna, Union, and Wayne Counties, together with parts of Lackawanna, Monroe, Northumberland, Perry, and Tioga Counties, and appears as follows:



See Joint Exhibit 15.

k. 11th Congressional District

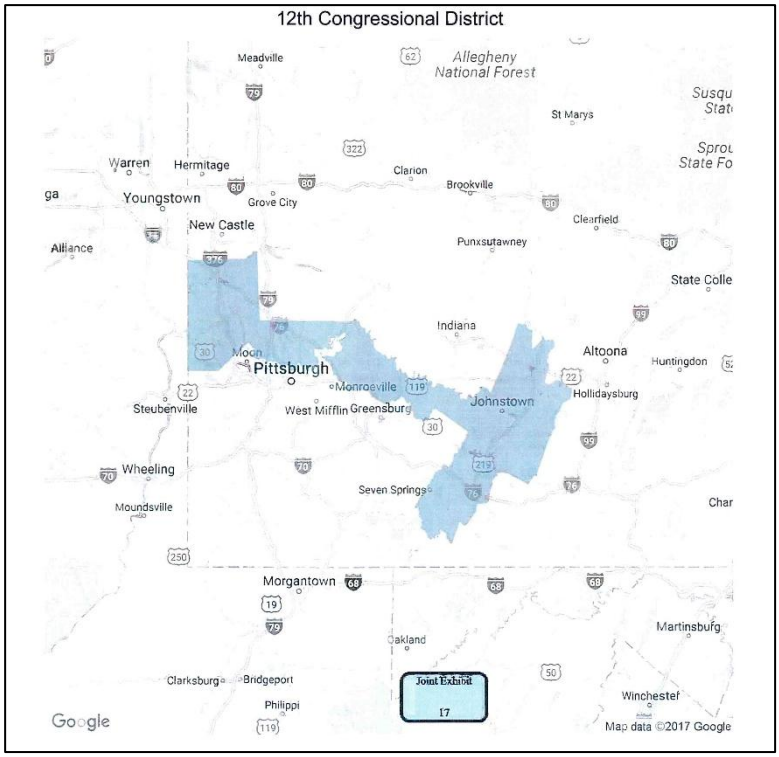
The 11th Congressional District is composed of Columbia, Montour, and Wyoming Counties, together with parts of Carbon, Cumberland, Dauphin, Luzerne, Northumberland, and Perry Counties, and appears as follows:



See Joint Exhibit 16.

I. 12th Congressional District

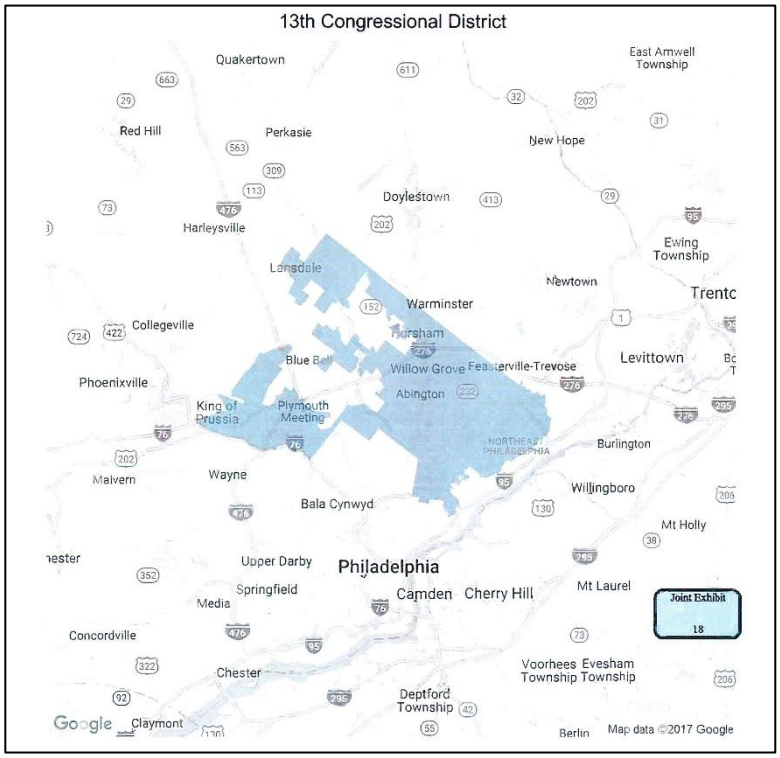
The 12th Congressional District is composed of Beaver County, together with parts of Allegheny, Cambria, Lawrence, Somerset, and Westmoreland Counties, and appears as follows:



See Joint Exhibit 17.

m. 13th Congressional District

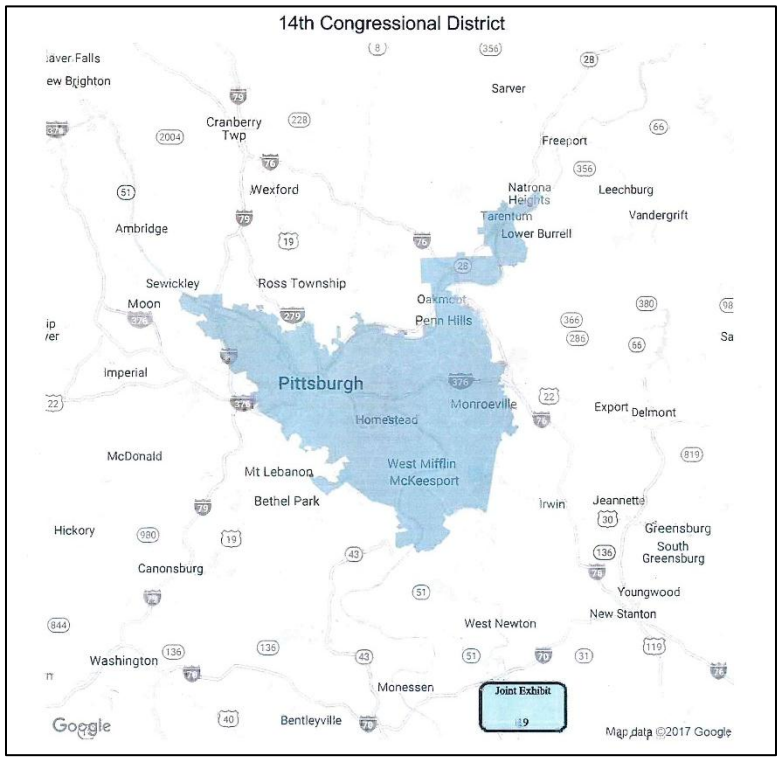
The 13th Congressional District is composed of parts of Montgomery and Philadelphia Counties, and appears as follows:



See Joint Exhibit 18.

n. 14th Congressional District

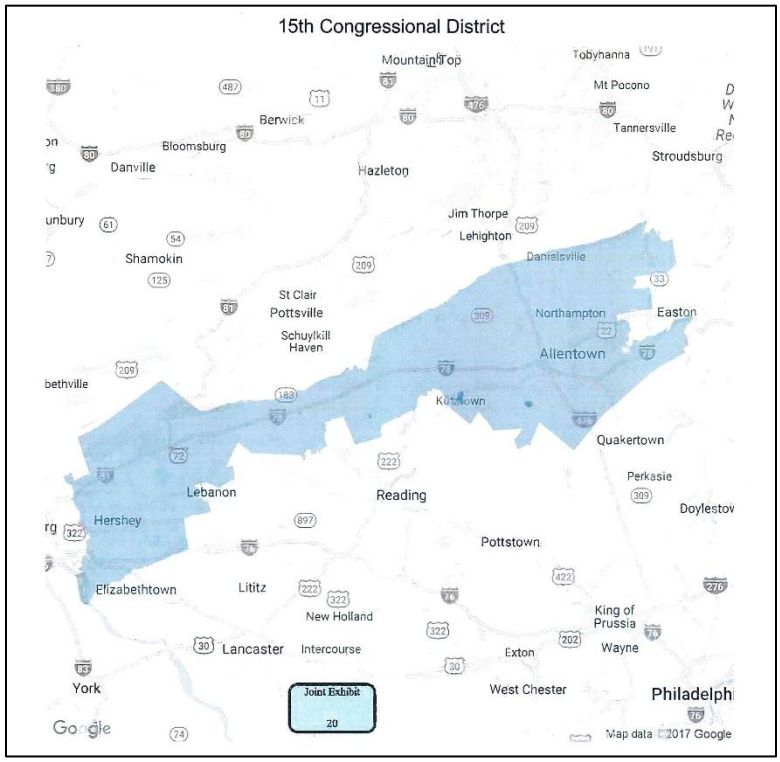
The 14th Congressional District is composed of parts of Allegheny and Westmoreland Counties, and appears as follows:



See Joint Exhibit 19.

o. 15th Congressional District

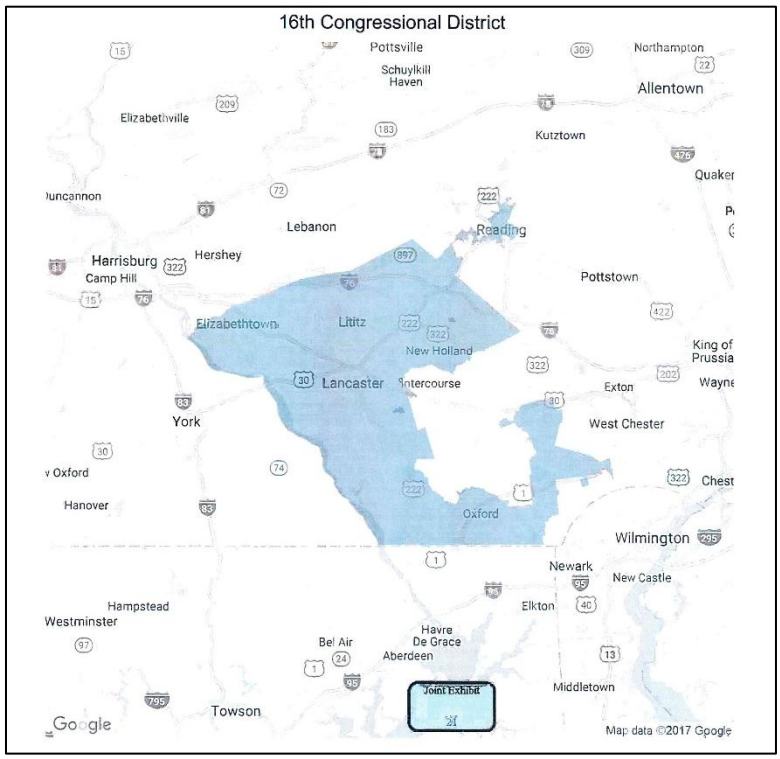
The 15th Congressional District is composed of Lehigh County and parts of Berks, Dauphin, Lebanon, and Northampton Counties, and appears as follows:



See Joint Exhibit 20.

p. 16th Congressional District

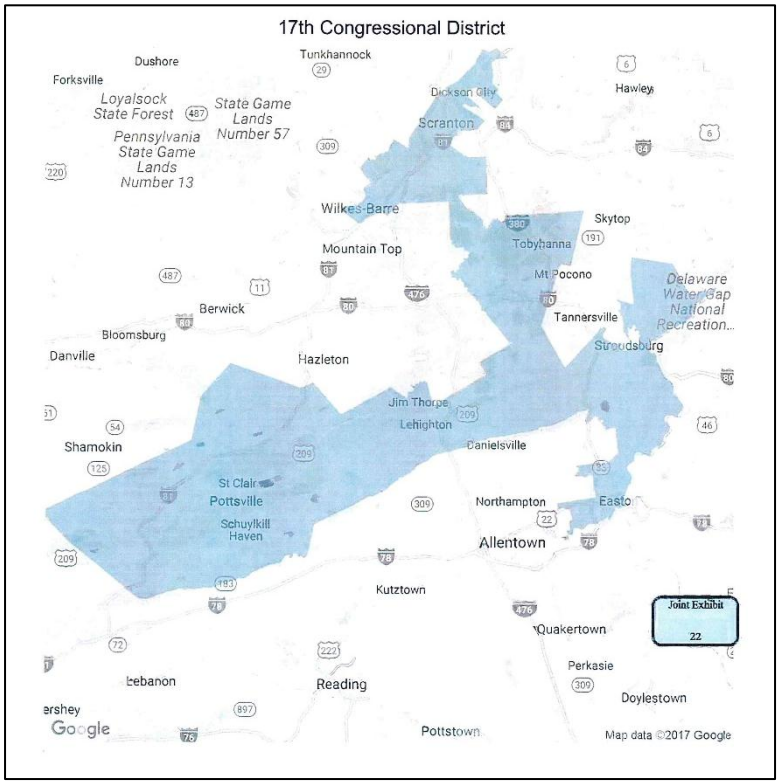
The 16th Congressional District is composed of parts of Berks, Chester, and Lancaster Counties, and appears as follows:



See Joint Exhibit 21.

q. 17th Congressional District

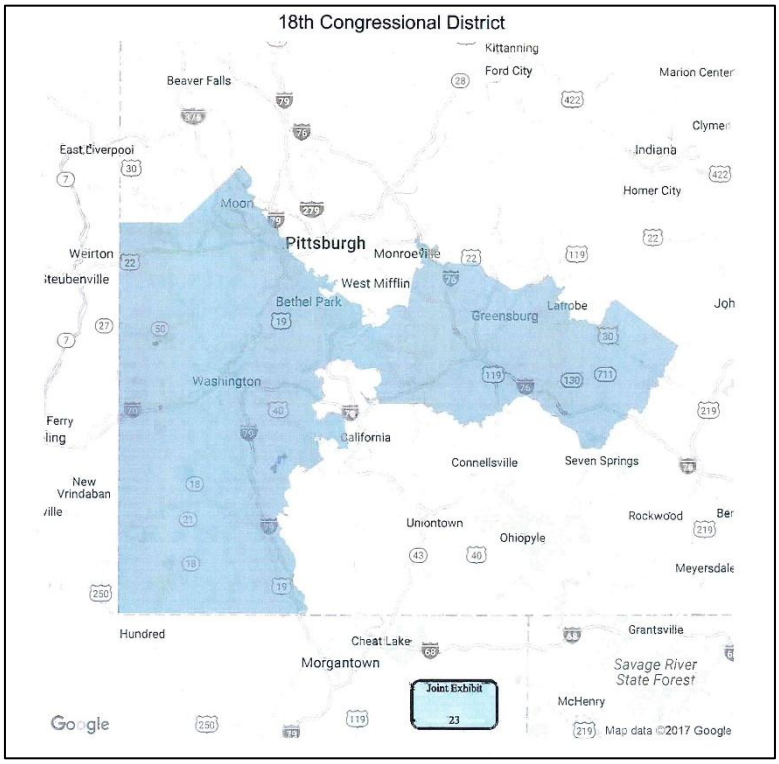
The 17th Congressional District is composed of Schuylkill County and parts of Carbon, Lackawanna, Luzerne, Monroe, and Northampton Counties, and appears as follows:



See Joint Exhibit 22.

r. 18th Congressional District

Finally, the 18th Congressional District is composed of parts of Allegheny, Greene, Washington, and Westmoreland Counties, and appears as follows:



See Joint Exhibit 23.

2. Other Characteristics

Of the 67 counties in Pennsylvania, the 2011 Plan divides a total of 28 counties between at least two different congressional districts:[16] Montgomery County is divided among five congressional districts; Berks and Westmoreland Counties are each divided

[16] The 2011 Plan also consolidates previously split counties: prior to the 2011 Plan, Armstrong, Butler, Mercer, Venango, and Warren Counties were split between congressional districts, whereas, under the 2011 Plan, they are not.

among four congressional districts;[17] Allegheny, Chester,[18] and Philadelphia Counties are each divided among three congressional districts; and Cambria, Carbon, Clarion, Crawford, Cumberland, Delaware, Erie,[19] Greene, Huntingdon, Lackawanna, Lancaster, Lawrence, Lebanon, Luzerne, Monroe, Northampton,[20] Northumberland, Perry, Somerset, Tioga, and Washington Counties are each split between two congressional districts.[21] Additionally, whereas, prior to 1992, no municipalities in Pennsylvania were divided among multiple congressional districts, the 2011 Plan divides 68, or 2.66%, of Pennsylvania's municipalities between at least two Congressional districts.[22]

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[17] The City of Reading is separated from the remainder of Berks County. From at least 1962 to 2002, Berks County was situated entirely within a single congressional district.

[18] The City of Coatesville is separated from the remainder of Chester County.

[19] From at least 1931 until 2011, Erie County was not split between congressional districts.

[20] The City of Easton is separated from the remainder of Northampton County.

[21] In total, 11 of the 18 congressional districts contain more than three counties which are divided among multiple congressional districts.

[22] The municipalities include Archbald, Barr, Bethlehem, Caln, Carbondale, Chester, Cumru, Darby, East Bradford, East Carroll, East Norriton, Fallowfield, Glenolden, Harrisburg, Harrison, Hatfield, Hereford, Horsham, Kennett, Laureldale, Lebanon, Lower Alsace, Lower Gwynedd, Lower Merion, Mechanicsburg, Millcreek, Monroeville, Morgan, Muhlenberg, North Lebanon, Northern Cambria, Olyphant, Penn, Pennsbury, Perkiomen, Philadelphia, Piney, Plainfield, Plymouth Township, Ridley, Riverside, Robinson, Sadsbury, Seven Springs, Shippen, Shippensburg, Shirley, Spring, Springfield, Stroud, Susquehanna, Throop, Tinicum, Trafford, Upper Allen, Upper Darby, Upper Dublin, Upper Gwynedd, Upper Hanover, Upper Merion, Upper Nazareth, West Bradford, West Hanover, West Norriton, Whitehall, Whitemarsh, Whitpain, and Wyomissing. Monroeville, Caln, Cumru, and Spring Township are split into three separate congressional districts. Three of these municipalities – Seven Springs, Shippensburg, and Trafford – are naturally divided between multiple counties, and Cumru is naturally noncontiguous. Additionally, wards in Bethlehem and Harrisburg are split between congressional districts.

Finally, as noted above, the General Assembly was tasked with reducing the number of Pennsylvania's congressional districts from 19 to 18, necessitating the placement of at least two congressional incumbents into the same district. The 2011 Plan placed then-Democratic Congressman for the 12th Congressional District Mark Critz and then-Democratic Congressman for the 4th Congressional District Jason Altmire into the same district. Notably, the two faced off in an ensuing primary election, in which Critz prevailed. He subsequently lost the general election to now-Congressman Keith Rothfus, who has prevailed in each biannual election thereafter.

D. Electoral History

As grounding for the parties' claims and evidentiary presentations, we briefly review the Commonwealth's electoral history before and after the 2011 Plan was enacted.[23] As noted above, the map for the 2011 Plan is attached at Appendix A. The parties have provided copies of prior congressional district maps – for 1943, 1951, 1962, 1972, 1982, 1992, and 2002 – which were procured from the Pennsylvania Manual.[24] They are attached as Joint Exhibit 26 to the Joint Stipulations of Fact. *See* Joint Stipulation of Facts, 12/8/17, at ¶ 93.

[23] As above, this information is derived from the parties' Joint Stipulation of Facts.

[24] The Pennsylvania Manual is a regularly published book issued by the Pennsylvania Department of General Services. We cite it as authoritative. *See, e.g., Erfer v. Commonwealth*, 794 A.2d 325 (Pa. 2002).

The distribution of seats in Pennsylvania from 1966 to 2010 is shown below:

Year	Districts	Democratic Seats	Republican Seats
1966	27	14	13
1968	27	14	13
1970	27	14	13
1972	25	13	12
1974	25	14	11
1976	25	17	8
1978	25	15	10
1980	25	12[25]	12
1982	23	13	10
1984	23	13	10
1986	23	12	11
1988	23	12	11
1990	23	11	12
1992	21	11	10
1994	21	11	10
1996	21	11	10
1998	21	11	10
2000	21	10	11
2002	19	7	12
2004	19	7	12
2006	19	11	8
2008	19	12	7
2010	19	7	12

[25] One elective representative, Thomas M. Foglietta, was not elected as either a Democrat or Republican in 1980.

Joint Stipulation of Facts, 12/8/17, at ¶ 70.

In the three elections since the 2011 Plan was enacted, Democrats have won the same five districts, and Republicans have won the same 13 districts. In the 2012 election, Democrats won five congressional districts with an average of 76.4% of the vote in each, whereas Republicans won the remaining 13 congressional districts with an average 59.5% of the vote in each, and, notably, Democrats earned a statewide share of 50.8% of the vote, an average of 50.4% per district, with a median of 42.8% of the vote, whereas Republicans earned only a statewide share of 49.2% of the vote.[26]

In the 2014 election, Democratic candidates again won five congressional races, with an average of 73.6% of the vote in each, whereas Republicans again won 13 congressional districts, with an average of 63.4% of the vote in each.[27] In 2014,

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[26] Specifically, in 2012, Democratic candidates won in the 1st Congressional District with 84.9% of the vote; the 2nd Congressional District with 90.5% of the vote; the 13th Congressional District with 69.1% of the vote; the 14th Congressional District with 76.9% of the vote; and the 17th Congressional District with 60.3% of the vote. On the other hand, Republican candidates won in the 3rd Congressional District with 57.2% of the vote; the 4th Congressional District with 63.4% of the vote; the 5th Congressional District with 62.9% of the vote; the 6th Congressional District with 57.1% of the vote; the 7th Congressional District with 59.4% of the vote; the 8th Congressional District with 56.6% of the vote; the 9th Congressional District with 61.7% of the vote; the 10th Congressional District with 65.6% of the vote; the 11th Congressional District with 58.5% of the vote; the 12th Congressional District with 51.7% of the vote; the 15th Congressional District with 56.8% of the vote; the 16th Congressional District with 58.4% of the vote; and the 18th Congressional District with 64.0% of the vote.

[27] Specifically, in 2014, Democrats won in the 1st Congressional District with 82.8% of the vote; the 2nd Congressional district with 87.7% of the vote; the 13th Congressional District with 67.1% of the vote; the 14th Congressional District, which was uncontested, with 100% of the vote; and the 17th Congressional District with 56.8% of the vote. Republican candidates won in the 3rd Congressional District with 60.6% of the vote; the 4th Congressional District with 74.5% of the vote; the 5th Congressional District with 63.6% of the vote; the 6th Congressional district with 56.3% of the vote; the 7th Congressional District with 62.0% of the vote; the 8th Congressional District with 61.9% of the vote; the 9th Congressional District with 63.5% of the vote; the 10th Congressional District with 71.6% of the vote; the 11th Congressional District with 66.3% of the vote; the 12th Congressional District with 59.3% of the vote; the 15th Congressional District, (continued…)

Democrats earned a 44.5% statewide vote share in contested races, whereas Republicans earned a 55.5% statewide vote share in contested races, with a 54.1% statewide share vote in the aggregate.

In the 2016 election, Democrats again won those same five congressional districts, with an average of 75.2% of the vote in each and a statewide vote share of 45.9%, whereas Republicans won those same 13 districts with an average of 61.8% in each and a statewide vote share of 54.1%.[28] [29]

(…continued)
which was uncontested, with 100% of the vote; the 16th Congressional District with 57.7% of the vote; and the 18th Congressional District, which was uncontested, with 100% of the vote.

[28] Specifically, in 2016, Democrats again prevailed in the 1st Congressional District with 82.2% of the vote; the 2nd Congressional District with 90.2% of the vote; the 13th Congressional District, which was uncontested, with 100% of the vote; the 14th Congressional District with 74.4% of the vote; and the 17th Congressional District with 53.8% of the vote. Republicans again prevailed in the remainder of the districts: in the 3rd Congressional district, which was uncontested, with 100% of the vote; in the 4th Congressional District with 66.1% of the vote; in the 5th Congressional District with 67.2% of the vote; in the 6th Congressional District with 67.2% of the vote; in the 7th Congressional District with 59.5% of the vote; in the 8th Congressional District with 54.4% of the vote; in the 9th Congressional District with 63.3% of the vote; in the 10th Congressional District with 70.2% of the vote; in the 11th Congressional District with 63.7% of the vote; in the 12th Congressional District with 61.8% of the vote; in the 15th Congressional District with 60.6% of the vote; in the 16th Congressional District with 55.6% of the vote; and in the 18th Congressional District, which was uncontested, with 100% of the vote.

[29] Notably, voters in the 6th and 7th Congressional Districts reelected Republican congressmen while simultaneously voting for Democratic nominee and former Secretary of State Hillary Clinton for president. Contrariwise, voters in the 17th Congressional District reelected a Democratic congressman while voting for Republican nominee Donald Trump for president. Additionally, several traditionally Democratic counties voted for now-President Trump.

In short, in the last three election cycles, the partisan distribution has been as follows:

Year	Districts	Democratic Seats	Republican Seats	Democratic Vote Percentage	Republic Vote Percentage
2012	18	5	13	50.8%	49.2%
2014	18	5	13	44.5%	55.5%
2016	18	5	13	45.9%	54.1%

Joint Stipulation of Facts, 12/8/18, at ¶ 102.

II. Petitioners' Action

Petitioners filed this lawsuit on June 15, 2017, in the Commonwealth Court. In Count I of their petition for review, Petitioners alleged that the 2011 Plan[30] violates their rights to free expression and association under Article I, Sections 7[31] and 20[32] of the Pennsylvania Constitution. More specifically, Petitioners alleged that the General Assembly created the 2011 Plan by "expressly and deliberately consider[ing] the political views, voting histories, and party affiliations of Petitioners and other Democratic voters" with the intent to burden and disfavor Petitioners' and other Democratic voters'

[30] Petitioners challenged, and before us continue to challenge, the Plan as a whole. Whether such challenges are properly brought statewide, or must be district specific, is an open question. *See Vieth v. Jubelirer*, 541 U.S. 267 (2004). However, no such objection is presented to us.

[31] Article I, Section 7 of the Pennsylvania Constitution provides in relevant part: "The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty." Pa. Const. art. I, § 7.

[32] Article I, Section 20 provides: "The citizens have a right in a peaceable manner to assemble together for their common good . . . ." Pa. Const. art. I, § 20.

rights to free expression and association. Petition for Review, 6/15/17, at ¶¶ 105. Petitioners further alleged that the 2011 Plan had the effect of burdening and disfavoring Petitioners' and other Democratic voters' rights to free expression and association because the 2011 Plan "prevented Democratic voters from electing the representatives of their choice and from influencing the legislative process" and suppressed "the political views and expression of Democratic voters." *Id.* at ¶ 107. They contended the Plan "also violates the Pennsylvania Constitution's prohibition against retaliation against individuals who exercise their rights under" these articles. *Id.* at ¶ 108. Specifically, Petitioners alleged that the General Assembly's "cracking" of congressional districts in the 2011 Plan has resulted in their inability "to elect representatives of their choice or to influence the political process." *Id.* at ¶112.

In Count II, Petitioners alleged the Plan violates the equal protection provisions of Article 1, Sections 1 and 26[33] of the Pennsylvania Constitution, and the Free and Equal Elections Clause of Article I, Section 5[34] of the Pennsylvania Constitution. More specifically, Petitioners alleged that the Plan intentionally discriminates against Petitioners and other Democratic voters by using "redistricting to maximize Republican seats in Congress and entrench [those] Republican members in power." *Id.* at ¶ 116. Petitioners further alleged that the Plan has an actual discriminatory effect, because it

[33] Article 1, Section 1, provides: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." Pa. Const. art. I, § 1. Section 26 provides: "Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right." Pa. Const. art. I, § 26.

[34] Article I, Section 5 provides: "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Pa. Const. art. I, § 5.

"disadvantages Petitioners and other Democratic voters at the polls and severely burdens their representational rights." *Id.* at ¶ 117. They contended that "computer modeling and statistical tests demonstrate that Democrats receive far fewer congressional seats than they would absent the gerrymander, and that Republicans' advantage is nearly impossible to overcome." *Id.* at ¶ 118. Petitioners claimed that individuals who live in cracked districts under the 2011 Plan are essentially excluded from the political process and have been denied any "realistic opportunity to elect representatives of their choice," and any "meaningful opportunity to influence legislative outcomes." *Id.* at ¶ 119. Finally, Petitioners claimed that, with regard to individuals living in "packed" Democratic districts under the Plan, the weight of their votes has been "substantially diluted," and their votes have no "impact on election outcomes." *Id.* at ¶ 120.

In response to Respondents' application, on October 16, 2017, Judge Dan Pellegrini granted a stay of the Commonwealth Court proceedings pending the United States Supreme Court's decision in *Gill v. Whitford*, No. 16-1161 (U.S. argued Oct. 3, 2017). However, thereafter, Petitioners filed with this Court an application for extraordinary relief, asking that we exercise extraordinary jurisdiction over the matter.[35] On November 9, 2017, we granted the application and assumed plenary jurisdiction over the matter, but, while retaining jurisdiction, remanded the matter to the Commonwealth Court to "conduct all necessary and appropriate discovery, pre-trial and trial proceedings so as to create an evidentiary record on which Petitioners' claims may

[35] *See* 42 Pa.C.S. § 726 ("Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, in any matter pending before any court or district judge of this Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done."); *see also Vaccone v. Syken*, 899 A.2d 1103, 1108 (Pa. 2006).

be decided." Supreme Court Order, 11/9/17, at 2. We ordered the court to do so on an expedited basis, and to submit to us findings of fact and conclusions of law no later than December 31, 2017. *Id.* Finally, we directed that the matter be assigned to a commissioned judge of that court.

The Commonwealth Court, by the Honorable P. Kevin Brobson, responded with commendable speed, thoroughness, and efficiency, conducting a nonjury trial from December 11 through 15, and submitting to us its recommended findings of fact and conclusions of law on December 29, 2017, two days prior to our deadline.[36] Thereafter, we ordered expedited briefing, and held oral argument on January 17, 2018.

III. Commonwealth Court Proceedings

In the proceedings before the Commonwealth Court, that court initially disposed of various pretrial matters. Most notably, the court ruled on Petitioners' discovery requests, and Legislative Respondents' objections thereto, directed to gleaning the legislators' intent behind the passage of the 2011 Plan. By order and opinion dated November 22, 2017, the court concluded that, under the Speech and Debate Clause of the Pennsylvania Constitution,[37] the court "lack[ed] the authority to compel testimony or

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[36] The court's December 29, 2017 Recommended Findings of Fact and Conclusions of Law is broken into two principal, self-explanatory parts. Herein, we refer to those two parts as "Findings of Fact" and "Conclusions of Law."

[37] The Speech and Debate Clause provides:

> The members of the General Assembly shall in all cases, except treason, felony, violation of their oath of office, and breach or surety of the peace, be privileged from arrest during their attendance at the sessions of their respective Houses and in going to and returning from the same; and for any speech or debate in either House they shall not be questioned in any other place.

Pa. Const. art. II, § 15.

the production of documents relative to the intentions, motivations, and activities of state legislators and their staff with respect to the consideration and passage of" the 2011 Plan, Commonwealth Court Opinion, 11/22/17, at 7, and so quashed those requests.[38]

[38] Petitioners sought discovery from various third parties, including, *inter alia*, the Republican National Committee, the National Republican Congressional Committee, the Republican State Leadership Committee, the State Government Leadership Foundation, and former Governor Corbett, requesting all documents pertaining to the 2011 Plan, all documents pertaining the Redistricting Majority Project (REDMAP), all communications and reports to donors that refer to or discuss the strategy behind REDMAP or evaluate its success, and any training materials on redistricting presented to members, agents, employees, consultants or representatives of the Pennsylvania General Assembly and former Governor Corbett. The discovery request was made for the purpose of establishing the intent of Legislative Respondents to dilute the vote of citizens who historically cast their vote for Democratic candidates. Legislative Respondents opposed the request, asserting, in relevant part, that the information sought was privileged under the Speech and Debate Clause of Article I, Section 15 of the Pennsylvania Constitution. Agreeing with Legislative Respondents, the Commonwealth Court denied the discovery request, excluding any documents that reflected communications with members of the General Assembly or "the intentions, motivations, and activities of state legislators and their staff with respect to the consideration and passage of [the 2011 Plan]," *see* Commonwealth Court Opinion, 11/22/17, at 11-13, and later denied the admission of such information produced in the federal court action.

Given the other unrebutted evidence of the intent to dilute the vote of citizens who historically voted for Democratic candidates, we need not resolve the question of whether our Speech and Debate Clause confers a privilege protecting this information from discovery and use at trial in a case, such as this one, involving a challenge to the constitutionality of a statute. However, we caution against reliance on the Commonwealth Court's ruling. This Court has never interpreted our Speech and Debate Clause as providing anything more than immunity from suit, in certain circumstances, for individual members of the General Assembly. *See, e.g., Sweeney v. Tucker*, 375 A.2d 698 (Pa. 1977). Although not bound by decisions interpreting the federal Speech or Debate Clause in Article I, Section 6 of the United States Constitution, *see id.* at 703 n.14, we note that the high Court has recognized an evidentiary privilege only in cases where an individual legislator is facing criminal charges. *See, e.g., United States v. Johnson*, 383 U.S. 169 (1966); *United States v. Helstoski*, 442 U.S. 477 (1979). To date, the United States Supreme Court has never held that an evidentiary privilege exists under the Speech or Debate Clause in lawsuits challenging the constitutionality of a statute. Further, we are not aware of any precedent to support the application of any such privilege to information in the possession of third parties, not legislators.

In addition, Petitioners sought to admit, and Legislative Respondents sought to exclude, certain materials produced by House Speaker Mike Turzai in the federal litigation in *Agre v. Wolf*, *supra*, in response to permitted discovery in that case, along with Petitioners' expert Dr. Jowei Chen's expert reports and testimony based on those materials. (As noted, similar discovery was denied in this case, per the Commonwealth Court's Speech and Debate Clause ruling.) These materials include redistricting maps revealing partisan scoring down to the precinct level, demonstrating that some legislators designing the 2011 Plan relied upon such partisan considerations. Ultimately, the court permitted Dr. Chen's testimony about these materials, but refused to admit the materials themselves, refused to make any findings about them, *see* Findings of Fact at ¶ 307, and submitted a portion to this Court under seal, *see* Petitioners' Exhibit 140. Notably, that sealing order required Petitioners to submit both a "Public" and a "Sealed" version of their brief in order to discuss Exhibit 140.[39] Given our disposition of this matter, we do not further address these materials or the court's evidentiary rulings with respect to them.

In all, the court heard oral argument and ruled on eight motions *in limine.*[40]

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[39] The sole redaction in this regard in the "Public Version" of Petitioners' Brief is on page 8. Thus, the remainder of the citations in this Opinion merely generically refer to "Petitioners' Brief."

[40] The other motions included:

> (1) Petitioners' motion to exclude or limit Intervenors' witness testimony, including precluding the testimony of an existing congressional candidate, limiting the number of witnesses who could testify as Republican Party Chairs to one, and limiting the number of witnesses who could testify as "Republicans at large" to one. The motion was granted. N.T. Trial, 12/11/17, at 94.
>
> (2) Petitioners' motion to exclude testimony from Dr. Wendy K. Tam Cho regarding Dr. Chen. The motion was denied. *Id.* at 95.
>
> (3) Petitioners' motion to exclude the expert testimony of Dr. James Gimpel regarding the intended or actual effect of the 2011 Plan on Pennsylvania's

(continued…)

A. Findings of Fact of the Commonwealth Court

Prior to the introduction of testimony, the parties and Intervenors stipulated to certain background facts, much of which we have discussed above, and to the introduction of certain portions of deposition and/or prior trial testimony as exhibits.[41]

1. Voter Testimony

(…continued)

communities of interest. Legislative Respondents subsequently agreed to withdraw the challenged portion of the Dr. Gimpel's report. *Id.* at 95-96.

(4) Legislative Respondents' motion to exclude documents and testimony regarding REDMAP. The motion was denied. *Id.* at 96.

[41] Petitioners introduced designated excerpts from the depositions of: Carmen Febo San Miguel, Petitioners' Exhibit 163; Donald Lancaster, Petitioners' Exhibit 164; Gretchen Brandt, Petitioners' Exhibit 165; John Capowski, Petitioners' Exhibit 166; Jordi Comas, Petitioners' Exhibit 167; John Greiner, Petitioners' Exhibit 168; James Solomon, Petitioners' Exhibit 169; Lisa Isaacs, Petitioners' Exhibit 170; Lorraine Petrosky; Petitioners' Exhibit 171; Mark Lichty, Petitioners' Exhibit 172; Priscilla McNulty, Petitioners' Exhibit 173; Richard Mantell, Petitioners' Exhibit 174; Robert McKinstry, Jr., Petitioners' Exhibit 175; Robert Smith, Petitioners' Exhibit 176; and Thomas Ulrich, Petitioners' Exhibit 177. Generally, the testimony of the aforementioned Petitioners demonstrates a belief that the 2011 Plan has negatively affected their ability to influence the political process and/or elect a candidate who represents their interests. *See* Findings of Fact at ¶¶ 221-34. Petitioners also introduced excerpts from the trial testimony of State Senator Andrew E. Dinniman in *Agre v. Wolf*, Petitioners' Exhibit 178, and excerpts from the deposition testimony of State Representative Gregory Vitali, Petitioners' Exhibit 179. Senator Dinniman and Representative Vitali both testified as to the circumstances surrounding the enactment of the 2011 Plan.

Respondents introduced affidavits from Lieutenant Governor Stack and Commissioner Marks. Lieutenant Governor Stack's affidavit stated, *inter alia*, that "it is beneficial, when possible, to keep individual counties and municipalities together in a single congressional district." Affidavit of Lieutenant Governor Stack, 12/14/17, at 3, ¶ 8, Respondents' Exhibit 11. Commissioner Marks' affidavit addressed the ramifications with respect to timing in the event a new plan be ordered. Affidavit of Commissioner Marks, 12/14/17, Respondents' Exhibit 2. Intervenors introduced affidavits from Thomas Whitehead and Carol Lynne Ryan, both of whom expressed concern that granting Petitioners relief would adversely affect their political activities. *See* Intervenors' Exhibits 16 and 17.

Initially, several Petitioners testified at trial. They testified as to their belief that, under the 2011 Plan, their ability to elect a candidate who represents their interests and point of view has been compromised. William Marx, a resident of Delmont in Westmoreland County, testified that he is a registered Democrat, and that, under the 2011 Plan, he lives in the 12th Congressional District, which is represented by Congressman Keith Rothfus, a Republican. Marx testified that Congressman Rothfus does not represent his views on, *inter alia*, taxes, healthcare, the environment, and legislation regarding violence against women, and he stated that he has been unable to communicate with him. Marx believes that the 2011 Plan precludes the possibility of having a Democrat elected in his district. N.T. Trial, 12/11/17, at 113-14.

Another Petitioner, Mary Elizabeth Lawn, testified that she is a Democrat who lives in the city of Chester. Under the 2011 Plan, Chester is in the 7th Congressional District, which is represented by Congressman Patrick Meehan, a Republican.[42] *Id.* at 134, 137-39. According to Lawn, Chester is a "heavily African-American" city, and, prior to the enactment of the 2011 Plan, was a part of the 1st Congressional District, which is represented by Congressman Bob Brady, a Democrat.[43] *Id.* at 135, 138-39. According to Lawn, since the enactment of the 2011 Plan, she has voted for the Democratic candidate in three state elections, and her candidate did not win any of the elections. *Id.* at 140. Lawn believes that the 2011 Plan has affected her ability to participate in the

[42] Reportedly, Congressman Meehan will not seek reelection in 2018. Mike DeBonis and Robert Costa, *Rep. Patrick Meehan, Under Misconduct Cloud, Will Not Seek Reelection*, Wash. Post, Jan. 25, 2018 *available at* https://www.washingtonpost.com/news/powerpost/wp/2018/01/25/rep-patrick-meehan-under-misconduct-cloud-will-not-seek-reelection/?utm_term=.9216491ff846.

[43] Reportedly, Congressman Brady also will not seek reelection in 2018. Daniella Diaz, *Democratic Rep. Bob Brady is Not Running for Re-election*, CNN Politics, Jan. 31, 2018, *available at* https://www.cnn.com/2018/01/31/politics/bob-brady-retiring-from-congress-pennsylvania-democrat/index.html.

political process because she was placed in a largely Republican district where the Democratic candidate "doesn't really have a chance." *Id.* Like Marx, Lawn testified that her congressman does not represent her views on many issues, and that she found her exchanges with his office unsatisfying. *Id.* at 140-44.

Finally, Thomas Rentschler, a resident of Exeter Township, testified that he is a registered Democrat. N.T. Trial, 12/12/17, at 669. Rentschler testified that he lives two miles from the City of Reading, and that he has a clear "community of interest" in that city. *Id.* at 682. Under the 2011 Plan, however, Reading is in the 16th Congressional District, and Rentschler is in the 6th Congressional District, which is represented by Congressman Ryan Costello, a Republican. *Id.* at 670-71, 677. Rentschler testified that, while he voted for the Democratic candidate in the last three state elections, all three contests were won by the Republican candidate. *Id.* at 673. In Rentschler's view, the 2011 Plan "has unfairly eliminated [his] chance of getting to vote and actually elect a Democratic candidate just by the shape and the design of the district." *Id.* at 674.

2. Expert Testimony

Petitioners presented the testimony of four expert witnesses, and the Legislative Respondents sought to rebut this testimony through two experts of their own. We address this testimony *seriatim*.

Dr. Jowei Chen

Petitioners presented the testimony of Dr. Jowei Chen, an expert in the areas of redistricting and political geography who holds research positions at the University of Michigan, Stanford University, and Willamette University.[44] Dr. Chen testified that he evaluated the 2011 Plan, focusing on three specific questions: (1) whether partisan

[44] None of the experts presented to the Commonwealth Court were objected to based upon their qualifications as an expert in their respective fields.

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. N.T. Trial, 12/11/17, at 165.

In order to evaluate the 2011 plan, Dr. Chen testified that he used a computer algorithm to create two sets, each with 500 plans, of computer-simulated redistricting plans for Pennsylvania's congressional districts. *Id.* at 170. The computer algorithm used to create the first set of simulated plans ("Simulation Set 1") utilized traditional Pennsylvania districting criteria, specifically: population equality; contiguity; compactness; absence of splits within municipalities, unless necessary; and absence of splits within counties, unless necessary. *Id.* at 167. The computer algorithm used to create the second set of simulated plans ("Simulation Set 2") utilized the aforementioned criteria, but incorporated the additional criteria of protecting 17 incumbents,[45] which, according to Dr. Chen, is not a "traditional districting criterion." *Id.* at 206. Dr. Chen testified that the purpose of adding incumbent protection to the criteria for the second set of computer-simulated plans was to determine whether "a hypothetical goal by the General Assembly of protecting incumbents in a nonpartisan manner might somehow explain or account for the extreme partisan bias" of the 2011 Plan. *Id.*

With regard to Simulation Set 1, the set of computer-simulated plans utilizing only traditional districting criteria, Dr. Chen noted that one of those plans, specifically, "Chen

[45] Dr. Chen noted that there were 19 incumbents in the November 2012 congressional elections, but that, as discussed, Pennsylvania lost one congressional district following the 2010 census. N.T. Trial, 12/11/17, at 207-08.

Figure 1: Example of a Simulated Districting Plan from Simulation Set 1 (Adhering to Traditional Districting Criteria)" (hereinafter "Simulated Plan 1"), which was introduced as Petitioners' Exhibit 3, results in only 14 counties being split into multiple congressional districts, as compared to the 28 counties that are split into multiple districts under the 2011 Plan. *Id.* at 173-74. Indeed, referring to a chart titled "Chen Figure 3: Simulation Set 1: 500 Simulated Plans Following Only Traditional Districting Criteria (No Consideration of Incumbent Protection)," which was introduced as Petitioners' Exhibit 4, Dr. Chen explained that the maximum number of split counties in any of the 500 Simulation Set 1 plans is 16, and, in several instances, is as few as 11. *Id.* at 179. The vast majority of the Simulation Set 1 plans have 12 to 14 split counties. *Id.*

With respect to splits between municipalities, Dr. Chen observed that, under the 2011 Plan, there are 68 splits, whereas the range of splits under the Simulation Set 1 plans is 40 to 58. *Id.* at 180; Petitioners' Exhibit 4. Based on the data contained in Petitioners' Exhibit 4, Dr. Chen noted that the 2011 Plan "splits significantly more municipalities than would have resulted from the simulated plans following traditional districting criteria, and [it] also split significantly more counties." N.T. Trial, 12/11/17, at 180. He concluded that the evidence demonstrates that the 2011 Plan "significantly subordinated the traditional districting criteria of avoiding county splits and avoiding municipal splits. It shows us that the [2011 Plan] split far more counties, as well as more municipalities, than the sorts of plans that would have arisen under a districting process following traditional districting principles in Pennsylvania." *Id.* at 181.

In terms of geographic compactness, Dr. Chen explained that he compared Simulated Plan 1 to the 2011 Plan utilizing two separate and widely-accepted standards. First, Dr. Chen calculated the Reock Compactness Score, which is a ratio of

a particular district's area to the area of the smallest bounding circle that can be drawn to completely contain the district – the higher the score, the more compact the district. *Id.* at 175. The range of Reock Compactness Scores for the congressional districts in Simulated Set 1 was "about .38 to about .46," *id.* at 182, and Simulated Plan 1 had an average Reock Compactness Score range of .442, as compared to the 2011 Plan's score of .278, revealing that, according to Dr. Chen, the 2011 Plan "is significantly less compact" than Simulated Plan 1. *Id.* at 175.

Dr. Chen also calculated the Popper-Polsby Compactness Score of both plans. The Popper-Polsby Compactness Score is calculated by first measuring each district's perimeter and comparing it to the area of a hypothetical circle with that same perimeter. The ratio of the particular district's area to the area of the hypothetical circle is its Popper-Polsby Compactness Score – the higher the score, the greater the geographic compactness. *Id.* at 176-77. The range of Popper-Polsby Compactness Scores for congressional districts in the Simulated Set 1 plans was "about .29 up to about .35," *id.* at 183, and Simulated Plan 1 had an average Popper-Polsby Score of .310, as compared to the 2011 Plan's score of .164, again leading Dr. Chen to conclude that "the enacted map is significantly far less geographically compact" than Simulated Plan 1. *Id.* at 177.

Utilizing a chart showing the mean Popper-Polsby Compactness Score and the mean Reock Compactness Score for each of the 500 Simulation Set 1 plans, as compared to the 2011 Plan, *see* Petitioners' Exhibit 5 ("Chen Figure 4: Simulation Set 1: 500 Simulated Plans Following Only Traditional Districting Criteria (No Consideration of Incumbent Protection)"), Dr. Chen opined that "no matter which measure of compactness you use, it's very clear that the [2011 Plan] significantly and completely sacrifice[s] the traditional districting principle of geographic compactness compared to

the sorts of plans that would have emerged under traditional districting principles." N.T. Trial, 12/11/17, at 184.

Dr. Chen next addressed the 500 Simulation Set 2 Plans, which, as noted above, included the additional criteria of protecting the 17 incumbents. Dr. Chen stated that, in establishing the additional criteria, no consideration was given to the identities or party affiliations of the incumbents. *Id.* at 208. One of the Simulation Set 2 plans, "Chen Figure 1A: Example of a Simulated Districting Plan from Simulation Set 2 (Adhering to Traditional Districting Criteria And Protecting 17 Incumbents)" (hereinafter "Simulated Plan 1A"), which was introduced as Petitioners' Exhibit 7, resulted in only 15 counties being split into multiple congressional districts, as compared to the 28 counties that are split into multiple districts under the 2011 Plan. *Id.* at 213. Referring to Petitioners' Exhibit 8, titled "Chen Figure 6: Simulation Set 2: 500 Simulated Plans Following Traditional Districting Criteria and Protecting 17 Incumbents," Dr. Chen further observed that the 2011 Plan split more municipalities (68) than any of the Simulated Set 2 plans, which resulted in a range of splits between 50 and 66. Based on this data, Dr. Chen opined:

> We're able to conclude from [Petitioners' Exhibit 8] that the [2011 Plan] subordinate[s] the traditional districting criteria of avoiding county splits and avoiding municipal splits and the subordination of those criteria was not somehow justified or explained or warranted by an effort to protect 17 incumbents in an nonpartisan manner. To put that in layman's terms, an effort to protect incumbents would not have justified splitting up as many counties and as many municipalities as we saw split up in the [2011 Plan].

Id. at 217.

With respect to geographic compactness, Dr. Chen explained that Simulated Plan 1A had an average Reock Compactness Score of .396, as compared to the 2011 Plan's score of .278, and Simulated Plan 1A had a Popper-Polsby Compactness Score

of .273, as compared to the 2011 Plan's score of .164. *Id.* at 214; Petitioners' Exhibit 7. Based on an illustration of the mean Popper-Polsby Compactness Score and the mean Reock Compactness Score for each of the 500 Simulation Set 2 plans, as compared to the 2011 Plan, *see* Petitioners' Exhibit 9 ("Chen Figure 7: Simulation Set 2: 500 Simulated Plans Following Traditional Districting Criteria and Protecting 17 Incumbents"), Dr. Chen concluded that the 2011 Plan "significantly subordinated [the] traditional districting criteria of geographic compactness and that subordination of geographic compactness of districts was not somehow justified or necessitated or explained by a hypothetical effort to protect 17 incumbents." N.T. Trial, 12/11/17, at 220.

Dr. Chen also testified regarding the partisan breakdown of the 2011 Plan. Dr. Chen explained that he requested and obtained from the Department of State the actual election data for each voting precinct in Pennsylvania for the six 2008 and 2010 statewide elections. *Id.* at 185-86. Those elections included the elections for the President, Attorney General, Auditor General, and State Treasurer in 2008, and the United States Senate election and the state gubernatorial election in 2010. *Id.* at 187. The election data obtained by Dr. Chen indicated how many votes were cast for each party candidate. *Id.* at 189. By overlaying the precinct-level election results on top of the geographic boundaries as shown on a particular map, he was able to determine whether a particular district had more Republican or Democratic votes during the elections. *Id.* at 196-97. Those districts that had more Republican votes would, naturally, be classified as Republican.

Dr. Chen observed that, under the 2011 Plan, 13 of the 18 congressional districts are classified as Republican. *Id.* at 198. However, when Dr. Chen overlaid the precinct-level election results on Simulated Plan 1, only 9 of the 18 congressional

districts would be classified as Republican. *Id.* at 197. Indeed, in the 500 Simulation Set 1 plans, the highest number of classified Republican districts was 10, and in none of the simulated plans would 13 of the congressional districts be classified as Republican. *Id.* at 200. Based on this data, Dr. Chen stated "I'm able to conclude with well-over 99.9 percent statistical certainty that the [2011 Plan's] creation of a 13-5 Republican advantage in Pennsylvania's Congressional delegation is an outcome that would never have emerged from a districting process adhering to and following traditional districting principles." *Id.* at 203-04.

Moreover, Dr. Chen testified that, even under the Simulation Set 2 plans, which took into account preservation of incumbent candidates, none of the 500 plans resulted in a Republican District/Democratic District ratio of more than 10 to 8. *Id.* at 221-22; Petitioners' Exhibit 10. Based on a comparison of the 2011 Plan and his simulated redistricting plans, Dr. Chen determined that "partisan intent predominated the drawing of the [2011 Plan] . . . and the [2011 Plan] was drawn with a partisan intent to create a 13-5 Republican advantage and that this partisan intent subordinated traditional districting principles in the drawing of the enacted plan." *Id.* at 166.

Dr. Chen was asked to consider whether the partisan breakdown of the 2011 Plan might be the result of a "hypothetical effort to produce a certain racial threshold of having one district of over a 56.8 percent African-American voting-age population." *Id.* at 245.[46] To answer this question, Dr. Chen explained that he analyzed the 259 computer-simulated plans from Simulation Sets 1 and 2 that included a congressional voting district with an African-American voting age population of at least 56.8%. Dr.

[46] Under the 2011 Plan, the only congressional district with an African-American voting-age population of more than 50% is the 2nd Congressional District, which includes areas of Philadelphia; the African-American voting-age population for that district is 56.8%. N.T. Trial, 12/11/17, at 239.

Chen testified that, of those 259 simulated plans, *none* resulted in a Republican-Democrat congressional district ratio of 13 to 5. *Id.* at 244-45, 250. Indeed, of the Simulated Set 1 plans, which did not take into account protection of incumbents, the maximum ratio was 9 to 9, and of the Simulated Set 2 plans, which did protect incumbents, the maximum ratio was 11 to 8, and, in one case, was as low as 8 to 11. *Id.*; Petitioners' Exhibit 15 ("Chen Figure 10"). Dr. Chen concluded "the 13-5 Republican advantage of the enacted map is an outcome that is not plausible, even if one is only interested in plans that create one district with over 56.8 percent African-American voting-age population." N.T. Trial, 12/11/17, at 245.

Dr. Chen also was asked whether the 13-5 Republican advantage in the 2011 Plan could be explained by political geography – that is, the geographic patterns of political behavior. *Id.* at 251. Dr. Chen explained that political geography can create natural advantages for one party over another; for example, he observed that, in Florida, Democratic voters are often "far more geographically clustered in urban areas," whereas Republicans "are much more geographically spaced out in rural parts" of the state, resulting in a Republican advantage in control over districts and seats in the state legislature. *Id.* at 252-53.

In considering the impact of Pennsylvania's political geography on the 2011 Plan, Dr. Chen explained that he measured the partisan bias of the 2011 Plan by utilizing a common scientific measurement referred to as the mean-median gap. *Id.* at 257. To calculate the mean, one looks at the average vote share per party in a particular district. *Id.* To calculate the median, one "line[s] up" the districts from the lowest to the highest vote share; the "middle best district" is the median. *Id.* at 258. The median district is the district that either party has to win in order to win the election. *Id.* Dr. Chen testified that, under the 2011 Plan, the Republican Party has a mean vote share of 47.5%, and a

median vote share of 53.4%. *Id.* at 261; Petitioners' Exhibit 1, at 20. This results in a mean-median gap of 5.9%, which, according to Dr. Chen, indicates that, under the 2011 Plan, "Republican votes . . . are spread out in a very advantageous manner so as to allow -- in a way that would allow the Republicans to more easily win that median district." N.T. Trial, 12/11/17, at 259. The converse of this mean-median gap result is that Democratic voters "are very packed into a minority of the districts, which they win by probably more comfortable margins," which makes it "much harder for Democrats under that scenario to be able to win the median district. So, in effect, what that means is it's much harder for the Democrats to be able to win a majority of the Congressional delegation." *Id.* at 260.

Dr. Chen recognized that "Republicans clearly enjoy a small natural geographic advantage in Pennsylvania because of the way that Democratic voters are clustered and Republican voters are a bit more spread out across different geographies of Pennsylvania." *Id.* at 255. However, Dr. Chen observed that the range of mean/median gaps created in any of the Simulated Set 1 plans was between "a little over 0 percent to the vast majority of them being under 3 percent," with a maximum of 4 percent. *Id.* at 262-63; Petitioners' Exhibit 16 ("Chen Figure 5"). Dr. Chen explained that this is a "normal range," and that a 6% gap "is a very statistically extreme outcome that cannot be explained by voter geography or by traditional districting principles alone." N.T. Trial, 12/11/17, at 263-64. Dr. Chen noted that the range of mean/median gaps created by any of the Simulated Set 2 plans also did not approach 6%, and, thus, that the 2011 Plan's "extreme partisan skew of voters is not an outcome that naturally emerges from Pennsylvania's voter geography combined with traditional districting principles and an effort to protect 17 incumbents in a nonpartisan manner. It's not a plausible outcome given those conditions." *Id.* at 266; Petitioners' Exhibit 17 ("Chen Figure 9").

In sum, Dr. Chen "statistically conclude[d] with extremely high certainty . . . that, certainly, there is a small geographic advantage for the Republicans, but it does not come close to explaining the extreme 13-5 Republican advantage in the [2011 Plan]." N.T. Trial, 12/11/17, at 255-56.

Ultimately, the Commonwealth Court found Dr. Chen's testimony credible; specifically, the court held that Dr. Chen's testimony "established that the General Assembly included factors other than nonpartisan traditional districting criteria in creating the 2011 Plan in order to increase the number of Republican-leaning congressional voting districts." Findings of Fact at ¶ 309. The court noted, however, that Dr. Chen's testimony "failed to take into account the communities of interest when creating districting plans," and "failed to account for the fact that courts have held that a legislature may engage in some level of partisan intent when creating redistricting plans." *Id.* at ¶¶ 310, 311.

Dr. John Kennedy

Petitioners next presented the testimony of Dr. John Kennedy, an expert in the area of political science, specializing in the political geography and political history of Pennsylvania, who is a professor of political science at West Chester University. Dr. Kennedy testified that he analyzed the 2011 Plan "to see how it treated communities of interest, whether there were anomalies present, whether there are strangely designed districts, whether there are things that just don't make sense, whether there are tentacles, whether there are isthmuses, whether there are other peculiarities." N.T. Trial, 12/12/17, at 580. Dr. Kennedy also explained several concepts used to create a gerrymandered plan. For example, he described that "cracking" is a method by which a particular party's supporters are separated or divided so they cannot form a larger, cohesive political voice. *Id.* at 586. Conversely, "packing" is a process by which

individual groups who reside in different communities are placed together based on their partisan performance, in an effort to lessen those individuals' impact over a broader area. *Id.* Finally, Dr. Kennedy defined "highjacking" as the combining of two congressional districts, both of which have the majority support of one party – the one not drawing the map – thereby forcing two incumbents to run against one another in the primary election, and automatically eliminating one of them. *Id.* at 634.

When asked specifically about the 2011 Plan, Dr. Kennedy opined that the 2011 Plan "negatively impacts Pennsylvania's communities of interest to an unprecedented degree and contains more anomalies than ever before." *Id.* at 579. For example, Dr. Kennedy noted that Erie County, in the 3rd Congressional District, is split under the 2011 Plan for "no apparent nonpartisan reason," when it had never previously been split. *Id.* at 591. According to Dr. Kennedy, Erie County is a historically Democratic county, and, in splitting the county, the legislature "cracked" it, diluting its impact by pushing the eastern parts of the county into the rural and overwhelmingly Republican 5th Congressional District. *Id.* at 597; *see* Petitioners' Exhibit 73.

Dr. Kennedy next addressed the 7th Congressional District, which he noted "has become famous certainly systemwide, if not nationally, as one of the most gerrymandered districts in the country," earning the nickname "the Goofy kicking Donald district." N.T. Trial, 12/11/17, at 598-99; *see* Joint Exhibit 12. According to Dr. Kennedy, the 7th Congressional District was historically based in southern Delaware County; under the 2011 Plan, it begins in Delaware County, moves north into Montgomery County, then west into Chester County, and finally, both north into Berks County and south into Lancaster County. At one point, along Route 30, the district is contiguous only by virtue of a medical facility, N.T. Trial, 12/11/17, at 600-01; at another point, in King of Prussia, it remains connected by a single steak and seafood restaurant.

Id. at 604. Dr. Kennedy further observed that the 7th Congressional District contains 26 split municipalities. *Id.* at 615.

Dr. Kennedy offered the 1st Congressional District as an example of a district which has been packed. *Id.* at 605; *see* Petitioners' Exhibit 70. He described that the 1st Congressional District begins in Northeast Philadelphia, an overwhelmingly Democratic district, and largely tracks the Delaware River, but occasionally reaches out to incorporate other Democratic communities, such as parts of the city of Chester and the town of Swarthmore. N.T. Trial, 12/11/17, at 605-08.

Dr. Kennedy also discussed the 4th Congressional District, as shown in Petitioners' Exhibit 75, observing that the district is historically "a very Republican district." *Id.* at 631. In moving the northernmost tip of the City of Harrisburg, which is predominantly a Democratic city, to the 4th Congressional District from the district it previously shared with central Pennsylvania and the Harrisburg metro area, which are part of the same community of interest, the 2011 Plan has diluted the Democratic vote in Harrisburg. *Id.* at 631-32.[47]

In sum, Dr. Kennedy concluded that the 2011 Plan "gives precedence to political considerations over considerations of communities of interest and disadvantages Democratic voters, as compared to Republican voters. This is a gerrymandered map." *Id.* at 644. The Commonwealth Court found Dr. Kennedy's testimony credible. However, it concluded that Dr. Kennedy "did not address the intent behind the 2011 Plan," and it specifically "disregarded" Dr. Kennedy's opinion that the 2011 Plan was an unconstitutional gerrymander as an opinion on the ultimate question of law in this case. Findings of Fact at ¶¶ 339-41.

[47] Dr. Kennedy's testimony was not limited to discussion of the four specific congressional districts discussed herein.

Dr. Wesley Pegden

Petitioners next presented the testimony of Dr. Wesley Pegden, an expert in the area of mathematical probability, and professor of mathematical sciences at Carnegie Mellon University. Dr. Pegden testified that he evaluated the 2011 Plan to determine whether it "is an outlier with respect to partisan bias and, if so, if that could be explained by the interaction of political geography and traditional districting criteria in Pennsylvania." N.T. Trial, 12/13/17, at 716-17. In evaluating the 2011 Plan, Dr. Pegden utilized a computer algorithm that starts with a base plan − in this case, the 2011 Plan − and then makes a series of small random changes to the plan. Dr. Pegden was able to incorporate various parameters, such as maintaining 18 contiguous districts, maintaining equal population, and maintaining compactness. *Id.* at 726. Dr. Pegden then noted whether the series of small changes resulted in a decrease in partisan bias, as measured by the mean/median. *Id.* at 722-23.

The algorithm made approximately 1 trillion computer-generated random changes to the 2011 Plan, and, of the resulting plans, Dr. Pegden determined that 99.999999% of them had less partisan bias than the 2011 Plan. *Id.* at 749; Petitioners' Exhibit 117, at 1. Based on this data, Dr. Pegden concluded the General Assembly "carefully crafted [the 2011 Plan] to ensure a Republican advantage." Petitioners' Exhibit 117, at 1. He further testified the 2011 Plan "was indeed an extreme outlier with respect to partisan bias in a way that could not be explained by the interaction of political geography and the districting criteria" that he considered. N.T. Trial, 12/13/17, at 717.

The Court found Dr. Pegden's testimony to be credible; however, it noted that, like Dr. Chen's testimony, his testimony did not take into account "other districting considerations, such as not splitting municipalities, communities of interest, and some

permissible level of incumbent protection and partisan intent." Findings of Fact at ¶¶ 360-61. Further, as with Dr. Kennedy, the Commonwealth Court "disregarded" Dr. Pegden's opinion that the 2011 Plan was an unconstitutional gerrymander as an opinion on a question of law. *Id.* at ¶ 363.

Dr. Christopher Warshaw

Petitioners next presented the testimony of Dr. Christopher Warshaw, an expert in the field of American politics – specifically, political representation, public opinion, elections, and polarization – and professor of political science at George Washington University. Dr. Warshaw testified that he was asked to evaluate the degree of partisan bias in the 2011 Plan, and to place any such bias into "historical perspective." N.T. Trial, 12/13/17, at 836.

Dr. Warshaw suggested that the degree of partisan bias in a redistricting plan can be measured through the "efficiency gap," which is a formula that measures the number of "wasted" votes for one party against the number of "wasted" votes for another party. *Id.* at 840-41. For a losing party, all of the party's votes are deemed wasted votes. For a winning party, all votes over the 50% needed to win the election, plus one, are deemed wasted votes. The practices of cracking and packing can be used to create wasted votes. *Id.* at 839. He explained that, in a cracked district, the disadvantaged party loses narrowly, wasting a large number of votes without winning a seat; in a packed district, the disadvantaged party wins overwhelmingly, again, wasting a large number of votes. *Id*. at 839-40. To calculate the efficiency gap, Dr. Warshaw calculates the ratio of a party's wasted votes over the total number of votes cast in the election, and subtracts one party's ratio from the ratio for the other party. The larger the number, the greater the partisan bias. For purposes of evaluating the 2011 Plan, Dr. Warshaw explained that an efficiency gap of a negative percentage represents a

Republican advantage, and a positive percentage represents a Democratic advantage. *Id.* at 842. (The decision of which party's gap is deemed negative versus positive – the scale's polarity – is arbitrary. *Id.* at 854.) He summed up the approach as follows:

> The efficiency gap is just a way of translating this intuition that what gerrymandering is ultimately about is efficiently translating votes into seats by wasting as many of your opponent's supporters as possible and as few as possible -- as possible of your own. So it's really just a formula that captures this intuition that that's what gerrymandering is at its core.

Id. at 840.

Dr. Warshaw testified that, historically, in states with more than six congressional districts, the efficiency gap is close to 0%. An efficiency gap of 0% indicates no partisan advantage. *Id.* at 864. He explained that 75% of the time, the efficiency gap is between 10% and negative 10%, and, less than 4% of the time, the efficiency gap is outside the range of 20% and negative 20%. *Id.* at 865.

In analyzing the efficiency gap in Pennsylvania for the years 1972 through 2016, Dr. Warshaw discovered that, during the 1970s, there was "a very modest" Democratic advantage, but that the efficiency gap was relatively close to zero. *Id.* at 870; *see* Petitioner's Exhibit 40. In the 1980s and 90s, the efficiency gap indicated no partisan advantage for either party. *Id.* Beginning in 2000, there was a "very modest Republican advantage," but the efficiency gaps "were never very far from zero." *Id.* at 870-71. However, in 2012, the efficiency gap in Pennsylvania was negative 24%, indicating that "Republicans had a 24-percentage-point advantage in the districting process." *Id.* at 871. In 2014, "Republicans continued to have a large advantage in the districting process with negative 15 percent," and, in 2016, Republicans "continued to have a very large and robust" advantage with an efficiency gap of negative 19%. *Id.*

Dr. Warshaw confirmed that, prior to the 2011 Plan, Pennsylvania never had an efficiency gap of 15% in favor of either party, and only once had there been an efficiency gap of even 10%. *Id.* at 872. Thus, Dr. Warshaw concluded that the efficiency gaps that occurred after the 2011 Plan were "extreme" relative to the prior plans in Pennsylvania. *Id.* Indeed, he noted that the efficiency gap in Pennsylvania in 2012 was the largest in the country for that year, and was the second largest efficiency gap in modern history "since one-person, one-vote went into effect in 1972." *Id.* at 874. The impact of an efficiency gap between 15% and 24%, according to Dr. Warshaw, "implies that Republicans won an average of three to four extra Congressional seats each year over this timespan." *Id.* at 873.

When asked to consider whether geography may have contributed to the large efficiency gap in Pennsylvania, Dr. Warshaw stated, "it's very unlikely that some change in political geography or some other aspect of voting behavior would have driven this change. This change was likely only due to the districts that were put in place." *Id.* at 879. With regard to the change in the efficiency gap between the 2010 and 2012 elections, Dr. Warshaw opined that "there's no possible change in political geography that would lead to such a dramatic shift." *Id.* Dr. Warshaw further concluded that "the efficiency gaps that occured immediately after the 2011 Redistricting Plans went into place are extremely persistent," and are unlikely to be remedied by the "normal electoral process." *Id.* at 890-91.

In addition to his testimony regarding the efficiency gap, Dr. Warshaw discussed the concept of polarization, which he defined as the difference in voting patterns

between Democrats and Republicans in Congress, *id.* at 903, and the impact of partisan gerrymandering on citizens' faith in government. *Id.* at 953.[48]

The Commonwealth Court found Dr. Warshaw's testimony to be credible, particularly with respect to the existence of an efficiency gap in Pennsylvania. Nevertheless, the court opined that the full meaning and effect of the gap "requires some speculation and does not take into account some relevant considerations, such as quality of candidates, incumbency advantage, and voter turnout." Findings of Fact at ¶ 389. The court expressed additional concerns that the efficiency gap "devalues competitive elections," in that even in a district in which both parties have an equal chance of prevailing, a close contest will result in a substantial efficiency gap in favor of the prevailing party. *Id.* at ¶ 390. Finally, the court concluded that Dr. Warshaw's comparison of the efficiency gap in Pennsylvania and other states was of limited value, as it failed to take into consideration whether there were state differences in methods and limitations for drawing congressional districts. *Id.* at 89-90 ¶ 391.[49]

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[48] A detailed explanation of this aspect of his testimony is unnecessary for purposes of this Opinion.

[49] Following the presentation of Dr. Warshaw's testimony, Petitioners requested permission to admit into the record several documents, including: Petitioners' Exhibit 124 (Declaration of Stacie Goede, Republican State Leadership Conference); Petitioners' Exhibit 126 (Redistricting 2010 Preparing for Success); Petitioners' Exhibit 127 (RSLC Announces Redistricting Majority Project (REDMAP); Petitioners' Exhibit 128 (REDistricting MAjority Project); Petitioners' Exhibit 129 (REDMAP Political Report: July 2010); Petitioners' Exhibit 131 (REDMAP 2012 Summary Report); Petitioners' Exhibit 132 (REDMAP Political Report: Final Report); Petitioners' Exhibit 133 (2012 RSLC Year in Review); Petitioners' Exhibit 134 (REDMAP fundraising letter); and Petitioners' Exhibit 140 ("Map-CD18 Maximized"). As noted above, the Commonwealth Court sustained Respondents' objections to the admission of these documents, but admitted them under seal "for the sole purpose of . . . allowing the Supreme Court to revisit my evidentiary ruling if it so chooses." N.T. Trial, 12/13/17, at 1061; *see id.* at 1070. Petitioners also moved for the admission of Exhibits 27, 28, 29, 30, 31, and 33. The court refused to admit Exhibits 27, 28, 29, 30, and 31, and reiterated that it had (continued…)

Dr. Wendy K. Tam Cho

In response to the testimony offered by Petitioners, Legislative Respondents presented the testimony of their own experts, beginning with Wendy K. Tam Cho, Ph.D., a professor at the University of Illinois, who was certified as an expert in the areas of political science with a focus on political geography, redistricting, American elections, operations research, statistics, probability, and high-performance computing; she was called to rebut Dr. Chen's and Dr. Pegden's testimony. N.T. Trial, 12/14/17, at 1132. Dr. Cho opined that, based upon her review of one of Dr. Chen's prior papers, she believed that his methodology was a flawed attempt at a Monte Carlo simulation – *i.e.*, a flawed attempt to use random sampling to establish the probability of outcomes. Specifically, Dr. Cho explained that Dr. Chen's methodology was flawed because, although his algorithm randomly selected an initial voting district from which to compile a redistricting plan, it subsequently followed a determined course in actually compiling it, thereby undermining its ability to establish probabilistic outcomes. *Id.* at 1137-38. Dr. Cho also criticized Dr. Chen's algorithm on, *inter alia*, the basis that it had not been academically validated, *id.* at 1170-73; that many or all of the alternative plans failed to include all legally applicable and/or traditional redistricting principles "as [she] understand[s] them," *id.* at 1176; and that the algorithm generated too small a sample size of alternative plans to establish probabilistic outcomes. *Id.* at 1181-85.

Dr. Cho testified that, based upon her review of Dr. Pegden's published work, she believed his methodology too was flawed, in that it failed to incorporate ordinary

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(…continued)
previously ruled on Exhibit 33 and held it was not admissible. *Id.* at 1077. The court also refused to admit Exhibits 135, 136, 137, 138, 139, and 141-161. *Id.* at 1083.

redistricting criteria such as avoiding municipal splits and protecting incumbents. *Id.* at 1219.

Notably, however, Dr. Cho conceded that she did not actually review either Dr. Chen's or Dr. Pegden's algorithms or codes, *id.* at 1141, 1296, and both Dr. Pegden and Dr. Chen testified on rebuttal that the bulk of Dr. Cho's assumptions regarding their methodology – and, thus, derivatively, her criticisms thereof – were erroneous. *Id.* at 1368-95; N.T. Trial, 12/15/17, at 1650-75. Ultimately, the Commonwealth Court found Dr. Cho's testimony incredible "with regard to her criticisms of the algorithms used by Dr. Chen and Dr. Pegden, but credible with regard to her observation that Dr. Pegden's algorithm failed to avoid municipal splits and did not account for permissible incumbency protection." Findings of Fact at ¶ 398. Nevertheless, the court found Dr. Cho's testimony did not lessen the weight of either Dr. Chen's conclusion that adherence to what he viewed as traditional redistricting criteria could not explain the 2011 Plan's partisan bias, or Dr. Pegden's conclusion that the 2011 Plan is a statistical outlier as compared to maps with nearly identical population equality, contiguity, compactness, and number of county splits. *Id.* at ¶¶ 399-400. The court also concluded that Dr. Cho offered no meaningful guidance as to an appropriate test for determining the existence of an unconstitutional partisan gerrymander. *Id.* at ¶ 401.

Dr. Nolan McCarty

Respondents also presented the testimony of Dr. Nolan McCarty, an expert in the area of redistricting, quantitative election and political analysis, representation and legislative behavior, and voting behavior, and professor of politics and public affairs at Princeton University. Dr. McCarty was asked to comment on the expert reports of Dr. Chen and Dr. Warshaw. Dr. McCarty explained that he analyzed whether the 2011 Plan resulted in a partisan bias by calculating the partisan voting index ("PVI") of each

congressional district. N.T. Trial, 12/15/17, at 1421. The PVI is calculated by taking the presidential voting returns in a congressional district for the previous two elections, subtracting the national performance of each political party, and then calculating the average over those two elections. *Id.* Utilizing the PVI, Dr. McCarty opined that there was no evidence of a partisan advantage to the Republican Party under the 2011 Plan. *Id.* at 1489-90. He further suggested that, under the 2011 Plan, the Democratic Party should have won 8 of the 18 congressional seats, and that its failure to do so was the result of other factors, including candidate quality, incumbency, spending, national tides, and trends within the electorate. *Id.* at 1447-48.

Dr. McCarty criticized Dr. Chen's method of calculating the partisan performance of a district, opining that it is an imperfect predictor of how a district will vote in congressional elections. *Id.* at 1458-76. However, Dr. Chen addressed Dr. McCarty's criticisms on rebuttal, *id.* at 1675-701, "to the satisfaction of the Court." Findings of Fact at ¶ 407.

Dr. McCarty also criticized Dr. Warshaw's reliance on the efficiency gap as an indicator of gerrymandering, contending (1) that the efficiency gap does not take into consideration partisan bias that results naturally from geographic sorting; (2) that proponents of the efficiency gap have not developed principled ways of determining when an efficiency gap is too large to be justified by geographic sorting; and (3) close elections can have an effect on the calculation of efficiency gaps. N.T. Trial, 12/15/17, at 1484; *see also* Legislative Respondents' Exhibit 17 at 18-20. He further suggested there are many components to wasted votes that are not related to partisan districting. N.T. Trial, 12/15/17, at 1483-84. Finally, Dr. McCarty criticized Dr. Warshaw's testimony regarding the effect gerrymandering has on the polarization of political parties. *Id.* at 1477-82.

The Commonwealth Court found Dr. McCarty's testimony not credible with regard to his criticism of Dr. Chen's report; indeed, the court concluded that "the methodology employed by Dr. Chen to calculate partisan performance appears to have been a reliable predictor of election outcomes in Pennsylvania since the enactment of the 2011 Plan." Findings of Fact at ¶ 409. Moreover, the Commonwealth Court observed that "Dr. Chen's methodology resulted in accurate predictions for 54 out of 54 congressional elections under the 2011 Plan." *Id.*

With regard to Dr. Warshaw's expert report, the Commonwealth Court likewise determined that Dr. McCarty's criticisms were not credible to the extent he (1) disagreed that gerrymandering does not exacerbate problems associated with polarization, and (2) suggested that cracking and packing may actually benefit voters. *Id.* at ¶ 410. The court further rejected as incredible Dr. McCarty's criticism of Dr. Warshaw's reliance on the efficiency gap, noting that "Dr. Warshaw accounted for some geographic sorting in his analysis of the efficiency gap and did not dispute that close elections can impact the calculation of an efficiency gap." *Id.* Although the court credited Dr. McCarty's testimony that proponents of the efficiency gap have not developed principled methods of determining when an efficiency gap is so large it necessarily evidences partisan gerrymandering, and that wasted votes are not always the result of partisan districting, the Commonwealth Court concluded that Dr. McCarty's testimony did not lessen (1) "the weight given to Dr. Chen's testimony that the 2011 Plan is an outlier with respect to its partisan advantage," or (2) "the weight given to Dr. Warshaw's testimony that an efficiency gap exists in Pennsylvania." *Id.* at ¶¶ 411-12. The court also concluded that Dr. McCarty offered no guidance as to the appropriate test for determining when a legislature's use of partisan considerations results in unconstitutional gerrymandering. *Id.* at ¶ 413.

B. Conclusions of Law of the Commonwealth Court

After setting forth its findings of fact, the Commonwealth Court offered recommended conclusions of law. Preliminarily, the court explained that the federal Constitution requires that seats in the United States House of Representatives be reapportioned decennially among the states according to their populations as determined in the census, and commits post-reapportionment redistricting to the states' legislatures, subject to federal law. Conclusions of Law at ¶¶ 1-2 (quoting the federal Elections Clause). The court reasoned that, in Pennsylvania, although the General Assembly in performing post-reapportionment redistricting is subject to federal restrictions – *e.g.*, the requirement that districts be as equal in population as possible and the requirements of the Voting Rights Act of 1965 – it is largely free from state restrictions, as its task is not subject to explicit, specific, constitutional or statutory requirements.[50] The Commonwealth Court intimated that, although a party's claim that a legislative redistricting plan is unconstitutional on the ground that it is a partisan gerrymander is justiciable under federal and state law, *id.* at ¶ 10 (citing *Davis v. Bandemer*, 478 U.S. 109, 124-27 (1986);[51] *Erfer v. Commonwealth*, 794 A.2d 325, 331

[50] The court contrasted the General Assembly's freedom in this regard with the Legislative Reapportionment Commission's relatively lesser freedom in performing state legislative redistricting, which, as noted above, is governed by Article II, Section 16 of the Pennsylvania Constitution; political subdivisions' lesser freedom in performing political-subdivision redistricting, which is governed by Article IX, Section 11 of the Pennsylvania Constitution; and other states' lesser freedom in performing congressional redistricting subject to their own state restrictions, *see* Conclusions of Law at ¶ 7 (citing, as an example, Va. Const. art. II, § 6 (requiring Virginia's Congressional districts to be contiguous and compact)).

[51] Actually, such a claim's justiciability under federal law is, at best, unclear. In *Bandemer*, the United States Supreme Court held that such claims are justiciable under the Equal Protection Clause, but was unable to agree on an adjudicative standard. However, in *Vieth*, the court revisited the issue, and a four-Justice plurality indicated they would overrule *Bandemer*'s holding, with an equal number of Justices indicating they would reaffirm it, although they remained unable to agree on an adjudicative (continued…)

(Pa. 2002)), it is insufficient to allege that a redistricting plan employs partisan or political classifications *per se*: rather, a party must demonstrate that the plan employs *excessive* partisan or political classifications, *see id.* at ¶¶ 10-15 (citing, *inter alia*, *Vieth, supra*, at 307 (Kennedy, J., concurring) (opining that such a claim predicated on partisan or political classifications *per se* is nonjusticiable, but that one predicated on the allegation that "the [partisan or political] classifications . . . were applied in an invidious manner or in a way unrelated to any legitimate legislative objective" might be justiciable); *Erfer*, 794 A.2d at 334 (describing such a claim's justiciability as "not amenable to judicial control or correction save for the most egregious abuses."); *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 745 (Pa. 2012) ("*Holt I*") (acknowledging, in the context of state legislative redistricting, that redistricting "has an inevitably legislative, and therefore an inevitably political, element," but indicating that constitutional requirements function as a "brake on the most overt of potential excesses and abuse")). The court noted that Petitioners, insofar as they are challenging the 2011 Plan's constitutionality, bear the burden of proving its unconstitutionality, and that it is insufficient for them to demonstrate that a better or fairer plan exists; rather, they must demonstrate that the 2011 Plan clearly, plainly, and palpably violates constitutional

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(…continued)
standard. *See Vieth*, 541 U.S. at 270-306 (plurality opinion) (Scalia, J., joined by Rehnquist, C.J., O'Connor, J., and Thomas, J.); *id.* at 317 (Stevens, J. dissenting); *id.* at 342-55 (Souter, J., joined by Ginsburg, J., dissenting); *id.* at 355-68 (Breyer, J., dissenting). Justice Kennedy, concurring in the judgment, agreed with the plurality that the claim at bar was nonjusticiable, insofar as he viewed some political partisan or political classifications as permissible and, largely due to that circumstance, could not glean an appropriate adjudicative standard, but declined to foreclose future claims for which he expressed optimism that such a standard might be determined. *See id.* at 308-17 (Kennedy, J., concurring in the judgment).

requirements. *See id.* at ¶ 16 (citing, *inter alia*, *Singer v. Sheppard*, 346 A.2d 897, 900 (Pa. 1975)).

Turning to Petitioners' claims, the Commonwealth Court first rejected Petitioners' argument that the 2011 Plan violated their rights to free speech pursuant to Article I, Section 7 of the Pennsylvania Constitution and free assembly pursuant to Article I, Section 20 of the Pennsylvania Constitution. The court acknowledged that these provisions predate the First Amendment to the United States Constitution, and that, although their interpretation is often guided by analogy to First Amendment jurisprudence, they provide broader protection of individual freedom of speech and association. The court cited its decision in *Working Families Party v. Commonwealth*, 169 A.3d 1247 (Pa. Cmwlth. 2017), for the proposition that, where a party challenges a statute as violative of Article I, Sections 7 and 20, the fundamental adjudicative framework is a means-ends test weighing "the character and magnitude of the burden imposed by the [statute] against the interests proffered to justify that burden": specifically, "'regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest[;] [l]esser burdens, however, trigger less exacting review, and a [s]tate's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.'" Conclusions of Law at ¶ 25 (quoting *Working Families Party*, 169 A.3d at 1260-61 (internally quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (internal quotation marks omitted))). The court then explained that this Court has recognized that the right to free speech includes the right to free speech unencumbered by official retaliation:

> To prove a claim of retaliation, a plaintiff must establish: (1) the plaintiff was engaged in a constitutionally protected activity; (2) the defendant's action caused the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and (3)

> the adverse action was motivated at least in part as a response to the exercise of the plaintiff's constitutional rights.

Id. at ¶ 26 (quoting *Uniontown Newspapers, Inc. v. Roberts*, 839 A.2d 185, 198 (Pa. 2003) (internal citations and quotation marks omitted)).

Observing that no majority of the United States Supreme Court has yet addressed a challenge to a redistricting plan as violative of the First Amendment and that no Pennsylvania court has yet considered a challenge to a redistricting plan as violative of Article I, Sections 7 and 20, the court remarked that Petitioners are not precluded by the 2011 Plan from freely associating with any candidate or political party or from voting. The court characterized Petitioners' claims as actually seeking a declaration that they are entitled to a redistricting plan "free of any and all partisan considerations," noting that such a right was "not apparent in the Pennsylvania Constitution or in the history of gerrymandering decisions in Pennsylvania or throughout the country," and that both the United States Supreme Court and this Court have previously acknowledged that partisan considerations may play some role in redistricting. *Id.* at ¶¶ 27-38 (citing *Vieth* and *Holt I*).

The court then noted Justice Kennedy's remarks in *Vieth* that courts must have some judicially administrable standard by which to appraise partisan gerrymanders, and found that Petitioners presented no such standard.[52] Finally, assuming *arguendo* that

[52] Later, the Commonwealth Court explained:

> [s]ome unanswered questions that arise based on Petitioners' presentation include: (1) what is a constitutionally permissible efficiency gap; (2) how many districts must be competitive in order for a plan to pass constitutional muster (realizing that a competitive district would result in a skewed efficiency gap); (3) how is a "competitive" district defined; (4) how is a "fair" district defined; and (5) must a plan guarantee a minimum number of congressional seats in favor of one party or another to be constitutional.

(continued…)

Petitioners' putative retaliation claim is cognizable under Pennsylvania law, the court found that Petitioners failed to establish the same. Although conceding that Petitioners were engaged in constitutionally-protected political activity, the court first found that they failed to establish that the General Assembly caused them to suffer any injury that would chill a person of ordinary firmness from continuing to engage in such activity, essentially because they remained politically active:

> With respect to the second element, Petitioners all continue to participate in the political process. Indeed, they have voted in congressional races since the implementation of the 2011 Plan. The Court assumes that each Petitioner is a person of [at least] ordinary firmness.

Id. at ¶ 34.

The court also determined that Petitioners failed to establish that the General Assembly's adoption of the 2011 Plan was motivated in part as a response to Petitioners' participation in the political process, essentially reasoning that intent to gain a partisan advantage over a rival faction is not equivalent to an intent to punish the faction's voters, that gleaning the intent of the General Assembly as a body was largely impossible, and that the fact that some Democratic state representatives voted in favor of the 2011 Plan undermined the notion that its intent was to punish Democratic voters:

> With respect to the third element, Petitioners have similarly failed to adduce evidence that the General Assembly passed the 2011 Plan with any motive to retaliate against Petitioners (or others who voted for Democratic candidates in any particular election) for exercising their right to vote. . . .
>
> Intent to favor one party's candidates over another should not be conflated with motive to retaliate against voters for casting their votes for a particular candidate in a prior election. There is no record evidence to suggest that in

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Conclusions of Law at ¶ 61 n.24.

> voting for the 2011 Plan, the General Assembly, or any particular member thereof, was motivated by a desire to punish or retaliate against Pennsylvanians who voted for Democratic candidates. Indeed, it is difficult to assign a singular and dastardly motive to a branch of government made up of 253 individual members elected from distinct districts with distinct constituencies and divided party affiliations. . . .
>
> On final passage of the 2011 Plan in the PA House, of the 197 members voting, 136 voted in the affirmative, with some Republican members voting in the negative and 36 Democratic members voting in the affirmative. Given the negative Republican votes, the 2011 Plan would not have passed the PA House without Democratic support. The fact that some Democrats voted in favor of the 2011 Plan further militates against a finding or conclusion that the General Assembly passed the 2011 Plan, in whole or in part, as a response to actual votes cast by Democrats in prior elections.

Id. at ¶¶ 35-37 (paragraph numbering omitted).

Next, the court rejected Petitioners' argument that the 2011 Plan violated their rights to equal protection pursuant to Article I, Sections 1 and 26 of the Pennsylvania Constitution (the "Equal Protection Guarantee") and their right to free and equal elections pursuant to Article I, Section 5 of the Pennsylvania Constitution. The court opined that, "[i]n the context of partisan gerrymandering, the Pennsylvania Supreme Court has stated that the Equal Protection Guarantee is coterminous with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution," Conclusions of Law at ¶ 45 (citing *Erfer*, 794 A.2d at 332 (citing *Love v. Borough of Stroudsburg*, 597 A.2d 1137, 1139 (Pa. 1991)); *Kramer v. Workers' Comp. Appeal Bd. (Rite Aid Corp.)*, 883 A.2d 518, 532 (Pa. 2005); *Zauflik v. Pennsbury Sch. Dist.*, 72 A.3d

773, 789 n. 24 (Pa. Cmwlth. 2013), ***aff'd***, 104 A.3d 1096 (Pa. 2014); *Doe v. Miller*, 886 A.2d 310, 314 n.9 (Pa. Cmwlth. 2005), ***aff'd per curiam***, 901 A.2d 495 (Pa. 2006)).[53] [54]

The Commonwealth Court further opined that this Court has previously described the Free and Equal Elections Clause as requiring that elections "are public and open to all qualified electors alike;" that "every voter has the same right as any other voter;" that "each voter under the law has the right to cast his ballot and have it honestly counted;" that "the regulation of the right to exercise the franchise does not deny the franchise[;]" and that "no constitutional right of the qualified elector is subverted or denied him[,]" but, in the context of partisan gerrymandering, merely reiterates the protections of the Equal

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[53] The court further opined that *Erfer* was "consistent with decades of Pennsylvania Supreme Court precedent holding that the 'equal protection provisions of the Pennsylvania Constitution are analyzed . . . under the same standards used by the United States Supreme Court when reviewing equal protection claims under the Fourteenth Amendment to the United States Constitution.'" Conclusions of Law at ¶ 45 (quoting *Love*, 597 A.2d at 1139; citing *Commonwealth v. Albert*, 758 A.2d 1149, 1151 (Pa. 2000); *James v. SEPTA*, 477 A.2d 1302, 1305 (Pa. 1984); *Laudenberger v. Port Auth. of Allegheny Cnty.*, 436 A.2d 147, 155 n.13 (Pa. 1981); *Baltimore & Ohio R.R. Co. v. Commonwealth*, 334 A.2d 636, 643 (Pa. 1975)).

[54] Notably, in *Erfer*, our determination that the Equal Protection Guarantee was to be adjudicated as coterminous with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution was predicated on *Love*, in which we merely remarked that the Equal Protection Guarantee and Equal Protection Clause involve the same jurisprudential framework – *i.e.*, a means-ends test taking into account a law's use of suspect classification, burdening of fundamental rights, and its justification in light of its objectives. *See Erfer*, 794 A.3d at 331-32; *Love*, 597 A.2d at 1139. The same was true in *Kramer*, where we remarked that we had previously employed "the same standards applicable to federal equal protection claims" and that the parties therein did not dispute "that the protections [were] coterminous[.]" *Kramer*, 883 A.2d at 532. Moreover, our affirmance in *Zauflik* was rooted in the parties' failure to conduct an analysis under *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991). *See Zauflik*, 104 A.3d at 1117 n.10; *infra* note 53. Finally, concerning *Doe*, the issue was not meaningfully litigated before the Commonwealth Court, and, in any event, this Court affirmed its decision *per curiam*, rendering it of no salient precedential value in the instant case. *See Commonwealth v. Tilghman*, 673 A.2d 898, 903-05 (Pa. 1996) (noting that orders affirming a lower court's *decision*, as opposed to its *opinion*, *per curiam* should not be construed as endorsing its reasoning).

Protection Guarantee. *Id.* at ¶¶ 40 (citing *In re 1991 Pa. Legislative Reapportionment Comm'n*, 609 A.2d 132 (Pa. 1992) (quoting *City Council of City of Bethlehem v. Marcincin*, 515 A.2d 1320, 1323 (Pa. 1986)), and *Erfer*, 794 A.2d at 332).[55]

The court explained that, in *In re 1991 Legislative Reapportionment Comm'n*, this Court adopted a standard suggested by a plurality of justices in *Bandemer* for determining whether a redistricting plan was unconstitutional on the basis of partisan gerrymandering:

> A plaintiff raising a gerrymandering claim must establish that there was intentional discrimination against an identifiable political group and that there was an actual discriminatory effect on that group. In order to establish discriminatory effect, the plaintiff must show: (1) that the identifiable group has been, or is projected to be, disadvantaged at the polls; (2) that by being disadvantaged at the polls, the identifiable group will lack political power and be denied fair representation.

Conclusions of Law at ¶ 47 (internal quotation marks, citations, and brackets omitted). The Commonwealth Court acknowledged that *Bandemer*'s and, with it, *Erfer*'s test, was abrogated by *Vieth* as a matter of federal law, but, noting that this Court has not yet specifically discarded it, nevertheless endeavored to apply it to Petitioners' claim. Although acknowledging that Petitioners had established intentional discrimination – in that the General Assembly was likely aware of, and intended, the 2011 Plan's political consequences – the court determined that Petitioners could not establish that they constituted an identifiable political group:

[55] Notably, as discussed below, although we did reject in *Erfer* the suggestion that the Free and Equal Elections Clause provided greater protection of the right to vote than the Equal Protection Guarantee, our rejection was predicated on the lack of a persuasive argument to that end. *Erfer*, 794 A.2d at 331-32.

> In light of the standard articulated in *Erfer*, and based on the evidence adduced at trial, Petitioners have established intentional discrimination, in that the 2011 Plan was intentionally drawn so as to grant Republican candidates an advantage in certain districts within the Commonwealth. . . . Although the 2011 Plan was drawn to give Republican candidates an advantage in certain districts within the Commonwealth, Petitioners have failed to meet their burden of showing that the 2011 Plan equated to intentional discrimination against an identifiable political group. . . . Voters who are likely to vote Democratic (or Republican) in a particular district based on the candidates or issues, regardless of the voters' political affiliation, are not an identifiable political group for purposes of the Equal Protection Guarantee under the Pennsylvania Constitution.

Id. at ¶¶ 51-53 (paragraph numbering omitted).

Moreover, the court found that Petitioners had failed to establish that they would be disadvantaged at the polls or would lack political power or fair representation, noting that they remain free to participate in democratic processes:

> While Petitioners contend that Republican candidates who prevail in congressional districts do not represent their particular views on issues important to them and will effectively ignore them, the Court refuses to make such a broad finding based on Petitioners' feelings. There is no constitutional provision that creates a right in voters to their elected official of choice. As a matter of law, an elected member of Congress represents his or her district in its entirety, even those within the district who do not share his or her views. This Court will not presume that members of Congress represent only a portion of their constituents simply because some constituents have different priorities and views on controversial issues. . . . At least 3 of the 18 congressional districts in the 2011 Plan are safe Democratic seats. . . . Petitioners can, and still do, campaign for, financially support, and vote for their candidate of choice in every congressional election. . . . Petitioners can still exercise their right to protest and attempt to influence public opinion in their congressional district and throughout the Commonwealth. . . . Perhaps most importantly, Petitioners and likeminded voters from across the Commonwealth can exercise their political power at the polls to elect legislators and a Governor who will address and remedy any unfairness

> in the 2011 Plan through the next reapportionment following the 2020 U. S. Census.

Conclusions of Law at ¶ 56 (paragraph labeling omitted).[56]

Finally, in a post-script summary, the court reiterated its view that Petitioners had failed to identify a judicially manageable standard for claims of partisan gerrymandering, and noted that it predicated its conclusions of law on what it viewed as the "evidence presented and the current state of the law," acknowledging that there are matters pending before the United States Supreme Court that might impact the applicable legal framework. *Id.* at ¶ 65 (citing *Gill v. Whitford, supra*; *Benisek v. Lamone* No. 17-333 (U.S. jurisdictional statement filed Sept. 1, 2017)).

IV. Arguments

A. Petitioners and Aligned Respondents and *Amici*

We now address the arguments presented to this Court. We begin with Petitioners, those Respondents arguing that Petitioners are entitled to relief, and Petitioners' supporting *amici*.

Petitioners first assert that the 2011 Plan violates the free expression and free association clauses of the Pennsylvania Constitution, *see* Pa. Const. art. I, §§ 7, 20, which, they highlight, pre-date the First Amendment and provide broader protections for speech and associational rights than those traditionally recognized under the federal Constitution. Consistent with that notion, Petitioners emphasize that, in contrast to federal challenges to laws restricting the freedom of expression, which are assessed under the rubric of intermediate scrutiny, courts apply the more exacting strict scrutiny standard to challenges to such laws under the Pennsylvania Constitution. *See*

[56] On the court's last point, one imagines that Petitioners find cold comfort in their right to protest and advocate for change in an electoral system that they allege has been structurally designed to marginalize their efforts in perpetuity.

Petitioners' Brief at 46-47 (citing *Pap's A.M. v. City of Erie*, 812 A.2d 591 (2002) ("*Pap's II*")).

According to Petitioners, these broad protections under the Pennsylvania Constitution's Article I, Section 7 free expression clause necessarily extend to the act of voting, as voting constitutes direct "personal expression of favor or disfavor for particular policies, personalities, or laws," Petitioners' Brief at 47-48 (quoting *Commonwealth v. Cobbs*, 305 A.2d 25, 27 (Pa. 1973)), and gives voters a firsthand opportunity to "express their own political preferences." *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 288 (1992)). Petitioners further suggest that the political nature of the expression inherent in voting deserves even greater protection than other forms of expression, as "the right to participate in electing our political leaders" is the most "basic [right] in our democracy." *Id.* (quoting *McCutcheon v. FEC*, 134 S. Ct. 1434, 1440-41 (2014) (plurality)).

While Petitioners recognize that, in the instant matter, the 2011 Plan does not entirely limit Democratic voters' political expression, they note that laws which discriminate against or burden protected expression based on content or viewpoint — including those laws which render speech less effective — are nevertheless subject to strict scrutiny analysis. Petitioners' Brief at 49 (citing *Ins. Adjustment Bureau v. Ins. Com'r for Com. of Pa.*, 542 A.2d 1317, 1323-24 (Pa. 1988)). Petitioners maintain that such is the case here, as the Plan was drawn to give Republicans an advantage in 13 out of 18 congressional districts (*see* Conclusions of Law at ¶ 52; Findings of Fact at ¶ 291) and discriminates against the political viewpoint of Democratic voters across the Commonwealth by: splitting traditionally Democratic strongholds to reduce the effectiveness of the Democratic vote — *i.e.*, Erie County, Harrisburg, and Reading; removing predominantly Democratic municipalities from their broader communities and

combining them with other Democratic municipalities to dilute the weight of the Democratic vote — *i.e.*, Swarthmore, Easton, Bethlehem, Scranton, Wilkes-Barre, and the Allegheny River Valley; or knitting together "disparate Republican precincts while excising Democratic strongholds" to diminish the representational rights of Democrats — *i.e.*, Pennsylvania's 12th District. Petitioners' Brief at 52.

As further proof of the diminished value of the Democratic vote under the 2011 Plan, Petitioners emphasize that, in each of the past three elections, Democrats won only 5 of the 18 seats, despite winning the majority of the statewide congressional vote in 2012 and nearly half of that vote in 2014 and 2016. Petitioners also rely upon the experts' testimony and alternative plans, described above, which they contend constitute "powerful evidence" of the intent to disadvantage Democratic voters. *Id.* at 53 (quoting *Holt I*, 38 A.3d at 756-57).

In light of the above evidence, Petitioners argue that the 2011 Plan does not satisfy strict scrutiny — or *any* scrutiny, for that matter — because Legislative Respondents failed to identify any legitimate, much less compelling, governmental interest served by drawing the congressional district boundaries to disadvantage Democratic voters. As such, Petitioners criticize the Commonwealth Court for failing to address whether the Plan constitutes viewpoint discrimination and for failing to assess the Plan with any measure of judicial scrutiny — strict scrutiny or otherwise.

While the Commonwealth Court found that Petitioners failed to offer a manageable standard for determining when permissible partisanship in drawing districts becomes unconstitutional, Petitioners maintain that the constitutional prohibition against viewpoint discrimination and the strict scrutiny standard are indeed the appropriate standards by which to assess their claim, noting that courts have long applied modern constitutional principles to invalidate traditionally acceptable practices, such as the

gerrymandering employed in the instant case. Petitioners' Brief at 55 (citing *Elrod v. Burns*, 427 U.S. 347 (1976) (holding that the First Amendment to the United States Constitution prohibited the practice of terminating government employees on a partisan basis); *Reynolds v. Sims*, 377 U.S. 533, 579 (1964) (invalidating the practice of drawing legislative districts with unequal population)). Petitioners additionally take issue with the Commonwealth Court's conclusion that there is no right to a "nonpartisan, neutral redistricting process," Conclusions of Law at ¶ 30, noting that the cases upon which the Commonwealth Court relied in reaching this conclusion were equal protection cases, and, thus, distinguishable from free speech-based gerrymandering challenges, which the high Court allowed to proceed in *Shapiro v. McManus*, 136 S. Ct. 450 (2015). Petitioners' Brief at 57 (citing *Erfer*, 794 A.2d at 328 n.2).

Based on the foregoing, Petitioners urge this Court to find that the Pennsylvania Constitution categorically prohibits partisan gerrymandering to any degree, as it "serves no good purpose and offers no societal benefit." *Id.* However, Petitioners argue that, even if some partisan considerations were permitted in drafting the map of congressional districts, this Court should nevertheless hold that the 2011 Plan's "extreme and obvious viewpoint discrimination" is unconstitutional. *Id.* at 58. Petitioners offer that, at a minimum, the subordination of traditional districting criteria in an attempt to disadvantage a party's voters based on their political beliefs, as they claim Respondents did in the instant case, should be prohibited.

Alternatively, Petitioners allege that the 2011 Plan impermissibly retaliates against Democratic voters based upon their voting histories and party affiliation. Petitioners note that, to establish a free-speech retaliation claim in the context of redistricting, a party must establish that: (1) the plan intended to burden them "because of how they voted or the political party with which they were affiliated"; (2) they suffered

a "tangible and concrete adverse effect"; and (3) the retaliatory intent was a "but for" cause of their injury. *Id.* at 59-60 (quoting *Shapiro v. McManus*, 203 F. Supp.3d 579, 596-98 (D. Md. 2016)). Petitioners maintain that they have satisfied each of the three elements of this test and that the Commonwealth Court erred in finding otherwise.

With respect to the first retaliation prong, Petitioners assert that the materials provided by Speaker Turzai in the federal litigation, discussed above, are "direct, conclusive evidence that the mapmakers drew district boundaries to disadvantage Democratic voters *specifically* based on their voting histories, which the mapmakers measured for every precinct, municipality, and county in Pennsylvania." *Id.* at 60 (emphasis original). Petitioners claim this is further evidenced by the testimony of their experts, which demonstrated that the mapmakers used Democratic voters' past voting history when "packing and cracking" legislative districts to subject those voters to disfavored treatment. *Id.* Regarding the second prong, Petitioners argue that they proved the Plan caused them to suffer a tangible and concrete adverse effect — namely, losing several seats statewide. Finally, as to the third prong, Petitioners contend that they would have won at least several more seats had the Plan not been drawn to intentionally burden Democratic voters based on their past voting histories.

In rejecting their claim, the Commonwealth Court relied upon the three-part test in *Uniontown Newspapers*, which required, *inter alia*, the challenger to establish that the action caused "an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity." *Uniontown Newspapers*, 839 A.2d at 198. However, Petitioners submit that doing so was improper because "chilling" is not an element of a constitutional retaliation claim. Rather, according to Petitioners, the focus on "chilling" in *Uniontown Newspapers* was due to the fact that it was the only injury alleged in the case, not because it was the only cognizable injury in a retaliation case.

Indeed, Petitioners suggest that they suffered multiple concrete harms wholly separate from any chilling, which they claim is sufficient to establish the second prong of the retaliation test. In any event, Petitioners argue that they were, in fact, chilled, as, objectively, the Plan's "uncompetitive districts clearly would deter many 'ordinary' persons from voting." Petitioners' Brief at 63.

Lastly, Petitioners reject the Commonwealth Court's conclusion that the General Assembly lacked a retaliatory motive, noting the "overwhelming evidence" — including the documents produced by Speaker Turzai — conclusively established that the mapmakers considered Democrats' votes in prior elections when drawing the map to disadvantage Democratic voters.

Petitioners next argue that the Plan violates equal protection principles and the Free and Equal Elections Clause of the Pennsylvania Constitution. *Id.* at 64 (quoting Pa. Const. art I, §§ 1, 5, 26). Specifically, principally relying upon the standard articulated in *Erfer*, Petitioners explain that a congressional districting map violates the equal protection clause if it reflects "intentional discrimination against an identifiable political group" and if "there was an actual discriminatory effect on that group." *Id.* at 65 (quoting *Erfer*, 794 A.2d at 332). First, regarding the intentional discrimination requirement, Petitioners maintain that the overwhelming evidence proved that the 2011 Plan intentionally discriminated against Democratic voters, noting the Commonwealth Court specifically found that such discrimination occurred. Second, with respect to the identifiable political group requirement, Petitioners argue that Democratic voters do, in fact, constitute an identifiable political group, citing the statistical evidence from Dr. Chen regarding the high correlation in the level of support for Democratic candidates in particular geographic units and Dr. Warshaw's expert opinion with respect to the highly predictable nature of congressional elections based on political party.

Third, Petitioners assert that the Plan had an actual discriminatory effect on Democratic voters in the Commonwealth, arguing that, thereby, they have been discriminated against in an exercise of their civil right to vote in violation of Article I, Section 26, and deprived of an "equal" election in violation of the Free and Equal Elections Clause. As noted, at least as a matter of equal protection, Petitioners must prove: (1) that the Plan created disproportionate results at the polls, and (2) that they have "essentially been shut out of the political process." *Erfer*, 794 A.2d at 333. Petitioners allege, based upon the evidence detailed above, that they satisfy the first element because drawing the Plan to purposely diminish the effectiveness of Democrats' votes and to give Republicans the advantage at the polls created disproportional election results, denying Democrats political power and fair representation. Petitioners submit, however, that the second "shut out of the political process" element should be eliminated because it is vague and "unworkable," claiming that *Erfer* provided no guidance regarding the type of evidence that would satisfy that standard, and that *Bandemer*, *supra*, upon which *Erfer* was based, did not impose such a requirement. Petitioners further suggest that imposing an "essentially shut out" requirement is counterintuitive, as it would allow partisan map drawers to continue to politically gerrymander so long as the minority party receives *some* of the congressional seats. In any event, Petitioners argue that, because the Plan artificially deprives Democratic voters of the ability to elect a Democratic representative, and, given the extreme political polarization between the two political parties, Republican representatives will not adequately represent Democrats' interests, thus shutting Democratic voters out of the political process.

Finally, Petitioners reject the Commonwealth Court's conclusion that the Plan satisfies equal protection principles because Democrats potentially will have the

opportunity to influence the new map in 2020. Petitioners emphasize that "the possibility that the legislature may itself change the law and remedy the discrimination is not a defense under the Pennsylvania Constitution," as, under that logic, *every* discriminatory law would be constitutional. Petitioners' Brief at 73.

Petitioners requested that this Court give the legislature two weeks to develop a new, constitutional plan that satisfies non-partisan criteria, and that we adopt a plan ourselves with the assistance of a special master if the legislature fails to do so.

Executive Respondents Governor Wolf, Secretary Torres, Commissioner Marks and Lieutenant Governor Stack have filed briefs supporting Petitioners, arguing, for largely the same reasons advanced by Petitioners, that the 2011 Plan violates the free expression and free association provisions of the Pennsylvania Constitution, as well as equal protection principles and the Free and Equal Elections Clause. Further, Executive Respondents agree that the evidence provided by Petitioners was sufficient to establish that the Plan is unconstitutional.

Beyond the points raised by Petitioners, Executive Respondents Wolf, Torres, and Marks assert that, although the Commonwealth Court found that Petitioners were required to provide a standard to assess when partisan considerations in creating a redistricting plan cross the line into unconstitutionality, no such bright line rule was necessary to determine that the Plan was unconstitutional in this case, given the extreme and, indeed, flagrant level of partisan gerrymandering that occurred. Additionally, while the Commonwealth Court suggested that Petitioners' standard must account for a variety of specific variables such as the number of districts which must be competitive and the constitutionally permissible efficiency gap percentage, Respondents Wolf, Torres, and Marks argue that precise calculations are not required, noting that "courts routinely decide constitutional cases using judicially manageable standards that

are rooted in constitutional principles but that are not susceptible of precise calculation." Wolf, Marks, and Stack Brief at 8 (citing, *e.g.*, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585-86 (1996) (declining "to draw a bright line marking the limits of a constitutionally acceptable punitive damages award," but finding "the grossly excessive award imposed in this case transcends the constitutional limit")). *Id.* at 9. Respondents Wolf, Torres, and Marks further observe that this Court, in invalidating a prior state legislative redistricting plan as contrary to law in *Holt I*, expressly rejected "the premise that any predetermined [population] percentage deviation [existed] with which any reapportionment plan [had to comply]," and declined to "set any immovable 'guideposts' for a redistricting commission to meet that would guarantee a finding of constitutionality." *Id.* at 10 (quoting *Holt I*, 38 A.3d at 736).

For his part, Respondent Stack adds that, while he concurs with Petitioners' position that the Plan fails strict scrutiny analysis, in his view, the Plan also fails under the rational basis standard, as the Plan "lacks a legitimate state interest, and instead advances the impermissible interest of achieving partisan advantage." Stack Brief at 24. Respondent Stack further argues that, "[a]lthough the Legislative Respondents proffered the hypothetical state interests of redrawing the district maps to conform to the results of the census, they cannot and do not offer any rational relationship between that interest and the map they drew." *Id.* at 27. Additionally, with respect to Petitioners' claim under the Free and Equal Elections Clause, Respondent Stack emphasizes that "[t]he constitutional requirement of 'free and equal elections' contemplates that all voters are to be treated equally." *Id.* at 25. As the Plan was overtly drawn to favor Republicans, Respondent Stack maintains that the Plan "exhibits the heavy hand of state action . . . offensive to democracy," violating the Commonwealth's duty to ensure that it provides free and equal elections. *Id.* at 26.

Executive Respondents provide additional insight into how this Court should fashion a remedy, noting that, as representatives of the department that administers elections in Pennsylvania, they are uniquely positioned to make suggestions in this regard. Specifically, Respondents Wolf, Torres, and Marks offer that it is still possible to hold the primary on the scheduled May 15 date if a new redistricting map is in place by February 20, 2018. However, they submit that it would also be possible, through a series of internal administrative adjustments and date changes, to postpone the primary elections from May to the summer of 2018, which would allow a new plan to be administered as late as the beginning of April.

As to the process of creating a new plan, Respondents Wolf, Torres, and Marks assert that three weeks is a reasonable time period for the General Assembly and Governor to enact and sign into law a new redistricting plan, noting that the General Assembly previously enacted a revised congressional districting plan within only 10 days of the court's order to do so. Wolf, Torres, Marks Brief at 25 (citing *Vieth v. Pennsylvania*, 241 F. Supp.2d 478, 480 (M.D. Pa. 2003), *aff'd sub nom. Vieth,* 541 U.S. at 267). However, if the General Assembly fails to enact a plan by the Court's deadline, Respondents Wolf, Torres, and Marks suggest that this Court should draft a plan upon consideration of the evidence submitted by the parties. *Id.* at 26 (citing *League of Women Voters of Florida v. Detzner*, 179 So.3d 258 (Fla. 2015)).

Respondent Stack agrees with the suggestion of Respondents Wolf, Torres, and Marks that this Court may, and indeed should, adopt a new redistricting plan if the General Assembly and the Governor cannot reach an agreement on a constitutionally valid map in time for the 2018 congressional primaries. Should this Court take that route, Respondent Stack cites favorably one of the maps developed by Dr. Chen – Chen Figure 1, Petitioners' Exhibit 3 (identified as Simulated Plan 1 above) – which he

maintains serves as a good guide, claiming that it meets or exceeds the 2011 Plan based on traditional redistricting criteria, and provides sufficient data to judge its compliance with traditional districting criteria, as well as federal Voting Rights Act requirements. Stack Brief at 10-15, 39. Respondent Stack offers that this Court should retain a special master, who could reference Dr. Chen's map as a guide in drawing a new map, should the legislature fail to produce a map in a timely fashion.

Amicus Common Cause, like Petitioners, contends that the 2011 Plan violates the Free and Equal Elections Clause of the Pennsylvania Constitution, asserting that this clause provides greater protections to the right to vote than the federal Equal Protection Clause.

Relying upon our seminal decision in *Edmunds*, *supra*,[57] which provides the framework for analyzing whether a right under the Pennsylvania Constitution is more expansive than its federal counterpart, Common Cause first argues that the text of the Free and Equal Elections Clause demonstrates that it should be viewed as independent from the Equal Protection Clause of the United States Constitution. Common Cause notes that, in contrast to the more general provisions of the Pennsylvania Constitution such as Article I, Sections I and 26, which implicate, but do not specifically address, the

[57] *Edmunds* instructs that an analysis of whether a right under the Pennsylvania Constitution affords greater protection than the United States Constitution encompasses the following four factors:

> 1) text of the Pennsylvania constitutional provision;
>
> 2) history of the provision, including Pennsylvania case-law;
>
> 3) related case-law from other states;
>
> 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.

Edmunds, 586 A.2d at 895.

right to vote, Article I, Section 5's proclamation that "[e]lections shall be free and equal" and that "no power . . . shall at any time interfere to prevent the free exercise of the right of suffrage" is direct and specific, indicating that the clause should not be "subsumed into Sections 1 and 26, let alone federal jurisprudence." Common Cause Brief at 6-7.

Second, Common Cause argues that the history of the Free and Equal Elections Clause supports giving it independent effect. Specifically, Common Cause highlights that, since as early as 1776, Pennsylvania has recognized the importance of the right to vote, providing in Chapter I, Section VII of the Declaration of Rights that "all elections ought to be free; and that all free men having a sufficient evident common interest with, and attachment to the community, have a right to elect officers, or to be elected into office." *Id.* (quoting Pa. Const. of 1776, ch. I, § VII). Common Cause continues that, in 1790, Pennsylvania adopted the Free and Equal Elections Clause into its Constitution, but the federal Constitution was, and continued to be, largely silent regarding the right to free and equal elections, containing no comparable provision and leaving "the selection of representatives and senators largely to the states, subject to minimum age and eligibility requirements." *Id.* at 8-9. While the United States later adopted the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Common Cause stresses that it did not do so until 1868 — many decades after Pennsylvania had declared free and equal elections a fundamental right. Thus, in light of the temporal differences between the two provisions and the fact that the federal Equal Protection Clause does not specifically address elections, Common Cause maintains that the Free and Equal Elections Clause and the federal Equal Protection Clause should not be viewed as coterminous.

Common Cause also suggests that Pennsylvania case law supports giving the Free and Equal Elections Clause independent effect, noting that this Court has

interpreted the clause since as early as the 1860s, when the Court explained that elections are made equal by "laws which shall arrange all the qualified electors into suitable districts, and make their votes equally potent in the election; so that some shall not have more votes than others, and that all shall have an equal share in filling the offices of the Commonwealth." *Id.* at 11 (quoting *Patterson v. Barlow*, 60 Pa. 54, 75 (Pa. 1869)). This Court further provided, with respect to the concept of legislative deference under the Free and Equal Elections Clause, that, although the General Assembly enjoys discretion in creating laws to ensure that elections are equal, the legislature's actions in this regard may be reviewed "in a case of plain, palpable, and clear abuse of the power which actually infringes on the rights of the electors." *Id.* (quoting *Patterson*, 60 Pa. at 75). Common Cause additionally highlights that our case law historically has recognized that the creation of "suitable districts" in accordance with the Free and Equal Elections Clause relies heavily on "the guiding principles respecting compactness, contiguity, and respect for the integrity of political subdivisions." *Id.* at 13 (quoting *Holt I*, 38 A.3d at 745). Given the significant amount of time between the passage of the Free and Equal Elections Clause and the Fourteenth Amendment to the United States Constitution, as well as the separate attention that our Court has given to the Free and Equal Elections Clause, Common Cause suggests that "[i]t is incoherent to assume that Pennsylvania's jurisprudence under the [Free and Equal Elections Clause] disappeared into the Fourteenth Amendment." *Id.* at 11.

Third, Common Cause argues that the relative dearth of case law from other jurisdictions regarding free and equal elections illustrates that Pennsylvania was a "trailblazer in guaranteeing the right to vote," noting that, of the original 13 states, only the Pennsylvania, Delaware, and Massachusetts Constitutions contained a clause guaranteeing free and equal elections. *Id.* at 14. While Common Cause offers that at

least one other state — Alaska — has found that its state constitution provides greater protection against gerrymandering than the federal Constitution, *see Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1371 (Alaska 1987), Common Cause suggests that the general lack of comparable provisions in other state constitutions indicates that, "[a]s in 1776, Pennsylvania should lead the states in declaring the right to free and fair elections, this time by stamping out gerrymandering." Common Cause Brief at 14.

Lastly, Common Cause asserts that the Pennsylvania Constitution defeats traditional policy arguments made in support of the practice of gerrymandering, such as the purported difficulty in identifying a workable standard to assess constitutional violations and the notion of legislative deference in drawing congressional districts. More specifically, with respect to the difficulty of identifying a standard, Common Cause submits that the three criteria long used for drawing voting districts in Pennsylvania — compactness, contiguity, and integrity of political subdivisions — provide a sufficient standard by which to assess whether an electoral map violates the Free and Equal Elections Clause. Common Cause stresses that, because these criteria are specifically written into the Pennsylvania Constitution, *see* Pa Const. art. II, § 16 ("representative districts . . . shall be composed of compact and continuous territory as nearly equal in population as practicable . . . . Unless absolutely necessary no county, city, incorporated town, borough, township or ward shall be divided in forming either a senatorial or representative district"), and have provided the basis for invalidating state legislative district maps in the past, *see Holt I*, *supra*, they are sufficiently precise as to present a feasible standard for evaluating the constitutionality of a congressional district map under the Free and Equal Elections Clause. Additionally, regarding the principle of legislative deference, Common Cause argues that legislative deference does not give the General Assembly unfettered discretion to engage in partisan gerrymandering

without judicial interference, noting that, unlike the federal Constitution, Pennsylvania's Constitution specifically requires the Court to review challenges to state legislative district maps. *See* Pa. Const. art. II, § 17(d). While Common Cause concedes that the legislature typically enjoys substantial deference in redistricting matters, it maintains that such deference is not warranted in circumstances, such as in the instant case, where the "faction in control of the legislature" used its authority to create political advantage, rather than to create a map which reflects the "true will of the people." Common Cause Brief at 17.

Asserting that the four *Edmunds* factors support giving the Free and Equal Elections Clause independent effect, Common Cause concludes that the 2011 Plan violates that provision because, as exhibited by Petitioners' evidence, it is not compact or contiguous, nor does it respect political subdivision boundaries. Moreover, Common Cause asserts that the secretive manner in which the Plan was created strongly suggests that the legislature drew the congressional districts with the improper, highly partisan motive of benefitting the Republican Party, rather than doing so with the will of the people in mind. Under these circumstances, Common Cause argues that this Court should uphold the democratic principles of the Pennsylvania Constitution and strike down the gerrymandered Plan pursuant to the Free and Equal Elections Clause.

Amicus Brennan Center for Justice ("Brennan Center") likewise argues on behalf of Petitioners that this Court can, and indeed should, strike down the 2011 Plan as unconstitutional. In so asserting, Brennan Center emphasizes that, although some degree of good faith political "give-and-take" is bound to occur with the redistricting process, this case presents a particularly extreme, unconstitutional form of partisan gerrymander which must be remedied by this Court. While the Commonwealth Court below highlighted the difficulty with identifying a workable standard to assess when,

precisely, partisan gerrymandering becomes unconstitutional, Brennan Center maintains that "judicial action to stamp out extreme gerrymanders can be focused and limited," Brennan Center Brief at 6, explaining that cases of extreme, unconstitutional gerrymandering are relatively rare and are easily detectable based upon two, objective indicia: single-party control of the redistricting process and a recent history of competitive statewide elections. *Id.* at 7. Brennan Center observes that these factors have been present in every state in the past decade which had a congressional districting map showing extreme partisan bias, including Pennsylvania during the creation of the 2011 Plan. Brennan Center further offers that other accepted quantitative metrics, such as the efficiency gap, the seats-to-votes curve, and the mean-median vote share, can measure the level of partisan bias in a state and assist in identifying extreme gerrymandering, noting that the 2011 Plan performed poorly under each of these metrics.

While Brennan Center acknowledges that federal courts have been hesitant to exercise jurisdiction over partisan gerrymandering claims because of concerns over federalism and excessive burdens on the federal docket, Brennan Center suggests that this Court is not subject to the same constraints. Moreover, Brennan Center highlights that the political question doctrine, which has also hamstrung federal courts in partisan gerrymandering cases, does not restrict this Court from acting in such cases, as this Court held that the political question doctrine renders a case non-justiciable only when the Pennsylvania Constitution "explicitly or implicitly" demonstrates "the clear intent to entrust the legislature with the sole prerogative to assess the adequacy of its own effort[s]," *id.* at 19 (quoting *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414, 439 (Pa. 2017)), and the Pennsylvania Constitution contains no such limitation with regard to interpreting the constitutionality of partisan congressional redistricting.

Finally, Brennan Center contends that extreme partisan gerrymandering, such as in the instant case, is "contrary to fundamental constitutional and democratic values," undermining both legislative accountability to the people and legislative representativeness. *Id.* at 15. Brennan Center asserts that finding the Plan unconstitutional in this case will "enhance the legitimacy of Pennsylvania's democracy" and restore confidence among Pennsylvanians in the political process. *Id.* at 23.

Similar to the points raised by Petitioners, as *amicus*, the AFL-CIO argues that the 2011 Plan is unconstitutional under Article I, Sections 7 and 20 and Article I, Section 5 of the Pennsylvania Constitution, which it asserts provides an independent basis for relief. The AFL-CIO further suggests that Article I, Section 1 of the Pennsylvania Constitution, which ensures equality under the law, and Article I, Section 26 of the Pennsylvania Constitution, which protects Pennsylvanians against the denial or discrimination of their civil rights, provide additional bases for relief under state law and support reviewing the Plan under strict scrutiny.

Analyzing each of these provisions pursuant to the *Edmunds* factors, the AFL-CIO highlights the rich history of the Pennsylvania Constitution, including, most notably, that the Pennsylvania Constitution was at the forefront of ensuring robust rights associated with representational democracy, such as the right to freedom of speech and association, the right to equality under the law, and the right to vote in free and equal elections, which the AFL-CIO notes Pennsylvania extended, quite remarkably, to those individuals who did not own property. Moreover, with respect to the Free and Equal Elections Clause, the AFL-CIO emphasizes that this Court has specifically stated that elections are free and equal:

> when they are public and open to all qualified electors alike: when every voter has the same right as any other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the

> right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.

AFL-CIO Brief at 20-21 (quoting *Winston v. Moore*, 91 A. 520 at 523 (Pa. 1914)). The AFL-CIO maintains that the unique history of these provisions demonstrates that they "provide heightened protections beyond any analogous provisions in the federal constitution," and, thus, provide a separate legal basis for finding the 2011 Plan unconstitutional. *Id.* at 4.

Amici Bernard Grofman, professor of political science at the University of California, and Keith Gaddie, professor of political science at the University of Oklahoma, echo the call of Petitioners, Executive Respondents, and other *amici* for this Court to act and provide a check on extreme partisan gerrymandering, highlighting its pernicious nature. Grofman and Gaddie also provide a suggested standard for assessing partisan gerrymandering cases, proposing that a partisan gerrymander is unconstitutional if each of the following three elements is shown: (1) partisan asymmetry, meaning the districting map had a "disparate impact on voters based on political affiliation," as measured by degree of partisan bias and mean-median gap, Grofman Gaddie Brief at 14; (2) lack of responsiveness of electoral outcomes to voters' decisions, meaning representation does not change despite a change in voter preference from one political party to another; and (3) causation, meaning intentional discrimination, rather than other, neutral causes, led to the asymmetry and lack of responsiveness. Grofman and Gaddie maintain that their standard is judicially manageable, as it can be applied by courts "coherently and consistently" across cases, and they urge this Court to adopt it. *Id.* at 36.

Also, as *amicus*, the American Civil Liberties Union ("ACLU") argues in support of Petitioners that the 2011 Plan violates the free expression and association clauses of

the Pennsylvania Constitution, asserting, consistent with Petitioners' position, that the Pennsylvania Constitution provides greater protections for these rights than does the First Amendment to the United States Constitution. The ACLU also notes the unique nature of the Pennsylvania Constitution's Free and Equal Elections Clause, which, it suggests, grants more robust protections for the right to vote than the federal Constitution. Further, as a matter of policy, the ACLU suggests that greater protections for speech, associational, and voting rights are consistent with the "marketplace of ideas" concept developed by Justice Oliver Wendell Holmes, which, the ACLU notes, highlights the importance of government viewpoint neutrality in maintaining the free exchange of ideas critical to our democracy, particularly where the electoral process is at stake. ACLU Brief at 6-9.

Similar to Petitioners, the ACLU maintains that extreme partisan gerrymandering is unconstitutional, explaining that unconstitutional partisan gerrymandering is "distinct from the inevitable incidental political considerations and partisan effects that may occur," *id.* at 22, and, instead, occurs when a state acts with an intent to "entrench" by drawing district "lines for the purpose of locking in partisan advantage regardless of the voters' likely choices." *Id.* at 22-23 (citing *Arizona State Legislature*, 135 S. Ct. at 2658). The ACLU suggests that such political entrenchment was present in the instant case, and it maintains that the General Assembly's deliberate effort to discriminate against minority-party voters triggers strict scrutiny, which the ACLU notes the Legislative Respondents have made no effort to satisfy. Thus, the ACLU argues that this Court should find the Plan violates the Pennsylvania Constitution.

Additionally, Political Science Professors,[58] the Pittsburgh Foundation,[59] and Campaign Legal Center have each filed *amicus curiae* briefs in support of Petitioners. These *amici* focus largely on the increasing prevalence of partisan gerrymandering occurring across the United States, which they attribute to sophisticated, ever-evolving technology which makes it more feasible than ever to gather specific data about voters and to utilize that data to "tailor durably biased maps." Political Science Professors' Brief at 12. These *amici* warn that instances of extreme partisan gerrymandering will only worsen as this technology continues to develop.

Turning to the 2011 Plan, these *amici* all agree that it represents a particularly egregious form of partisan gerrymandering. They suggest that the challenge to the Plan is justiciable under the Pennsylvania Constitution, and they assert that judicially manageable standards exist by which to assess the constitutionality of the Plan. More specifically, the Pittsburgh Foundation offers that a congressional redistricting plan is unconstitutional if it: "(1) was intentionally designed predominantly to attain a partisan result; (2) largely disregards traditional and accepted districting criteria; and (3) has been demonstrated (or is reliably predicted) to have an actual disparate and unfair impact on a substantial number of Pennsylvania voters." Pittsburgh Foundation Brief at

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[58] Political Science Professors identify themselves as "nationally recognized university research scholars and political scientists from some of the foremost academic institutions in Pennsylvania and from across the country whose collective studies on electoral behavior, voter identity, and redistricting in the United States have been published in leading scholarly journals and books." Political Science Professors' Brief at 1.

[59] The Pittsburgh Foundation is a non-profit organization which "works to improve the quality of life in the Pittsburgh region by evaluating and addressing community issues, promoting responsible philanthropy, and connecting donors to the critical needs of the community." The Pittsburgh Foundation, http://pittsburghfoundation.org (last visited Jan. 29, 2018).

13. Political Science Professors submit that courts should use computer simulations, as well as objective, social science measures, to assess a districting map's partisan bias, such as the efficiency gap and the mean-median difference. Lastly, Campaign Legal Center argues that this Court should adopt Petitioners' proposed standard.[60]

B. Legislative Respondents

We now turn to the arguments of the Legislative Respondents. They contend that districting legislation, such as the 2011 Plan at issue, does not implicate, let alone violate, free speech or associational rights because it "is not directed to voter speech or conduct." Legislative Respondents' Brief at 23. Rather, according to Legislative Respondents, the Plan creates "18 equipopulous districts," giving Petitioners' votes the same weight as other Pennsylvania voters and fully allowing Petitioners to participate in the political process by voting for the candidate of their choice and associating with any political party or candidate they so choose. *Id.*

Regarding Petitioners' reliance on cases involving laws which made speech less effective, Legislative Respondents suggest those decisions are inapplicable to the case at bar because they concern laws which actually restricted speech, whereas the Plan in the instant case allows Democrats to communicate as desired through such means as voting for their preferred candidates, joining the Democratic Party, contacting their representatives, and financially supporting causes they care about. Although Legislative Respondents concede that the Plan might make it more difficult for Petitioners to "persuade a majority of the other 705,000+ voters in their districts to agree with them on the candidate they prefer," *id.* at 25, they emphasize that Petitioners have no free speech or associational right to "an agreeable or more persuadable audience,"

[60] The application to file an amicus brief *nunc pro tunc*, filed by Concerned Citizens for Democracy, is granted.

id. at 26, citing a variety of federal cases holding that the redistricting plans challenged therein did not violate voters' First Amendment rights. *Id.* (citing, *e.g.*, *League of Women Voters v. Quinn*, No. 1:11-CV-5569, 2011 WL 5143044, *12-13 (N.D. Ill. Oct. 28, 2011); *Comm. for a Fair and Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp.2d 563, 575 (N.D. Ill. 2011)).

Moreover, relying on this Court's decision in *Holt v. 2011 Reapportionment Commission*, 67 A.3d 1211 (Pa. 2013) ("*Holt II*"), Legislative Respondents highlight the "inherently political" nature of redistricting, which, they note, this Court found constitutionally permissible. Legislative Respondents' Brief at 27 (quoting *Holt II,* 67 A.3d at 1234). Further, to the extent that Petitioners distinguish in their argument between permissible "political considerations" and what they deem impermissible "partisan intent," Respondents maintain that "the two concepts are inextricably intertwined," as "political parties are comprised of constituencies, which in part includes 'communities of interest' — what Petitioners argue is the 'good' side of 'political.'" *Id.* at 28. As such, Legislative Respondents contend that Petitioners' argument that no partisan considerations should be permitted during the redistricting process runs afoul of *Holt II* and necessarily must fail. They suggest that, to find otherwise, would allow any Pennsylvania voter to challenge, and potentially invalidate, a plan designed to protect an incumbent or to protect "communities of interest" — a "sweeping rule" that Respondents contend is not justified by the law, the facts, or public policy. *Id.* at 29-30.

Next, Respondents assert that Petitioners cannot satisfy the requirements of a retaliation claim. Relying upon the *Uniontown Newspapers* test, Legislative Respondents first argue that Petitioners fail to provide record evidence establishing that the 2011 Plan was enacted with a retaliatory motive to coerce Democratic voters into voting differently than they would otherwise vote. To the contrary, Respondents

maintain that no legislature would reasonably believe that gerrymandering would coerce voters to vote differently, and they further submit that the record demonstrates that the Plan was passed with bipartisan support, indicating the Plan was not drawn with a "dastardly motive." *Id.* at 31. Respondents also contend that Petitioners failed to prove that the Plan "chilled" a person from continuing to participate in the political process, as the evidence of record did not show a decrease in voter turnout or civil participation following the Plan's enactment. Lastly, Legislative Respondents highlight the fact that political gerrymandering is not typically the type of government conduct associated with a case of retaliation; rather, Respondents note that retaliation claims typically involve overt actions intended to invoke fear in the target, such as police intimidation tactics or organized harassment campaigns.

Next, Legislative Respondents assert that Petitioners failed to prove that the 2011 Plan violated the equal protection and Free and Equal Elections clauses of the Pennsylvania Constitution. Relying upon *Erfer*, Respondents contend that Petitioners produced no evidence that the Plan was designed to intentionally discriminate against Democratic voters, emphasizing the bipartisan manner in which the Plan was adopted, and claiming that Petitioners' statistical data does not account for the various non-partisan factors considered in drawing the Plan, such as preserving the core of existing districts, preserving communities of interest, and protecting incumbents. Respondents also suggest that Democratic voters do not constitute an "identifiable political group" because they encompass a wide range of people beyond those who belong to the Democratic Party, and because Pennsylvania voters frequently split their tickets between Democratic and Republican candidates, making it difficult to clearly identify a voter as solely "Democratic."

With respect to the second *Erfer* prong, Respondents maintain that Petitioners failed to establish that the Plan had a discriminatory effect on Democratic voters and, more specifically, failed to prove that the Plan resulted in a lack of political power which effectively shut out Democrats from the political process. Respondents argue that, contrary to Petitioners' assertions, this Court specifically found that merely voting for a political candidate who loses an election does not shut out a voter from the political process*, see Erfer*, 794 A.2d at 333, and they submit that, in any event, the five "safe" Democratic seats in the congressional delegation demonstrate that Democrats are not shut out. Respondents further observe that, although Petitioners suggest, due to congressional polarization, that Democrats' interests are not adequately represented by their congressmen, they fail to provide evidence substantiating this claim and fail to identify the interests of Democratic voters which allegedly are not represented in congress, particularly those Democrats who are "split ticket" voters.

Moreover, to the extent that Petitioners suggest that the second element of the *Erfer* test should be eliminated as unworkable, Respondents maintain that we should deny their request, claiming that Petitioners seek to eliminate that element because they are simply unable to meet it. Respondents further argue that, in advocating for the removal of the second element, Petitioners essentially are seeking a state constitutional right to proportional representation, which the United States Supreme Court expressly rejected in *Bandemer*. *See Bandemer*, 478 U.S. at 139. In any event, Respondents emphasize that Petitioners have not met their burden of establishing that this Court should depart from *Erfer* and the federal precedent upon which it relies, as the equal protection guarantees under the United States and Pennsylvania Constitutions are coterminous, and Petitioners do not suggest otherwise.

Respondents further assert that, even if this Court were to abandon the standard articulated in *Erfer*, Petitioners' claim would nevertheless fail because, pursuant to recent United States Supreme Court precedent, there is no judicially manageable standard by which to evaluate claims involving equal protection violations due to partisan gerrymandering. *See Vieth*, 541 U.S. at 292. Respondents observe that Petitioners do not attempt to offer a judicially manageable standard to apply in place of the *Erfer* standard, and they note that the standards proposed by *amici* are similarly unavailing, as they each are incompatible with each other.

Additionally, Legislative Respondents contend that policy considerations weigh heavily against this Court creating a new standard for evaluating partisan gerrymandering claims under Pennsylvania's equal protection clause, as they claim the legislature is uniquely competent to engage in redistricting, and judicial oversight in this area implicates separation-of-powers concerns. Respondents further suggest that there are a variety of positive elements to using political considerations in redistricting, including preserving "core constituencies" and incumbency, as well as the states' right to establish their districts in the manner they so choose. Moreover, Legislative Respondents highlight various checks on the state redistricting process, such as the "Make or Alter" provision of the federal Elections Clause of the United States Constitution,[61] the threat of political retaliation when the political tides turn, and, as in Pennsylvania, legislation which establishes a bi-partisan commission to draw district lines. Nevertheless, should this Court decide to select a new standard, Legislative Respondents submit that they should receive a new trial.

[61] See supra p. 5.

Legislative Respondents conclude by cautioning that this Court should not adopt legal criteria for redistricting beyond those in Pennsylvania's Constitution, claiming that doing so would infringe on the legislative function and run afoul of the federal Elections Clause. Accordingly, Respondents ask our Court to affirm the Commonwealth Court's decision and find that Petitioners did not demonstrate that the 2011 Plan clearly, plainly, and palpably violates the Constitution.

C. Intervenors

Intervenors — Republican voters, candidates for office, committee chairpersons, and other active members of the Republican Party — stress that they have invested substantial time, money, and effort in preparing for the upcoming election deadlines based upon the 2011 Plan, and they suggest that this Court should not require a new congressional map before the 2018 primaries, as it would be a "monumental task" to educate voters about changes in the congressional districts in time for the election. Intervenors' Brief at 17. Intervenors also highlight potential problems with overall voter confusion, as well as various challenges congressional candidates would face as a result of changes to the 2011 Plan during this election cycle, including potentially having to circulate new nomination petitions and having to direct their campaign activities to potentially new voters and demographics. While Executive Respondents maintain that the date of the primary could be extended, Intervenors contend that an extension imposed this late in the election cycle would "result in significant logistical challenges for county election administrators," as well as substantially increase the costs borne by state and county governments. *Id.* at 29. According to Intervenors, the above-described challenges would be particularly pronounced with respect to the special election for the 18th Congressional District, scheduled for March 13 of this year.

While Intervenors would find, based upon *Vieth*, that Petitioners have not shown that their partisan gerrymandering claims are justiciable, should this Court nevertheless find the claims justiciable and the 2011 Plan unconstitutional, they argue that we must give the legislature the first opportunity to correct the Plan, as ordering new districts without giving the legislature the chance to rectify any constitutional violations would raise separation-of-powers concerns. In doing so, Intervenors assert that our Court should follow the standard for relief that this Court endorsed in *Butcher v. Bloom*, 203 A.2d 556 (Pa. 1964), wherein, after finding that the state redistricting plan violated *Reynolds*, *supra*, our Court declined to order immediate redistricting in light of the "[s]erious disruption of orderly state election processes and basic governmental functions" that would result from the Court's immediate action. Intervenors' Brief at 17 (quoting *Butcher*, 203 A.2d at 568). Instead, Intervenors note this Court opted to leave the plan in place until after the upcoming election so as to allow the legislature to have a "reasonable opportunity to enact new reapportionment legislation," giving the legislature almost a full year to do so. *Id.* at 23 (quoting *Butcher*, 203 A.2d at 569).

Claiming that the same concerns in *Butcher* are present in the instant case, Intervenors submit that we should likewise give the legislature a reasonable and adequate time in which to correct the Plan, which they suggest could be in place for the 2020 elections. Further counseling against the immediate remedying of the 2011 Plan's constitutional deficiencies, Intervenors highlight the fact that Petitioners, without explanation, waited three election cycles (almost seven years) to bring their claims, indicating that any constitutional issues are not pressing. Intervenors also cite the United States Supreme Court's pending decision in *Gill*, which they note may impact the resolution of this case.

V. Analysis

We begin our analysis of the challenge to the 2011 Plan with the presumption that the General Assembly did not intend to violate the Pennsylvania Constitution, "in part because there exists a judicial presumption that our sister branches take seriously their constitutional oaths." *Stilp v. Commonwealth*, 905 A.2d 918, 938-39 (Pa. 2006); *see also* 1 Pa.C.S. § 1922(3). Accordingly, a statute is presumed to be valid, and will be declared unconstitutional only if the challenging parties carry the heavy burden of proof that the enactment "clearly, palpably, and plainly violates the Constitution." *See West Mifflin Area School District v. Zahorchak,* 4 A.3d 1042, 1048 (Pa. 2010).

Upon review,[62] and for the following reasons, we are persuaded by Petitioners and the other presentations before us that the 2011 Plan clearly, plainly, and palpably violates the Free and Equal Elections Clause of our Constitution.[63]

A. Free and Equal Elections Clause

Pennsylvania's Constitution, when adopted in 1776, was widely viewed as "the most radically democratic of all the early state constitutions." Ken Gormley, "Overview of Pennsylvania Constitutional Law," as appearing in Ken Gormley, ed., *The Pennsylvania Constitution A Treatise on Rights and Liberties*, 3 (2004). Indeed, our Constitution, which was adopted over a full decade before the United States Constitution, served as the foundation — the template — for the federal charter. *Id*. Our autonomous state Constitution, rather than a "reaction" to federal constitutional

[62] Given that this case is before us following our grant of extraordinary jurisdiction, our standard of review is *de novo*. Further, although the findings of fact made by Judge Brobson are not binding on this Court, "we will afford them due consideration, as the jurist who presided over the hearings was in the best position to determine the facts." *Annenberg v. Commonwealth*, 757 A.2d 338, 343 (Pa. 2000) (citations omitted).

[63] Given that we base our decision on the Free and Equal Elections Clause, we need not address the free expression or equal protection arguments advanced by Petitioners.

jurisprudence, stands as a self-contained and self-governing body of constitutional law, and acts as a wholly independent protector of the rights of the citizens of our Commonwealth.

The touchstone of interpretation of a constitutional provision is the actual language of the Constitution itself. *Ieropoli v. AC & S Corp.*, 842 A.2d 919, 925 (Pa. 2004). "[T]he Constitution's language controls and must be interpreted in its popular sense, as understood by the people when they voted on its adoption." *Id.* In doing so, reading the provisions of the Constitution in any "strained or technical manner" is to be avoided. *Jubelirer v. Rendell*, 953 A.2d 514, 528 (Pa. 2008). Consistent therewith, "we must favor a natural reading which avoids contradictions and difficulties in implementation, which completely conforms to the intent of the framers and which reflects the views of the ratifying voter." *Commonwealth ex rel. Paulinski v. Isaac*, 397 A.2d 760, 766 (Pa. 1979).

Further, if, in the process of undertaking explication of a provision of the Pennsylvania Constitution, any ambiguity becomes apparent in the plain language of the provision, we follow the rules of interpretation similar to those generally applicable when construing statutes. *See, e.g., Robinson Township v. Commonwealth*, 83 A.3d 901, 945 (Pa. 2013); *Commonwealth v. Omar*, 981 A.2d 179, 185 (Pa. 2009). If the constitutional language is clear and explicit, we will not "delimit the meaning of the words used by reference to a supposed intent." *Robinson Township*, 83 A.3d at 945 (quoting *Commonwealth ex rel. MacCallum v. Acker*, 162 A. 159, 160 (Pa. 1932)). If the words of a constitutional provision are not explicit, we may resort to considerations other than the plain language to discern intent, including, in this context, the occasion and necessity for the provision; the circumstances under which the amendment was ratified; the mischief to be remedied; the object to be attained; and the contemporaneous

legislative history. 1 Pa.C.S. §§ 1921, 1922; *accord* Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 Okla. City U. L. Rev. 189, 195 & 200 (2002) (state constitutions, ratified by electorate, are characterized as "voice of the people," which invites inquiry into "common understanding" of provision; relevant considerations include constitutional convention debates that reflect collective intent of body, circumstances leading to adoption of provision, and purpose sought to be accomplished).

Moreover, the Free and Equal Elections Clause has no federal counterpart, and, thus, our seminal comparative review standard described in *Commonwealth v. Edmunds*, *supra*, is not directly applicable.[64] Nonetheless, certain of the *Edmunds* factors obviously may assist us in our analysis. *Jubelirer*, 953 A.2d at 524-25; *Edmunds*, 586 A.2d at 895. Indeed, we have recently employed certain of these factors when analyzing the Environmental Rights Amendment. *See Robinson Township* 83 A.3d at 944 ("The Environmental Rights Amendment has no counterpart in the federal charter and, as a result, the seminal, comparative review standard described in [*Edmunds*] is not strictly applicable here. Nonetheless, some of the *Edmunds* factors obviously are helpful in our analysis."). Thus, in addition to our analysis of the plain language, we may consider, as necessary, any relevant decisional law and policy considerations argued by the parties, and any extra-jurisdictional case law from states that have identical or similar provisions, which may be helpful and persuasive. *See Jubelirer,* 953 A.2d at 525 n.12.

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[64] As noted above, our landmark decision in *Edmunds,* our Court set forth a four-part test which we routinely follow in examining and interpreting a provision of our Commonwealth's organic charter. This test examines (1) the relevant text of the provision of Pennsylvania Constitution; (2) the history of the provision, including Pennsylvania case law; (3) relevant case law from other jurisdictions interpreting similar provisions of that jurisdiction's constitution; and (4) policy considerations.

Finally, we emphasize that Article I is the Commonwealth's Declaration of Rights, which spells out the social contract between government and the people which is of such "general, great and essential" quality as to be ensconced as "inviolate." Pa. Const. art. I, Preamble & § 25; *see also* Pa. Const. art. I, § 2 ("All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness."). Although plenary, the General Assembly's police power is not absolute, as legislative power is subject to restrictions enumerated in the Constitution and to limitations inherent in the form of government chosen by the people of this Commonwealth. *See* Pa. Const. art. III, §§ 28-32 (enumerating restrictions). Specifically, under our Constitution, the people have delegated general power to the General Assembly, with the express exception of certain fundamental rights reserved to the people in Article I of our Constitution. *See* Pa. Const. art. I, § 25 ("[t]o guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate."); *see generally Robinson Township*, 83 A.3d at 946-48.

Thus, with this context in hand, we begin with the actual language of Article I, Section 5.

1. Language

Article I, Section 5 of the Pennsylvania Constitution, entitled "Elections," is contained within the Pennsylvania Constitution's "Declaration of Rights," which, as noted above, is an enumeration of the fundamental individual human rights possessed by the people of this Commonwealth that are specifically exempted from the powers of Commonwealth government to diminish.[65] As noted above, this section provides:

[65] *See* Pa. Const. art. I, § 25 ("To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.").

> Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

Pa. Const. art. I, § 5. This clause first appeared, albeit in different form, in our Commonwealth's first organic charter of governance adopted in 1776, 11 years before the United States Constitution was adopted. By contrast, the United States Constitution – which furnishes no explicit protections for an individual's electoral rights, nor sets any minimum standards for a state's conduct of the electoral process – does not contain, nor has it ever contained, an analogous provision. *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89, 100 (2014) (observing that "the U.S. Constitution does not grant the right to vote. It instead defines the right through a negative gloss, detailing the various reasons states cannot limit the franchise.").

The broad text of the first clause of this provision mandates clearly and unambiguously, and in the broadest possible terms, that *all* elections conducted in this Commonwealth must be "free and equal." In accordance with the plain and expansive sweep of the words "free and equal," we view them as indicative of the framers' intent that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government. Thus, Article I, Section 5 guarantees our citizens an equal right, on par with every other citizen, to elect their representatives. Stated another way, the actual and plain language of Section 5 mandates that all voters have an equal opportunity to translate their votes into representation. This interpretation is consistent with both the historical reasons for the inclusion of this provision in our Commonwealth's Constitution and the meaning we have ascribed to it through our case law.

2. History

Our Commonwealth's centuries-old and unique history has influenced the evolution of the text of the Free and Equal Elections Clause, as well as our Court's interpretation of that provision. Although the general character of our Commonwealth during the colonial era was reflective of the fundamental desire of Pennsylvania's founder, William Penn, that it be a haven of tolerance and non-discrimination for adherents of various religious beliefs, the manner in which the colony was governed from its inception nevertheless excluded certain groups from participation in its official government. Roman Catholics, for example, could not hold office in the colony from 1693 to 1776, due to the requirement in the Charter of Privileges, a precursor to our Constitution in which Penn set forth the manner of governance for the colony,[66] that every candidate for office was required to swear "that he did not believe in the doctrine of transubstantiation, that he regarded the invocation of the Virgin Mary and the saints as superstitious and the Popish Mass as idolatrous." J. Paul Selsam, *The Pennsylvania Constitution of 1776*, 179 (1971). Thus, although successive waves of European immigrants were attracted to the Pennsylvania colony after its founding by the promise of religious tolerance, not every group which settled in Pennsylvania was afforded the equal legal right to participate in its governance. Related thereto, the colony became divided over time by the geographical areas in which these immigrants settled, as well as their religious beliefs.

English and Quaker immigrants fleeing persecution in England were the first to arrive and settled in the eastern part of the colony in and around the City of Philadelphia and in Chester and Bucks Counties. German immigrants arrived thereafter in sizable

[66] *William Penn Sch. Dist.,* 170 A.3d at 418–19.

numbers and settled primarily in the central and northeastern part of the colony, and finally came a large influx of Scots-Irish Presbyterians who lived primarily in the interior and frontier regions of the colony: first in Lancaster, York and Cumberland Counties, and then expanding westward to the areas beyond the Allegheny mountains, congregating in and near the settlement which became modern day Pittsburgh. *Id*. at 4-5.

These groups were divided along economic and religious lines. The English and Quakers who engaged in extensive commerce and banking became the most wealthy and aristocratic elements in the colony. *Id.* at 6. German immigrants reaped a comfortable living from farming the fertile lands of their settlement. Rosalind Branning, *Pennsylvania Constitutional Development*, 10 (1960). The Scots-Irish, who occupied the frontier regions, eked out an existence through hunting, trapping, and subsistence farming; however, they also became skilled tradesmen, highly proficient in construction, masonry, and ironworking, and began to be described as "the leather aprons," which, although intended as a pejorative by members of the colony's aristocracy, they proudly adopted as a badge of honor reflective of their considerable skills and abilities in their chosen professions. Robert Brunhouse, *The Counter-Revolution in Pennsylvania* 1776-1790, 16 (1942).

These various groups began to align themselves into nascent political factions which, by the 1760s, exerted varying degrees of control over the colonial government. The eastern Presbyterian adherents formed a group known as "the Proprietary Party," so named because of their faithfulness to the tenets of William Penn's religious and political philosophy, and they were joined by the Anglicans who had also settled in the Philadelphia region. The Quakers, disillusioned by Penn's embrace of the Anglican faith, united with German pietistic religious sects to form a party known as the Quaker or

"Anti-Proprietary Party." Selsam at 6-7; Branning, at 10. The Scots-Irish, who were angry at having their pleas for assistance during the French and Indian War ignored by the colonial assembly, which was dominated by the Proprietary Party, aligned with the Anti-Proprietary party as a means of achieving their goal of fair representation in the assembly. Branning at 10.

Although these political alliances remained intact until the early 1770s, they began to unravel with the tensions occasioned by the general colonial revulsion at the heavy-handed tactics of the British Crown — *e.g.*, the imposition of the Stamp Act and the use of writs of assistance to enforce the Revenue Act — which ultimately culminated in the Revolutionary War. The Quakers and the Anglicans remained loyal to the British Crown as these tensions rose. However, the Scots-Irish in the western region, who dominated the Anti-Proprietary Party, were strongly supportive of the cause of the opponents of the crown, and they began to demand reforms be made by the colonial assembly, controlled by the Proprietary Party, including reapportionment of representation to the west. *Id.* at 11. They were joined in this effort by a large segment of the working-class population of the City of Philadelphia, disenfranchised by the requirement of the Charter of Privileges that imposed a property ownership requirement for the right to vote. This, coupled with the Charter's restriction of representation in the assembly to counties, resulted in the underrepresentation of the City of Philadelphia in colonial affairs, as well as the denial of representation to the western region due to the assembly's deliberately slow pace in recognizing new counties in that area. *Id.* Thus, by the early 1700s, colonial government remained dominated by the counties of Philadelphia, Chester, and Bucks, even though they had been eclipsed in population by the western regions of the colony and the City of Philadelphia. Selsam at 31-33. Although, in an effort to placate these groups, the assembly granted a concession by

giving the west 28 seats in the assembly, while retaining 30 for the east, this did little to mollify the fervor of these groups for further reform. Branning at 11.

The opportunity for such reform arose with the formal adoption of the Declaration of Independence by the Continental Congress in 1776. This same Congress also adopted a resolution suggesting that the colonies adopt constitutions in the event that they had "no government sufficient to the exigencies of their affairs." *Id.* at 12. For the Pennsylvania colony, this was the catalyst which enabled the reformers from the western regions and the City of Philadelphia, who were now known as "the radicals," to achieve the calling of a constitutional convention. This convention, which was presided over by Benjamin Franklin, who also was serving at the same time in the Continental Congress, adopted our Commonwealth's Constitution of 1776, which, for its time, was considered very forward thinking. *Id.* at 13. Many of its provisions reflected the prevailing sentiment of the radical delegates from the frontier and the City of Philadelphia for a devolution of centralized political power from the hands of a very few, in order to form a government more directly responsive to the needs of the people. Thus, it adopted a unicameral legislature on the belief that bicameral legislatures with one house dominated by elites who were elected on the basis of monetary or property qualifications would thwart the will of the people, as expressed through their representatives in the lower chamber, whose members were elected by those whose right of suffrage was not similarly constrained. Joseph S. Foster, *The Politics of Ideology: The Pennsylvania Constitutional Convention of 1789-1790*, 123 Pennsylvania J. of History, Vol. 59, No. 2 (April 1992). Even though concerned with foundational matters such as the structure of government, the delegates, in response to their experience of being excluded from participation in the colonial government, included

two explicit provisions to establish protections of the right of the people to fair and equal representation in the governance of their affairs.

The first requirement was that representation be proportional to population and that reapportionment of legislative seats be done every seven years. *See* Pa. Const. of 1776, art. I, § IV. As noted by one commentator, this was the direct product of the personal history of the majority of the delegates, and the requirement of equal representation was, thus, intended to protect future individuals against the exclusion from the legislative process "by persons who gained power and intended to keep it." John L. Gedid, "*History of the Pennsylvania Constitution"* as appearing in Ken Gormley, ed., "*The Pennsylvania Constitution A Treatise on Rights and Liberties*, 48 (2004).

Concomitant with this requirement, the delegates also deliberately incorporated into that Constitution the Declaration of Rights – which they considered to be an integral part of its framework – and therein the first version of Article I, Section 5, which declared that "all elections ought to be free; and that all free men having a sufficient evident common interest with, and attachment to the community, have a right to elect officers, or to be elected into office." Pa. Const. of 1776, art. I, § VII.

This section reflected the delegates' desire to secure access to the election process by all people with an interest in the communities in which they lived — universal suffrage — by prohibiting exclusion from the election process of those without property or financial means. It, thus, established a critical "leveling" protection in an effort to establish the uniform right of the people of this Commonwealth to select their representatives in government. It sought to ensure that this right of the people would forever remain equal no matter their financial situation or social class. Gedid, at 51; *see also* Selsam, at 190 ("The long struggle by the people for the control of their affairs was finally rewarded.").

Opposition to the new Constitution arose almost immediately, driven chiefly by the Quakers, Episcopalians, and Germans who had not fought in the Revolution, and the commercial interests in the City of Philadelphia. Branning at 17. These groups felt excluded from participation in the new government just as the factions who had written the 1776 Constitution previously did. Moreover, significant resentment grew over the increasing political power and attainment of elected office by those of lower socioeconomic status in the period after 1776. The social and commercial aristocracy of the Commonwealth resented the acquisition of political control of state government by the "leather aprons." Brunhouse at 16. Further, the exclusion of some of the population through the requirement of "test oaths" in the 1776 Constitution, which required all voters, candidates for office, and office holders to swear allegiance to uphold the new frame of government, further alienated those groups, chiefly from the eastern part of the state, for whom such oaths violated their religious beliefs. *Id.* These groups united and became known as the "Anti-Constitutionalists," and later by the designation Republicans and, later still, Federalists.[67] Supporters of the new charter of governance were allied into a political faction known as the Constitutionalists.

The strife between these two groups, and deficiencies in the structure of the new government — *i.e*., the lack of a strong executive and an ill-defined role for a putative executive body created by the 1776 Constitution and given power over the legislature, the Council of Censors — rapidly intensified, such that the Commonwealth's government became paralyzed by dysfunction, so much so that the Continental Congress threatened to take it over. Gedid, at 52. These two factions vied for control

[67] As utilized in this history, this designation referred only to their views on the proper structure of governance, and does not refer to the modern Republican Party which came into being 60 years later. Gedid, at 52.

of the Council of Censors and the General Assembly throughout the late 1770s and 1780s. The Republicans, though well represented on the Council of Censors, could not garner the necessary votes to call a constitutional convention under its rules. However, popular dissatisfaction with the chaotic state of the Commonwealth's governance grew to such a degree that the Republicans gained control of the General Assembly in 1788, and, in November 1789, they passed legislation to call a constitutional convention. Branning, at 19.

Although there was some opposition to the calling of the convention by the Constitutionalists, given that the 1776 Constitution contained no explicit authorization for the assembly to do so, they, nevertheless, agreed to participate in the convention which began on November 24, 1789. Rather than continuing the internecine strife that had continually threatened the new Commonwealth's government, the leaders of the Constitutionalists, who were prominent political leaders with deep experience serving in the Commonwealth government, such as William Findley, forged what was regarded as an unexpected alliance with powerful members of the leadership of the Republicans, particularly James Wilson. Foster, at 128-29. The coalition of delegates shepherded by Findley and Wilson in producing a new Constitution was remarkable, given the regional and ideological strife which had preceded the convention. Its members represented 16 of the state's 21 counties, and they came from widely divergent geographic regions of the Commonwealth, ranging from Northampton County in the northeastern region of the state to Allegheny and Washington counties in the west. These delegates thus represented a wide spectrum of people with diverse political, ideological, and religious views. *Id*. at 131. Their work yielded a Constitution which, while making the structural reforms to the Commonwealth's government favored by the Republicans, such as the adoption of a bicameral legislature and the creation of the office of chief executive with

veto power over legislation, also preserved the principle cherished most by the Constitutionalists – namely, popular elections in which the people's right to elect their representatives in government would be equally available to all, and would, hereinafter, not be intentionally diminished by laws that discriminated against a voter based on his social or economic status, geography of his residence, or his religious and political beliefs. *Id*. at 137-38.

Consequently, popular election of representatives was maintained by the new Constitution, and applicable in all elections for both houses of the bicameral legislature. Importantly, consistent with the evident desire of the delegates to neutralize the factors which had formerly given rise to such rancorous division amongst the people in the selection of their representatives, the language of Article I, Section 5 was revised to remove all prior ambiguous qualifying language. In its place, the delegates adopted the present language of the first clause of Article I, Section 5, which has remained unchanged to this day by the people of this Commonwealth.[68] It states, simply and plainly, that "elections shall be free and equal."[69]

When viewed against the backdrop of the intense and seemingly unending regional, ideological, and sectarian strife detailed above, which bitterly divided the people of various regions of our state, this provision must be understood then as a salutary effort by the learned delegates to the 1790 convention to end, once and for all,

[68] The 1790 Constitution was never ratified by popular vote; however, all subsequent constitutions in which this language is included have been ratified by the people of the Commonwealth.

[69] Indeed, the majority of delegates expressly rejected a proposal to remove the "and equal" language from the revised amendment. Minutes of the Constitutional Convention of 1789 at 377. Ours, thus, became the first constitution to utilize this language, and other states such as Delaware, following our lead, adopted the same language into their constitution a mere two years later in 1792. Eleven other states since then have included a "free and equal" clause in their constitutions.

the primary cause of popular dissatisfaction which undermined the governance of Pennsylvania: namely, the dilution of the right of the people of this Commonwealth to select representatives to govern their affairs based on considerations of the region of the state in which they lived, and the religious and political beliefs to which they adhered. These historical motivations of the framers have undergirded our Court's interpretation of the Free and Equal Elections Clause throughout the years since its inclusion in our Constitution.

3. Pennsylvania Case Law

As one noted commentator on the Pennsylvania Constitution, Charles Buckalew, himself a delegate to the 1873 Constitutional Convention, opined, given the aforementioned history, the words "free and equal" as used in Article I, Section 5 have a broad and wide sweep:

> They strike not only at privacy and partiality in popular elections, but also at corruption, compulsion, and other undue influences by which elections may be assailed; at all regulations of law which shall impair the right of suffrage rather than facilitate or reasonably direct the manner of its exercise, and at all its limitations, unproclaimed by the Constitution, upon the eligibility of the electors for office. And they exclude not only all invidious discriminations between individual electors, or classes of electors, but also between different sections or places in the State.

Charles R. Buckalew, *An Examination of the Constitution of Pennsylvania. Exhibiting The Derivation and History of Its Several Provisions*, Article I at 10 (1883).

Our Court has ascribed the same expansive meaning to the terms "free and equal" in Article I, Section 5. Although our Court has infrequently relied on this provision to strike down acts of the legislature pertaining to the conduct of elections, the qualifications of voters to participate therein, or the creation of electoral districts, our view as to what constraints Article I, Section 5 places on the legislature in these areas

has been consistent over the years. Indeed, nearly 150 years ago, in considering a challenge to an act of the legislature establishing eligibility qualifications for electors to vote in all elections held in Philadelphia, and specifying the manner in which those elections are to be conducted, we recognized that, while our Constitution gives to the General Assembly the power to promulgate laws governing elections, those enactments are nonetheless subject to the requirements of the Free and Equal Elections Clause of our Constitution, and, hence, may be invalidated by our Court "in a case of plain, palpable and clear abuse of the power which actually infringes the rights of the electors." *Patterson*, 60 Pa. at 75.

In answering the question of how elections must be made equal, we stated: "Clearly by laws which shall arrange all the qualified electors into suitable districts, and make their votes equally potent in the election; so that some shall not have more votes than others, and that all shall have an equal share in filling the offices of the Commonwealth." *Id.* Thus, with this decision, our Court established that any legislative scheme which has the effect of impermissibly diluting the potency of an individual's vote for candidates for elective office relative to that of other voters will violate the guarantee of "free and equal" elections afforded by Article I, Section 5. *See City of Bethlehem*, 515 A.2d at 1323-24 (recognizing that a legislative enactment which "dilutes the vote of any segment of the constituency" will violate Article I, Section 5). This interpretation is wholly consonant with the intent of the framers of the 1790 Constitution to ensure that each voter will have an equally effective power to select the representative of his or her choice, free from any discrimination on the basis of his or her particular beliefs or views.

In the nearly 150 years since *Patterson*, our Court has not retreated from this interpretation of the Free and Equal Elections Clause. In 1914, our Court, in the case of *Winston, supra*, considered a challenge under the Free and Equal Elections Clause to

an act of the legislature which set standards regulating the nominations and elections for judges and elective offices in the City of Philadelphia. Although our Court ultimately ruled that the act did not violate this clause, we again reaffirmed that the clause protected a voter's individual right to an equal, nondiscriminatory electoral process. In describing the minimum requirements for "free and fair" elections, we stated:

> [E]lections are free and equal within the meaning of the Constitution when they are public and open to all qualified electors alike; when every voter has the same right as every other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.

Winston, 91 A. at 523.

We relied on these principles in the case of *In re New Britain Borough School District*, 145 A. 597 (Pa. 1929), to strike down the legislative creation of voting districts for elective office which, although not overtly depriving electors therein of their right to choose candidates for office secured by the Free and Equal Elections Clause, nevertheless operated to impair that right. In that case, the legislature created a new borough from parts of two existing townships and created a school district which overlapped the boundaries of the new borough. The new district, thus, encompassed part of the school district in each of the townships from which it was created. Pursuant to other acts of the legislature then in force, the court of common pleas of the county in which the district was situated, upon petition of taxpayers and electors in the newly created borough, appointed a board of school directors. The creation of the new school district was ultimately not approved as required by other legislation mandating the assent of the state board of elections for the creation of the district, and, thus, technically the residents of the new borough remained within their old school districts.

Residents of each of the former townships challenged the constitutionality of the effect of the combination of their former respective school districts under the Free and Equal Elections Clause, arguing that they had been deprived of their right to select school directors. Our Court agreed, and found that the residents of the two former school districts were effectively denied their right to elect representatives of their choosing to represent them on a body which would decide how their tax monies were spent. We noted that the residents of the newly created school district could not lawfully vote for representatives on the school boards of their prior districts, given that they were no longer legally residents thereof, and they also could not lawfully vote for school directors in the newly created school district, given that the ballot for every voter was required to be the same, and, because the new school district had not been approved, the two groups of borough residents would each have to be given separate ballots for their former districts. In our discussion of the Free and Equal Elections Clause, our Court emphasized that the rights protected by this provision may not be taken away by an act of the legislature, and that that body is prohibited by this clause from interfering with the exercise of those rights, even if the interference occurs by inadvertence. *Id.* at 599.

While it is true that our Court has not heretofore held that a redistricting plan violates the Free and Equal Elections Clause – for example, because it is the product of politically-motivated gerrymandering – we have never precluded such a claim in our jurisprudence. Our Court considered a challenge under Article I, Section 5 rooted in alleged political gerrymandering in the creation of state legislative districts in *In re 1991 Pennsylvania Legislative Reapportionment Comm'n*, *supra*. In that case, we entertained and rejected a claim that political gerrymandering operated to deny a candidate's claimed right to run for state legislative office under this provision. We found that the

individual's constitutionally protected right to run for state legislative office was protected by the redistricting plan, but concluded that right did not extend so far as to require that a reapportionment plan be tailored to allow him to challenge the incumbent of his choice.

More saliently, in *Erfer*, our Court specifically held that challenges to the enactment of a congressional redistricting plan predicated on claims of impermissible political gerrymandering may be brought under Article I, Section 5. Therein, we rebuffed the argument that Article I, Section 5 was limited in its scope of application to only elections of Commonwealth officials, inasmuch as there was nothing in the plain text of this provision which would so limit it. Likewise, our own review of the historical circumstances surrounding its inclusion in the 1790 Constitution, discussed above, supports our interpretation.

Moreover, in *Erfer*, we rejected the argument, advanced by Legislative Respondents in their post-argument filing seeking a stay of our Court's order of January 22, 2018,[70] that, because Article I, Section 4 of the United States Constitution confers on state legislatures the power to enact congressional redistricting plans, such plans are not subject to the requirements of the Pennsylvania Constitution:

> It is true that the U.S. Constitution has granted our legislature the power to craft congressional reapportionment plans. Yet, we see no indication that such a grant of power simultaneously suspended the constitution of our Commonwealth *vis à vis* congressional reapportionment. Without clear support for the radical conclusion that our Commonwealth's Constitution is nullified in challenges to congressional reapportionment plans, it would be highly inappropriate for us to circumscribe the operation of the organic legal document of our Commonwealth.

[70] *See supra* note 8.

Id. at 331.

Ultimately, in *Erfer*, we did not opine on whether, under our prior decisions interpreting Article I, Section 5, a congressional redistricting plan would be violative of the Free and Equal Elections Clause because of political gerrymandering. Although the petitioners in that case alleged that the redistricting plan at issue therein violated Article I, Section 5, our Court determined that they had not provided sufficient reasons for us to interpret our constitutional provision as furnishing additional protections of the right to vote beyond those recognized by the United States Supreme Court as conferred by the Equal Protection Clause of the United States Constitution. *See id.* at 332 ("Petitioners provide us with no persuasive argument as to why we should, at this juncture, interpret our constitution in such a fashion that the right to vote is more expansive than the guarantee found in the federal constitution."). Thus, we adjudicated the Article I, Section 5 challenge in that case solely on federal equal protection grounds, and rejected it, based on the test for such claims articulated by the plurality of the United States Supreme Court in *Bandemer, supra*.

Importantly, however, our Court in *Erfer* did not foreclose future challenges under Article I, Section 5 resting solely on independent state grounds. Indeed, the unique historical reasons discussed above, which were the genesis of Article I, Section 5, and its straightforward directive that "elections shall be free and equal" suggests such a separate analysis is warranted. The Free and Equal Elections Clause was specifically intended to equalize the power of voters in our Commonwealth's election process, and it explicitly confers this guarantee; by contrast, the Equal Protection Clause was added to the United States Constitution 78 years later with the ratification of the Fourteenth Amendment to address manifest legal inequities which were contributing causes of the

Civil War, and which persisted in its aftermath, and it contains no such unambiguous protections.

Moreover, and importantly, when properly presented with the argument, our Court entertains as distinct claims brought under the Free and Equal Elections Clause of our Constitution and the federal Equal Protection Clause, and we adjudicate them separately, utilizing the relevant Pennsylvania and federal standards. In *Shankey v. Staisey*, 257 A.2d 897 (Pa. 1969), a group of third-party voters challenged a Pennsylvania election statute which specified that, in order for an individual's vote for a third-party candidate for a particular office in the primary election to be counted, the total number of aggregate votes by third-party voters for that office had to equal or exceed the number of signatures required on a nominating petition to be listed on the ballot as a candidate for that office. The voters' challenge, which was brought under both the Free and Equal Elections Clause of the Pennsylvania Constitution and the Equal Protection Clause of the United States Constitution, alleged that these requirements wrongfully equated public petitions with ballots, thereby imposing a more stringent standard for their vote to be counted than that which voters casting ballots for major party candidates had to meet.

Our Court applied different constitutional standards in deciding these claims. In considering and rejecting the Article I, Section 5 claim – that the third-party candidates' right to vote was diminished because of these special requirements – our Court applied the interpretation of the Free and Equal Elections Clause set forth in *Winston*, *supra*, and ruled that, because the statute required major party candidates and third party candidates to demonstrate the same numerical level of voter support for their votes to be counted, the fact that this demonstration was made by ballot as opposed to by petition did not render the election process unequal. By contrast, in adjudicating the

equal protection claim, our Court utilized the test for an equal protection clause violation articulated by the United States Supreme Court and examined whether the statute served to impermissibly classify voters without a reasonable basis to do so.

Given the nature of the petitioners' argument in *Erfer*, which was founded on their apparent belief that the protections of Article I, Section 5 and Article 1, Section 26 were coextensive, our Court was not called upon, therein, to reassess the validity of the *Shankey* Court's use of a separate and distinct standard for adjudicating a claim that a particular legislative enactment involving the electoral process violates the Free and Equal Elections Clause, from that used to determine if the enactment violates the federal Equal Protection Clause. Thus, we reject Justice Mundy's assertion that *Erfer* requires us, under the principles of *stare decisis*, to utilize the same standard to adjudicate a claim of violation of the Free and Equal Elections Clause and the federal Equal Protection Clause. *See* Dissenting Opinion (Mundy, J.) at 2-3. To the extent that *Erfer* can be read for that proposition, we expressly disavow it, and presently reaffirm that, in accord with *Shankey* and the particular history of the Free and Equal Elections Clause, recounted above, the two distinct claims remain subject to entirely separate jurisprudential considerations.[71]

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[71] Like Pennsylvania, a number of other states go further than merely recognizing the right to vote, and provide additional and independent protections through provisions in their constitutions guaranteeing that their elections shall be "free and equal." Pa. Const. art. I, § 5. More specifically, the constitutions of twelve additional states contain election clauses identical to our charter, requiring elections to be "free and equal." These twelve other states are: Arizona, Ariz. Const. art. II, § 21; Arkansas, Ark. Const. art. 3, § 2; Delaware, Del. Const. art. I, § 3; Illinois, Ill. Const. art. III, § 3; Indiana, Ind. Const. art. 2, § 1; Kentucky, Ky. Const. § 6; Oklahoma, Okla. Const. art. III, § 5; Oregon, Or. Const. art. II, § 1; South Dakota, S.D. Const. art. VI, § 19; Tennessee, Tenn. Const. art. I, § 5; Washington, Wash. Const. art. I, § 19; and Wyoming, Wy. Const. art. I, § 27. While few have faced reapportionment challenges, state courts have breathed meaning into these unique constitutional provisions, a few of which are set forth below by way of example. Specifically, last year, the Court of Chancery of Delaware, in an in-depth treatment of Delaware's Constitution, much like that engaged in by our Court today, considered a (continued…)

4. Other Considerations

In addition to the occasion for the adoption of the Free and Equal Elections Clause, the circumstances in which the provision was adopted, the mischief to be remedied, and the object to be obtained, as described above, the consequences of a particular interpretation are also relevant in our analysis. Specifically, partisan gerrymandering dilutes the votes of those who in prior elections voted for the party not

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(…continued)
challenge to family-focused events at polling places on election day which induced parents of students to vote, but which operated as impediments to voting by the elderly and disabled. In concluding such conduct violated the Delaware Constitution's Elections Clause, the court reasoned that an election which provided a targeted group specific incentives to vote was neither free nor equal, noting the historical concerns in Delaware regarding the integrity of the election process. *Young v. Red Clay Consolidated School*, 159 A.3d 713, 758, 763 (Del. Ch. 2017).

Even more apt, two states, Illinois and Kentucky, have long traditions regarding the application and interpretation of their elections clauses. In an early Illinois decision, the Illinois Supreme Court, considering a challenge to a congressional apportionment statute, cited to the Illinois Constitution and concluded: "[a]n election is free where the voters are exposed to no intimidation or improper influence and where each voter is allowed to cast his ballot as his own conscience dictates. Elections are equal when the vote of each voter is equal in its influence upon the result to the vote of every other elector—where each ballot is as effective as every other ballot." *Moran v. Bowley*, 179 N.E. 526, 531 (Ill. 1932). Similarly, in an early Kentucky decision involving the lack of printed ballots leaving numerous voters unable to exercise the franchise, that state's high court offered that "[t]he very purpose of elections is to obtain a full, fair, and free expression of the popular will upon the matter, whatever it may be, submitted to the people for their approval or rejection; and when any substantial number of legal voters are, from any cause, denied the right to vote, the election is not free and equal, in the meaning of the [Kentucky] Constitution." *Wallbrecht v. Ingram*, 175 S.W. 1022, 1026 (Ky. 1915).

Thus, other states with identical constitutional provisions have considered and applied their elections clauses to a variety of election challenges, providing important protections for their voters. While those states whose constitutions have identical "free and equal" language to that of the Pennsylvania Constitution have not addressed the identical issue before us today, they, and other states, have been willing to consider and invigorate their provisions similarly, providing an equal right to each citizen, on par with every other citizen, to elect their representatives.

in power to give the party in power a lasting electoral advantage. By placing voters preferring one party's candidates in districts where their votes are wasted on candidates likely to lose (cracking), or by placing such voters in districts where their votes are cast for candidates destined to win (packing), the non-favored party's votes are diluted. It is axiomatic that a diluted vote is not an equal vote, as all voters do not have an equal opportunity to translate their votes into representation. This is the antithesis of a healthy representative democracy. Indeed, for our form of government to operate as intended, each and every Pennsylvania voter must have the same free and equal *opportunity* to select his or her representatives. As our foregoing discussion has illustrated, our Commonwealth's commitment to neutralizing factors which unfairly impede or dilute individuals' rights to select their representatives was borne of our forebears' bitter personal experience suffering the pernicious effects resulting from previous electoral schemes that sanctioned such discrimination. Furthermore, adoption of a broad interpretation guards against the risk of unfairly rendering votes nugatory, artificially entrenching representative power, and discouraging voters from participating in the electoral process because they have come to believe that the power of their individual vote has been diminished to the point that it "does not count." A broad and robust interpretation of Article I, Section 5 serves as a bulwark against the adverse consequences of partisan gerrymandering.

5. Conclusion

The above analysis of the Free and Equal Elections Clause – its plain language, its history, the occasion for the provision and the circumstances in which it was adopted, the case law interpreting this clause, and consideration of the consequences of our interpretation – leads us to conclude the Clause should be given the broadest interpretation, one which governs all aspects of the electoral process, and which

provides the people of this Commonwealth an equally effective power to select the representative of his or her choice, and bars the dilution of the people's power to do so.

B. Measurement of Compliance with Article I, Section 5

We turn now to the question of what measures should be utilized to assess a dilution claim under the Free and Equal Elections Clause of the Pennsylvania Constitution. Neither Article 1, Section 5, nor any other provision of our Constitution, articulates explicit standards which are to be used in the creation of congressional districts. However, since the inclusion of the Free and Equal Elections Clause in our Constitution in 1790, certain neutral criteria have, as a general matter, been traditionally utilized to guide the formation of our Commonwealth's legislative districts in order to prevent the dilution of an individual's vote for a representative in the General Assembly. These standards place the greatest emphasis on creating representational districts that both maintain the geographical and social cohesion of the communities in which people live and conduct the majority of their day-to-day affairs, and accord equal weight to the votes of residents in each of the various districts in determining the ultimate composition of the state legislature.

Significantly, the framers of the 1790 constitution who authored the Free and Equal Elections Clause also included a mandatory requirement therein for the legislature's formation of state senatorial districts covering multiple counties, namely that the counties must adjoin one another. Also, the architects of that charter expressly prohibited the division of any county of the Commonwealth, or the City of Philadelphia, in the formation of such districts. Pa. Const. of 1776, § 7. Thus, as preventing the dilution of an individual's vote was of paramount concern to that august group, it is evident that they considered maintaining the geographical contiguity of political

subdivisions, and barring the splitting thereof in the process of creating legislative districts, to afford important safeguards against that pernicious prospect.

In the eight-plus decades after the 1790 Constitution became our Commonwealth's fundamental plan of governance, many problems arose from the corruption of the political process by well-heeled special interest groups who rendered our representative democracy deeply dysfunctional by weakening the power of an individual's vote through, *inter alia*, their selection, and financial backing in the electoral process, of representatives who exclusively served their narrow interests and not those of the people as a whole. Gedid, *supra*, at 61-63. One of the methods by which the electoral process was manipulated by these interest groups to attain those objectives was the practice of gerrymandering, popular revulsion of which became one of the driving factors behind the populace's demand for the calling of the 1873 Constitutional Convention.

As noted by an eminent authority on Pennsylvania constitutional law, by the time of that convention, gerrymandering was regarded as "one of the most flagrant evils and scandals of the time, involving notorious wrong to the people and open disgrace to republican institutions." Thomas Raeburn White, *Commentaries on the Constitution of Pennsylvania* 61 (1907). Although the delegates to that convention did not completely eliminate this practice through the charter of governance which they adopted, and which the voters subsequently approved, they nevertheless included significant protections against its occurrence through the explicit adoption of certain requirements which all state legislative districts were, thereafter, required to meet: (1) the population of such districts must be equal, to the extent possible; (2) the district that is created must be comprised of compact and contiguous geographical territory; and (3) the district respects the boundaries of existing political subdivisions contained therein, such that

the district divides as few of those subdivisions as possible. Pa. Const. of 1874, art. 2, § 16. Given the great concern of the delegates over the practice of gerrymandering occasioned by their recognition of the corrosive effects on our entire democratic process through the deliberate dilution of our citizenry's individual votes, the focus on these neutral factors must be viewed, then, as part of a broader effort by the delegates to that convention to establish "the best methods of representation to secure a just expression of the popular will." Branning at 59 (quoting Wayne Mac Veach, *Debates of the Convention to Amend the Constitution of Pennsylvania*, Volume I at 45 (1873)). Consequently, these factors have broader applicability beyond setting standards for the drawing of electoral districts for state legislative office.

The utility of these requirements to prevent vote dilution through gerrymandering retains continuing vitality, as evidenced by our present Constitution, adopted in 1968. In that charter, these basic requirements for the creation of senatorial districts were not only retained, but, indeed, were expanded by the voters to govern the establishment of election districts for the selection of their representatives in the state House of Representatives. Pa. Const., art. 2, § 16.

Because these factors are deeply rooted in the organic law of our Commonwealth, and continue to be the foundational requirements which state legislative districts must meet under the Pennsylvania Constitution, we find these neutral benchmarks to be particularly suitable as a measure in assessing whether a congressional districting plan dilutes the potency of an individual's ability to select the congressional representative of his or her choice, and thereby violates the Free and Equal Elections Clause. In our judgment, they are wholly consistent with the overarching intent of the framers of the 1790 Constitution that an individual's electoral power not be diminished through any law which discriminatorily dilutes the power of his

or her vote, and, thus, they are a measure by which to assess whether the guarantee to our citizenry of "free and equal" elections promised by Article, I Section 5 in the selection of their congressional representative has been violated. Because the character of these factors is fundamentally impartial in nature, their utilization reduces the likelihood of the creation of congressional districts which confer on any voter an unequal advantage by giving his or her vote greater weight in the selection of a congressional representative as prohibited by Article I, Section 5. Thus, use of these objective factors substantially reduces the risk that a voter in a particular congressional district will unfairly suffer the dilution of the power of his or her vote.

Moreover, rather than impermissibly lessening the power of an individual's vote based on the geographical area in which the individual resides – which, as explained above, Article I, Section 5 also prohibits – the use of compactness, contiguity, and the maintenance of the integrity of the boundaries of political subdivisions maintains the strength of an individual's vote in electing a congressional representative. When an individual is grouped with other members of his or her community in a congressional district for purposes of voting, the commonality of the interests shared with the other voters in the community increases the ability of the individual to elect a congressional representative for the district who reflects his or her personal preferences. This approach inures to no political party's benefit or detriment. It simply achieves the constitutional goal of fair and equal elections for all of our Commonwealth's voters. Finally, these standards also comport with the minimum requirements for congressional districts guaranteed by the United States Constitution, as interpreted by the United States Supreme Court. *See Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (holding that the plain objective of the United States Constitution is to make "equal representation for equal numbers of people the fundamental goal for the House of Representatives.").

Consequently, for all of these reasons, and as expressly set forth in our Order of January 22, 2018, we adopt these measures as appropriate in determining whether a congressional redistricting plan violates the Free and Equal Elections Clause of the Pennsylvania Constitution. Therefore, an essential part of such an inquiry is an examination of whether the congressional districts created under a redistricting plan are:

> 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, 1/22/19, at ¶ "Fourth."[72]

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. *See*, *e.g.*, *Holt I,* 38 A.3d at 1235. However, we view these factors to be wholly subordinate to the neutral criteria of compactness, contiguity, minimization of the division of political subdivisions, and 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.

When, however, it is demonstrated that, in the creation of congressional districts, these neutral criteria have been subordinated, in whole or in part, to extraneous considerations such as gerrymandering for unfair partisan political advantage, a congressional redistricting plan violates Article I, Section 5 of the Pennsylvania Constitution. We note that, consistent with our prior interpretation of Article I, Section 5,

[72] Nothing herein is intended to suggest that congressional district maps must not also comply with federal law, and, most specifically, the Voting Rights Act, 52 U.S.C. § 10301.

see In re New Britain Borough School District, *supra*, this standard does not require a showing that the creators of congressional districts intentionally subordinated these traditional criteria to other considerations in the creation of the district in order for it to violate Article I, Section 5; rather, it is sufficient to establish a violation of this section to show that these traditional criteria were subordinated to other factors.

However, this is not the exclusive means by which a violation of Article I, Section 5 may be established. As we have repeatedly emphasized throughout our discussion, the overarching objective of this provision of our constitution is to prevent dilution of an individual's vote by mandating that the power of his or her vote in the selection of representatives be equalized to the greatest degree possible with all other Pennsylvania citizens. We recognize, then, that there exists the possibility that advances in map drawing technology and analytical software can potentially allow mapmakers, in the future, to engineer congressional districting maps, which, although minimally comporting with these neutral "floor" criteria, nevertheless operate to unfairly dilute the power of a particular group's vote for a congressional representative. *See* N.T. Trial, 12/13/17, at 839-42 (Dr. Warshaw discussing the concept of an efficiency gap based on the number of "wasted" votes for the minority political party under a particular redistricting plan). However, as the case at bar may be resolved solely on the basis of consideration of the degree to which neutral criteria were subordinated to the pursuit of partisan political advantage, as discussed below, we need not address at this juncture the possibility of such future claims.[73]

[73] In her dissenting opinion, Justice Mundy inexplicably contends that our allowance for the possibility that a *future* challenge to a *future* plan might show dilution even though the neutral redistricting criteria were adhered to "undermines the conclusion" that there is a violation *in this case*. Dissenting Opinion (Mundy, J.) at 3. However, as we state above, and as we discuss further below, assessment of those criteria fully, and solely, supports our conclusion in this case.

We are confident, however, that, technology can also be employed to aid in the expeditious development of districting maps, the boundaries of which are drawn to scrupulously adhere to neutral criteria. Indeed, as this Court highlighted in *Holt I*, "the development of computer technology appears to have substantially allayed the initial, extraordinary difficulties in" meeting such criteria. *Holt I*, 38 A.3d at 760; *see also id.* at 750 (noting that, since 1991, technology has provided tools allowing mapmakers to "achieve increasingly 'ideal' districts") (citing Gormley, Legislative Reapportionment, at 26–27, 45–47); *see also Larios v. Cox*, 305 F.Supp.2d. 1335, 1342 (N.D. Ga. 2004) ("given recent advances in computer technology, constitutional plans can be crafted in as short a period as one day"). As this Court views the record in this case, in the context of the computer technology of 2018, this thesis has clearly been proven.

C. Application to the 2011 Plan

Having established the means by which we measure a violation of Article I, Section 5, we now apply that measure to the 2011 Plan. Doing so, it is clear, plain, and palpable that the 2011 Plan subordinates the traditional redistricting criteria in the service of partisan advantage, and thereby deprives Petitioners of their state constitutional right to free and equal elections. *See West Mifflin Area School District,* 4 A.3d at 1048. Indeed, the compelling expert statistical evidence presented before the Commonwealth Court, in combination with and illustrated by an examination of the Plan itself and the remainder of the evidence presented below, demonstrates that the Plan cannot plausibly be directed at drawing equally populous, compact, and contiguous districts which divide political subdivisions only as necessary to ensure equal population.

Perhaps the most compelling evidence concerning the 2011 Plan derives from Dr. Chen's expert testimony. As detailed above, Dr. Chen created two sets of 500

computer-simulated Pennsylvania redistricting plans, the first of which – Simulated Set 1 – employed the traditional redistricting criteria of population equality, compactness, contiguousness, and political-subdivision integrity – *i.e.*, a simulation of the potential range of redistricting plans attempting to apply the traditional redistricting criteria. Dr. Chen's Simulated Set 1 plans achieved population equality and contiguity; had a range of Reock Compactness Scores from approximately .31 to .46, which was significantly more compact than the 2011 Plan's score of .278; and had a range of Popper-Polsby Compactness Scores from approximately .29 to .35, which was significantly more compact than the 2011 Plan's score of .164. Further, his simulated plans generally split between 12-14 counties and 40-58 municipalities, in sharp contrast to the 2011 Plan's far greater 28 county splits and 68 municipality splits. In other words, all of Dr. Chen's Simulated Set 1 plans, which were, again, a simulation of the potential range of redistricting plans attempting to apply the traditional redistricting criteria, were more compact and split fewer political subdivisions than the 2011 Plan, establishing that a process satisfying these traditional criteria would not lead to the 2011 Plan's adoption. Thus, Dr. Chen unsurprisingly opined that the 2011 Plan subordinated the goals of compactness and political-subdivision integrity to other considerations.[74] Dr. Chen's testimony in this regard establishes that the 2011 Plan did not primarily consider, much less endeavor to satisfy, the traditional redistricting criteria.[75]

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[74] Dr. Chen also credibly rebutted the notion that the 2011 Plan's outlier status derived from a hypothetical attempt to protect congressional incumbents – which attempt still, in any event, subordinated the traditional redistricting factors to others – or an attempt to establish the 2011 Plan's majority African-American district.

[75] Indeed, the advent of advanced technology and increased computing power underlying Dr. Chen's compelling analysis shows such technology need not be employed, as the record shows herein, for illicit partisan gerrymandering. As discussed above, such tools will, just as powerfully, aid the legislature in performing its redistricting function in comportment with traditional redistricting factors and their constituents' (continued…)

Dr. Chen's testimony in this regard comports with a lay examination of the Plan, which reveals tortuously drawn districts that cause plainly unnecessary political-subdivision splits. In terms of compactness, a rudimentary review reveals a map comprised of oddly shaped, sprawling districts which wander seemingly arbitrarily across Pennsylvania, leaving 28 counties, 68 political subdivisions, and numerous wards, divided among as many as five congressional districts, in their wakes. Significantly, these districts often rend municipalities from their surrounding metropolitan areas and quizzically divide small municipalities which could easily be incorporated into single districts without detriment to the traditional redistricting criteria. As Dr. Kennedy explained below, the 7th Congressional District, pictured above, has been referred to as resembling "Goofy kicking Donald Duck," and is perhaps chief among a number of rivals in this regard, ambling from Philadelphia's suburbs in central Montgomery County, where it borders four other districts, south into Delaware County, where it abuts a fifth, then west into Chester County, where it abuts another district and travels northwest before jutting out in both northerly and southerly directions into Berks and Lancaster Counties. Indeed, it is difficult to imagine how a district as Rorschachian and sprawling, which is contiguous in two locations only by virtue of a medical facility and a seafood/steakhouse, respectively, might plausibly be referred to as "compact." Moreover, in terms of political subdivision splits, the 7th Congressional District splits each of the five counties in its path and some 26 separate political subdivisions between multiple congressional districts. In other words, the 7th Congressional District is itself responsible for 17% of the 2011 Plan's county splits and 38% of its municipality splits.

(…continued)
constitutional rights, as well as aiding courts in their evaluations of whether the legislature satisfied its obligations in this regard.

The 7th Congressional District, however, is merely the starkest example of the 2011 Plan's overall composition. As pictured above, and as discussed below, many of the 2011 Plan's congressional districts similarly sprawl through Pennsylvania's landscape, often contain "isthmuses" and "tentacles," and almost entirely ignore the integrity of political subdivisions in their trajectories.[76] Although the 2011 Plan's odd shapes and seemingly arbitrary political subdivision splits are not themselves sufficient to conclude it is not predicated on the traditional redistricting factors, Dr. Chen's cogent analysis confirms that these anomalous shapes are neither necessary to, nor within the ordinary range of, plans generated with solicitude toward, applying traditional redistricting considerations.

The fact that the 2011 Plan cannot, as a statistical matter, be a plan directed at complying with traditional redistricting requirements is sufficient to establish that it violates the Free and Equal Elections Clause. Nevertheless, we acknowledge the multitude of evidence introduced in the Commonwealth Court showing that its deviation from these traditional requirements was in service of, and effectively works to, the unfair partisan advantage of Republican candidates in future congressional elections and, conversely, dilutes Petitioners' power to vote for congressional representatives who represent their views. Dr. Chen explained that, while his simulated plans created a range of up to 10 safe Republican districts with a mean-median vote gap of 0 to 4%, the 2011 Plan creates 13 safe Republican districts with a mean-median vote gap of 5.9%.

[76] Indeed, the bulk of the 2011 Plan's districts make then-Massachusetts Governor Elbridge Gerry's eponymous 1812 partisan redistricting plan, criticized at the time for its salamander-like appearance – hence, "Gerry-mander" – and designed to dilute extant Federalist political power, appear relatively benign in comparison. *See generally* Jennifer Davis, "Elbridge Gerry and the Monstrous Gerrymander," https://blogs.loc.gov/law/2017/02/elbridge-gerry-and-the-monstrous-gerrymander (Feb. 10, 2017).

Dr. Chen also credibly rejected the notion that the 2011 Plan's outlier status in this regard was attributable to an attempt to account for Pennsylvania's political geography, to protect incumbent congresspersons, or to establish the 2011 Plan's majority-African American district. Indeed, he explicitly concluded that the traditional redistricting criteria were jettisoned in favor of unfair partisan gain. Dr. Warshaw's testimony similarly detailed how the 2011 Plan not only preserves the modest natural advantage, or vote efficiency gap, in favor of Republican congressional candidates relative to Republicans' statewide vote share – which owes to the fact that historically Democratic voters tend to self-sort into metropolitan areas and which he testified, until the 2011 Plan, was "never far from zero" percent – but also creates districts that increase that advantage to between 15 to 24% relative to statewide vote share. In other words, in its disregard of the traditional redistricting factors, the 2011 Plan consistently works toward and accomplishes the concentration of the power of historically-Republican voters and, conversely, the corresponding dilution of Petitioners' power to elect their chosen representatives.

Indeed, these statistical analyses are illustrated to some degree by Dr. Kennedy's discussion of the 2011 Plan's particulars. Dr. Kennedy, for example, explained that, at the district-by-district level, the 2011 Plan's geospatial oddities and divisions of political subdivisions and their wards effectively serve to establish a few overwhelmingly Democratic districts and a large majority of less strong, but nevertheless likely Republican districts. For example, the 1st Congressional District, beginning in Northeast Philadelphia and largely tracking the Delaware River, occasionally reaches "tentacles" inland, incorporating Chester, Swarthmore, and other

historically Democratic regions.[77] Contrariwise, although the 3rd Congressional District formerly contained traditionally-Democratic Erie County in its entirety, the 2011 Plan's 3rd and 5th Congressional Districts now divide that constituency, making both districts likely to elect Republican candidates.[78] Additionally, it is notable that the 2011 Plan's accommodation for Pennsylvania's loss of one congressional seat took the form of redrawing its 12th Congressional District, a 120-mile-long district that abuts four others and pitted two Democratic incumbent congressmen against one another in the next cycle's primary election, after which the victor of that contest lost to a Republican candidate who gleaned 51.2% of the general election vote. These geographic idiosyncrasies, the evidentiary record shows, served to strengthen the votes of voters inclined to vote for Republicans in congressional races and weaken those inclined to vote for Democrats.

In sum, we conclude that the evidence detailed above and the remaining evidence of the record as a whole demonstrates that Petitioners have established that the 2011 Plan subordinates the traditional redistricting criteria in service of achieving unfair partisan advantage, and, thus, violates the Free and Equal Elections Clause of the Pennsylvania Constitution. Such a plan, aimed at achieving unfair partisan gain, undermines voters' ability to exercise their right to vote in free and "equal" elections if the term is to be interpreted in any credible way.

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[77] Notably, in the last three congressional elections, voters in the 1st Congressional District elected a Democratic candidate with 84.9%, 82.8%, and 82.2% of the vote, respectively.

[78] In the 2012 and 2014 congressional elections, voters in the 3rd Congressional District elected a Republican candidate with 57.1% and 60.6% of the vote, respectively, and, by 2016, the Republican candidate ran unopposed.

An election corrupted by extensive, sophisticated gerrymandering and partisan dilution of votes is not "free and equal." In such circumstances, a "power, civil or military," to wit, the General Assembly, has in fact "interfere[d] to prevent the free exercise of the right of suffrage." Pa. Const. art. 1, § 5.

VI. Remedy

Having set forth why the 2011 Plan is constitutionally infirm, we turn to our January 22, 2018 Order which directed a remedy for the illegal plan. Therein, our Court initially invited our sister branches – the legislative and executive branches – to take action, through the enactment of a remedial congressional districting plan; however, recognizing the possibility that the legislature and executive would be unwilling or unable to act, we indicated in our Order that, in that eventuality, we would fashion a judicial remedial plan:

> Second, should the Pennsylvania General Assembly choose to submit a congressional districting plan that satisfies the requirements of the Pennsylvania Constitution, it shall submit such plan for consideration by the Governor on or before **February 9, 2018**. If the Governor accepts the General Assembly's congressional districting plan, it shall be submitted to this Court on or before **February 15, 2018**.
>
> Third, should the General Assembly not submit a congressional districting plan on or before **February 9, 2018**, or should the Governor not approve the General Assembly's plan on or before **February 15, 2018**, this Court shall proceed expeditiously to adopt a plan based on the evidentiary record developed in the Commonwealth Court. In anticipation of that eventuality, the parties shall have the opportunity to be heard; to wit, all parties and intervenors may submit to the Court proposed remedial districting plans on or before **February 15, 2018**.

Order, 1/22/18, at ¶¶ "Second" and "Third."

As to the initial and preferred path of legislative and executive action, we note that the primary responsibility and authority for drawing federal congressional legislative districts rests squarely with the state legislature. *See* U.S. Const. art. I, § 4; *Butcher,* 216 A.2d at 458 ("[W]e considered it appropriate that the Legislature, the organ of government with the primary responsibility for the task of reapportionment, be afforded an additional opportunity to enact a constitutional reapportionment plan."); *Growe v. Emison*, 507 U.S. 25, 34 (1993) (stating that "the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts"); *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978); *Reynolds*, 377 U.S. at 586. Thus, in recognizing this foundational tenet, but also considering both the constitutionally infirm districting plan and the imminent approaching primary elections for 2018, we requested that these sister branches enact legislation regarding a new districting plan, providing a deadline to do so approximately three weeks from the date of our Order. Indeed, if the legislature and executive timely enact a remedial plan and submit it to our Court, our role in this matter concludes, unless and until the constitutionality of the new plan is challenged.

When, however, the legislature is unable or chooses not to act, it becomes the judiciary's role to determine the appropriate redistricting plan. Specifically, while statutes are cloaked with the presumption of constitutionality, it is the duty of this Court, as a co-equal branch of government, to declare, when appropriate, certain acts unconstitutional. Indeed, matters concerning the proper interpretation and application of our Commonwealth's organic charter are at the end of the day for this Court — and only this Court. *Pap's II*, 812 A.2d at 611 (noting Supreme Court has final word on meaning of Pennsylvania Constitution). Further, our Court possesses broad authority to craft

meaningful remedies when required. Pa. Const. art. V, §§ 1, 2, 10; 42 Pa.C.S. § 726 (granting power to "enter a final order or otherwise cause right and justice to be done").

Thus, as an alternative to the preferable legislative route for creating a remedial redistricting plan, in our Order, we considered the possibility that the legislature and Governor would not agree upon legislation providing for a remedial plan, and, thus, we allowed for the prospect of a judicially-imposed remedial plan. Our narrowly crafted contingency, which afforded all parties and Intervenors a full and fair opportunity to submit proposed remedial plans for our consideration, was well within our judicial authority, and supported by not only our Constitution and statutes as noted above, but by Commonwealth and federal precedent, as well as similar remedies provided by the high courts of other states acting when their sister branches fail to remedy an unconstitutional plan.

Perhaps the clearest balancing of the legislature's primary role in districting against the court's ultimate obligation to ensure a constitutional plan was set forth in our decision in *Butcher*. In that matter, our Court, after concluding a constitutionally infirm redistricting of both houses of the General Assembly resulted in an impairment of our citizens' right to vote, found it prudent to allow the legislature an additional opportunity to enact a legal remedial plan. *Butcher*, 216 A.2d at 457-58. Yet, we also made clear that a failure to act by the General Assembly by a date certain would result in judicial action "to ensure that the individual voters of this Commonwealth are afforded their constitutional right to cast an equally weighted vote." *Id*. at 458-59. After the deadline passed without enactment of the required statute, we fashioned affirmative relief, after the submission of proposals by the parties. *Id*. at 459. Our Order in this matter, cited above, is entirely consistent with our remedy in *Butcher*. *See also Mellow v. Mitchell*, 607 A.2d 204, 205-06 (Pa. 1992) (designating master in wake of legislative failure to

remedy redistricting of seats for the Pennsylvania House of Representatives which was held to be unconstitutional).

Our approach is also buttressed by, and entirely consistent with, the United States Supreme Court's landmark ruling in *Baker v. Carr*, 369 U.S. 186 (1962), and more recent decisions from the United States Supreme Court which make concrete the state judiciary's ability to formulate a redistricting plan, when necessary. *See, e.g., Growe*; *Scott v. Germano*, 381 U.S. 407 (1965) (*per curiam*). As described by the high Court in *Wise*, "Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the 'unwelcome obligation,' *Conner v. Finch*, [431 U.S. 407, 415 (1977)], of the federal court to devise and impose a reapportionment plan pending later legislative action." *Wise,* 437 U.S. at 540. The same authority to act is inherent in the state judiciary.

Specifically, in *Growe*, the United States Supreme Court was faced with the issue of concurrent jurisdiction between a federal district court and the Minnesota judiciary regarding Minnesota's state legislative and federal congressional districts. The high Court, in a unanimous decision authored by Justice Scalia, specifically recognized the role of the state judiciary in crafting relief: "In the reapportionment context, the Court has required federal judges to defer [to] consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself." *Growe*, 507 U.S. at 33 (emphasis original). As an even more pointed endorsement of the state judiciary's ability to craft appropriate relief – indeed, encouraging action by the state judiciary – the *Growe* Court quoted its prior decision in *Scott*:

> The power of the judiciary of a State to require valid reapportionment *or to formulate a valid redistricting plan* has not only been recognized by this Court but appropriate

> action by the States in such cases has been specifically encouraged.

Id. at 33 (quoting *Scott*, 381 U.S. at 409) (emphasis added).

Thus, the *Growe* Court made clear the important role of the state judiciary in ensuring valid reapportionment schemes, not only through an assessment of constitutionality, but also through the enactment of valid legislative redistricting plans. Pursuant to *Growe,* therefore, although the legislature has initial responsibility to act in redistricting matters, that responsibility can shift to the state judiciary if a state legislature is unable or unwilling to act, and then to the federal judiciary *only* once the state legislature or state judiciary have not undertaken to remedy a constitutionally infirm plan.

Finally, virtually every other state that has considered the issue looked, when necessary, to the state judiciary to exercise its power to craft an affirmative remedy and formulate a valid reapportionment plan. *See, e.g., People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1229 (Colo. 2003) (offering, in addressing the issue of how frequently the legislature can draw congressional districts, that United States Supreme Court is clear that states have the primary responsibility in congressional redistricting, and that federal courts must defer to the states, including state courts, especially in matters turning on state constitution); *Hippert v. Richie*, 813 N.W.2d 374, 378 (Minn. 2012) (explaining that, as legislature and Governor failed to enact a legislative redistricting plan by deadline, it was up to the state judiciary to prepare a valid legislative plan and order its adoption, citing *Growe* as "precisely the sort of state judicial supervision of redistricting" that the United States Supreme Court has encouraged); *Brown v. Butterworth*, 831 So.2d 683, 688-89 (D.C. App. Fla 2002) (emphasizing constitutional power of state judiciary to require valid reapportionment); *Stephenson v. Bartlett*, 562 S.E.2d 377, 384 (N.C. 2002) (noting that it is only the Supreme Court of North Carolina that can answer state

constitutional questions with finality, and that, "within the context of state redistricting and reapportionment disputes, it is well within the 'power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan'" (quoting *Germano*, 381 U.S. at 409)); *Wilson v. Fallin*, 262 P.3d 741, 745 (Okla. 2013) (holding that three decades after *Baker v. Carr*, the United States Supreme Court in *Growe* was clear that state courts may exercise jurisdiction over legislative redistricting and that federal courts should defer to state action over questions of state redistricting by state legislatures and state courts); *Alexander v. Taylor*, 51 P.3d 1204, 1208 (Okla. 2002) ("It is clear to us that [*Baker* and *Growe*], . . . stand for the proposition that Art. 1, § 4 does not prevent either federal or state courts from resolving redistricting disputes in a proper case."); *Boneshirt v. Hazeltine*, 700 N.W.2d 746, 755 (S.D. 2005) (Konenkamp, J., concurring) (opining that the Supreme Court recognized that "[t]he power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged" and that both "[r]eason and experience argue that courts empowered to invalidate an apportionment statute which transgresses constitutional mandates cannot be left without the means to order appropriate relief."); *Jensen v. Wisconsin Board of Elections*, 639 N.W.2d 537, 542 (Wis. 2002) (*per curiam*) (noting deference of federal courts regarding "consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself" and that "any redistricting plan judicially 'enacted' by a state court (just like one enacted by a state legislature) would be entitled to presumptive full-faith-and-credit legal effect in federal court."); *but see Maudlin v. Branch*, 866 So.2d 429 (Miss. 2003) (finding, under Mississippi statute, no Mississippi court had jurisdiction to draw plans for congressional districting).

Thus, it is beyond peradventure that it is the legislature, in the first instance, that is primarily charged with the task of reapportionment. However, the Pennsylvania Constitution, statutory law, our Court's decisions, federal precedent, and case law from our sister states, all serve as a bedrock foundation on which stands the authority of the state judiciary to formulate a valid redistricting plan when necessary. Our prior Order, and this Opinion, are entirely consistent with such authority.[79]

VII. Conclusion

For all of these reasons, the Court entered its Order of January 22, 2018, striking as unconstitutional the Congressional Redistricting Act of 2011, and setting forth a process assuring that a remedial redistricting plan would be in place in time for the 2018 Primary Elections.

Justices Donohue, Dougherty and Wecht join the opinion.

Justice Baer files a concurring and dissenting opinion.

Chief Justice Saylor files a dissenting opinion in which Justice Mundy joins.

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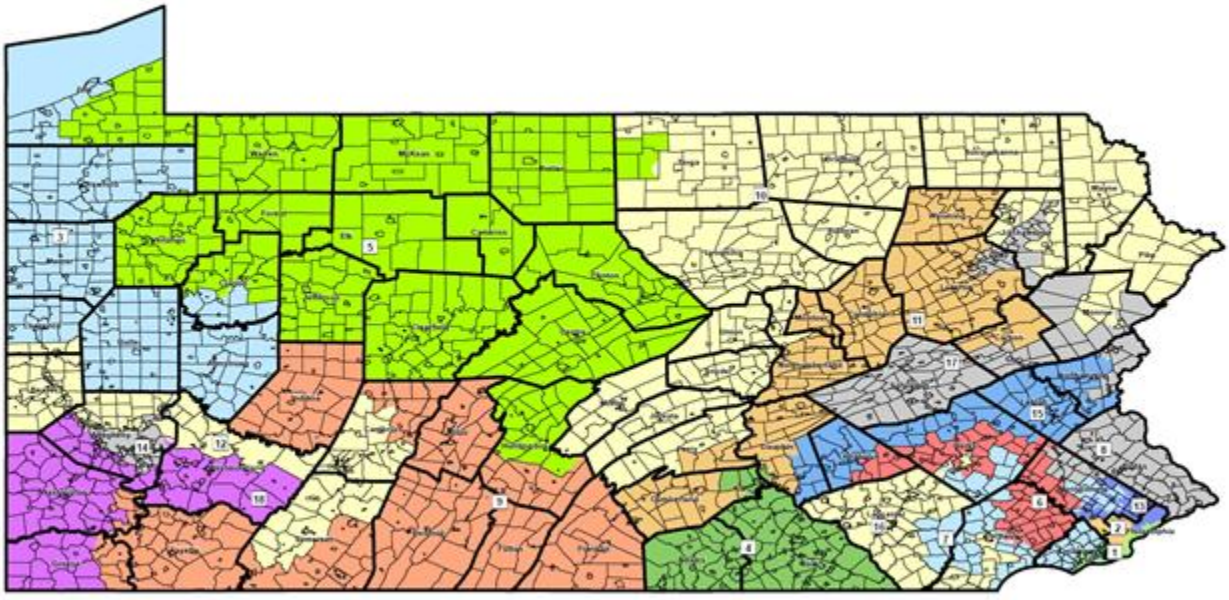
[79] Justice Mundy, in her dissent, seemingly reads the federal Elections Clause in a vacuum, and, to the extent that she suggests an inability, or severely circumscribed ability, of state courts generally, or of our Court *sub judice*, to act, this approach has not been embraced or suggested by the United States Supreme Court or the Pennsylvania Supreme Court for over a half century. Indeed, to read the federal Constitution in a way that limits our Court in its power to remedy violations of our Commonwealth's Constitution is misguided and directly contrary to bedrock notions of federalism embraced in our federal Constitution, and evinces a lack of respect for state rights. In sum, and as fully set forth above, in light of interpretations of the Elections Clause like that found in *Growe* – which encourage federal courts to defer to state redistricting efforts, including congressional redistricting, and expressly permit the judicial creation of redistricting maps when a legislature fails to act – as well as essential jurisprudential concepts of comity and federalism, it is beyond peradventure that state courts possess the authority to grant equitable remedies for constitutional violations, including the drawing of congressional maps (of course, subject to federal safeguards and, principally, the Voting Rights Act).

Justice Mundy files a dissenting opinion.

Appendix A

Pennsylvania Congressional Districts
Act 131 of 2011



SOURCE: http://www.redistricting.state.pa.us/Resources/GISData/Districts/Congressional/2011/PDF/2011-PA-Congressional-Map.pdf)

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464 MD 2021 and additional consolidated case(s)

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Carol Ann Carter, Monica Parrilla, Rebecca Poyourow, William Tung, Roseanne Milazzo, Burt Siegel, Susan Cassanelli, Lee Cassanelli, Lynn Wachman, Michael Guttman, Maya Fonkeu, Brady Hill, Mary Ellen Balchunis, Tom DeWall, Stephanie McNulty and Janet Temin, Petitioners	:	**CASES CONSOLIDATED**
v.	:	No. 464 M.D. 2021
Veronica Degraffenreid, in her official capacity as the Acting Secretary of the Commonwealth of Pennsylvania; Jessica Mathis, in her official capacity as Director for the Pennsylvania Bureau of Election Services and Notaries, Respondents	:	
Philip T. Gressman, Ron Y. Donagi; Kristopher R. Tapp; Pamela Gorkin; David P. Marsh; James L. Rosenberger; Amy Myers; Eugene Boman; Gary Gordon; Liz McMahon; Timothy G. Feeman; and Garth Isaak, Petitioners	:	
v.	:	No. 465 M.D. 2021
Veronica Degraffenreid, in her official capacity as the Acting Secretary of the Commonwealth of Pennsylvania; Jessica Mathis, in her official capacity as Director for the Pennsylvania Bureau of Election Services and Notaries, Respondents	:	

APPLICATION TO INTERVENE
OF DRAW THE LINES PA APPLICANTS

Pursuant to Rule 1531(b) of the Pennsylvania Rules of Appellate Procedure, applicants Adam Dusen, Sara Stroman, Mike Walsh, Myra Forrest, Athan Biss, Michael Skros, Susan Wood, Jean Handley, Daniel Mallinson, Jesse Stowell, Sandra Strauss, Rick Bryant, Jeffrey Cooper, Kyle Hynes, Priscilla McNulty and Joseph Amodei, each of whom is affiliated in some manner with the Draw the Lines PA project, (the "DTL Applicants") hereby apply to intervene in the above-captioned proceeding. In support of this application, the DTL Applicants state as follows:

1. On December 20, 2021, this Court ordered, *inter alia*, that any applications to intervene in this proceeding shall be filed by December 31, 2021, and that any party to this proceeding who wishes to submit to the Court for its consideration a proposed 17-district congressional reapportionment plan consistent with the results of the 2020 Census shall file the proposed plan by January 28, 2022.

2. The DTL Applicants are citizens of the Commonwealth of Pennsylvania and are registered to vote in Pennsylvania. Applicants reside in the following congressional districts:

Applicant Name	**Municipality**	**County of Residence**	**Congressional District**
Adam Dusen	Buckingham Township	Bucks	1

Applicant Name	Municipality	County of Residence	Congressional District
Sara Stroman	Philadelphia	Philadelphia	3
Mike Walsh	Upper Merion Township	Montgomery	4
Myra Forrest	New Hanover Township	Montgomery	4
Athan Biss	Lower Merion Township	Montgomery	5
Michael Skros	Westtown Township	Chester	6
Susan Wood	West Cornwall Township	Lebanon	9
Jean Handley	Susquehanna Township	Dauphin	10
Daniel Mallinson	Middletown Borough	Dauphin	10
Jesse Stowell	Harrisburg City	Dauphin	10
Sandra Strauss	Harrisburg City	Dauphin	10

Applicant Name	Municipality	County of Residence	Congressional District
Rick Bryant	State College Borough	Centre	12
Jeffrey Cooper	Gettysburg Borough	Adams	13
Kyle Hynes	Pittsburgh	Allegheny	18
Priscilla McNulty	Pittsburgh	Allegheny	18
Joseph Amodei	Wilkinsburg Borough	Allegheny	18

3. Applicants will suffer a detriment if the General Assembly and the Governor fail to enact a congressional reapportionment plan in a timely manner because it will be impossible for the 2022 primary and general elections to proceed on time. Among other things, Pennsylvania's current congressional map is configured for 18 districts, but, based on census data, Pennsylvania will be allocated only 17 members in the next Congress. In addition, at least applicants Dusen, Stroman, Walsh, Forrest, Biss, Skros, Handley, Mallinson, Stowell and Strauss reside in districts that are overpopulated relative to other districts in the state and, therefore, would be deprived of the right to substantially equal representation, as guaranteed under the U.S. Constitution and the Pennsylvania Constitution. *See, e.g., League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018)

(concluding that the text of the Pennsylvania Constitution "clearly and unambiguously, and in the broadest possible terms," requires that "all aspects of the electoral process . . . [be] conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government.").

4. In addition to being registered to vote in Pennsylvania, each applicant has demonstrated an interest in congressional maps that are created through a fair and transparent nonpartisan process. Each applicant is affiliated with Draw the Lines PA ("DTL"), a statewide project of the Committee of Seventy, a 117-year old nonpartisan civic leadership organization that advances representative, ethical and effective government in Philadelphia and Pennsylvania through citizen engagement and public policy advocacy. *See* https://drawthelinespa.org/ (last accessed December 29, 2021).

5. Launched in 2018, DTL is a nonpartisan education and engagement initiative that has attempted to demonstrate that ordinary Pennsylvanians, when given the same digital tools and data used in the political redistricting process, can, through a fair and transparent process, produce voting districts that are objectively better by standard mapping metrics. *Id*.

6. Three years ago, DTL held the first of five public mapping competitions. At the completion of the final DTL competition, DTL formed the

Citizen Map Corps, which is comprised of citizen mappers from throughout the Commonwealth. Together with DTL staff and a nonpartisan DTL Steering Committee that includes esteemed Pennsylvania civic, academic and business leaders, the Citizen Map Corps created and published the "Pennsylvania Citizens' Map" in September 2021. The nonpartisan Citizens' Map is a 17-district congressional map that aggregates what over 7,200 Pennsylvanians, representing 40 of Pennsylvania's 67 counties, collectively mapped. The map is superior when measured according to legal and constitutional metrics, including compactness, contiguity, population equality and limiting jurisdictional splits, *see League of Women Voters*, 178 A.3d at 742, as well as compliance with the Voting Rights Act and other metrics important to Pennsylvanians, including competitiveness, partisan fairness, and representation of communities of interest.

7. DTL presented The Citizens' Map to leadership in the Pennsylvania State Senate and the Pennsylvania House of Representatives as a potential starting point for the General Assembly's reapportionment work.

8. Each of the DTL Applicants either serves as a member of the Citizen Map Corps or as a member of the DTL Steering Committee.

9. The DTL Applicants respectfully submit this application for intervention so they can submit to this Court for its consideration The Citizens' Map,

representing the efforts of thousands of Pennsylvania citizens over a period of many months.

10. Pennsylvania Rule of Appellate Procedure 1531(b) allows a person not named as a respondent in an original jurisdiction petition for review to seek leave to intervene by filing an application to intervene.

11. The DTL Applicants satisfy the requirements of Pa. R. Civ. P. 2327 and 2329, in that applicants could have joined as original parties in the above-captioned actions, the determination of such actions may affect legally enforceable interests of the applicants, and applicants' interests are not already adequately represented.

12. Additionally, the DTL Applicants meet Pennsylvania's test for intervention, as they have shown a "substantial, direct, and immediate" interest in the outcome of these proceedings. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 280 (Pa. 1975). An interest is substantial where the proposed intervenor's concern exceeds "the common interest of all citizens in procuring obedience to the law." *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016). A direct interest is one which will cause harm to the party's interest, and an immediate interest is one in which the "causal connection is not remote or speculative." *Id.* This is particularly true particularly with respect to applicants Dusen, Stroman, Walsh, Forrest, Biss, Skros, Handley, Mallinson, Stowell and

Strauss, who reside in districts that are overpopulated relative to other districts in the state.

13. Pursuant to Pa.R.Civ.P. 2238, attached as Exhibit "A" hereto is the proposed Petition for Review of the DTL Intervenors. This proposed Petition joins in and adopts by reference the original petition of petitioners Carol Ann Carter et al. which commenced these proceedings.

WHEREFORE, applicants Adam Dusen, Sara Stroman, Mike Walsh, Myra Forrest, Athan Biss, Michael Skros, Susan Wood, Jean Handley, Daniel Mallinson, Jesse Stowell, Sandra Strauss, Rick Bryant, Jeffrey Cooper, Kyle Hynes, Priscilla McNulty and Joseph Amodei (the "DTL Applicants") respectfully request that this Court grant their application to intervene and allow them to submit their proposed 17-district congressional reapportionment plan consistent with the results of the 2020 Census on or before January 28, 2022.

Dated: December 30, 2021

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

By: */s/ John P. Lavelle, Jr.*

John P. Lavelle, Jr. (Pa. ID No. 54279)
1701 Market Street
Philadelphia, PA 19103-2921
+1.215.963.5000
john.lavelle@morganlewis.com

Counsel for the DTL Applicants

VERIFICATION

I, Jeffrey Cooper, am authorized to make this verification on behalf of applicants Adam Dusen, Sara Stroman, Mike Walsh, Myra Forrest, Athan Biss, Michael Skros, Susan Wood, Jean Handley, Daniel Mallinson, Jesse Stowell, Sandra Strauss, Rick Bryant, Jeffrey Cooper, Kyle Hynes, Priscilla McNulty and Joseph Amodei. I verify that the statements made in the foregoing Application for Intervention are true and correct to the best of my knowledge, information and belief. I understand the statements made herein are subject to the penalties of perjury of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Signed this 30th day of December, 2021.

Jeffrey Cooper

Jeffrey Cooper

CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing of confidential information and documents differently than non-confidential information and documents.

/s/ John P. Lavelle, Jr.
John P. Lavelle, Jr. (Pa. ID No. 54279)

EXHIBIT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Carol Ann Carter, Monica Parrilla, Rebecca Poyourow, William Tung, Roseanne Milazzo, Burt Siegel, Susan Cassanelli, Lee Cassanelli, Lynn Wachman, Michael Guttman, Maya Fonkeu, Brady Hill, Mary Ellen Balchunis, Tom DeWall, Stephanie McNulty and Janet Temin, Petitioners	:	**CASES CONSOLIDATED** **[PROPOSED] PETITION FOR REVIEW OF DTL INTERVENORS**
v.	:	No. 464 M.D. 2021
Veronica Degraffenreid, in her official capacity as the Acting Secretary of the Commonwealth of Pennsylvania; Jessica Mathis, in her official capacity as Director for the Pennsylvania Bureau of Election Services and Notaries, Respondents	:	
Philip T. Gressman, Ron Y. Donagi; Kristopher R. Tapp; Pamela Gorkin; David P. Marsh; James L. Rosenberger; Amy Myers; Eugene Boman; Gary Gordon; Liz McMahon; Timothy G. Feeman; and Garth Isaak, Petitioners	:	
v.	:	No. 465 M.D. 2021
Veronica Degraffenreid, in her official capacity as the Acting Secretary of the Commonwealth of Pennsylvania; Jessica Mathis, in her official capacity as Director for the Pennsylvania Bureau of Election Services and Notaries, Respondents	:	

Adam Dusen, Sara Stroman, Mike Walsh, Myra Forrest, Athan Biss, Michael Skros, Susan Wood, Jean Handley, Daniel Mallinson, Jesse Stowell, Sandra Strauss, Rick Bryant, Jeffrey Cooper, Kyle Hynes, Priscilla McNulty and Joseph Amodei, Intervenors/Applicants	:	
v.	:	No.
Veronica Degraffenreid, in her official capacity as the Acting Secretary of the Commonwealth of Pennsylvania; Jessica Mathis, in her official capacity as Director for the Pennsylvania Bureau of Election Services and Notaries, Respondents	:	

NOTICE TO PLEAD

To: Respondents.

You are hereby notified to file a written response to the enclosed Petition for Review Of DTL Intervenors within thirty (30) days from service hereof or a judgment may be entered against you.

Dated: December 30, 2021

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

By: */s/ John P. Lavelle, Jr.*

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Counsel for the DTL Intervenors

PROPOSED PETITION FOR REVIEW
OF DTL INTERVENORS

Proposed Intervenors-Petitioners, Adam Dusen, Sara Stroman, Mike Walsh, Myra Forrest, Athan Biss, Michael Skros, Susan Wood, Jean Handley, Daniel Mallinson, Jesse Stowell, Sandra Strauss, Rick Bryant, Jeffrey Cooper, Kyle Hynes, Priscilla McNulty and Joseph Amodei, each of whom is affiliated in some manner with the Draw the Lines PA project (collectively referred to as the "DTL Intervenors"), by and through their undersigned counsel, respectfully join the petition of Carol Ann Carter, Monica Parrilla, Rebecca Poyourow, William Tung, Roseanne Milazzo, Burt Siegel, Susan Cassanelli, Lee Cassanelli, Lynn Wachman, Michael Guttman, Maya Fonkeu, Brady Hill, Mary Ellen Balchunis, Tom Dewall, Stephanie McNulty and Janet Temin filed on December 17, 2021 (the "Original Petition") in the above-referenced consolidated litigation, and in further support thereof, aver as follows:

1. The DTL Intervenors are citizens of the Commonwealth of Pennsylvania and are registered to vote in Pennsylvania. The Intervenors reside in the following congressional districts:

Intervenor's Name	**Municipality**	**County of Residence**	**Congressional District**
Adam Dusen	Buckingham Township	Bucks	1
Sara Stroman	Philadelphia	Philadelphia	3
Mike Walsh	Upper Merion Township	Montgomery	4
Myra Forrest	New Hanover Township	Montgomery	4
Athan Biss	Lower Merion Township	Montgomery	5
Michael Skros	Westtown Township	Chester	6
Susan Wood	West Cornwall Township	Lebanon	9
Jean Handley	Susquehanna Township	Dauphin	10
Daniel Mallinson	Middletown Borough	Dauphin	10
Jesse Stowell	Harrisburg City	Dauphin	10

Intervenor's Name	Municipality	County of Residence	Congressional District
Sandra Strauss	Harrisburg City	Dauphin	10
Rick Bryant	State College Borough	Centre	12
Jeffrey Cooper	Gettysburg Borough	Adams	13
Kyle Hynes	Pittsburgh	Allegheny	18
Priscilla McNulty	Pittsburgh	Allegheny	18
Joseph Amodei	Wilkinsburg Borough	Allegheny	18

2. The DTL Intervenors will suffer a detriment if the General Assembly and the Governor fail to enact a congressional reapportionment plan in a timely manner because it will be impossible for the 2022 primary and general elections to proceed on time. Among other things, Pennsylvania's current congressional map is configured for 18 districts, but, based on census data, Pennsylvania will be allocated only 17 members in the next Congress. In addition, at least applicants Dusen, Stroman, Walsh, Forrest, Biss, Skros, Handley, Mallinson, Stowell and Strauss reside in districts that are overpopulated relative to other districts in the state and, therefore, would be deprived of the right to substantially equal representation, as guaranteed

under the U.S. Constitution and the Pennsylvania Constitution. *See, e.g., League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018) (concluding that the text of the Pennsylvania Constitution "clearly and unambiguously, and in the broadest possible terms," requires that "all aspects of the electoral process . . . [be] conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government.").

3. In addition to being registered to vote in Pennsylvania, each DTL Intervenor has demonstrated an interest in congressional maps that are created through a fair and transparent nonpartisan process. Each intervenor is affiliated with Draw the Lines PA ("DTL"), a statewide project of the Committee of Seventy, a 117-year old nonpartisan civic leadership organization that advances representative, ethical and effective government in Philadelphia and Pennsylvania through citizen engagement and public policy advocacy. *See* https://drawthelinespa.org/ (last accessed December 29, 2021).

4. Launched in 2018, DTL is a nonpartisan education and engagement initiative that has attempted to demonstrate that ordinary Pennsylvanians, when given the same digital tools and data used in the political redistricting process, can, through a fair and transparent process, produce voting districts that are objectively better by standard mapping metrics. *Id*.

5. Three years ago, DTL held the first of five public mapping competitions. At the completion of the final DTL competition, DTL formed the Citizen Map Corps, which is comprised of citizen mappers from throughout the Commonwealth. Together with DTL staff and a nonpartisan DTL Steering Committee that includes esteemed Pennsylvania civic, academic and business leaders, the Citizen Map Corps created and published the "Pennsylvania Citizens' Map" in September 2021. The nonpartisan Citizens' Map is a 17-district congressional map that aggregates what over 7,200 Pennsylvanians, representing 40 of Pennsylvania's 67 counties, collectively mapped. The map is superior when measured according to legal and constitutional metrics, including compactness, contiguity, population equality and limiting jurisdictional splits, *see League of Women Voters*, 178 A.3d at 742, as well as compliance with the Voting Rights Act and other metrics important to Pennsylvanians, including competitiveness, partisan fairness, and representation of communities of interest.

6. DTL presented The Citizens' Map to leadership in the Pennsylvania State Senate and the Pennsylvania House of Representatives as a potential starting point for the General Assembly's reapportionment work.

7. Each of the DTL Intervenors either serves as a member of the Citizen Map Corps or as a member of the DTL Steering Committee.

8. Paragraphs 1 through 8 of the Original Petition are incorporated herein by reference as though fully set forth herein.

9. Paragraphs 11 through 48 of the Original Petition are incorporated herein by reference as though fully set forth herein.

10. Paragraphs 50 through 54 of the Original Petition are incorporated herein by reference as though fully set forth herein.

11. Paragraphs 56 through 59 of the Original Petition are incorporated herein by reference as though fully set forth herein.

12. Paragraphs 61 through 63 of the Original Petition are incorporated herein by reference as though fully set forth herein.

PRAYER FOR RELIEF

WHEREFORE, the DTL Intervenors respectfully request that this Court:

a. Declare that the current configuration of Pennsylvania's congressional districts violates Article I, Section 5 of the Pennsylvania Constitution; Article I, Section 2 of the U.S. Constitution; and 2 U.S.C. § 2c.

b. Enjoin Respondents, their respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them, from implementing, enforcing, or giving any effect to Pennsylvania's current congressional district plan;

c. Adopt a new congressional district plan that complies with Article I, Section 5 of the Pennsylvania Constitution; Article I, Section 2 of the U.S. Constitution; and 2 U.S.C. § 2.

d. Award Petitioners their costs, disbursements, and reasonable attorneys' fees; and

e. Grant such other and further relief as the Court deems just and proper.

Dated: December 30, 2021

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

By: */s/ John P. Lavelle, Jr.*

John P. Lavelle, Jr. (Pa. ID No. 54279)
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Counsel for the DTL Intervenors

VERIFICATION

I, Jeffrey Cooper, am authorized to make this verification on behalf of intervenors Adam Dusen, Sara Stroman, Mike Walsh, Myra Forrest, Athan Biss, Michael Skros, Susan Wood, Jean Handley, Daniel Mallinson, Jesse Stowell, Sandra Strauss, Rick Bryant, Jeffrey Cooper, Kyle Hynes, Priscilla McNulty and Joseph Amodei. I verify that the statements made in the foregoing Petition are true and correct to the best of my knowledge, information and belief. I understand the statements made herein are subject to the penalties of perjury of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Signed this 30th day of December, 2021.	Jeffrey Cooper Jeffrey Cooper

CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing of confidential information and documents differently than non-confidential information and documents.

/s/ John P. Lavelle, Jr.
John P. Lavelle, Jr. (Pa. ID No. 54279)

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Carol Ann Carter, Monica Parrilla, Rebecca Poyourow, William Tung, Roseanne Milazzo, Burt Siegel, Susan Cassanelli, Lee Cassanelli, Lynn Wachman, Michael Guttman, Maya Fonkeu, Brady Hill, Mary Ellen Balchunis, Tom DeWall, Stephanie McNulty and Janet Temin, Petitioners	:	**CASES CONSOLIDATED**
v.	:	No. 464 M.D. 2021
Veronica Degraffenreid, in her official capacity as the Acting Secretary of the Commonwealth of Pennsylvania; Jessica Mathis, in her official capacity as Director for the Pennsylvania Bureau of Election Services and Notaries, Respondents	:	
Philip T. Gressman, Ron Y. Donagi; Kristopher R. Tapp; Pamela Gorkin; David P. Marsh; James L. Rosenberger; Amy Myers; Eugene Boman; Gary Gordon; Liz McMahon; Timothy G. Feeman; and Garth Isaak, Petitioners	:	
v.	:	No. 465 M.D. 2021
Veronica Degraffenreid, in her official capacity as the Acting Secretary of the Commonwealth of Pennsylvania; Jessica Mathis, in her official capacity as Director for the Pennsylvania Bureau of Election Services and Notaries, Respondents	:	

PROPOSED ORDER

PROPOSED ORDER

AND NOW, this ____ day of _____, 202_, upon consideration of the Proposed Intervenors-Petitioners' Application to Intervene, and any opposition thereto, it is hereby ORDERED that the Proposed Intervenors-Petitioners' Application is GRANTED and the Prothonotary shall file and docket their Petition for Review forthwith.

It is FURTHER ORDERED, that the Proposed Intervenors-Petitioners shall submit their proposed 17-district congressional reapportionment plan consistent with the results of the 2020 Census on or before January 28, 2022.

_____ J.

Received 12/30/2021 2:16:22 PM Commonwealth Court of Pennsylvania

Filed 12/30/2021 2:16:22 PM Commonwealth Court of Pennsylvania
464 MD 2021 and additional consolidated case(s)

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Carol Ann Carter, Monica Parrilla, Rebecca Poyourow, William Tung, Roseanne Milazzo, Burt Siegel, Susan Cassanelli, Lee Cassanelli, Lynn Wachman, Michael Guttman, Maya Fonkeu, Brady Hill, Mary Ellen Balchunis, Tom DeWall, Stephanie McNulty and Janet Temin, Petitioners	:	464 MD 2021
	:	465 MD 2021
v.	:	
Veronica Degraffenreid, in her official capacity as the Acting Secretary of the Commonwealth of Pennsylvania; Jessica Mathis, in her official capacity as Director for the Pennsylvania Bureau of Election Services and Notaries, Respondents		

PROOF OF SERVICE

I hereby certify that this 30th day of December, 2021, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Service

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	April Otterberg
Service Method:	First Class Mail
Service Date:	12/30/2021
Address:	353 N. Clark St Chicago, IL 60654
Phone:	312-840-8646

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Representing:	Petitioner	Amy Myers
	Petitioner	Amy Myers
	Petitioner	Brady Hill
	Petitioner	Burt Siegel
	Petitioner	Carol Ann Carter
	Petitioner	David P. Marsh
	Petitioner	David P. Marsh
	Petitioner	Eugene Boman
	Petitioner	Eugene Boman
	Petitioner	Garth Isaak
	Petitioner	Garth Isaak
	Petitioner	Gary Gordon
	Petitioner	Gary Gordon
	Petitioner	James L. Rosenberger
	Petitioner	James L. Rosenberger
	Petitioner	Janet Temin
	Petitioner	Kristopher R. Tapp
	Petitioner	Kristopher R. Tapp
	Petitioner	Lee Cassanelli
	Petitioner	Liz McMahon
	Petitioner	Liz McMahon
	Petitioner	Lynn Wachman
	Petitioner	Mary Ellen Balchunis
	Petitioner	Maya Fonkeu
	Petitioner	Michael Guttman
	Petitioner	Monica Parrilla
	Petitioner	Pamela Gorkin
	Petitioner	Pamela Gorkin
	Petitioner	Philip T. Gressman
	Petitioner	Philip T. Gressman
	Petitioner	Rebecca Poyourow
	Petitioner	Ron Y. Donagi
	Petitioner	Ron Y. Donagi
	Petitioner	Roseanne Milazzo
	Petitioner	Stephanie McNulty
	Petitioner	Susan Cassanelli
	Petitioner	Timothy G. Feeman
	Petitioner	Timothy G. Feeman
	Petitioner	Tom DeWall
	Petitioner	William Tung

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Claire Lally
Service Method:	First Class Mail
Service Date:	12/30/2021
Address:	1099 New York Ave NW Ste 900 Washington, DC 20001
Phone:	202-637-6349

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Representing:	Petitioner	Amy Myers
	Petitioner	Amy Myers
	Petitioner	Brady Hill
	Petitioner	Burt Siegel
	Petitioner	Carol Ann Carter
	Petitioner	David P. Marsh
	Petitioner	David P. Marsh
	Petitioner	Eugene Boman
	Petitioner	Eugene Boman
	Petitioner	Garth Isaak
	Petitioner	Garth Isaak
	Petitioner	Gary Gordon
	Petitioner	Gary Gordon
	Petitioner	James L. Rosenberger
	Petitioner	James L. Rosenberger
	Petitioner	Janet Temin
	Petitioner	Kristopher R. Tapp
	Petitioner	Kristopher R. Tapp
	Petitioner	Lee Cassanelli
	Petitioner	Liz McMahon
	Petitioner	Liz McMahon
	Petitioner	Lynn Wachman
	Petitioner	Mary Ellen Balchunis
	Petitioner	Maya Fonkeu
	Petitioner	Michael Guttman
	Petitioner	Monica Parrilla
	Petitioner	Pamela Gorkin
	Petitioner	Pamela Gorkin
	Petitioner	Philip T. Gressman
	Petitioner	Philip T. Gressman
	Petitioner	Rebecca Poyourow
	Petitioner	Ron Y. Donagi
	Petitioner	Ron Y. Donagi
	Petitioner	Roseanne Milazzo
	Petitioner	Stephanie McNulty
	Petitioner	Susan Cassanelli
	Petitioner	Timothy G. Feeman
	Petitioner	Timothy G. Feeman
	Petitioner	Tom DeWall
	Petitioner	William Tung

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Devin Michael Misour
Service Method:	eService
Email:	dmisour@reedsmith.com
Service Date:	12/30/2021
Address:	Reed Smith LLP 225 Fifth Avenue Pittsburgh, PA 15222
Phone:	412--28-8-3091
Representing:	Petitioner Amy Myers Petitioner Amy Myers Petitioner David P. Marsh Petitioner David P. Marsh Petitioner Eugene Boman Petitioner Eugene Boman Petitioner Garth Isaak Petitioner Garth Isaak Petitioner Gary Gordon Petitioner Gary Gordon Petitioner James L. Rosenberger Petitioner James L. Rosenberger Petitioner Kristopher R. Tapp Petitioner Kristopher R. Tapp Petitioner Liz McMahon Petitioner Liz McMahon Petitioner Pamela Gorkin Petitioner Pamela Gorkin Petitioner Philip T. Gressman Petitioner Philip T. Gressman Petitioner Ron Y. Donagi Petitioner Ron Y. Donagi Petitioner Timothy G. Feeman Petitioner Timothy G. Feeman

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Devin Michael Misour
Service Method:	First Class Mail
Service Date:	12/30/2021
Address:	Reed Smith Llp 225 Fifth Ave Fl 9 Pittsburgh, PA 15222
Phone:	412-288-3091
Representing:	Petitioner Amy Myers Petitioner Amy Myers Petitioner David P. Marsh Petitioner David P. Marsh Petitioner Eugene Boman Petitioner Eugene Boman Petitioner Garth Isaak Petitioner Garth Isaak Petitioner Gary Gordon Petitioner Gary Gordon Petitioner James L. Rosenberger Petitioner James L. Rosenberger Petitioner Kristopher R. Tapp Petitioner Kristopher R. Tapp Petitioner Liz McMahon Petitioner Liz McMahon Petitioner Pamela Gorkin Petitioner Pamela Gorkin Petitioner Philip T. Gressman Petitioner Philip T. Gressman Petitioner Ron Y. Donagi Petitioner Ron Y. Donagi Petitioner Timothy G. Feeman Petitioner Timothy G. Feeman

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Edward David Rogers
Service Method:	eService
Email:	rogerse@ballardspahr.com
Service Date:	12/30/2021
Address:	1735 Market Street 51st Floor Philadelphia, PA 19103
Phone:	215-864-8144
Representing:	Petitioner Amy Myers Petitioner Brady Hill Petitioner Burt Siegel Petitioner Carol Ann Carter Petitioner David P. Marsh Petitioner Eugene Boman Petitioner Garth Isaak Petitioner Gary Gordon Petitioner James L. Rosenberger Petitioner Janet Temin Petitioner Kristopher R. Tapp Petitioner Lee Cassanelli Petitioner Liz McMahon Petitioner Lynn Wachman Petitioner Mary Ellen Balchunis Petitioner Maya Fonkeu Petitioner Michael Guttman Petitioner Monica Parrilla Petitioner Pamela Gorkin Petitioner Philip T. Gressman Petitioner Rebecca Poyourow Petitioner Ron Y. Donagi Petitioner Roseanne Milazzo Petitioner Stephanie McNulty Petitioner Susan Cassanelli Petitioner Timothy G. Feeman Petitioner Tom DeWall Petitioner William Tung

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Edward David Rogers
Service Method:	First Class Mail
Service Date:	12/30/2021
Address:	Ballard Spahr Llp 1735 Market St Fl 51 Philadelphia, PA 191037599
Phone:	610-246-4701
Representing:	Petitioner Amy Myers Petitioner Brady Hill Petitioner Burt Siegel Petitioner Carol Ann Carter Petitioner David P. Marsh Petitioner Eugene Boman Petitioner Garth Isaak Petitioner Gary Gordon Petitioner James L. Rosenberger Petitioner Janet Temin Petitioner Kristopher R. Tapp Petitioner Lee Cassanelli Petitioner Liz McMahon Petitioner Lynn Wachman Petitioner Mary Ellen Balchunis Petitioner Maya Fonkeu Petitioner Michael Guttman Petitioner Monica Parrilla Petitioner Pamela Gorkin Petitioner Philip T. Gressman Petitioner Rebecca Poyourow Petitioner Ron Y. Donagi Petitioner Roseanne Milazzo Petitioner Stephanie McNulty Petitioner Susan Cassanelli Petitioner Timothy G. Feeman Petitioner Tom DeWall Petitioner William Tung

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Executive Administrator Sam Hirsch
Service Method:	First Class Mail
Service Date:	12/30/2021
Address:	1099 New York Ave NW Ste 900 Washington, DC 200014412
Phone:	--

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Representing:	Petitioner	Amy Myers
	Petitioner	Amy Myers
	Petitioner	Brady Hill
	Petitioner	Burt Siegel
	Petitioner	Carol Ann Carter
	Petitioner	David P. Marsh
	Petitioner	David P. Marsh
	Petitioner	Eugene Boman
	Petitioner	Eugene Boman
	Petitioner	Garth Isaak
	Petitioner	Garth Isaak
	Petitioner	Gary Gordon
	Petitioner	Gary Gordon
	Petitioner	James L. Rosenberger
	Petitioner	James L. Rosenberger
	Petitioner	Janet Temin
	Petitioner	Kristopher R. Tapp
	Petitioner	Kristopher R. Tapp
	Petitioner	Lee Cassanelli
	Petitioner	Liz McMahon
	Petitioner	Liz McMahon
	Petitioner	Lynn Wachman
	Petitioner	Mary Ellen Balchunis
	Petitioner	Maya Fonkeu
	Petitioner	Michael Guttman
	Petitioner	Monica Parrilla
	Petitioner	Pamela Gorkin
	Petitioner	Pamela Gorkin
	Petitioner	Philip T. Gressman
	Petitioner	Philip T. Gressman
	Petitioner	Rebecca Poyourow
	Petitioner	Ron Y. Donagi
	Petitioner	Ron Y. Donagi
	Petitioner	Roseanne Milazzo
	Petitioner	Stephanie McNulty
	Petitioner	Susan Cassanelli
	Petitioner	Timothy G. Feeman
	Petitioner	Timothy G. Feeman
	Petitioner	Tom DeWall
	Petitioner	William Tung

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Jessica Amunson
Service Method:	First Class Mail
Service Date:	12/30/2021
Address:	1099 New York Ave NW Ste 900 Washington, DC 20001
Phone:	202-639-6023

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Representing:	Petitioner	Amy Myers
	Petitioner	Amy Myers
	Petitioner	Brady Hill
	Petitioner	Burt Siegel
	Petitioner	Carol Ann Carter
	Petitioner	David P. Marsh
	Petitioner	David P. Marsh
	Petitioner	Eugene Boman
	Petitioner	Eugene Boman
	Petitioner	Garth Isaak
	Petitioner	Garth Isaak
	Petitioner	Gary Gordon
	Petitioner	Gary Gordon
	Petitioner	James L. Rosenberger
	Petitioner	James L. Rosenberger
	Petitioner	Janet Temin
	Petitioner	Kristopher R. Tapp
	Petitioner	Kristopher R. Tapp
	Petitioner	Lee Cassanelli
	Petitioner	Liz McMahon
	Petitioner	Liz McMahon
	Petitioner	Lynn Wachman
	Petitioner	Mary Ellen Balchunis
	Petitioner	Maya Fonkeu
	Petitioner	Michael Guttman
	Petitioner	Monica Parrilla
	Petitioner	Pamela Gorkin
	Petitioner	Pamela Gorkin
	Petitioner	Philip T. Gressman
	Petitioner	Philip T. Gressman
	Petitioner	Rebecca Poyourow
	Petitioner	Ron Y. Donagi
	Petitioner	Ron Y. Donagi
	Petitioner	Roseanne Milazzo
	Petitioner	Stephanie McNulty
	Petitioner	Susan Cassanelli
	Petitioner	Timothy G. Feeman
	Petitioner	Timothy G. Feeman
	Petitioner	Tom DeWall
	Petitioner	William Tung

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	John Brent Hill
Service Method:	eService
Email:	jbh@hangley.com
Service Date:	12/30/2021
Address:	One Logan Square 27th Floor Philadelphia, PA 19103
Phone:	215--56-8-6200
Representing:	Respondent Degraffenreid, Veronica Respondent Jessica Mathis Respondent Jessica Mathis Respondent Veronica Degraffenreid

Served:	John Brent Hill
Service Method:	First Class Mail
Service Date:	12/30/2021
Address:	Hangley Aronchick Segal 1 Logan Sq Fl 27 Philadelphia, PA 19103
Phone:	215-496-7049
Representing:	Respondent Degraffenreid, Veronica Respondent Jessica Mathis Respondent Jessica Mathis Respondent Veronica Degraffenreid

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Kim M. Watterson
Service Method:	eService
Email:	kwatterson@reedsmith.com
Service Date:	12/30/2021
Address:	225 Fifth Avenue Pittsburgh, PA 15222
Phone:	412--28-8-7996
Representing:	Petitioner Amy Myers Petitioner Amy Myers Petitioner David P. Marsh Petitioner David P. Marsh Petitioner Eugene Boman Petitioner Eugene Boman Petitioner Garth Isaak Petitioner Garth Isaak Petitioner Gary Gordon Petitioner Gary Gordon Petitioner James L. Rosenberger Petitioner James L. Rosenberger Petitioner Kristopher R. Tapp Petitioner Kristopher R. Tapp Petitioner Liz McMahon Petitioner Liz McMahon Petitioner Pamela Gorkin Petitioner Pamela Gorkin Petitioner Philip T. Gressman Petitioner Philip T. Gressman Petitioner Ron Y. Donagi Petitioner Ron Y. Donagi Petitioner Timothy G. Feeman Petitioner Timothy G. Feeman

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Kim M. Watterson
Service Method:	First Class Mail
Service Date:	12/30/2021
Address:	Reed Smith Llp 225 5TH Ave Ste 1200 Pittsburgh, PA 152222716
Phone:	412-288-7996
Representing:	Petitioner Amy Myers Petitioner Amy Myers Petitioner David P. Marsh Petitioner David P. Marsh Petitioner Eugene Boman Petitioner Eugene Boman Petitioner Garth Isaak Petitioner Garth Isaak Petitioner Gary Gordon Petitioner Gary Gordon Petitioner James L. Rosenberger Petitioner James L. Rosenberger Petitioner Kristopher R. Tapp Petitioner Kristopher R. Tapp Petitioner Liz McMahon Petitioner Liz McMahon Petitioner Pamela Gorkin Petitioner Pamela Gorkin Petitioner Philip T. Gressman Petitioner Philip T. Gressman Petitioner Ron Y. Donagi Petitioner Ron Y. Donagi Petitioner Timothy G. Feeman Petitioner Timothy G. Feeman

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Lindsay Harrison
Service Method:	First Class Mail
Service Date:	12/30/2021
Address:	1099 New York Ave NW Ste 900 Washington, DC 20001
Phone:	202-639-6865

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Representing:	Petitioner	Amy Myers
	Petitioner	Amy Myers
	Petitioner	Brady Hill
	Petitioner	Burt Siegel
	Petitioner	Carol Ann Carter
	Petitioner	David P. Marsh
	Petitioner	David P. Marsh
	Petitioner	Eugene Boman
	Petitioner	Eugene Boman
	Petitioner	Garth Isaak
	Petitioner	Garth Isaak
	Petitioner	Gary Gordon
	Petitioner	Gary Gordon
	Petitioner	James L. Rosenberger
	Petitioner	James L. Rosenberger
	Petitioner	Janet Temin
	Petitioner	Kristopher R. Tapp
	Petitioner	Kristopher R. Tapp
	Petitioner	Lee Cassanelli
	Petitioner	Liz McMahon
	Petitioner	Liz McMahon
	Petitioner	Lynn Wachman
	Petitioner	Mary Ellen Balchunis
	Petitioner	Maya Fonkeu
	Petitioner	Michael Guttman
	Petitioner	Monica Parrilla
	Petitioner	Pamela Gorkin
	Petitioner	Pamela Gorkin
	Petitioner	Philip T. Gressman
	Petitioner	Philip T. Gressman
	Petitioner	Rebecca Poyourow
	Petitioner	Ron Y. Donagi
	Petitioner	Ron Y. Donagi
	Petitioner	Roseanne Milazzo
	Petitioner	Stephanie McNulty
	Petitioner	Susan Cassanelli
	Petitioner	Timothy G. Feeman
	Petitioner	Timothy G. Feeman
	Petitioner	Tom DeWall
	Petitioner	William Tung

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Marcel S. Pratt
Service Method:	eService
Email:	prattm@ballardspahr.com
Service Date:	12/30/2021
Address:	Ballard Spahr LLP 1735 Market Street, 51st Floor PHILADELPHIA, PA 19103
Phone:	215-864-8506
Representing:	Petitioner Brady Hill Petitioner Burt Siegel Petitioner Carol Ann Carter Petitioner Janet Temin Petitioner Lee Cassanelli Petitioner Lynn Wachman Petitioner Mary Ellen Balchunis Petitioner Maya Fonkeu Petitioner Michael Guttman Petitioner Monica Parrilla Petitioner Rebecca Poyourow Petitioner Roseanne Milazzo Petitioner Stephanie McNulty Petitioner Susan Cassanelli Petitioner Tom DeWall Petitioner William Tung

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Marcel S. Pratt
Service Method:	First Class Mail
Service Date:	12/30/2021
Address:	Ballard Spahr Llp 1735 Market St 51st Fl Philadelphia, PA 19103
Phone:	215-864-8506
Representing:	Petitioner Brady Hill Petitioner Burt Siegel Petitioner Carol Ann Carter Petitioner Janet Temin Petitioner Lee Cassanelli Petitioner Lynn Wachman Petitioner Mary Ellen Balchunis Petitioner Maya Fonkeu Petitioner Michael Guttman Petitioner Monica Parrilla Petitioner Rebecca Poyourow Petitioner Roseanne Milazzo Petitioner Stephanie McNulty Petitioner Susan Cassanelli Petitioner Tom DeWall Petitioner William Tung

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Michael R. McDonald
Service Method:	eService
Email:	mcdonaldm@ballardspahr.com
Service Date:	12/30/2021
Address:	1735 Market Street 51st Floor Philadelphia, PA 19103
Phone:	215-864-8425
Representing:	Petitioner Brady Hill Petitioner Burt Siegel Petitioner Carol Ann Carter Petitioner Janet Temin Petitioner Lee Cassanelli Petitioner Lynn Wachman Petitioner Mary Ellen Balchunis Petitioner Maya Fonkeu Petitioner Michael Guttman Petitioner Monica Parrilla Petitioner Rebecca Poyourow Petitioner Roseanne Milazzo Petitioner Stephanie McNulty Petitioner Susan Cassanelli Petitioner Tom DeWall Petitioner William Tung

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Michael R. McDonald
Service Method:	First Class Mail
Service Date:	12/30/2021
Address:	Ballard Spahr Llp 1735 Market St Fl 51 Philadelphia, PA 19103
Phone:	215-864-8425
Representing:	Petitioner Brady Hill Petitioner Burt Siegel Petitioner Carol Ann Carter Petitioner Janet Temin Petitioner Lee Cassanelli Petitioner Lynn Wachman Petitioner Mary Ellen Balchunis Petitioner Maya Fonkeu Petitioner Michael Guttman Petitioner Monica Parrilla Petitioner Rebecca Poyourow Petitioner Roseanne Milazzo Petitioner Stephanie McNulty Petitioner Susan Cassanelli Petitioner Tom DeWall Petitioner William Tung

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Paul Keller Ort
Service Method:	eService
Email:	ortp@ballardspahr.com
Service Date:	12/30/2021
Address:	1735 Market Street 51st Floor Philadelphia, PA 19103
Phone:	215-864-8287
Representing:	Petitioner Brady Hill Petitioner Burt Siegel Petitioner Carol Ann Carter Petitioner Janet Temin Petitioner Lee Cassanelli Petitioner Lynn Wachman Petitioner Mary Ellen Balchunis Petitioner Maya Fonkeu Petitioner Michael Guttman Petitioner Monica Parrilla Petitioner Rebecca Poyourow Petitioner Roseanne Milazzo Petitioner Stephanie McNulty Petitioner Susan Cassanelli Petitioner Tom DeWall Petitioner William Tung

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Paul Keller Ort
Service Method:	First Class Mail
Service Date:	12/30/2021
Address:	Ballard Spahr Llp 1735 Market St Fl 51 Philadelphia, PA 19103
Phone:	215-864-8287
Representing:	Petitioner Brady Hill Petitioner Burt Siegel Petitioner Carol Ann Carter Petitioner Janet Temin Petitioner Lee Cassanelli Petitioner Lynn Wachman Petitioner Mary Ellen Balchunis Petitioner Maya Fonkeu Petitioner Michael Guttman Petitioner Monica Parrilla Petitioner Rebecca Poyourow Petitioner Roseanne Milazzo Petitioner Stephanie McNulty Petitioner Susan Cassanelli Petitioner Tom DeWall Petitioner William Tung

Served:	Robert Andrew Wiygul
Service Method:	eService
Email:	rwiygul@hangley.com
Service Date:	12/30/2021
Address:	Hangley Aronchick Segal Pudlin & Schiller One Logan Square, 27th Floor Philadelphia, PA 19103
Phone:	215--49-6-7042
Representing:	Respondent Degraffenreid, Veronica Respondent Jessica Mathis Respondent Jessica Mathis Respondent Veronica Degraffenreid

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Robert Andrew Wiygul
Service Method:	First Class Mail
Service Date:	12/30/2021
Address:	Hangley Aronchick Et Al 18TH Cherry Sts Fl 27 Philadelphia, PA 19103
Phone:	215-496-7042
Representing:	Respondent Degraffenreid, Veronica Respondent Jessica Mathis Respondent Jessica Mathis Respondent Veronica Degraffenreid

Served:	Robert Joseph Clark
Service Method:	eService
Email:	clarkr@ballardspahr.com
Service Date:	12/30/2021
Address:	Ballard Spahr 1735 Market Street, 51st Floor Philadelphia, PA 19103
Phone:	215--86-4-8659
Representing:	Petitioner Brady Hill Petitioner Burt Siegel Petitioner Carol Ann Carter Petitioner Janet Temin Petitioner Lee Cassanelli Petitioner Lynn Wachman Petitioner Mary Ellen Balchunis Petitioner Maya Fonkeu Petitioner Michael Guttman Petitioner Monica Parrilla Petitioner Rebecca Poyourow Petitioner Roseanne Milazzo Petitioner Stephanie McNulty Petitioner Susan Cassanelli Petitioner Tom DeWall Petitioner William Tung

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Robert Joseph Clark
Service Method:	First Class Mail
Service Date:	12/30/2021
Address:	Ballard Spahr Llp 1735 Market St Fl 51 Philadelphia, PA 19103
Phone:	215-864-8659
Representing:	Petitioner Brady Hill Petitioner Burt Siegel Petitioner Carol Ann Carter Petitioner Janet Temin Petitioner Lee Cassanelli Petitioner Lynn Wachman Petitioner Mary Ellen Balchunis Petitioner Maya Fonkeu Petitioner Michael Guttman Petitioner Monica Parrilla Petitioner Rebecca Poyourow Petitioner Roseanne Milazzo Petitioner Stephanie McNulty Petitioner Susan Cassanelli Petitioner Tom DeWall Petitioner William Tung

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Shannon Elise McClure
Service Method:	eService
Email:	smcclure@reedsmith.com
Service Date:	12/30/2021
Address:	1717 Arch Street Suite 3100 Philadelphia, PA 19103
Phone:	215-241-7977
Representing:	Petitioner Amy Myers Petitioner Amy Myers Petitioner David P. Marsh Petitioner David P. Marsh Petitioner Eugene Boman Petitioner Eugene Boman Petitioner Garth Isaak Petitioner Garth Isaak Petitioner Gary Gordon Petitioner Gary Gordon Petitioner James L. Rosenberger Petitioner James L. Rosenberger Petitioner Kristopher R. Tapp Petitioner Kristopher R. Tapp Petitioner Liz McMahon Petitioner Liz McMahon Petitioner Pamela Gorkin Petitioner Pamela Gorkin Petitioner Philip T. Gressman Petitioner Philip T. Gressman Petitioner Ron Y. Donagi Petitioner Ron Y. Donagi Petitioner Timothy G. Feeman Petitioner Timothy G. Feeman

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Shannon Elise McClure
Service Method:	First Class Mail
Service Date:	12/30/2021
Address:	Reed Smith Llp 1717 Arch St Ste 3100 Philadelphia, PA 19103
Phone:	215-851-8226
Representing:	Petitioner Amy Myers Petitioner Amy Myers Petitioner David P. Marsh Petitioner David P. Marsh Petitioner Eugene Boman Petitioner Eugene Boman Petitioner Garth Isaak Petitioner Garth Isaak Petitioner Gary Gordon Petitioner Gary Gordon Petitioner James L. Rosenberger Petitioner James L. Rosenberger Petitioner Kristopher R. Tapp Petitioner Kristopher R. Tapp Petitioner Liz McMahon Petitioner Liz McMahon Petitioner Pamela Gorkin Petitioner Pamela Gorkin Petitioner Philip T. Gressman Petitioner Philip T. Gressman Petitioner Ron Y. Donagi Petitioner Ron Y. Donagi Petitioner Timothy G. Feeman Petitioner Timothy G. Feeman

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Tassity Johnson
Service Method:	First Class Mail
Service Date:	12/30/2021
Address:	1099 New York Ave NW Ste 900 Washington, DC 20001
Phone:	202-637-6303

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Representing:	Petitioner	Amy Myers
	Petitioner	Amy Myers
	Petitioner	Brady Hill
	Petitioner	Burt Siegel
	Petitioner	Carol Ann Carter
	Petitioner	David P. Marsh
	Petitioner	David P. Marsh
	Petitioner	Eugene Boman
	Petitioner	Eugene Boman
	Petitioner	Garth Isaak
	Petitioner	Garth Isaak
	Petitioner	Gary Gordon
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	Petitioner	James L. Rosenberger
	Petitioner	Janet Temin
	Petitioner	Kristopher R. Tapp
	Petitioner	Kristopher R. Tapp
	Petitioner	Lee Cassanelli
	Petitioner	Liz McMahon
	Petitioner	Liz McMahon
	Petitioner	Lynn Wachman
	Petitioner	Mary Ellen Balchunis
	Petitioner	Maya Fonkeu
	Petitioner	Michael Guttman
	Petitioner	Monica Parrilla
	Petitioner	Pamela Gorkin
	Petitioner	Pamela Gorkin
	Petitioner	Philip T. Gressman
	Petitioner	Philip T. Gressman
	Petitioner	Rebecca Poyourow
	Petitioner	Ron Y. Donagi
	Petitioner	Ron Y. Donagi
	Petitioner	Roseanne Milazzo
	Petitioner	Stephanie McNulty
	Petitioner	Susan Cassanelli
	Petitioner	Timothy G. Feeman
	Petitioner	Timothy G. Feeman
	Petitioner	Tom DeWall
	Petitioner	William Tung

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Courtesy Copy

Served:	Anthony Richard Holtzman
Service Method:	eService
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Representing:	Possible Intervenor Jake Corman Possible Intervenor Jake Corman Possible Intervenor Kim Ward Possible Intervenor Kim Ward

Served:	Anthony Richard Holtzman
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Address:	K& L Gates Llp 17 N 2ND St 18th Fl Harrisburg, PA 171011507
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Representing:	Possible Intervenor Jake Corman Possible Intervenor Jake Corman Possible Intervenor Kim Ward Possible Intervenor Kim Ward

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Corrie Allen Woods
Service Method:	eService
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Service Date:	12/30/2021
Address:	One Oxford Centre, Suite 4300 301 Grant Street Coraopolis, PA 15219
Phone:	412-345-3198
Representing:	Possible Intervenor Amanda Cappelletti Possible Intervenor Amanda Cappelletti Possible Intervenor Art Haywood Possible Intervenor Art Haywood Possible Intervenor Carolyn Comitta Possible Intervenor Carolyn Comitta Possible Intervenor Christine Tartaglione Possible Intervenor Christine Tartaglione Possible Intervenor James Brewster Possible Intervenor James Brewster Possible Intervenor Jay Costa Possible Intervenor Jay Costa Possible Intervenor John Kane Possible Intervenor John Kane Possible Intervenor Judy Schwank Possible Intervenor Judy Schwank Possible Intervenor Lindsey Williams Possible Intervenor Lindsey Williams Possible Intervenor Lisa Boscola Possible Intervenor Lisa Boscola Possible Intervenor Marty Flynn Possible Intervenor Marty Flynn Possible Intervenor Nikil Saval Possible Intervenor Nikil Saval Possible Intervenor Steve Santarsiero Possible Intervenor Steve Santarsiero Possible Intervenor Tim Kearney Possible Intervenor Tim Kearney Possible Intervenor Vincent Hughes Possible Intervenor Vincent Hughes Possible Intervenor Wayne Fontana Possible Intervenor Wayne Fontana

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Corrie Allen Woods
Service Method:	First Class Mail
Service Date:	12/30/2021
Address:	200 Commerce Dr Ste 210 Moon Township, PA 15108
Phone:	412-329-7751
Representing:	Possible Intervenor Amanda Cappelletti Possible Intervenor Amanda Cappelletti Possible Intervenor Art Haywood Possible Intervenor Art Haywood Possible Intervenor Carolyn Comitta Possible Intervenor Carolyn Comitta Possible Intervenor Christine Tartaglione Possible Intervenor Christine Tartaglione Possible Intervenor James Brewster Possible Intervenor James Brewster Possible Intervenor Jay Costa Possible Intervenor Jay Costa Possible Intervenor John Kane Possible Intervenor John Kane Possible Intervenor Judy Schwank Possible Intervenor Judy Schwank Possible Intervenor Lindsey Williams Possible Intervenor Lindsey Williams Possible Intervenor Lisa Boscola Possible Intervenor Lisa Boscola Possible Intervenor Marty Flynn Possible Intervenor Marty Flynn Possible Intervenor Nikil Saval Possible Intervenor Nikil Saval Possible Intervenor Steve Santarsiero Possible Intervenor Steve Santarsiero Possible Intervenor Tim Kearney Possible Intervenor Tim Kearney Possible Intervenor Vincent Hughes Possible Intervenor Vincent Hughes Possible Intervenor Wayne Fontana Possible Intervenor Wayne Fontana

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Jeffry William Duffy
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Address:	Baker & Hostetler LLP 2929 Arch St., 12th Floor Philadelphia, PA 19104
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Representing:	Possible Intervenor Bryan Cutler Possible Intervenor Bryan Cutler Possible Intervenor Kerry Benninghoff Possible Intervenor Kerry Benninghoff

Served:	Jeffry William Duffy
Service Method:	First Class Mail
Service Date:	12/30/2021
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Phone:	215-564-2916
Representing:	Possible Intervenor Bryan Cutler Possible Intervenor Bryan Cutler Possible Intervenor Kerry Benninghoff Possible Intervenor Kerry Benninghoff

Served:	Kathleen Kotula
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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Kevin Michael Greenberg
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Email:	greenbergk@gtlaw.com
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Phone:	215--98-8-7800
Representing:	Possible Intervenor Anthony H. Williams Possible Intervenor Anthony H. Williams Possible Intervenor Katie J. Muth Possible Intervenor Katie J. Muth Possible Intervenor Maria Collett Possible Intervenor Maria Collett Possible Intervenor Sharif Street Possible Intervenor Sharif Street

Served:	Kevin Michael Greenberg
Service Method:	First Class Mail
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Address:	1717 Arch St Ste 400 Philadelphia, PA 19103
Phone:	215-988-7800
Representing:	Possible Intervenor Anthony H. Williams Possible Intervenor Anthony H. Williams Possible Intervenor Katie J. Muth Possible Intervenor Katie J. Muth Possible Intervenor Maria Collett Possible Intervenor Maria Collett Possible Intervenor Sharif Street Possible Intervenor Sharif Street

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Marco Santino Attisano
Service Method:	eService
Email:	marco@arlawpitt.com
Service Date:	12/30/2021
Address:	707 Grant Street Suite 2750 Pittsburgh, PA 15219
Phone:	412-438-8209
Representing:	Possible Intervenor Amanda Cappelletti Possible Intervenor Amanda Cappelletti Possible Intervenor Art Haywood Possible Intervenor Art Haywood Possible Intervenor Carolyn Comitta Possible Intervenor Carolyn Comitta Possible Intervenor Christine Tartaglione Possible Intervenor Christine Tartaglione Possible Intervenor James Brewster Possible Intervenor James Brewster Possible Intervenor Jay Costa Possible Intervenor Jay Costa Possible Intervenor John Kane Possible Intervenor John Kane Possible Intervenor Judy Schwank Possible Intervenor Judy Schwank Possible Intervenor Lindsey Williams Possible Intervenor Lindsey Williams Possible Intervenor Lisa Boscola Possible Intervenor Lisa Boscola Possible Intervenor Marty Flynn Possible Intervenor Marty Flynn Possible Intervenor Nikil Saval Possible Intervenor Nikil Saval Possible Intervenor Steve Santarsiero Possible Intervenor Steve Santarsiero Possible Intervenor Tim Kearney Possible Intervenor Tim Kearney Possible Intervenor Vincent Hughes Possible Intervenor Vincent Hughes Possible Intervenor Wayne Fontana Possible Intervenor Wayne Fontana

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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Service Method:	First Class Mail
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Address:	Attisano & Romano LLC 429 Fourth Ave Ste 1705 Pittsburgh, PA 15219
Phone:	412-336-8622
Representing:	Possible Intervenor Amanda Cappelletti Possible Intervenor Amanda Cappelletti Possible Intervenor Art Haywood Possible Intervenor Art Haywood Possible Intervenor Carolyn Comitta Possible Intervenor Carolyn Comitta Possible Intervenor Christine Tartaglione Possible Intervenor Christine Tartaglione Possible Intervenor James Brewster Possible Intervenor James Brewster Possible Intervenor Jay Costa Possible Intervenor Jay Costa Possible Intervenor John Kane Possible Intervenor John Kane Possible Intervenor Judy Schwank Possible Intervenor Judy Schwank Possible Intervenor Lindsey Williams Possible Intervenor Lindsey Williams Possible Intervenor Lisa Boscola Possible Intervenor Lisa Boscola Possible Intervenor Marty Flynn Possible Intervenor Marty Flynn Possible Intervenor Nikil Saval Possible Intervenor Nikil Saval Possible Intervenor Steve Santarsiero Possible Intervenor Steve Santarsiero Possible Intervenor Tim Kearney Possible Intervenor Tim Kearney Possible Intervenor Vincent Hughes Possible Intervenor Vincent Hughes Possible Intervenor Wayne Fontana Possible Intervenor Wayne Fontana

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Thomas W. King III
Service Method:	eService
Email:	tking@dmkcg.com
Service Date:	12/30/2021
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Phone:	(72-4) -283-2200
Representing:	Possible Intervenor Anthony Luther Possible Intervenor Brandy Reep Possible Intervenor Candee Barnes Possible Intervenor David Ball Possible Intervenor Evan Smith Possible Intervenor James Foreman Possible Intervenor James Thompson Possible Intervenor James Vasilko Possible Intervenor Jay Hagerman Possible Intervenor Jeffrey Piccola Possible Intervenor Joseph Renwick Possible Intervenor Justin Behrens Possible Intervenor Kenneth Lunsford Possible Intervenor Kim Geyer Possible Intervenor Kristine Eng Possible Intervenor Leslie Oshe Possible Intervenor Linda Daniels Possible Intervenor Louis Capozzi Possible Intervenor Mary Owlett Possible Intervenor Matthew Stuckey Possible Intervenor Michael Slupe Possible Intervenor Pamela Thompson Possible Intervenor Stephanie Renwick Possible Intervenor Tammy Lunsford Possible Intervenor Thomas Reep

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Thomas W. King III
Service Method:	First Class Mail
Service Date:	12/30/2021
Address:	Dillon Mccandless Et Al 128 W Cunningham St Butler, PA 160015742
Phone:	724-283-2200
Representing:	Possible Intervenor Anthony Luther Possible Intervenor Brandy Reep Possible Intervenor Candee Barnes Possible Intervenor David Ball Possible Intervenor Evan Smith Possible Intervenor James Foreman Possible Intervenor James Thompson Possible Intervenor James Vasilko Possible Intervenor Jay Hagerman Possible Intervenor Jeffrey Piccola Possible Intervenor Joseph Renwick Possible Intervenor Justin Behrens Possible Intervenor Kenneth Lunsford Possible Intervenor Kim Geyer Possible Intervenor Kristine Eng Possible Intervenor Leslie Oshe Possible Intervenor Linda Daniels Possible Intervenor Louis Capozzi Possible Intervenor Mary Owlett Possible Intervenor Matthew Stuckey Possible Intervenor Michael Slupe Possible Intervenor Pamela Thompson Possible Intervenor Stephanie Renwick Possible Intervenor Tammy Lunsford Possible Intervenor Thomas Reep

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

/s/ John P. Lavelle

(Signature of Person Serving)

Person Serving:	Lavelle, John P.
Attorney Registration No:	054279
Law Firm:	
Address:	Morgan Lewis & Bockius Llp 1701 Market St Philadelphia, PA 19103
Representing:	Possible Intervenor Amodei, Joseph
	Possible Intervenor Amodei, Joseph
	Possible Intervenor Biss, Athan
	Possible Intervenor Biss, Athan
	Possible Intervenor Bryant, Rick
	Possible Intervenor Bryant, Rick
	Possible Intervenor Cooper, Jeffrey
	Possible Intervenor Cooper, Jeffrey
	Possible Intervenor Dusen, Adam
	Possible Intervenor Dusen, Adam
	Possible Intervenor Forrest, Myra
	Possible Intervenor Forrest, Myra
	Possible Intervenor Handley, Jean
	Possible Intervenor Handley, Jean
	Possible Intervenor Hynes, Kyle
	Possible Intervenor Hynes, Kyle
	Possible Intervenor Mallinson, Daniel
	Possible Intervenor Mallinson, Daniel
	Possible Intervenor McNulty, Priscilla
	Possible Intervenor McNulty, Priscilla
	Possible Intervenor Skros, Michael
	Possible Intervenor Skros, Michael
	Possible Intervenor Stowell, Jesse
	Possible Intervenor Stowell, Jesse
	Possible Intervenor Strauss, Sandra
	Possible Intervenor Strauss, Sandra
	Possible Intervenor Stroman, Sara
	Possible Intervenor Stroman, Sara
	Possible Intervenor Walsh, Mike
	Possible Intervenor Walsh, Mike
	Possible Intervenor Wood, Susan
	Possible Intervenor Wood, Susan

Cooper vs. Harris, 581 U.S. __ (2017) – the test for when race-based lines are drawn

- This case concerns North Carolina's redrawing of two congressional districts after the 2010 census.
- Prior to the redistricting, neither district had a majority black voting age population ("BVAP"), but both consistently elected candidates preferred by black voters.
- As a result of the redistricting, one district's BVAP went from 48.6% to 52.7% and the other district's BVAP went from 43.8% to 50.7%.
- Registered voters in those districts filed suit complaining of impermissible racial gerrymanders.
- A three-judge federal district court panel held both districts unconstitutional.
- As to the first district, the court found that racial considerations predominated in the drawing of the district's lines and rejected the state's claim that the action was justified by the Voting Rights Act.
- As to the second district, the court found that race predominated and it explained that the state made no attempt to justify its attention to race in designing that district.
- The U.S. Supreme Court affirmed.
- It discussed its two-step analysis for when a voter sued state officials for drawing race-based lines.
- First, the plaintiff must prove that race was a predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.
- Second, if racial considerations did predominate, the state must prove that its race-based sorting of voters serves a compelling interest and is narrowly tailored to that end.

Evenwel vs. Abbott, 578 U.S. __ (2016) – who counts when legislative districts are redrawn

- Texas, like all other states, uses total-population numbers from the decennial census when drawing legislative districts.
- After the 2010 census, Texas adopted a state senate map with a maximum total population deviation of 8.04% which was within the presumptively permissible 10% range.
- Appellants live in Texas senate districts with high eligible and registered-voter populations.
- They filed suit contending that basing apportionment on total population versus voter population dilutes their votes in relation to voters in other senate districts in violation of the one person, one vote principle of the Equal Protection Clause.
- They argued that the map's maximum population deviation exceeds 40% when measured by a voter population baseline of eligible voters or registered voters.
- The district court dismissed their complaint for failure to state a claim on which relief could be granted and the Supreme Court affirmed.
- The Supreme Court held that as constitutional history, precedent, and practice demonstrate, a state or locality may draw its legislative districts based on total population.
- The Supreme Court noted that non-voters have an important stake in many policy debates and in receiving constituent services. By ensuring that each representative is subject to requests and suggestions from the same number of constituents, total-population apportionment promises equitable and effective representation.

- Just a note, although this case deals with state senate districts, prior U.S. Supreme Court case law instructs that jurisdictions must design congressional and state legislative districts with equal populations, and must regularly reapportion districts to prevent malapportionment.

Harris vs. Arizona Independent Redistricting Commission, 578 U.S. __ (2016) – effort required to construct districts

- The AIRC redrew Arizona's legislative districts with guidance from legal counsel, mapping specialists, a statistician, and a Voting Rights specialist.
- The initial plan had a maximum population deviation from absolute equality of districts of 4.07% but the Commission adopted a revised plan with an 8.8 deviation.
- The DOJ approved the revised plan as consistent with the Voting Rights Act.
- A group of Arizona voters filed suit, claiming that the plan's population variants were inconsistent with the 14th Amendment.
- The federal district court disagreed and concluded that the deviations were primarily a result of good faith efforts to comply with the Voting Rights Act even though partisanship played some role.
- The U.S. Supreme Court affirmed.
- It held that the 14th Amendment's Equal Protection Clause requires an honest and good effort to construct districts as nearly of equal population as is practicable but does not require mathematical perfection.
- Deviations may be justified by legitimate considerations such as compactness and contiguity, maintaining the integrity of political subdivisions, maintaining a competitive balance among political parties, and before Shelby County vs. Holder, compliance with the Voting Rights Act.
- It was held that it was proper for the AIRC to proceed on a concern that it be in compliance with the Voting Rights Act.
- Additionally, the Court held that deviations from mathematical equality of under 10% do not by themselves make out a prima facie case of discrimination under the 14th Amendment requiring justification by the state.
- Instead, appellants must show that it is more probable than not that the deviation reflects the predominance of illegitimate reapportionment factors rather than legitimate considerations.
- The Court held that appellants failed to meet their burden where the record supports the district court's conclusion that the deviations reflected the AIRC efforts to achieve compliance with the Voting Rights Act and not secure political advantage for the Democratic party.

Arizona State Legislature vs. Arizona Independent Redistricting Commission, 576 U.S. __ (2015) – power to the people

- Arizona voters tired of decades of the turmoil of gerrymandering adopted Prop 106.
- Prop 106 amended the Arizona constitution to remove redistricting authority from the hands of the legislature and put it in an independent commission, the AIRC.
- The AIRC subsequently adopted redistricting maps for congressional as well as state legislative districts.

- The Arizona legislature sued arguing that the AIRC and its map violated the "Elections Clause" of the U.S. Constitution which provides that "the Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each state by the legislature thereof…."
- The Arizona legislature argued that "legislature" means the state's representative assembly and not an independent commission.
- The Commission responded that the term "the legislature" encompasses all legislative authority conferred by the state constitution, including initiatives adopted by the people themselves.
- The U.S. Supreme Court disagreed with the legislature and held that lawmaking power in Arizona includes the initiative process and that the Elections Clause permits use of the AIRC in congressional redistricting.

Received 01/24/2022 Commonwealth Court
Filed 01/24/2022 Commonwealth Court

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Carol Ann Carter, Monica Parrilla, Rebecca Poyourow, William Tung, Roseanne Milazzo, Burt Siegel, Susan Cassanelli, Lee Cassanelli, Lynn Wachman, Michael Guttman, Maya Fonkeu, Brady Hill, Mary Ellen Balchunis, Tom DeWall, Stephanie McNulty and Janet Temin, Petitioners	:	**CASES CONSOLIDATED**
v.	:	No. 464 M.D. 2021
Veronica Degraffenreid, in her official capacity as the Acting Secretary of the Commonwealth of Pennsylvania; Jessica Mathis, in her official capacity as Director for the Pennsylvania Bureau of Election Services and Notaries, Respondents	:	
Philip T. Gressman, Ron Y. Donagi; Kristopher R. Tapp; Pamela Gorkin; David P. Marsh; James L. Rosenberger; Amy Myers; Eugene Boman; Gary Gordon; Liz McMahon; Timothy G. Feeman; and Garth Isaak, Petitioners	:	
v.	:	No. 465 M.D. 2021
Veronica Degraffenreid, in her official capacity as the Acting Secretary of the Commonwealth of Pennsylvania; Jessica Mathis, in her official capacity as Director for the Pennsylvania Bureau of Election Services and Notaries, Respondents	:	

PROPOSED REDISTRICTING PLAN AND SUPPORTING STATEMENT OF AMICI CURIAE DRAW THE LINES PA PARTICIPANTS

Pursuant to this Court's Order of January 14, 2022, Adam Dusen, Sara Stroman, Mike Walsh, Myra Forrest, Athan Biss, Michael Skros, Susan Wood, Jean Handley, Daniel Mallinson, Jesse Stowell, Sandra Strauss, Rick Bryant, Jeffrey Cooper, Kyle Hynes, Priscilla McNulty and Joseph Amodei, each of whom is affiliated in some manner with the Draw the Lines PA project, (the "DTL Amicus Participants") hereby submit their proposed 17-district congressional redistricting map (the "PA Citizens' Map") and supporting statement in the above-captioned proceeding.

BACKGROUND

Draw the Lines PA ("DTL") is a statewide project of the Committee of Seventy, a 117-year-old nonpartisan civic leadership organization that advances representative, ethical and effective government in Philadelphia and Pennsylvania through citizen engagement and public policy advocacy. *See* https://drawthelinespa.org/ (last accessed January 24, 2022). Launched in 2018, DTL is a nonpartisan education and engagement initiative that has attempted to demonstrate that ordinary Pennsylvanians, when given the same digital tools and data used in the political redistricting process, can, through a fair and transparent

process, produce voting districts that are objectively better by standard mapping metrics.

Three years ago, DTL held the first of five public mapping competitions. At the completion of the final DTL competition, DTL formed the Citizen Map Corps, which is comprised of citizen mappers from throughout the Commonwealth. Together with DTL staff and a nonpartisan DTL Steering Committee that includes esteemed Pennsylvania civic, academic and business leaders, the Citizen Map Corps created and published the "Pennsylvania Citizens' Map" in September 2021. The nonpartisan Citizens' Map is a 17-district congressional map that aggregates what over 7,200 Pennsylvanians, representing 40 of Pennsylvania's 67 counties, collectively mapped. The map is superior when measured according to legal and constitutional metrics, including compactness, contiguity, population equality and limiting jurisdictional splits, *see League of Women Voters of Pennsylvania v. Commonwealth*, 178 A.3d 737, 742 (Pa. 2018), as well as compliance with the Voting Rights Act and other metrics important to Pennsylvanians, including competitiveness, partisan fairness, and representation of communities of interest.

DTL presented The Citizens' Map to leadership in the Pennsylvania State Senate and the Pennsylvania House of Representatives as a potential starting point for the General Assembly's reapportionment work. Governor Wolf has touted the Citizens' Map as meeting the principles proposed by his Pennsylvania Redistricting

Advisory Council and the map currently is being considered by the Senate State Government Committee.

The DTL Amicus Participants are citizens of the Commonwealth of Pennsylvania and are registered to vote in Pennsylvania. Each of the DTL Applicants either serves as a member of the Citizen Map Corps or as a member of the DTL Steering Committee.

The DTL Amicus Participants sought leave to participate in these proceedings as intervenors. In its Order of January 14, 2022, this Court denied the DTL Amicus Participants leave to participate as intervenors, but granted them leave to participate as Amicus Participants and to submit a "proposed 17-district congressional redistricting map/plan that is consistent with the results of the 2020 Census . . . and, if the Amicus Participant chooses to do so, a supporting brief and/or a supporting expert report" by 5 pm on Monday January 24, 2022. This submission is made by the DTL Amicus Participants pursuant to the Court's January 14, 2022 Order.

THE PA CITIZENS' MAP

Attached as Exhibit "A" hereto is the PA Citizens' Map. The PA Citizens' Map aims to balance the many values that the DTL citizen mappers found to be important. This includes creating compact, competitive districts that minimize county and municipal splits and honor the geographically and culturally distinct

regions in Pennsylvania. Further, it aims to honor the requirements of the Voting Rights Act.

Attached as Exhibit "B" is the statement of Justin Villere, Managing Director of DTL, explaining how the PA Citizens' Map was developed, how it addresses the 2020 Census data and how it addresses establishment of districts of equal population, that are contiguous and compact, that minimize jurisdictional splits and comply with the Voting Rights Act.

Dated: January 24, 2021

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

By: */s/ John P. Lavelle, Jr.*

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Counsel for the DTL Amicus Participants

CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing of confidential information and documents differently than non-confidential information and documents.

/s/ John P. Lavelle, Jr.
John P. Lavelle, Jr. (Pa. ID No. 5427)

PROOF OF SERVICE

On January 24, 2022, I caused a copy of the foregoing to be served on all counsel of record, pursuant to the Court's instructions, via the email address CommCourtFiling@pacourts.us.

/s/ John P. Lavelle, Jr.

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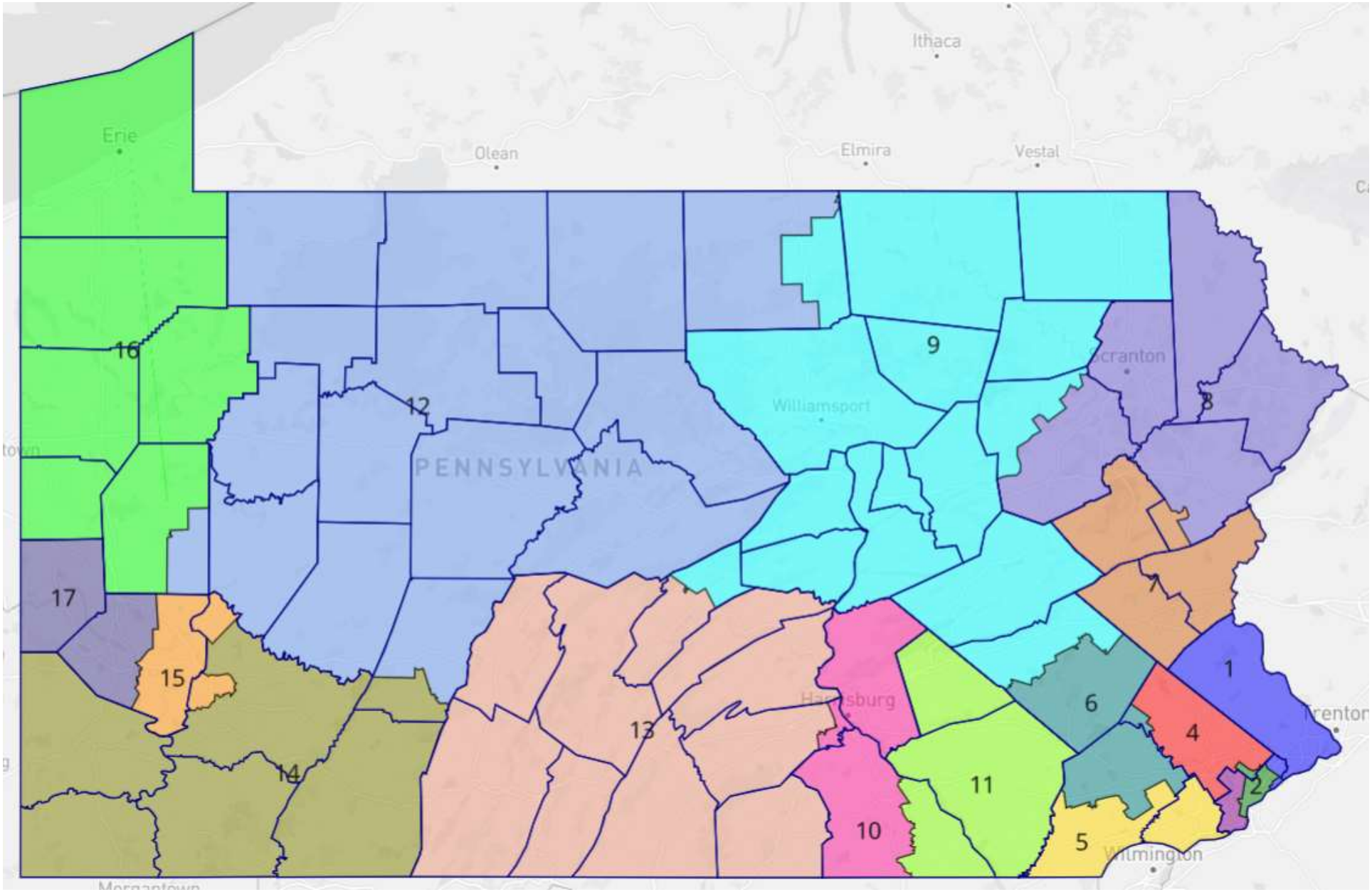
john.lavelle@morganlewis.com

EXHIBIT A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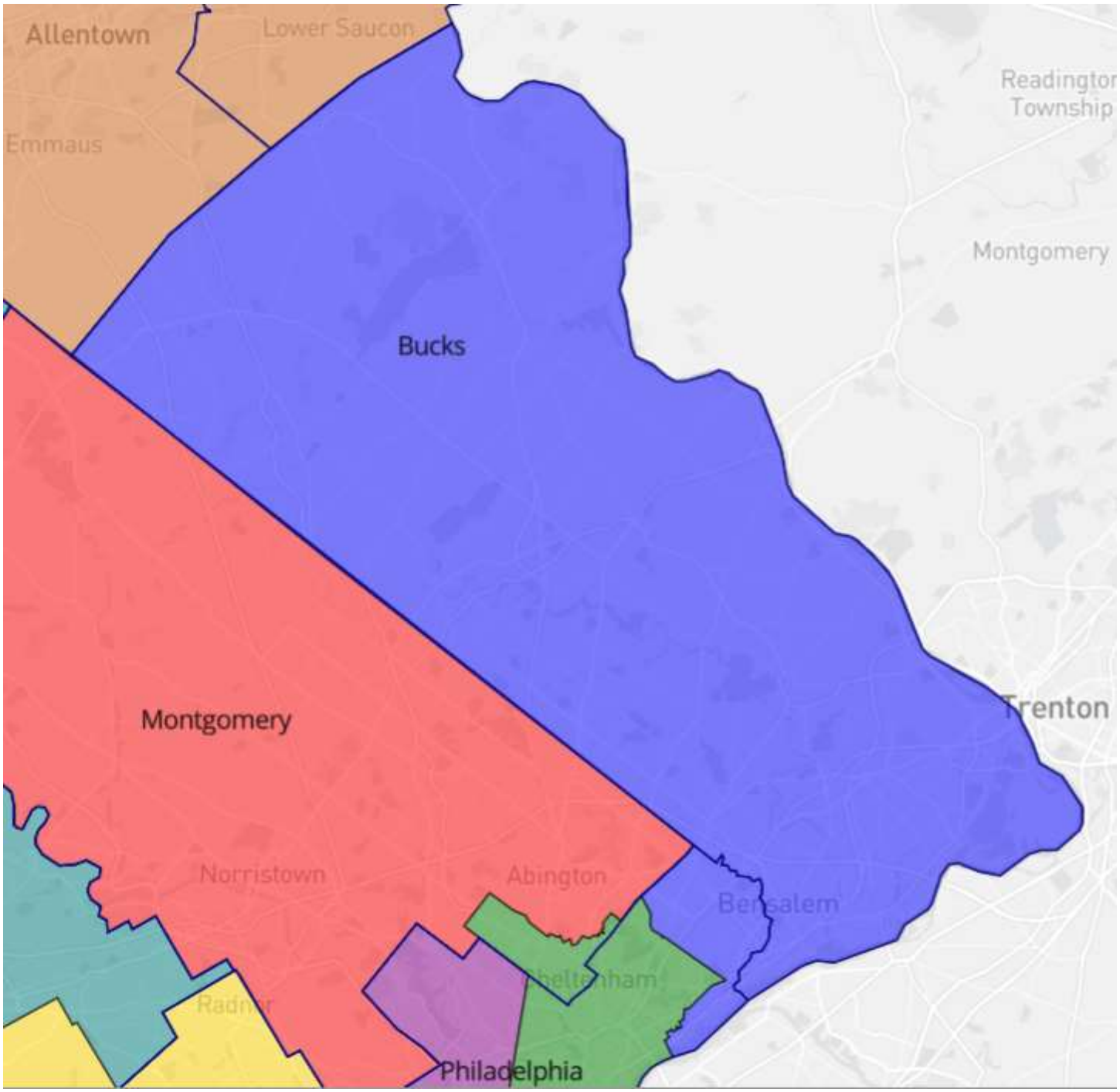
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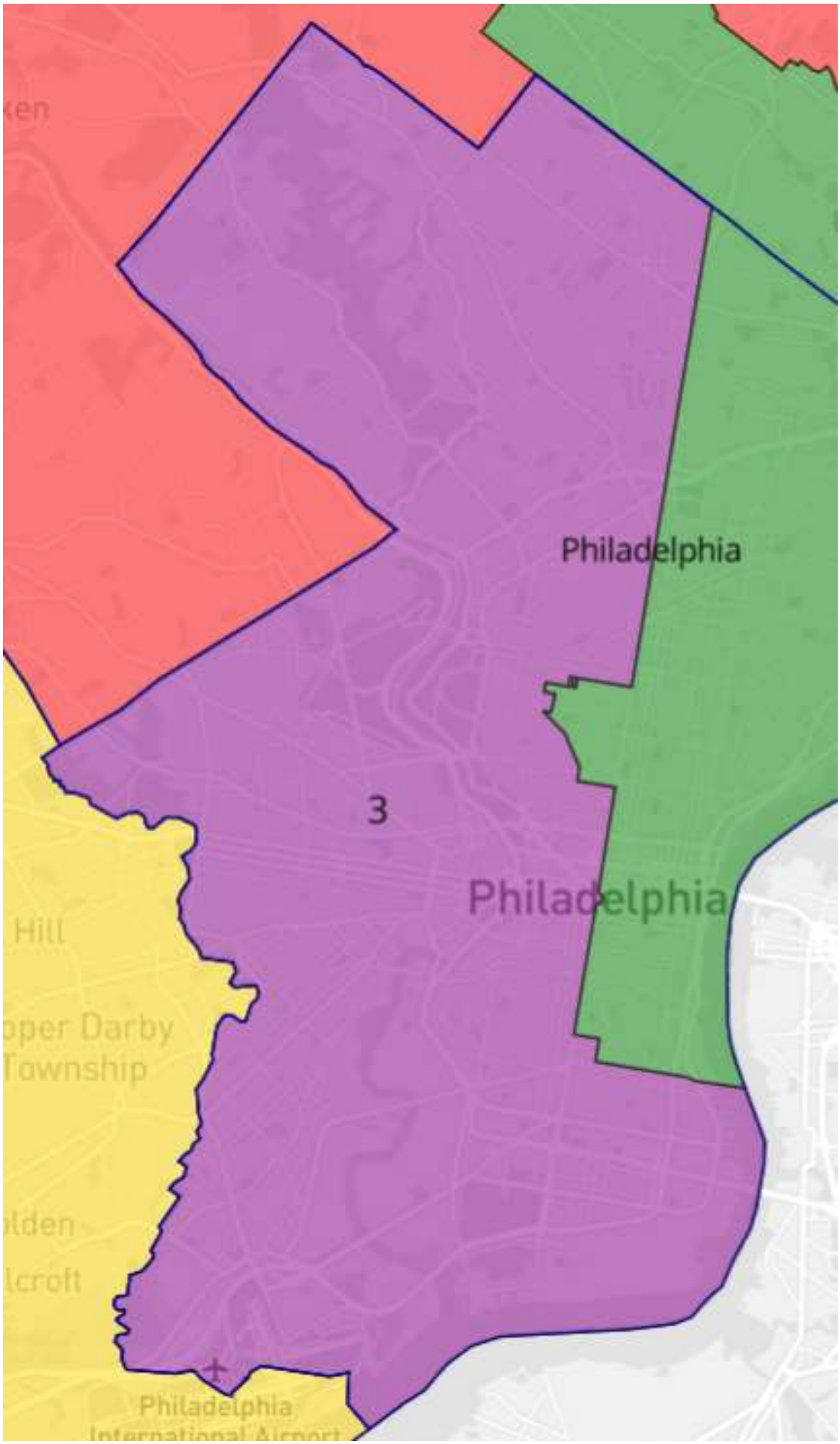
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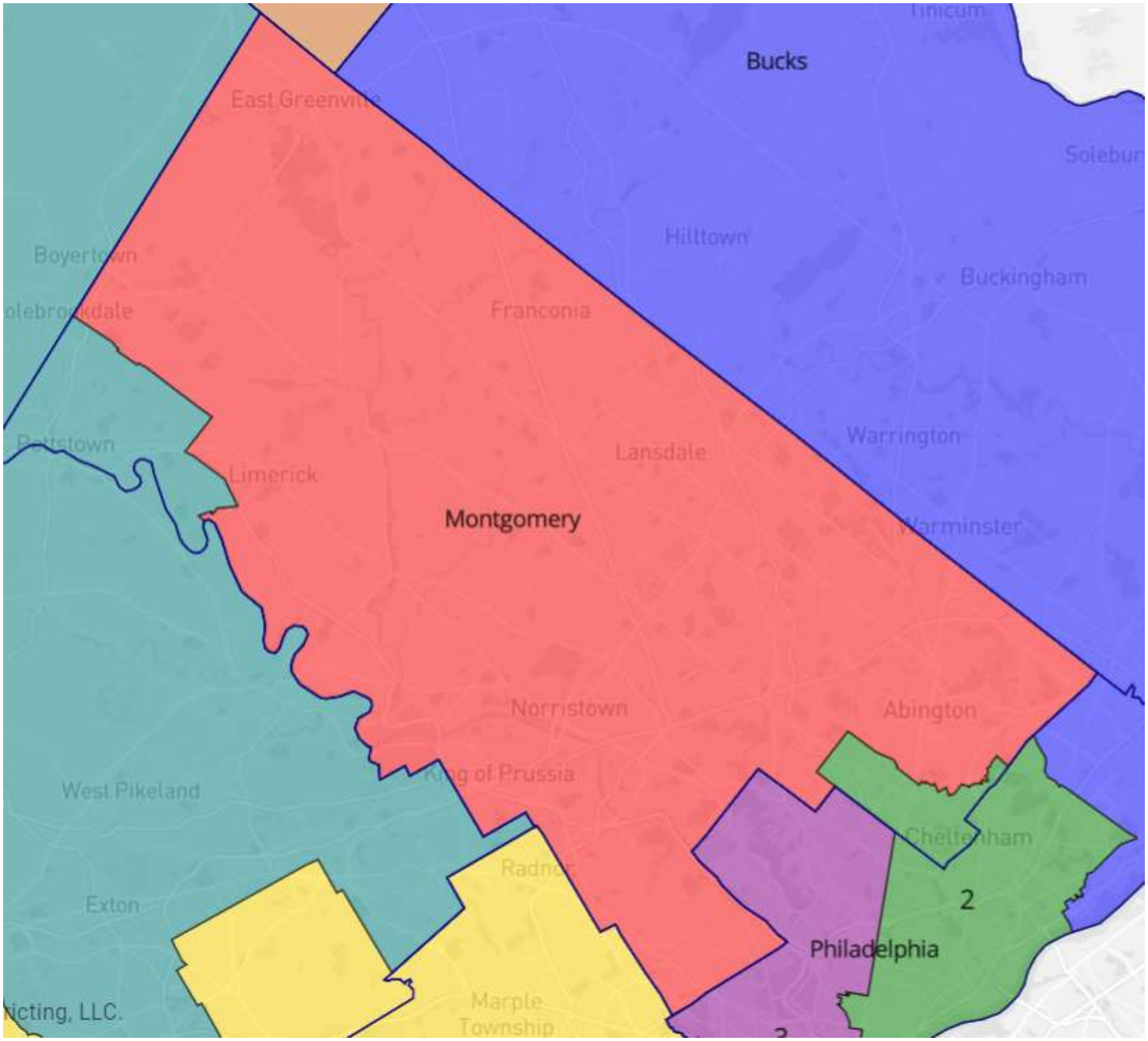
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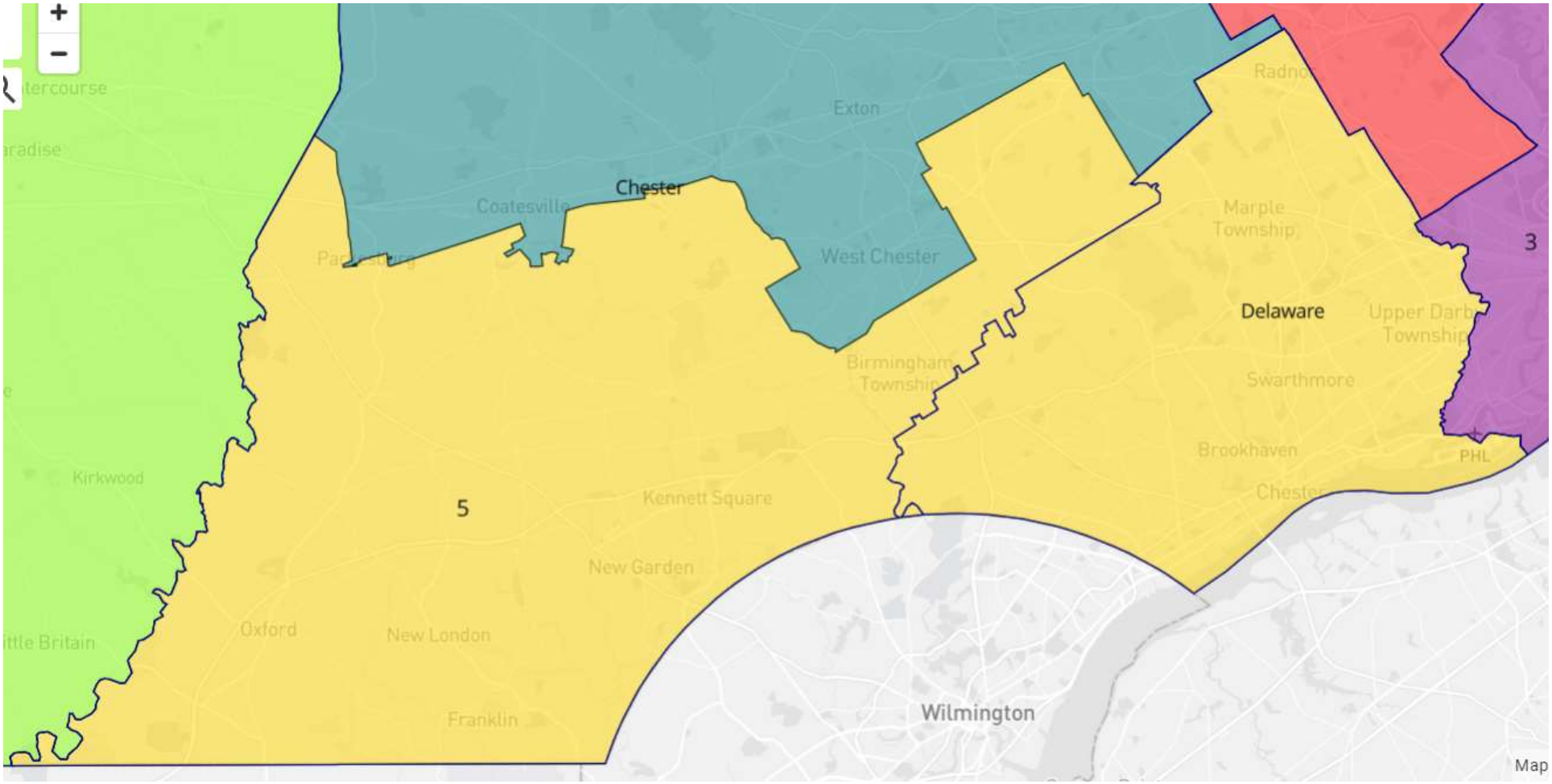
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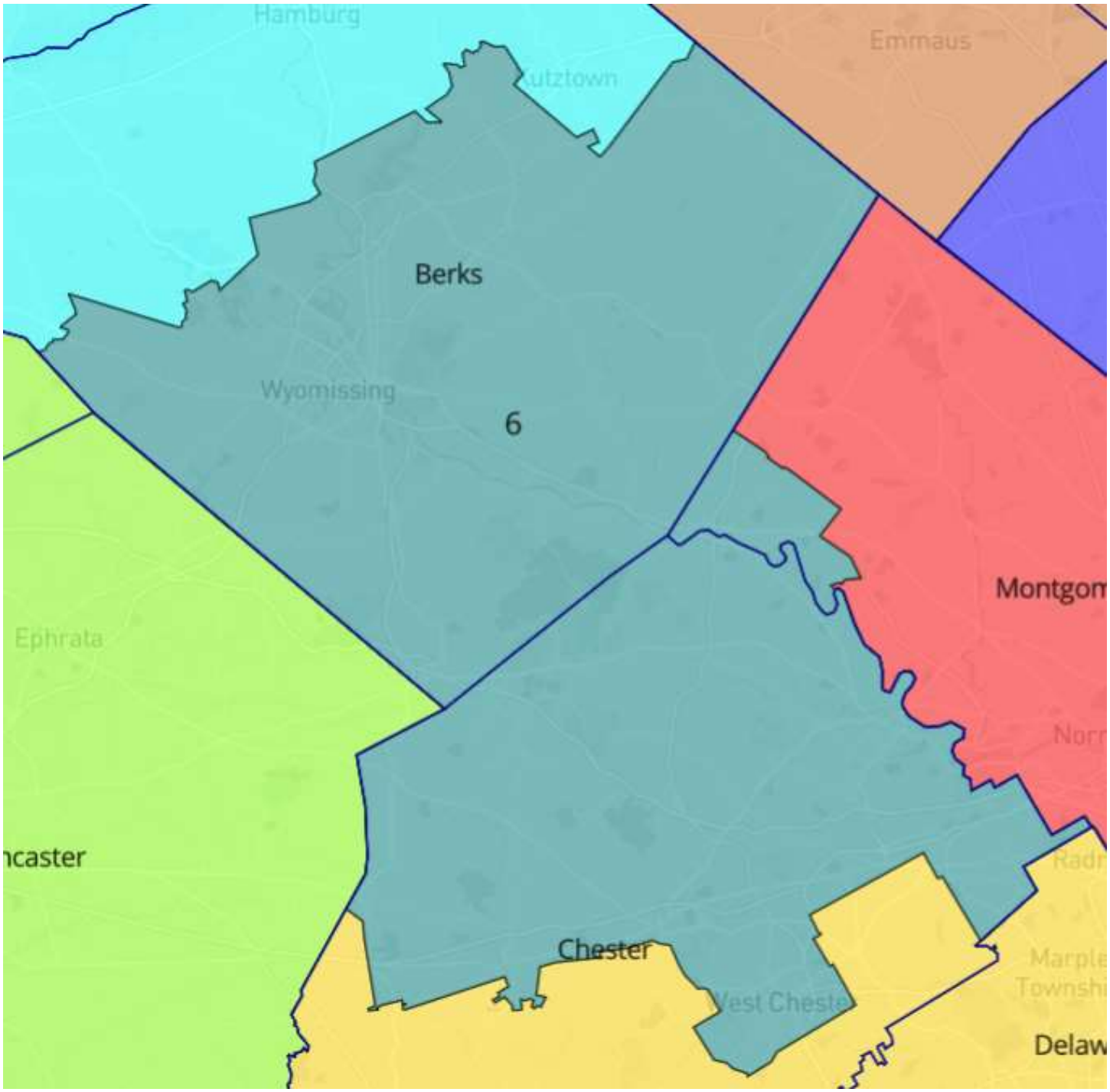
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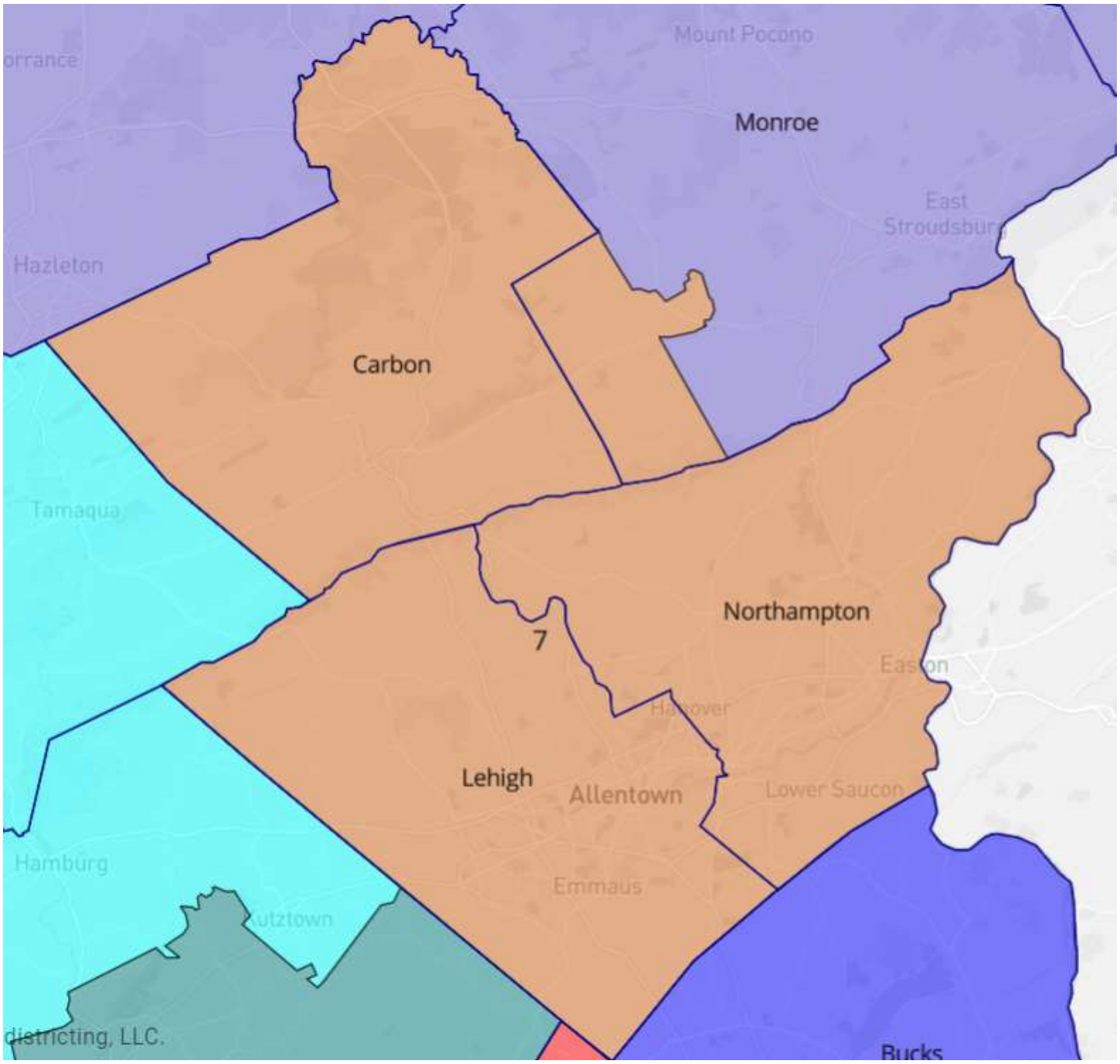
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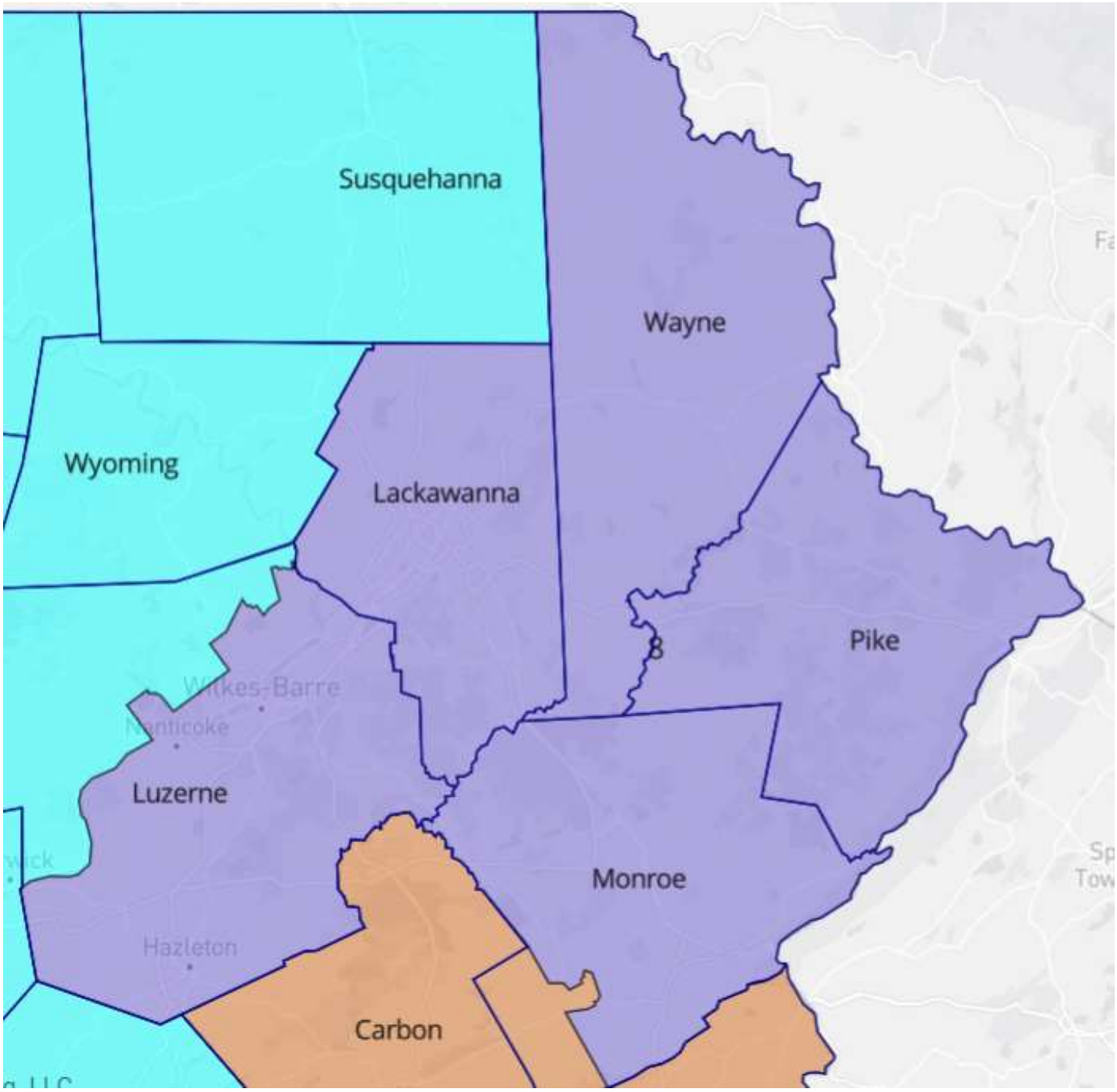
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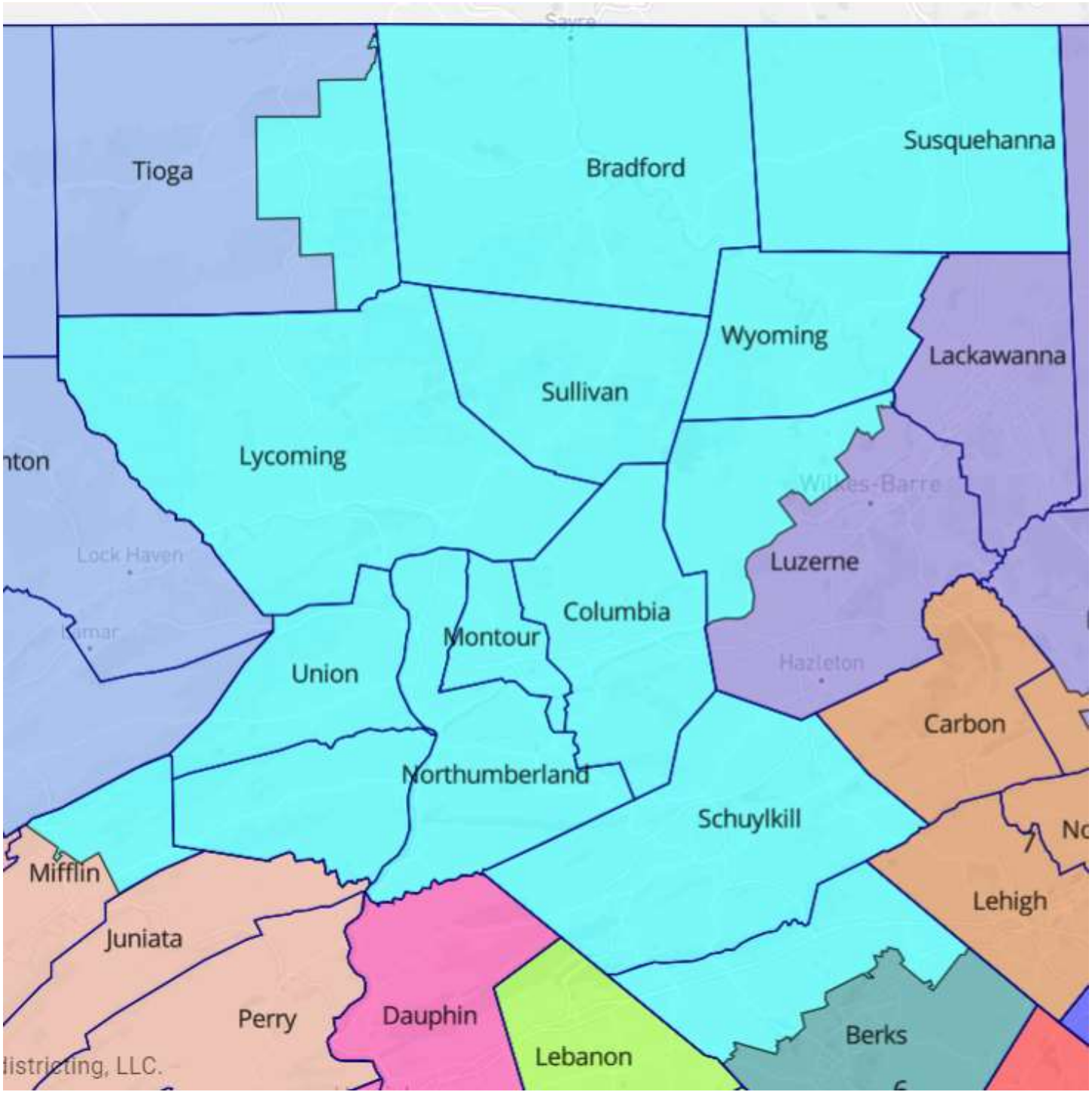
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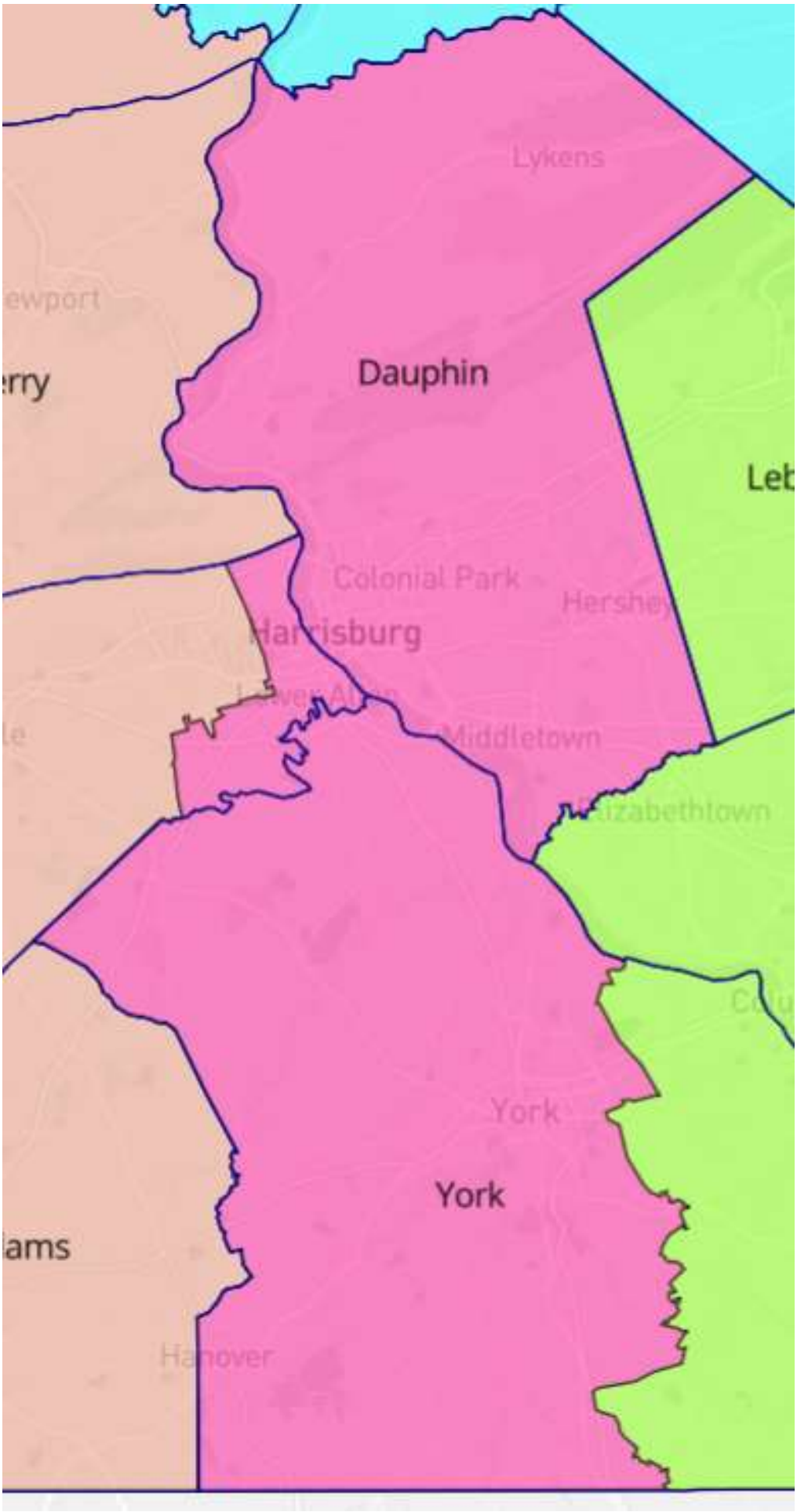
districting, LLC.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Hanover


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Columbia
York
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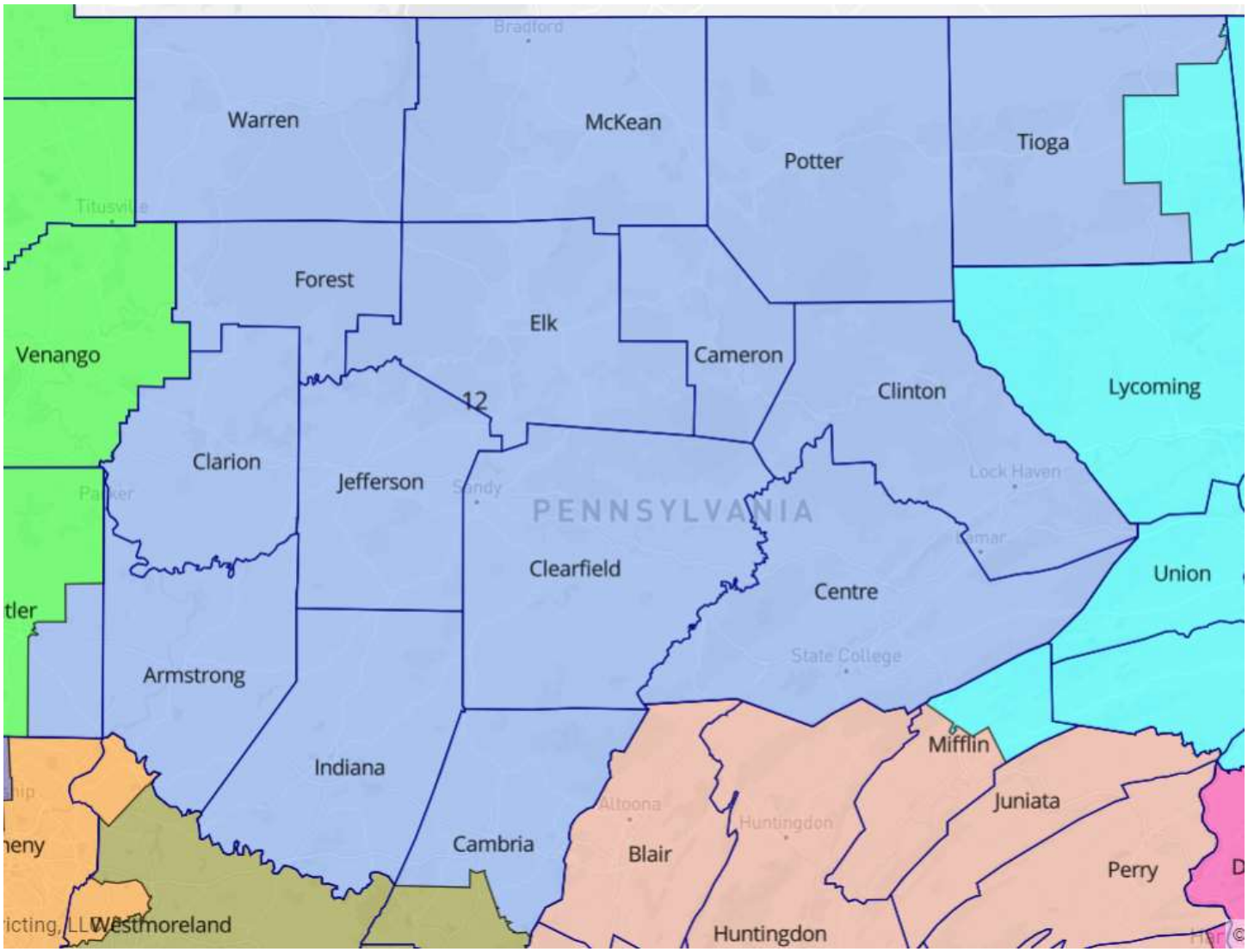
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Union
Armstrong
Indiana
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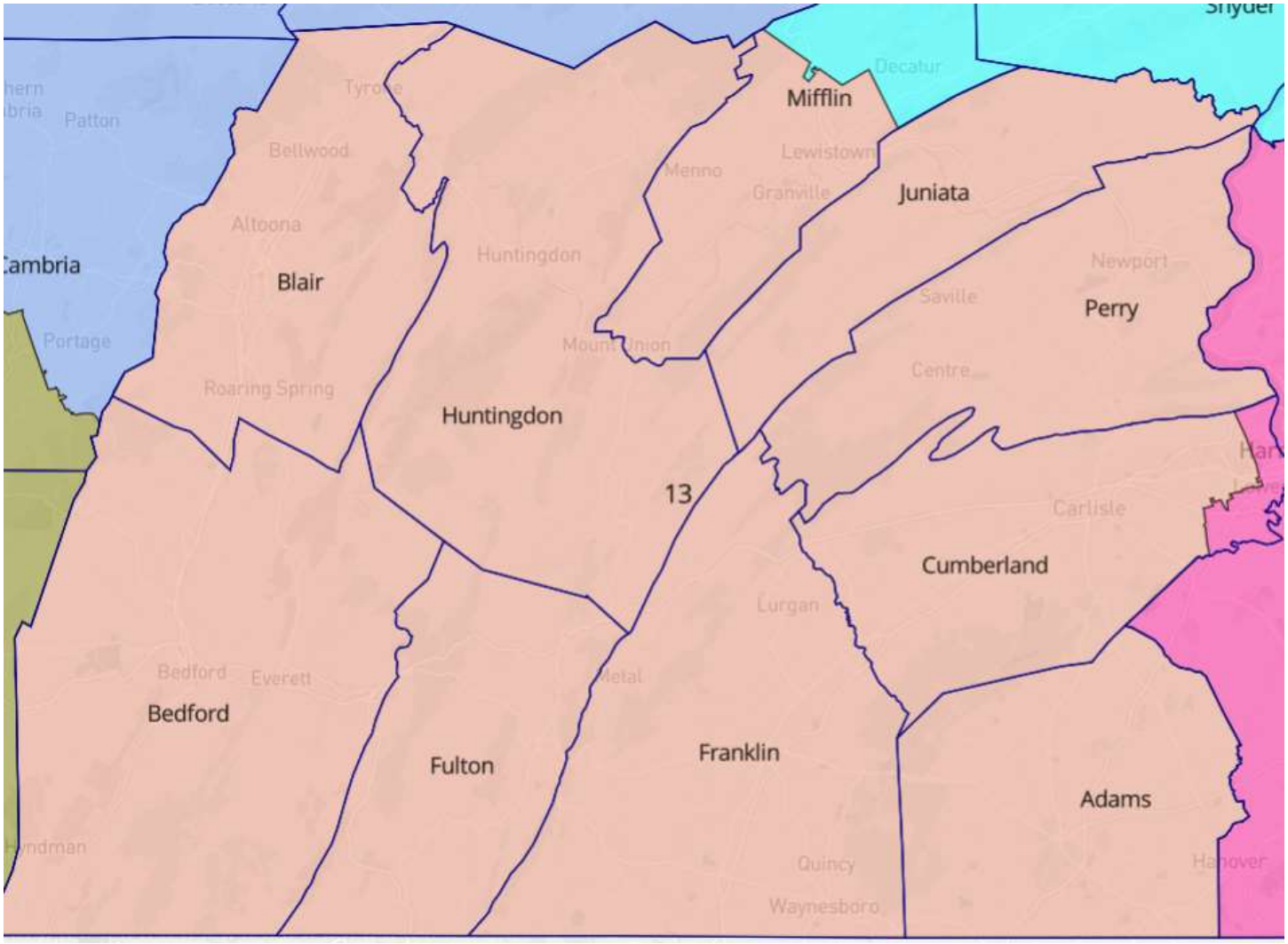
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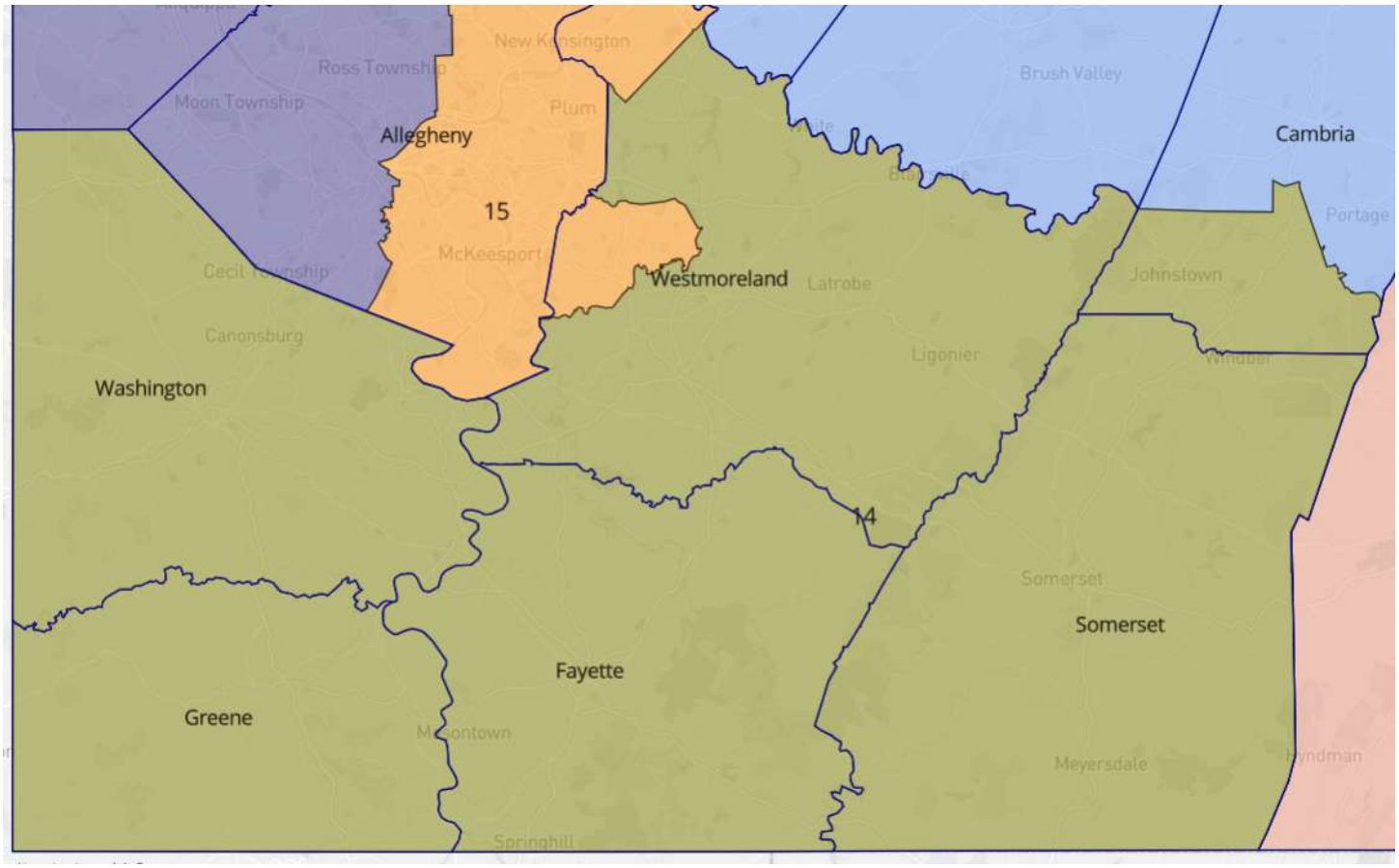
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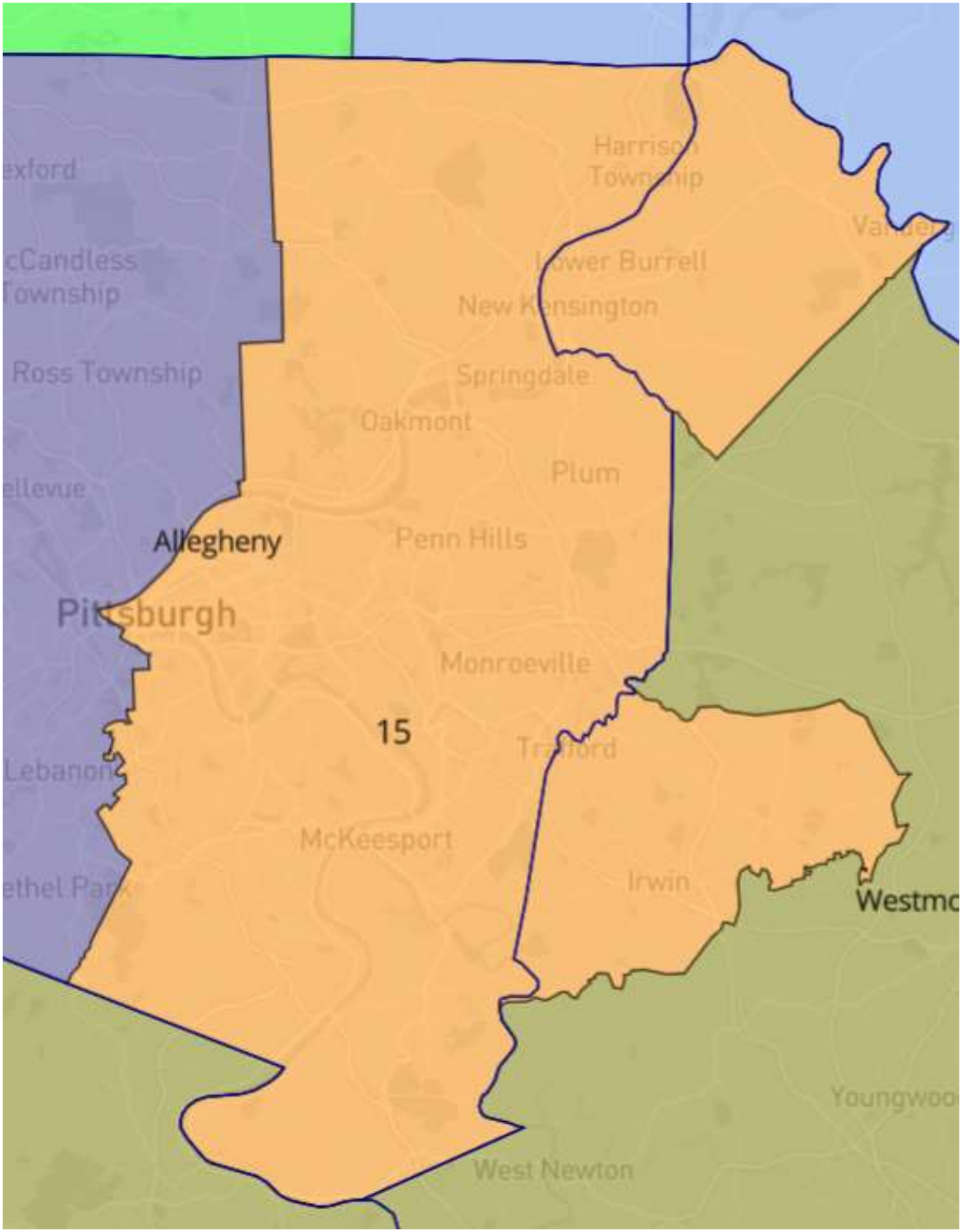
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Penn Hills
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West Newton


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Venango
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Lawrence
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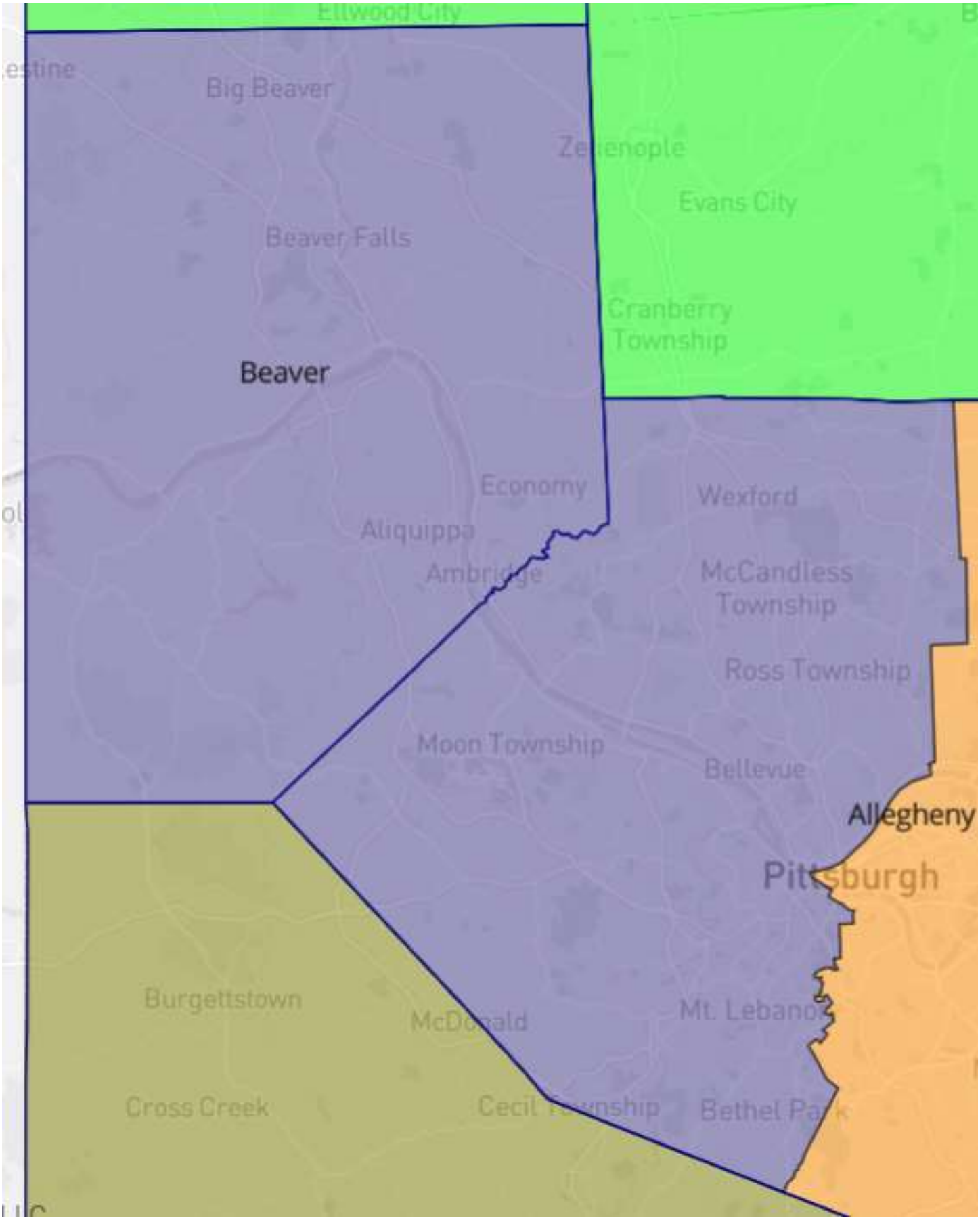
Beaver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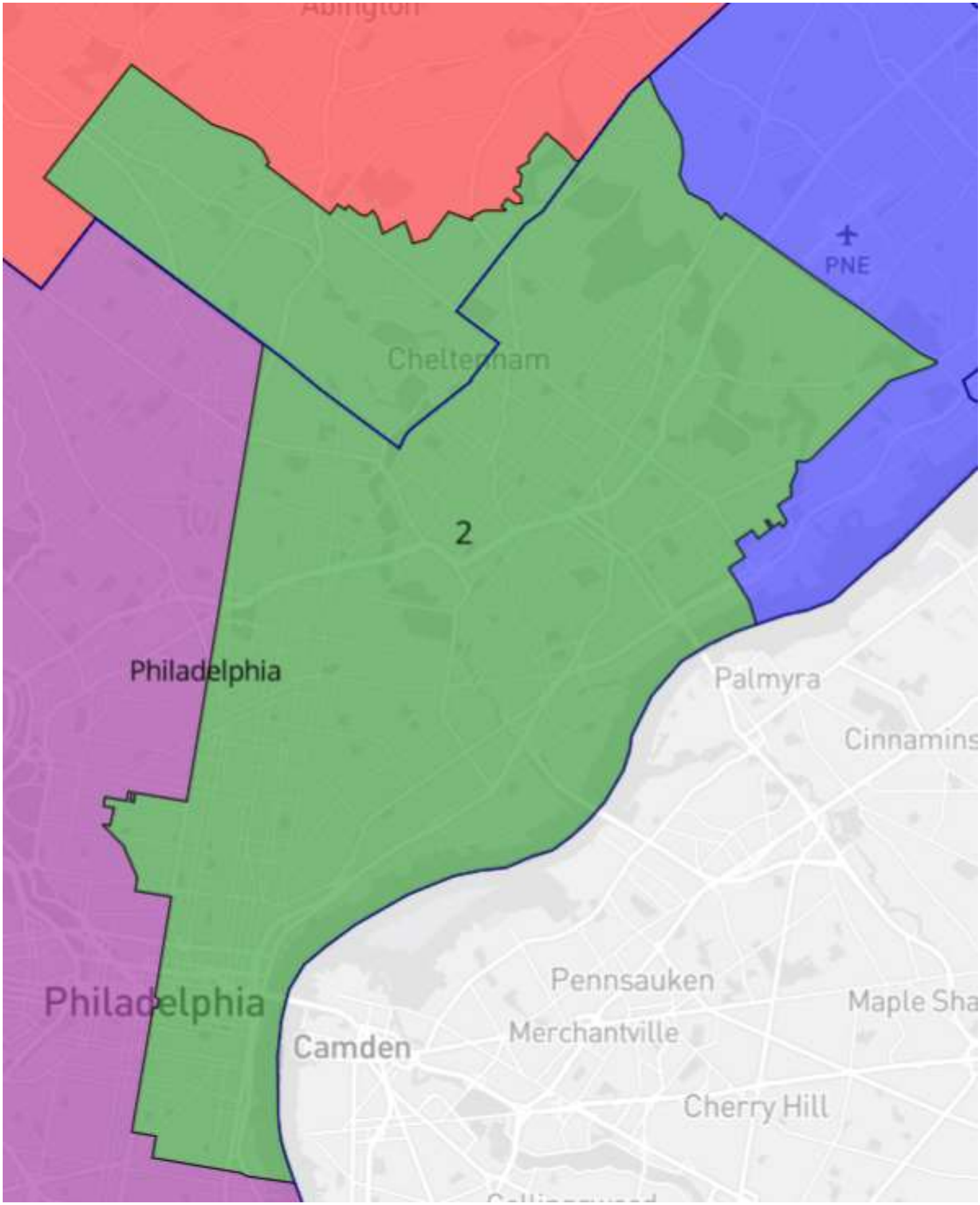
Burgettstown
McDonald
Mt. Lebanon
Cross Creek
Cecil Township
Bethel Park


PNE
Cheltenham
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Philadelphia
Palmyra
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Pennsauken
Maple Sha
Philadelphia
Merchantville
Camden
Cherry Hill

EXHIBIT B

The Story of the Pennsylvania Citizens' Map

January 2022

Statement of Justin Villere, Managing Director of Draw the Lines PA

I have been involved in the Draw the Lines PA ("DTL") Community Map project since December 2016. I organized or participated in almost every one of the 300+ in-person and virtual events held by DTL across the Commonwealth since 2017. I oversaw DTL's five bi-annual public mapping competitions from 2018-2021. Along with other judges who participated, I personally reviewed every one of the 1,500 maps that were submitted by Pennsylvanians. I managed DTL's relationship with Azavea, the Philadelphia-based GIS firm that created DistrictBuilder, the software platform primarily used for DTL's competitions. I also manage the DTL Citizen Map Corps, a group of 40 Pennsylvanians from across the Commonwealth who have won DTL competitions and proven to be extraordinary citizen mappers.

Previously, I worked as a director of a Philadelphia-based nonprofit from 2012-2016. I have a B.A. in History and Communication from the University of Colorado at Boulder, and a Master's in Public Administration from Cornell University.

Background on the Map

The Pennsylvania Citizens' Map is a composite map of 17 congressional districts in Pennsylvania that represent the efforts and mapping values of 7,211 Pennsylvanians from 40 of Pennsylvania's 67 counties– representing 90% of the Commonwealth's population– who participated in five Draw the Lines[1] public competitions held since 2018. Draw the Lines is a civic engagement project developed and hosted by the Committee of Seventy, Pennsylvania's oldest and largest 501c3 nonpartisan good government group.

Draw the Lines was created in October 2016 by longtime journalist and civic engagement consultant Chris Satullo and Seventy CEO David Thornburgh. Thornburgh continues to serve as DTL Chair. I have served as project manager and then managing director of Draw the Lines almost since its inception. During the competitions, the work of DTL was guided by three regional Steering Committees: West (chaired by former US Attorney Fred Thiemann and former Superior Court Judge Maureen Lally-Green); Central (chaired by former state Senator Mike Brubaker and Sandy Strauss, Director of Advocacy for the PA Council of Churches); and East (chaired by former PA Governor Mark Schweiker and CEO of the Urban Affairs Coalition Sharmain Matlock-Turner). The effort was funded almost exclusively by Pennsylvania foundations.

[1] DRAW THE LINES PA, https://drawthelinespa.org/ (last visited Jan. 24, 2022).

DTL competitions were open to anyone in Pennsylvania, and participants ranged from 13 year-old high school freshmen to college students from institutions across PA to senior citizens. Considering that each mapper, on average, spent three hours drawing a map, their collective effort added up to almost 22,000 hours, the equivalent to one person working full time for almost ten years. While other states have conducted such experiments in citizen engagement in redistricting, Draw the Lines PA involved roughly 10 times more citizens than any other state in history.

Draw the Lines citizen mappers completed and submitted 1,500 congressional maps (many maps were submitted by teams, and not all participants ended up completing maps). Each of these 1,500 maps were drawn and scored on common mapping metrics using free online software (District Builder[2] and Dave's Redistricting[3]). The statistical averages for these maps became benchmarks by which to draw the Citizens' Map (see below), as did the values that mappers declared important to them (prior to drawing and submitting a map citizen mappers were asked to prioritize the values and criteria they were attempting to represent in their map).

In the summer of 2020, about forty of the most skilled and active Draw the Lines citizen mappers were organized into a Citizen Map Corps, which has met monthly between then and now. With the benefit of their energetic and skilled involvement and insights, Draw the Lines published the original version of the Citizens' Map in September 2021. The map was accompanied by an extensive narrative that explained, district by district, the choices and tradeoffs embedded in the map. After the map was released, citizens were encouraged to make comments on the DTL website on what they liked and didn't like about the map. Draw the Lines received 116 comments on the map. After taking those recommendations under advisement, Draw the Lines then produced a second, final version of the map.

The Citizens' Map, in effect, represents the values of everyday Pennsylvania mappers more than any other map that has been published or considered. Further, by using direct hands-on public involvement to draw the original map, publishing the map, asking for feedback, and then revising it, Draw the Lines has modeled a transparent and accountable public process. The Citizens' Map is not a perfect map but it represents what our thousands of mappers and a clear majority of public commenters would want to see in their congressional maps.

Among the mapping criteria prioritized are those contained in the landmark 2018 Pennsylvania Supreme Court decision overturning PA's 2011 congressional maps. Accordingly, it uses the current map that resulted from that case as a general starting place.

A note on data and software

The Citizens' Map uses the 2020 PL 94-171 dataset produced by the U.S. Census Bureau in August 2021. It is unadjusted data; it does not adjust prisoner locations to their place of home address prior to incarceration.

[2] DISTRICT BUILDER, https://www.districtbuilder.org/ (last visited Jan. 24, 2022).
[3] DAVE'S REDISTRICTING, https://davesredistricting.org/maps#home (last visited Jan. 24, 2022).

The map was drawn on the free and publicly available Dave's Redistricting App.

Values prioritized by citizen mappers

Each mapper chose up to three values that they prioritized in their map. Draw the Lines totaled which values appeared as priorities most frequently. Equal population and contiguity are two requirements of any map and thus were not included.

1st	Compactness
2nd	Competitive elections
3rd	Communities of interest
4th	Minority representation
5th	Limiting jurisdictional splits
6th	Party advantage
7th	Incumbent protection

It's important to note that giving unfair advantage to any particular party or incumbent were not only near-universally ranked behind the other values, but people actively dismissed them as goals. It is clear that Pennsylvanians want partisan fairness in their maps.

The Metrics of the Citizens' Map

Equal population: It is standard practice that congressional districts have the exact same number of people, down to the person, to avoid court challenges on the basis of "one person, one vote." This map has a total deviation of one person.

Contiguous and compact: Two values that mattered significantly to DTL mappers were contiguous and compact districts, two values cited by the State Supreme Court as necessary and codified in the PA Constitution for state legislative districts. Each district is contiguous in the Citizens' Map. Further, it achieves a 38% Polsby-Popper (PP) compactness score. The median PP score of the 1,500 congressional maps produced by DTL mappers was 33%. This map significantly improves upon the 16% mark from the discarded 2011 maps. It also exceeds the 33% PP mark of the 2018 map. If one uses a different compactness measurement, Reock, this map is slightly better than the 2018 map - 45% to 43%, respectively.[4]

[4] For more information regarding the differences between the Polsby-Popper and Reock measurements, *see* Daniel McGlone, *Measuring District Compactness in PostGIS*, AZAVEA (Jul. 11, 2016) https://www.azavea.com/blog/2016/07/11/measuring-district-compactness-postgis/.

Further compactness measurements were calculated by redistricting expert Moon Duchin.[5]

Polsby-Popper	37.6%
Schwartzberg	1.67
Reock	45.1%
Convex Hull	0.81
Population Polygon	0.77

Jurisdictional splits: While limiting jurisdictional splits was not a top-3 priority for our mappers, it was cited by the State Supreme court in 2018 as necessary. Minimizing splits has a number of benefits: ease of election administration for county officials, limiting confusion among residents of who their elected officials are, and enabling communities to vote with a unified voice. This map splits 14 counties a total of 16 times, equal to the 14/16 split by the 2018 map and far superior to the 28 counties split 38 times in the 2011 map. It also takes pains to minimize splitting municipalities. It splits 16 municipalities, an improvement on the 19 splits in the 2018 map. Some municipal splits are unavoidable due to size (like Philadelphia), or due to the zero population deviation requirement. Other splits (like Pittsburgh) were the result of trade-offs to maximize other values (like communities of interest, compactness, and political competitiveness).

Compliance with the Voting Rights Act: To adhere to the Voting Rights Act, Districts 2 and 3 are majority-minority districts. District 2 is a coalition district (29% Black, 22% Hispanic, 10% Asian), while District 3 is majority Black (55%). A few DTL mappers created a third majority-minority district in their own maps, and others aimed to achieve a 37% single-minority population in additional districts; this figure has been cited as a baseline for giving a racial minority a chance to elect the candidate of their choice while maximizing their voting power in other districts.[6] However, doing so on the Citizens' Map would have had ripple effects on compactness, splits, and regionality.

Competitiveness: Throughout the Draw the Lines competitions, Pennsylvanians stated that they valued districts that created competitive elections. The Citizens' Map, using 2016-2020 composite election data, would yield five strongly Democratic and six strongly Republican districts. Six districts would produce competitive elections (major party candidates within 10% of each other). This exceeds the median that DTL mappers were able to produce (four competitive districts), plus the four elections that would be classified as competitive under this standard in 2018 and 2020. The 2011 map was notoriously uncompetitive—only three races total between 2012-2016 finished with candidates within 10% of each other.

Partisan fairness: Our mappers were almost unanimous in placing partisan advantage last when ranking the values that define a map. Accordingly, this map rates well on "proportionality,"

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[5] *See Draft Plans*, PENNSYLVANIA REDISTRICTING PUBLIC COMMENT PORTAL, https://portal.pennsylvania-mapping.org/plans (last visited Jan. 24, 2022).

[6] *See, e.g.*, Ryan P. Haygood, *The Dim Side of the Bright Line: Minority Voting Opportunity After Bartlett v. Strickland*, HARV. CIV. RIGHTS – C.L. L. REV. at 10 (Feb. 25, 2010), https://harvardcrcl.org/wp-content/uploads/sites/10/2010/02/HaygoodFinalFINAL.pdf.

meaning that if either party were to win 50% of the statewide vote, they would win 8-9 seats if the map were perfectly proportional.

PlanScore, which evaluates maps for partisan fairness, gives two readings on the efficiency gap metric.[7] When not factoring in the status of incumbents, PlanScore gives the Citizens' Map an efficiency gap of 3.5% in favor of Republicans.[8] This means Republicans would win an extra 3.5% of 17 seats, or an extra half-seat. When factoring incumbency, there is a 0.2% gap in favor of Republicans.[9] For reference, the overturned 2011 map was +19% R[10] (worth about 3 extra seats) and the 2018 remedial map was +3% R.[11]

Incumbency: While the locations of incumbent members of Congress was a value roundly rejected by DTL mappers, the Citizens' Map does partially consider these locations. This map attempts to balance the value of "wiping the slate clean" with the understanding that dramatically altering the previous map and moving congresspersons around to new districts could be disruptive to representation.

	2011	2018	HB 2146, passed House	PA Citizens' Map	Averages, individual DTL mappers
Counties Split	28 (38 times)	14 (18 times)	15 (18 times)	14 (16 times)	57 times
Municipalities Split	68	19	13	16	NA
Precincts Split	19	32	8	23	NA
Compact, Reock	34%	46%	38%	45%	NA
Compact, Polsby-Popper	16%	33%	31%	38%	33%
Competitive districts	1	4	5	6	4
Efficiency Gap	+19.0% R	+ 1.9% R	+7.1% R	+ 2.2% R	NA
Pop. Deviation	1	1	1	1	6,276
Maj-Min Districts	2	2	2	2	2

[7] Eric Petry, *How the Efficiency Gap Works*, BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW (last visited Jan. 24, 2022), https://www.brennancenter.org/sites/default/files/legal-work/How_the_Efficiency_Gap_Standard_Works.pdf.
[8] *CitizensMap_revised.geojson*, PLANSCORE (last updated Jan. 12, 2022), https://planscore.campaignlegal.org/plan.html?20220112T114256.829958524Z.
[9] *Id.*
[10] *2012-2016 Redistricting Plan*, PLANSCORE (last visited Jan. 24, 2022), https://planscore.campaignlegal.org/pennsylvania/#!2012-plan-ushouse-eg.
[11] *2018-2020 Redistricting Plan*, PLANSCORE (last visited Jan. 24, 2022), https://planscore.campaignlegal.org/pennsylvania/#!2018-plan-ushouse-eg.

** Maps drawn by DTL mappers used 2010 Census data, and up until 2020 the mapping platform was only able to draw districts down to the census tract level, rather than voting precincts. This explains the high county split and population deviation metrics.*

District-by-District Descriptions

The notion of "communities of interest" was important to DTL mappers as well. Any redistricting process that faithfully attempts to receive and incorporate public feedback is essentially seeking clarification from residents about important aspects of their communities that otherwise may not be known or apparent to map makers. This map attempts to demonstrate the most frequent regions of interest or other considerations of import to Pennsylvanians (e.g., geographic features) that our mappers have represented over the last three years.

District 1: Bucks County has been held together within a single district since the 1930s, and the majority of DTL maps did the same. The Citizens' Map does as well. To meet the population requirement, it dips into northeastern Philadelphia, as the character and culture of southern Bucks is quite similar to Wards 58, 65, and 66 in Philly.

The First District is composed of all of Bucks County and part of Philadelphia County consisting of the city of Philadelphia Wards 58 and 66 and part of Ward 65 (full precincts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 20, 23), and parts of Precinct 12 (Blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1071, 1010, 1011, 1012, 1013, 1014, 1015, 1020, 1021, 1022, 1023, 1024, 1025, 3000, 3001, 3002, 3003, 3004, 3010, 4003), Precinct 14 (Blocks 1020, 4010, 4011,4012, 4013), Precinct 15 (Block 1016), and Precinct 16 (Blocks 1001, 1002, 1003, 2000).

District 2: CD2 is made up of the rest of Northeast Philadelphia, over to Broad Street, and then down to the Pennsport neighborhood in South Philly. DTL mappers frequently used Broad Street as a clean dividing line, and this largely mirrors the 2018 map. The Citizens' Map takes care not to split Temple University, incorporating Wards 32 and 47. This trade-off ensures the second largest university in the Commonwealth is held together. It also includes Cheltenham and a part of Abington Township in Montgomery County. CD2 is a minority coalition district, with the voting-age population being 61% BIPOC.

The Second District is composed of part of Philadelphia County consisting of the city of Philadelphia Wards 1, 2, 5, 7, 14, 18, 19, 20, 23, 25, 31, 33, 35, 37, 41, 42, 43, 45, 47, 49, 53, 54, 55, 56, 57, 61, 62, 63, 64. It has part of Ward 32, including full precincts 2, 5, 6, 7, 8, 9, 11, 12, 13, 15, 29, and part of Precinct 14 (Blocks 1004, 1006, 1007, 1008), Part of Precinct 16 (Blocks 2003, 2007, 2008). It has part of Ward 65 (full precincts 13, 17, 18, 19, 21, 22) and part of Precinct 12 (Blocks 1019, 3004, 3009, 3019), Precinct 14 (Blocks 4008, 4009), Precinct 15 (Blocks 1018, 1019, 4005, 4006, 4007), and Precinct 16 (Blocks 1004, 1005, 1006, 1007, 1010, 1011, 1012, 1013, 1014, 1015, 1017). It also has part of Montgomery County consisting of the townships of Cheltenham and Rockledge, plus part of the township of Abington (Ward 4, Districts 1 and 2, plus part of Ward 3, District 1 (Blocks 2000, 2001, 2006, 2007, 2008, and 2016) and part of Ward 3, District 2 (Block 2010).

District 3: CD3 contains Northwest, West, and much of South Philadelphia. CD3 is a majority-minority district, with Black voting-age residents making up 55% of the population.

The Third District is composed of part of Philadelphia County consisting of the city of Philadelphia Wards 3, 4, 6, 8, 9, 10, 11, 12, 13, 15, 16, 17, 21, 22, 24, 26, 27, 28, 29, 30, 34, 36, 38, 39, 40, 44, 46, 48, 50, 51, 52, 59, 60, and part of Ward 32 (full precincts 1, 3, 4, 10, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, and part of Precinct 14 [Block 1005] and Precinct 16 [Blocks 2004, 2009]).

District 4: District 4 centers on the majority of Montgomery County. The region's population growth, particularly in Montgomery County, meant that behind Philadelphia, it was the most logical district to maintain a second split. Thus, the Pottstown and Pottsgrove area in the northwest (to CD6) and Cheltenham/part of Abington (CD2) are the only Montgomery County municipalities not included in CD4.

The Fourth District is composed of part of Montgomery County consisting of Ambler, Bridgeport, Bryn Athyn, Collegeville, Conshohocken, Douglass township, East Greenville, East Norriton, Franconia, Green Lane, Hatboro, Hatfield Borough, Hatfield Township, Horsham, Jenkintown, Lansdale, Lower Frederick, Lower Gwynedd, Lower Merion, Lower Moreland, Lower Providence, Lower Salford, Marlborough, Montgomery Township, Narberth, New Hanover, Norristown, North Wales, Pennsburg, Perkiomen, Plymouth Township, Red Hill, Royersford, Salford, Schwenksville, Skippack, Souderton, Springfield township, Telford, Towamencin, Trappe, Upper Dublin, Upper Frederick, Upper Gwynedd, Upper Hanover, Upper Merion, Upper Moreland, Upper Providence Township, Upper Salford, West Conshohocken, West Norriton, Whitemarsh, Whitpain, Worcester. It also contains part of Abington, Ward 3, District 2 (Blocks 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2011, 2012, 2013, 2014, 2015, 2017, 2018, 2019, 2020, 2021, 2022, 4004, 4005, 4009) and Ward 2, District 1 (Blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 2000, 2001, 2002, 3010, 3011). It also contains part of Limerick, Districts 1, 2, 4, 5, 6 and part of District 3 (Blocks 1002, 1003, 1004, 1005, 1007, 1008, 1009, 1010, 1011, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 3005, 3016, 3017, 3019, 3020, 3021).

District 5: District 5 contains all of Delaware County and the southern part of Chester County. DTL mappers were divided on pairing Delaware County with Chester or with south Philly by the airport (as was done in the 2018 map). Due to trade-offs elsewhere in the map (mainly by including Berks with Chester County), the Citizens' Map now pairs two of the faster growing counties in PA.

The Fifth District is composed of all of Delaware County and part of Chester County consisting of Atglen, Avondale, Birmingham township, East Fallowfield township, East Goshen, East Marlborough, East Nottingham, Elk township, Franklin township, Highland township, Kennett, Kennett Square, London Britain, London Grove, Londonderry township, Lower Oxford, Malvern, New Garden, New London, Newlin, Oxford borough, Penn township, Pennsbury, Pocopson,

Thornbury township, Upper Oxford, West Bradford, West Fallowfield township, West Grove, West Marlborough, West Nottingham, West Sadsbury, Westtown, Willistown. It also contains parts of Parkesburg Precinct South (Blocks 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2023, 2024, 2028, 2029, 2030, 2031, 2032, 2033, 2035, 2036, 2037, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060.)

District 6: Northern Chester County and the majority of Berks County (including Reading) are joined together in District 6. After being split among four districts in the 2011 map and three in the 2018 map, Berks County is only split once in the Citizens' Map. DTL mappers frequently matched Berks with Chester in their maps. An additional round of public comments spurred DTL to include South Coatesville with Coatesville in CD6.

The Sixth District is composed of part of Berks County consisting of Alsace, Amity township, Bally, Bechtelsville, Bern, Birdsboro, Brecknock township, Boyertown, Caernarvon township Colebrookdale, Cumru, District, Douglass township, Earl township, Exeter township, Fleetwood, Hereford, Kenhorst, Laureldale Leesport, Longswamp, Lower Alsace, Lower Heidelberg, Lyons, Maidencreek, Mohnton, Mount Penn, Muhlenberg, New Morgan, Oley, Ontelaunee, Pike township, Reading city, Robesonia, Robson, Rockland township, Ruscombmanor, Shillington, Sinking Spring, South Heidelberg, Spring township, St. Lawrence, Topton, Union township, Washington township, Wernersville, Wyomissing, and parts of Richmond township not listed in the description for District 9, and parts of Heidelberg township not listed in the description for District 9.

It contains part of Montgomery County consisting of Lower Pottsgrove, Pottstown, Upper Pottsgrove, West Pottsgrove, and part of Limerick District 3 not listed in the description of District 4.

District 6 contains part of Chester County consisting of Caln, Charlestown, Coatesville, Downingtown, East Bradford, East Brandywine, East Caln, East Coventry, East Nantmeal, East Pikeland, East Vincent, East Whiteland, Easttown, Elverson, Honey Brook borough, Honey Brook township, Modena, North Coventry, Phoenixville, Sadsbury township, Schuylkill township, South Coatesville, South Coventry, Spring City, Tredyffrin, Upper Uwchlan, Uwchlan, Valley township, Wallace, Warwick Township, West Brandywine, West Caln, West Chester, West Goshen, West Nantmeal, West Pikeland, West Vincent, West Whiteland, and part of Parkesburg (all of North precinct, and part of South precinct not named in the description for District 5).

District 7: District 7 couples Lehigh and Northampton County, which together comprise the Lehigh Valley. This was one of the most common groupings of any two counties in DTL maps. CD7 includes Carbon County and a part of Monroe, which mirrors those communities' connections via the Northeast Extension (I-476). DTL fielded public comments about including the Stroudsburg area with District 7, but there was not a clear consensus.

The Seventh District is composed of Lehigh County, Northampton County, Carbon County, and parts of Monroe County consisting of Polk township, Eldred Township, and part of Chestnut Hill (District 3, blocks 2005, 2025, 3021, 3022, 3023, 3027).

District 8: District 8 is anchored by Scranton/Wilkes-Barre, which DTL mappers from this area often took pains to keep together, along with Hazleton. DTL heard from residents that combining Lackawanna and Luzerne Counties with Pike and Monroe Counties brings together two clear communities (the SWB metro area and the Pocono commuter rim). It also includes Wayne County.

The Eighth District is composed of Pike County, Wayne County, Lackawanna County, and parts of Monroe County consisting of Barret, Coolbaugh, Delaware Water Gap, East Stroudsburg, Hamilton township, Jackson township, Middle Smithfield, Mount Pocono, Paradise townhip, Pocono, Price, Stroud, StroudsburgTobyhanna, Tunkhannock township, and all parts of Chestnut Hill not named in the description in district 7. It also includes parts of Luzerne County including Ashley, Avoca, Buck, Bear Creek, Bear Creek Village, Black Creek, Butler township, Conyngham borough, Conyngham township, Courtdale, Dennison, Dorrance, Dupont, Duryea, Edwardsville, Exeter borough, Fairview township, Forty fort, Foster township, Freeland, Hanover township, Hazle, Hazleton, Hollenback, Hughestown, Jeddo, Jenkins, Kingston borough, Kingston township, Laflin, Larksville, Laurel Run, Luzerne borough, Nanticoke, Nescopeck borough, Nescopeck township, Newport township, Nuangola, Penn Lake Park, Pittston city, Pittstown township, Plains, Plymouth borough, Plymouth township, Pringle, Rice, Slocum, Sugar Notch, Sugarloaf township, Swoyersville, Warrior Run, West Hazleton, West Pittston, West Wyoming, White Haven, Wilkes-Barre city, Wilkes-Barre township, Wright, Wyoming, and Yatesville, and part of Exeter township (all blocks not listed in the description for District 9 within Exeter).

District 9: District 9 groups northern tier counties with some of their more southern counterparts that share cultural characteristics. It keeps the Susquehanna Valley together, a recognized region with counties containing common cultural and economic interests (Columbia, Union, Snyder, Montour, Northumberland). It also comes close to the municipal limits of the Wilkes-Barre area. The current 9th District is one of the districts most likely to change as population shifts away from the northern and central parts of the state, towards south central and southeast.

The Ninth District is composed of Bradford, Columbia, Lycoming, Montour Northumberland, Schuylkill, Snyder, Sullivan, Susquehanna, Union, Wyoming Counties, and part of Luzerne County including Dallas borough, Dallas township, Fairmount, Franklin township, Harveys Lake, Hunlock, Huntington township, Jackson township, Kutztown, Lake township, Lehman township, Lenhartsville, Maxatawny, New Columbus, Ross township, Salem township, Shickshinny, Union township and part of Exeter township (1000, 1001, 1002, 1003, 1004, 1005, 1006, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1024, 1034, 1045, 1046, 1047).

It includes part of Berks County including Albany township, Bernville, Bethel township, Centre township, Centerport, Hamburg, Greenwich, Jefferson township, Marion township North Heidelberg, Penn township, Perry township, Shoemakersville, Tilden, Tulpehocken, Upper Bern, Upper Tulpehocken, Windsor township, Womelsdorf, and parts of Heidelberg township (Blocks 3011, 3012, 3013, 3014, 3016, 3017), and parts of Richmond township, District 1 (Blocks 2007, 2011, 2014, 2018, 2023, 2030, 2031, 2032, 2033, 2051, 2052).

It includes part of Mifflin County, including Armagh township and Decatur township, and part of Brown township (Church Hill precinct, Blocks 1043 and 1044).

It includes part of Tioga County, including Blossburg, Covington township, Hamilton township, Mansfield, Putnam, Richmond township, Roseville, Rutland, Sullivan, Union township, Ward, and part of Jackson township (Blocks 1001, 1010, 1011, 1012, 1021, 1023, 1024, 1048, 1052, 1053, 1054, 1055.

District 10: District 10 is all of Dauphin and the western half of York County, including the city of York. There was no clear consensus among our mappers if York County should be attached to Lancaster County to the east or Adams County to the west. CD10 in the original Citizens' Map included Adams, York, and parts of Cumberland County. However, this created an awkward connection between half of Dauphin County (including Harrisburg) and some of the south-central counties with which it had little in common, like Bedford and Blair County. It was universally panned by Dauphin County residents, spurring the revision.

The tenth District is composed of Dauphin County and parts of York County including Carroll township, Codorus, Conewago township, Dallastown, Dillsburg, Dover borough, Dover township, East Manchester, Fairview township, Franklin township, Franklintown, Glen Rock, Goldsboro, Jackson township, Jacobus, Jefferson borough, Hanover borough, Heidelberg township, Lewisberry, Loganville, Manchester borough, Manheim township, Monaghan, Mount Wolf, Newberry, New Freedom, New Salem, North Codorus, North York, Paradise township, Penn township, Railroad, Red Lion, Seven Valleys, Shrewsbury borough, Shrewsbury township, Spring Garden, Spring Grove, Springettsbury, Springfield township, Warrington township, Washington township, West Manchester, West Manheim, West York, Wellsville, Winterstown, Yoe, York city, York Haven, York township, and part of North Hopewell not listed in the description for congressional District 11.

It contains part of Cumberland County, including Camp Hill East Pennsboro, Lemoyne, Lower Allen, New Cumberland, Shiremanstown, Upper Allen, Wormleysburg, and part of Mechanicsburg, including all of Ward 1 and part of Ward 2, Precinct 1 (Blocks 1031, 1032, 1033, 1034, 1035, 1036, 2015, 2017, 2018, 2019, 2020).

District 11: The Lancaster County Commissioners recently approved a resolution expressing the desire for the county to be held together during this process. The Citizens' Map respects that request. It also includes Lebanon County and the eastern half of York County.

The Eleventh District is composed of Lancaster and Lebanon Counties and parts of York County, including Chanceford, Crossroads, Delta, East Hopewell, East Prospect, Fawn Grove, Fawn township, Felton, Hallam, Hellam, Hopewell township, Lower Chanceford, Lower Windsor, Peach Bottom, Stewartstown, Windsor borough, Windsor township, Wrightsville, Yorkana, and parts of North Hopewell (Blocks 2007, 2008, 2009, 2013, 2014, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2030, 2031, 2032, 2034, 2035, 2036, 2037, 2038, 2044, 2045, 2046, 2047, 2050, 2051, 2052, 2055).

District 12: District 12 is another northern tier district, made up of much of the Pennsylvania Wilds. DTL hears frequently from Centre County and its Democratic-leaning electorate that they are tired of continually being grouped with more red counties surrounding it on all sides. However, this map is not able to address those concerns, as minimizing splits and creating a compact district became more relevant. Much of this district used to be 15th in the old map, which lost the most raw population from the last round of redistricting.

The Twelfth District is composed of the entirety of Armstrong, Cameron, Centre, Clarion, Clearfield, Clinton, Elk, Forest, Indiana, Jefferson, McKean, Potter, and Warren counties.

It contains part of Tioga County including Bloss, Brookfield, Charleston, Chatham, Clymer township, Deerfield township, Delmar, Duncan, Elk township, Elkland borough, Farmington township, Gaines, Knoxville, Lawrence township, Lawrenceville, Liberty borough, Liberty township, Middlebury, Morris township, Nelson, Osceola, Shippen township, Tioga borough, Tioga township, Wellsboro, Westfield borough, and Westfield township.

It contains part of Butler County including Buffalo township, Chicora, Clearfield township, Clinton township, Donegal township, East Butler, Jefferson township, Saxonburg, Winfield, and part of Summit township, including South District and the part of North District not named in the description for congressional district 16.

It contains part of Cambria County including Allegheny township, Asheville, Barr, Blacklick, Cambria, Carrolltown, Cassandra, Chest Springs, Chest township, Clearfield township, Cresson borough, Cresson township, Dean, East Carroll, Ebensburg, Elder, Gallitzin borough, Gallitzin township, Hastings, Jackson township, Lilly, Loretto, Muster, Nanty-Glo, Northern Cambria, Patton borough, Portage borough, Portage township, Reade, Sankertown, Susquehanna township, Tunnell Springs, Vintondale, Washington township, West Carroll, White township, Wilmore, and part of Summerhill township the entirety of the North District and part of the South District (Blocks 2005, 2009, 2010, 2011, 2016, 2017, 2018, 2019, 2021, 2022, 2023, 2024, 2025, 2026, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2037, 2038, 3000, 3008, 3010).

District 13: Broadly, District 13 is a grouping DTL saw from mappers who were very focused on geographic features in south central PA along mountain ranges and watersheds. It aims to keep together communities within the Allegheny Mountains and valleys region. In the original Citizens' Map, CD13 contained Harrisburg, but that created a widely disliked community-of-

interest split in the Capital Region between Districts 10, 11, and 13. The new District 13 includes Adams County and most of Cumberland.

The Thirteenth District is composed of the entirety of Adams, Bedford, Blair, Franklin, Fulton, Huntingdon, Juniata, and Perry counties. It contains part of Mifflin County, including Bratton, Burham, Derry township, Granville township, Kistler, Lewistown, McVeytown, Menno, Newton Hamilton, Oliver township, Union township, Wayne township, and part of Brown township, including the entirety of the Reedsville/Big Valley precinct and part of the Church Hill precinct not listed in the description for congressional district 9. It contains part of Cumberland County, including Carlisle, Cooke, Dickinson, Hampden, Hopewell township, Lower Mifflin, Lower Frankford, Middlesex township, Monroe township, Mount Holly Springs, Newburg borough, Newville, North Middleton, North Newton, Penn township, Shippensburg borough, Shippensburg township, Silver Spring Southampton township, South Middleton, South Newton, Upper Frankford, Upper Mifflin, West Pennsboro, and part of Mechanicsburg, including Ward 3, 4, 5, and part of Ward 2, including Precinct 2 and all of Precinct 1 not listed in the description for District 10.

District 14: District 14 combines the Laurel Highlands (Westmoreland, Fayette, Somerset), with Washington and Greene Counties in SW PA, that have similar history, interests, and culture. This was referenced by numerous citizens at a House State Government Committee hearing on this topic in Uniontown in August.[12] DTL mappers were generally more likely to include Somerset in a district with Bedford County and others to its east; however, due to population decline, to maintain a solid Southwestern PA district, District 14 in the Citizens' Map includes Somerset. It also includes Johnstown in Cambria County to meet the population requirement.

The Fourteenth District is composed of the entirety of Fayette, Green, Somerset, and Washington counties. It includes part of Westmoreland County, including Adamsburg, Arona, Avonmore, Bell township, Bolivar, Cook, Delmont, Derry borough, Derry township, Donegal borough, Donegal township, East Huntingdon, Export, Fairfield township, Greensburg, Hempfield township, Jeannette, Latrobe, Laurel Mountain, Ligonier borough, Ligonier township, Loyalhanna, Madison borough, Monessen, Mount Pleasant borough, Mount Pleasant township, Murrysville, New Alexandria, New Florence, New Stanton, North Belle Vernon, Oklahoma, Rostraver, Salem township, Seward, Smithton, South Greensburg, South Huntingdon, Southwest Greensburg, St. Claire township, Sutersville, Unity, Washington township, Youngstown, Youngwood, and part of Sewickley township, including districts East Herminie, Lowber, Sewickley, West Herminie, and Whyel, and part of the Rilton district (Blocks 1000, 1001, 1002, 1003, 1004, 1006, 1009, 1022, 1023, 1025, 1026, 1027, 1028, 1029, 1033, 1037, 1043).

[12] Christen Smith, *Pennsylvania's southwestern 14th Congressional District asks to stay whole*, Pittsburgh Post-Gazette (Aug. 26, 2021, 3:49pm), https://www.post-gazette.com/news/politics-state/2021/08/26/Pennsylvania-s-southwestern-14th-Congressional-District-asks-to-stay-whole/stories/202108260157.

It includes part of Cambria County, including Adams township, Brownstown, Conemaugh township, Croyle, Dale, East Conemaugh, East Taylor, Ehrenfeld, Ferndale, Geistown, Johnstown, Lower Yoder, Middle Taylor, Richland township, Scalp Level, Scottdale, Southmont, South Fork, Stonycreek township, Summerhill borough, Upper Yoder, West Taylor, Westmont, and part of Summerhill township, South District not listed in the description for District 12.

District 15: District 15 is composed of the eastern half of Allegheny County and extends into Westmoreland County. Pittsburgh is the anchor of this district. This district splits Pittsburgh, using the confluence of the three rivers and the Fort Pitt Bridge as a natural western boundary. It crosses over the Allegheny River to include much of the North Hills, like O'Hara and Fox Chapel. We heard from several public commenters that splitting Pittsburgh is not ideal. However, many of our mappers, including those in the area, used natural boundaries in the city to divide their districts, particularly at Point State Park where the Three Rivers come together. That's where the Citizens' Map divides Districts 15 and 17.

The Fifteenth District is composed of part of Allegheny County including Aspinwall, Baldwin borough, Blawnox, Brackenridge, Braddock, Braddock Hills, Brentwood, Chalfont, Cheswick, Churchill, Clairton, Dravosburg, Duquesne, East Deer, East McKeesport, Edgewood, Elizabeth borough, Elizabeth township, Fawn township, Forest Hills, Forward township, Fox Chapel, Frazer, Glassport, Harmar, Harrison township, Homestead, Indiana township, Jefferson Hills, Liberty borough, Lincoln borough, McKeesport, Monroeville, Mount Oliver, Munhall, North Braddock, North Versailles, O'Hara, Oakmont, Penn Hills, Pitcairn, Pleasant Hills, Plum borough, Port Vue, Rankin, Sharpsburg, South Park, South Versailles, Springdale borough, Springdale township, Swissvale, Tarentum, Trafford, Turtle Creek, Verona, Versailles, Wall, West Deer, West Homestead, West Mifflin, Whitaker, White Oak, Whitehall Borough, Wilkins, Wilkinsburg, Wilmerding, and part of Pittsburgh, including the entirety of Wards 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 29, 30, and 31, and part of Ward 32, including the entirety of Districts 1, 2, 3, 5, 6, 7, part of District 4 (Blocks 1000, 1018, 1021), and part of District 8 (all blocks not listed in description for congressional district 17 for Ward 32, District 8).

It also includes parts of Westmoreland County including Allegheny township, Arnold, East Vandergrift, Hyde Park, Irwin borough, Lower Burrell, Manor borough, New Kensington, North Irwin, North Huntingdon, Penn borough, Penn township, Trafford, Upper Burrell, Vandergrift, West Leechburg, and part of Sewickley township, including part of the Rilton district not listed in the description for congressional District 14.

District 16: District 16: CD16 is anchored by Erie County, and then uses the I-79 corridor to connect Erie to counties south of it, down to Butler County. CD16 fairly closely resembles the current map. While unfortunate that this district splits Butler County, this was a trade-off for equal population purposes.

The Sixteenth District is composed of the entirety of Crawford, Erie, Lawrence, Mercer, Venango counties. It also contains part of Butler County, including Adams township, Allegheny township, Brady township, Bruin, Butler city, Butler township, Callery, Center township, Cherry

township, Cherry Valley, Clay township, Concord township, Connequenessing borough, Connequenessing township, Cranberry township, Eau Claire, Evans City, Fairview borough, Fairview township, Forward township, Franklin township, Harrisville, Jackson township, Karns City, Lancaster township, Marion township, Mars, Mercer township, Middlesex township, Muddy Creek, Oakland township, Parker township, Penn township, Petriolia, Portersville, Prospect, Slippery Rock borough, Slippery Rock township, Valencia, Venango township, Washington township, West Liberty, West Sunbury, Worth township, Zelienople, and part of Summit township, including the North District Blocks 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2068, 2090, 2091, 3002, 3003, 3004, 3005, 3006, 3007, 3008, 3009, and 3010.

District 17: District 17 combines Beaver County with the western half of Allegheny County. A large number of mappers used the western part of Pittsburgh to give this district enough population, so as to limit splitting Washington County to the south (CD14) or Lawrence County (CD16) to the north. This district will also be one of the more heavily watched districts with regard to the 2022 election, with incumbent Conor Lamb running for Senate and creating a very close toss-up district.

The seventeenth District is composed of Beaver County and part of Allegheny County, including the entirety of Aleppo township, Avalon, Bell Acres, Bellevue, Ben Avon, Ben Avon Heights, Bethel Park, Bradford Woods, Bridgeville, Carnegie, Castle Shannon, Collier, Coraopolis, Crafton, Crescent, Dormont, Edgeworth, Emsworth, Etna, Findlay, Franklin Park, Glenfield, Glen Osburne, Green Tree, Hampton, Haysville, Heidelberg borough, Ingram, Kennedy, Kilbuck, Leet, Leetsdale, Marshall, McCandless, McKees Rocks, Millvale, Moon, Mount Lebanon, Neville, North Fayette, Oakdale, Ohio, Pennsbury Village, Pine township, Reserve, Richland township, Robinson township, Ross township, Rosslyn Farms, Scott township, Sewickley borough, Sewickley Heights, Sewickley Hills, Shaler, South Fayette, Stowe, Thornburg, Upper St. Clair, West View, and part of Pittsburgh, including the entirety of Wards 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, and part of Ward 32, District 4 (all blocks not listed in the description for congressional district 15), and part of Ward 32, District 8 (Blocks 6001, 6012, 6021).

Common Questions about the Citizens' Map

How does the map deal with going from 18 to 17 districts?

Removing a district has ripple effects across the state. As written elsewhere, the 2020 Census data shows that Pennsylvania's population has largely shifted south and east, impacting districts 1-7, 10, and 11.[13] Conversely, seven current districts lost population relative to the 2010 Census, and will thus expand or shift geographically to meet the

[13] *See* Sarah Anne Hughes, *4 takeaways from new Pa. census data and what it means for redistricting*, SPOTLIGHT PA (Aug. 18, 2021), https://www.spotlightpa.org/news/2021/08/pa-redistricting-2020-census-data-takeaways/.

target population. These were located in the Northern Tier, central PA, and much of western PA.

In the Citizens' Map, the districts that changed most significantly were the old Districts 12 and 15, focused on the northern tier and central PA. District 9, which bordered District 12 plus the growing districts in the southeast, saw significant change as well.

How does this map stack up to the 2011 map?

Achieving a zero population deviation with compact districts that make regional sense and minimize splits, while being politically fair, requires a number of tradeoffs and less-than-ideal solutions.

That said, this map is far superior to the plan drawn in 2011 by the General Assembly, which was done in secret, without any public vetting or comment. It splits half as many counties (14 to 28), is more than twice as compact (37% Polsby-Popper, versus 16%), with six solidly competitive seats and fair representation (versus an average of one). It contains two majority-minority districts and has strong regional cohesion. Draw the Lines is confident that this map should be considered by whatever body draws PA's new congressional districts.

What changes were made between the original Citizens' Map and the revised version?

Pennsylvanians left 116 comments on the DTL website about the original map. One request appeared more than any other: the Capital Region was needlessly divided between three districts (10,11,13). Numerous commenters noted that Harrisburg has little in common with western counties like Blair and Bedford in CD13. The revised version keeps Dauphin County whole with much of York County in CD10, while including Adams County with the rest of CD13.

Commenters from Chester County were nearly unanimous in their feedback that Coatesville and South Coatesville should be kept together.

Lastly, the original Citizens' Map had a population deviation of four people. The revised version has a deviation of one person, in line with the most literal interpretation of the "One person, one vote" standard.

Signed: _____

By: Justin Villere
Title: Managing Director, Draw the Lines
Date: January 24, 2022

WIKIPEDIA

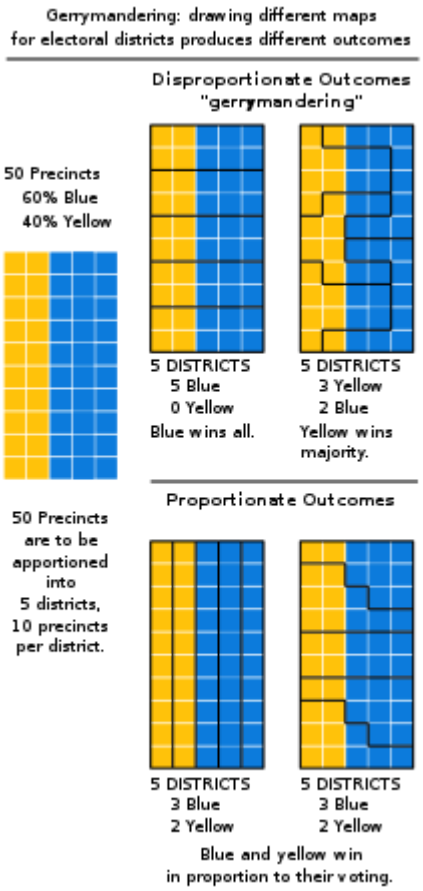
Gerrymandering

In representative democracies, **Gerrymandering** (/ˈdʒɛrimændərɪŋ/, originally /ˈgɛrimændərɪŋ/)[1][2] refers to political manipulation of electoral district boundaries with the intent of creating undue advantage for a party, group, or socio-economic class within the constituency.

Two principal tactics are used in gerrymandering: "cracking" (i.e. diluting the voting power of the opposing party's supporters across many districts) and "packing" (concentrating the opposing party's voting power in one district to reduce their voting power in other districts).[3]

In addition to its use achieving desired electoral results for a particular party, gerrymandering may be used to help or hinder a particular demographic, such as a political, ethnic, racial, linguistic, religious, or class group, such as in Northern Ireland, where boundaries were constructed to guarantee Protestant Unionist majorities.[4] Gerrymandering can also be used to protect incumbents. Wayne Dawkins describes it as politicians picking their voters instead of voters picking their politicians.[5]

The term *gerrymandering* is named after American politician Elbridge Gerry,[a][6] Vice President of the United States at the time of his death, who, as Governor of Massachusetts in 1812, signed a bill that created a partisan district in the Boston area that was compared to the shape of a mythological salamander. The term has negative connotations and gerrymandering is almost always considered a corruption of the democratic process. The resulting district is known as a *gerrymander* (/ˈdʒɛri ˌmændər, ˈgɛri-/). The word is also a verb for the process.[7][8]



Different ways to apportion electoral districts

Contents

Etymology

The word *gerrymander* (originally written *Gerry-mander*; a portmanteau of the name *Gerry* and the animal *salamander*) was used for the first time in the Boston Gazette (1803–16)—not to be confused with the original *Boston Gazette* (1719–1798)—on 26 March 1812 in Boston, Massachusetts, United States. The word was created in reaction to a redrawing of Massachusetts Senate election districts under Governor Elbridge Gerry, later Vice President of the United States. Gerry, who personally disapproved of the practice, signed a bill that redistricted Massachusetts for the benefit of the Democratic-Republican Party. When mapped, one of the contorted districts in the Boston area was said to resemble a mythological salamander.[9] Appearing with the term, and helping spread and sustain its popularity, was a political cartoon depicting a strange animal with claws, wings and a dragon-like head that supposedly resembled the oddly shaped district.

Printed in March 1812, this political cartoon was made in reaction to the newly drawn state senate election district of South Essex created by the Massachusetts legislature to favor the Democratic-Republican Party. The caricature satirizes the bizarre shape of the district as a dragon-like "monster", and Federalist newspaper editors and others at the time likened it to a salamander.

The cartoon was most likely drawn by Elkanah Tisdale, an early 19th-century painter, designer, and engraver who was living in Boston at the time.[10] Tisdale had the engraving skills to cut the woodblocks to print the original cartoon.[11] These woodblocks survive and are preserved in the Library of Congress.[12] The creator of the term *gerrymander*, however, may never be definitively established. Historians widely believe that the Federalist newspaper editors Nathan Hale and Benjamin and John Russell coined the term, but the historical record does not have definitive evidence as to who created or uttered the word for the first time.[13]

The redistricting was a notable success for Gerry's Democratic-Republican Party. In the 1812 election, both the Massachusetts House and governorship were comfortably won by Federalists, losing Gerry his job. The redistricted state Senate, however, remained firmly in Democratic-Republican hands.[9]

The word *gerrymander* was reprinted numerous times in Federalist newspapers in Massachusetts, New England, and nationwide during the remainder of 1812.[14] This suggests an organized activity of the Federalists to disparage Governor Gerry in particular, and the growing Democratic-Republican party in general. *Gerrymandering* soon began to be used to describe other cases of district shape manipulation for partisan gain in other states. According to the *Oxford English Dictionary,* the word's acceptance was marked by its publication in a dictionary (1848) and in an encyclopedia (1868).[15] Since the letter *g* of the eponymous *Gerry* is pronounced with a hard g /g/ as in *get*, the word *gerrymander* was originally pronounced /ˈgɛrimændər/. However, pronunciation as /ˈdʒɛrimændər/, with a soft g /dʒ/ as in *gentle,* has become the dominant pronunciation. Residents of Marblehead, Massachusetts, Gerry's hometown, continue to use the original pronunciation.[16]

From time to time, other names have been suffixed with *-mander* to tie a particular effort to a particular politician or group. Examples are the 1852 "Henry-mandering", "Jerrymander" (referring to California Governor Jerry Brown),[17] "Perrymander" (a reference to Texas Governor Rick Perry),[18][19] and "Tullymander" (after the Irish politician James Tully),[20] and "Bjelkemander" (referencing Australian politician Joh Bjelke-Petersen).

Tactics

The primary goals of gerrymandering are to maximize the effect of supporters' votes and to minimize the effect of opponents' votes. A partisan gerrymander's main purpose is to influence not only the districting statute but the entire corpus of legislative decisions enacted in its path.[21]

The image from above appearing in a news article by Elkanah Tisdale in 1813

These can be accomplished in a number of ways:[22]

- "Cracking" involves spreading voters of a particular type among many districts in order to deny them a sufficiently large voting bloc in any particular district.[22] Political parties in charge of redrawing district lines may create more "cracked" districts as a means of retaining, and possibly even expanding, their legislative power. By "cracking" districts, a political party could maintain, or gain, legislative control by ensuring that the opposing party's voters are not the majority in specific districts.[23][24] For example, the voters in an urban area could be split among several districts in each of which the majority of voters are suburban, on the presumption that the two groups would vote differently, and the suburban voters would be far more likely to get their way in the elections.
- "Packing" is concentrating many voters of one type into a single electoral district to reduce their influence in other districts.[22][24] In some cases, this may be done to obtain representation for a community of common interest (such as to create a majority-minority district), rather than to dilute that interest over several districts to a point of ineffectiveness (and, when minority groups are involved, to avoid likely lawsuits charging racial discrimination). When the party controlling the districting process has a statewide majority, packing is usually not necessary to attain partisan advantage; the minority party can generally be "cracked" everywhere. Packing is therefore more likely to be used for partisan advantage when the party controlling the districting process has a statewide minority, because by forfeiting a few districts packed with the opposition, cracking can be used in forming the remaining districts.

- "Hijacking" redraws two districts in such a way as to force two incumbents to run against each other in one district, ensuring that one of them will be eliminated.[22]
- "Kidnapping" moves an incumbent's home address into another district.[22] Reelection can become more difficult when the incumbent no longer resides in the district, or possibly faces reelection from a new district with a new voter base. This is often employed against politicians who represent multiple urban areas, in which larger cities will be removed from the district in order to make the district more rural.

These tactics are typically combined in some form, creating a few "forfeit" seats for packed voters of one type in order to secure more seats and greater representation for voters of another type. This results in candidates of one party (the one responsible for the gerrymandering) winning by small majorities in most of the districts, and another party winning by a large majority in only a few of the districts.

Effects

Gerrymandering is effective because of the wasted vote effect. *Wasted votes* are votes that did not contribute to electing a candidate, either because they were in excess of the bare minimum needed for victory or because the candidate lost. By moving geographic boundaries, the incumbent party packs opposition voters into a few districts they will already win, wasting the extra votes. Other districts are more tightly constructed with the opposition party allowed a bare minority count, thereby wasting all the minority votes for the losing candidate. These districts constitute the majority of districts and are drawn to produce a result favoring the incumbent party.[25]

A quantitative measure of the effect of gerrymandering is the efficiency gap, computed from the difference in the wasted votes for two different political parties summed over all the districts.[26][27] Citing in part an efficiency gap of 11.69% to 13%, a U.S. District Court in 2016 ruled against the 2011 drawing of Wisconsin legislative districts. In the 2012 election for the state legislature, that gap in wasted votes meant that one party had 48.6% of the two-party votes but won 61% of the 99 districts.[28]

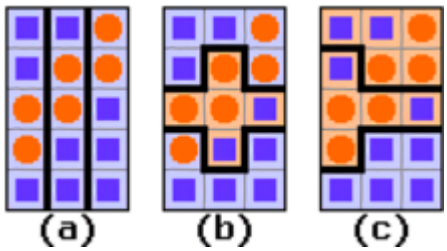
While the wasted vote effect is strongest when a party wins by narrow margins across multiple districts, gerrymandering narrow margins can be risky when voters are less predictable. To minimize the risk of demographic or political shifts swinging a district to the opposition, politicians can create more packed districts, leading to more comfortable margins in unpacked ones.

Effect on electoral competition

Some political science research suggests that, contrary to common belief, gerrymandering does not decrease electoral competition, and can even increase it. Some say that, rather than packing the voters of their party into uncompetitive districts, party leaders tend to prefer to spread their party's voters into multiple districts, so that their party can win a larger number of races.[29] (See scenario **(c)** in the box.) This may lead to increased competition. Instead of gerrymandering, some researchers find that other factors, such as partisan polarization and the incumbency advantage, have driven the recent decreases in electoral competition.[30] Similarly, a 2009 study found that "congressional polarization is primarily a function of the differences in how Democrats and Republicans represent the same districts rather than a function of which districts each party represents or the distribution of constituency preferences."[31]

These findings are, however, a matter of some dispute. While gerrymandering may not decrease electoral competition in all cases, there are certainly instances where gerrymandering does reduce such competition.

One state in which gerrymandering has arguably had an adverse effect on electoral competition is California. In 2000, a bipartisan redistricting effort redrew congressional district lines in ways that all but guaranteed incumbent victories; as a result, California saw only one congressional seat change hands between 2000 and 2010. In response to this obvious gerrymandering, a 2010 referendum in California gave the power to redraw congressional district lines to the California Citizens Redistricting Commission, which had been created to draw California State Senate and Assembly districts by another referendum in 2008. In stark contrast to the redistricting efforts that followed the 2000 census, the redistricting commission has created a number of the most competitive congressional districts in the country.[32]



How gerrymandering can influence electoral results on a non-proportional system. For a state with 3 equally sized districts, 15 voters and 2 parties: *Plum* (squares) and *Orange* (circles).

In **(a)**, creating 3 mixed-type districts yields a 3–0 win to *Plum*—a disproportional result considering the statewide 9:6 *Plum* majority.

In **(b)**, *Orange* wins the central (**+** shaped) district while *Plum* wins the upper and lower districts. The 2–1 result reflects the statewide vote ratio.

In **(c)**, gerrymandering techniques ensure a 2–1 win to the statewide minority *Orange* party.

Increased incumbent advantage and campaign costs

The effect of gerrymandering for incumbents is particularly advantageous, as incumbents are far more likely to be reelected under conditions of gerrymandering. For example, in 2002, according to political scientists Norman Ornstein and Thomas Mann, only four challengers were able to defeat incumbent members of the U.S. Congress, the lowest number in modern American history.[33] Incumbents are likely to be of the majority party orchestrating a gerrymander, and incumbents are usually easily renominated in subsequent elections, including incumbents among the minority.

Mann, a Senior Fellow of Governance Studies at the Brookings Institution, has also noted that "Redistricting is a deeply political process, with incumbents actively seeking to minimize the risk to themselves (via bipartisan gerrymanders) or to gain additional seats for their party (via partisan gerrymanders)".[34] The bipartisan gerrymandering that Mann mentions refers to the fact that legislators often also draw distorted legislative districts even when such redistricting does not provide an advantage to their party.

Gerrymandering of state legislative districts can effectively guarantee an incumbent's victory by 'shoring up' a district with higher levels of partisan support, without disproportionately benefiting a particular political party. This can be highly problematic from a governance perspective, because forming districts to ensure high levels of partisanship often leads to higher levels of partisanship in legislative bodies. If a substantial number of districts are designed to be polarized, then those districts' representation will also likely act in a heavily partisan manner, which can create and perpetuate partisan gridlock.

This demonstrates that gerrymandering can have a deleterious effect on the principle of democratic accountability. With uncompetitive seats/districts reducing the fear that incumbent politicians may lose office, they have less incentive to represent the interests of their constituents, even when those interests conform to majority support for an issue across the electorate as a whole. Incumbent politicians may look out more for their party's interests than for those of their constituents.

Gerrymandering can affect campaign costs for district elections. If districts become increasingly stretched out, candidates must pay increased costs for transportation and trying to develop and present campaign advertising across a district.[35] The incumbent's advantage in securing campaign funds is another benefit of his or her having a gerrymandered secure seat.

Less descriptive representation

Gerrymandering also has significant effects on the representation received by voters in gerrymandered districts. Because gerrymandering can be designed to increase the number of wasted votes among the electorate, the relative representation of particular groups can be drastically altered from their actual share of the voting population. This effect can significantly prevent a gerrymandered system from achieving proportional and descriptive representation, as the winners of elections are increasingly determined by who is drawing the districts rather than the preferences of the voters.

Gerrymandering may be advocated to improve representation within the legislature among otherwise underrepresented minority groups by packing them into a single district. This can be controversial, as it may lead to those groups' remaining marginalized in the government as they become confined to a single district. Candidates outside that district no longer need to represent them to win elections.

As an example, much of the redistricting conducted in the United States in the early 1990s involved the intentional creation of additional "majority-minority" districts where racial minorities such as African Americans were packed into the majority. This "maximization policy" drew support by both the Republican Party (who had limited support among African Americans and could concentrate their power elsewhere) and by minority representatives elected as Democrats from these constituencies, who then had safe seats.

The 2012 election provides a number of examples as to how partisan gerrymandering can adversely affect the descriptive function of states' congressional delegations. In Pennsylvania, for example, Democratic candidates for the House of Representatives received 83,000 more votes than Republican candidates, yet the Republican-controlled redistricting process in 2010 resulted in Democrats losing to their Republican counterparts in 13 out of Pennsylvania's 18 districts.[36]

In the seven states where Republicans had complete control over the redistricting process, Republican House candidates received 16.7 million votes and Democratic House candidates received 16.4 million votes. The redistricting resulted in Republican victories in 73 out of the 107 affected seats; in those 7 states, Republicans received 50.4% of the votes but won in over 68% of the congressional districts.[37] While it is but one example of how gerrymandering can have a significant effect on election outcomes, this kind of disproportional representation of the public will seems to be problematic for the legitimacy of democratic systems, regardless of one's political affiliation.

In Michigan, redistricting was constructed by a Republican Legislature in 2011.[38] Federal congressional districts were so designed that cities such as Battle Creek, Grand Rapids, Jackson, Kalamazoo, Lansing, and East Lansing were separated into districts with large conservative-leaning hinterlands that essentially diluted the Democratic votes in those cities in Congressional elections. Since 2010 not one of those cities is within a district in which a Democratic nominee for the House of Representatives has a reasonable chance of winning, short of Democratic landslide.

Incumbent gerrymandering

Gerrymandering can also be done to help incumbents as a whole, effectively turning every district into a packed one and greatly reducing the potential for competitive elections. This is particularly likely to occur when the minority party has significant obstruction power—unable to enact a partisan gerrymander, the legislature instead agrees on ensuring their own mutual reelection.

In an unusual occurrence in 2000, for example, the two dominant parties in the state of California cooperatively redrew both state and Federal legislative districts to preserve the status quo, ensuring the electoral safety of the politicians from unpredictable voting by the electorate. This move proved completely effective, as no State or Federal legislative office changed party in the 2004 election, although 53 congressional, 20 state senate, and 80 state assembly seats were potentially at risk.

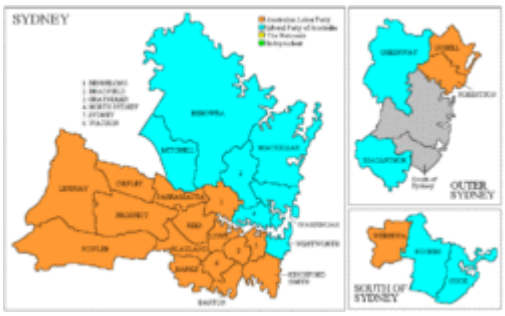
In 2006, the term "70/30 District" came to signify the equitable split of two evenly split (i.e. 50/50) districts. The resulting districts gave each party a guaranteed seat and retained their respective power base.

Prison-based gerrymandering

Prison-based gerrymandering occurs when prisoners are counted as residents of a particular district, increasing the district's population with non-voters when assigning political apportionment. This phenomenon violates the principle of one person, one vote because, although many prisoners come from (and return to) urban communities, they are counted as "residents" of the rural districts that contain large prisons, thereby artificially inflating the political representation in districts with prisons at the expense of voters in all other districts without prisons.[39] Others contend that prisoners should not be counted as residents of their original districts when they do not reside there and are not legally eligible to vote.[40][41]

Changes to achieve competitive elections

Due to the perceived issues associated with gerrymandering and its effect on competitive elections and democratic accountability, numerous countries have enacted reforms making the practice either more difficult or less effective. Countries such as the U.K., Australia, Canada and most of those in Europe have transferred responsibility for defining constituency boundaries to neutral or cross-party bodies. In Spain, they are constitutionally fixed since 1978.[42]



Electoral divisions in the Sydney area, drawn by the politically independent Australian Electoral Commission

In the United States, however, such reforms are controversial and frequently meet particularly strong opposition from groups that benefit from gerrymandering. In a more neutral system, they might lose considerable influence.

Redistricting by neutral or cross-party agency

The most commonly advocated electoral reform proposal targeted at gerrymandering is to change the redistricting process. Under these proposals, an independent and presumably objective commission is created specifically for redistricting, rather than having the legislature do it.

This is the system used in the United Kingdom, where the independent boundary commissions determine the boundaries for constituencies in the House of Commons and the devolved legislatures, subject to ratification by the body in question (almost always granted without debate). A similar situation exists in Australia where the independent Australian Electoral Commission and its state-based counterparts determine electoral boundaries for federal, state and local jurisdictions.

To help ensure neutrality, members of a redistricting agency may be appointed from relatively apolitical sources such as retired judges or longstanding members of the civil service, possibly with requirements for adequate representation among competing political parties. Additionally, members of the board can be denied access to information that might aid in gerrymandering, such as the demographic makeup or voting patterns of the population.

As a further constraint, consensus requirements can be imposed to ensure that the resulting district map reflects a wider perception of fairness, such as a requirement for a supermajority approval of the commission for any district proposal. Consensus requirements, however, can lead to deadlock, such as occurred in Missouri following the 2000 census. There, the equally numbered partisan appointees were unable to reach consensus in a reasonable time, and consequently the courts had to determine district lines.

In the U.S. state of Iowa, the nonpartisan Legislative Services Bureau (LSB, akin to the U.S. Congressional Research Service) determines boundaries of electoral districts. Aside from satisfying federally mandated contiguity and population equality criteria, the LSB mandates unity of counties and cities. Consideration of political factors such as location of incumbents, previous boundary locations, and political party proportions is specifically forbidden. Since Iowa's counties are chiefly regularly shaped polygons, the LSB process has led to districts that follow county lines.[33]

In 2005, the U.S. state of Ohio had a ballot measure to create an independent commission whose first priority was competitive districts, a sort of "reverse gerrymander". A complex mathematical formula was to be used to determine the competitiveness of a district. The measure failed voter approval chiefly due to voter concerns that communities of interest would be broken up.[43]

In 2017, the Open Our Democracy Act of 2017 was submitted to the US House of Representatives by Rep. Delaney as a means to implement non-partisan redistricting.

Redistricting by partisan competition

Many redistricting reforms seek to remove partisanship to ensure fairness in the redistricting process. The I-cut-you-choose method achieves fairness by putting the two major-parties in direct competition. I-cut-you-choose is a fair division method to divide resources amongst two parties, regardless of which party cuts first.[44] This method typically relies on assumptions of contiguity of districts but ignores all other constraints such as keeping communities of interest together. This method has been applied to nominal redistricting problems[45] but it generally has less public interest than other types of redistricting reforms. The I-cut-you-choose concept was popularized by the board game Berrymandering. Problems with this method arise when minor parties are shut-out of the process which will reinforce the two-party system. Additionally, while this method is provably fair to the two parties creating the districts, it is not necessarily fair to the communities they represent.

Transparency regulations

When a single political party controls both legislative houses of a state during redistricting, both Democrats and Republicans have displayed a marked propensity for couching the process in secrecy; in May 2010, for example, the Republican National Committee held a redistricting training session in Ohio where the theme was "Keep it Secret, Keep it Safe".[46] The need for increased transparency in redistricting processes is clear; a 2012 investigation by The Center for Public Integrity reviewed every state's redistricting processes for both transparency and potential for public input, and ultimately assigned 24 states grades of either D or F.[47]

In response to these types of problems, redistricting transparency legislation has been introduced to US Congress a number of times in recent years, including the Redistricting Transparency Acts of 2010, 2011, and 2013.[48][49][50] Such policy proposals aim to increase the transparency and responsiveness of the redistricting systems in the US. The merit of increasing transparency in redistricting processes is based largely on the premise that lawmakers would be less inclined to draw gerrymandered districts if they were forced to defend such districts in a public forum.

Changing the voting system

Because gerrymandering relies on the wasted-vote effect, the use of a different voting system with fewer wasted votes can help reduce gerrymandering. In particular, the use of multi-member districts alongside voting systems establishing proportional representation such as single transferable voting can reduce wasted votes and gerrymandering. Semi-proportional voting systems such as single non-transferable vote or cumulative voting are relatively simple and similar to *first past the post* and can also reduce the proportion of wasted votes and thus potential gerrymandering. Electoral reformers have advocated all three as replacement systems.[51]

Electoral systems with various forms of proportional representation are now found in nearly all European countries, resulting in multi-party systems (with many parties represented in the parliaments) with higher voter attendance in the elections,[52] fewer wasted votes, and a wider variety of political opinions represented.

Electoral systems with election of just one winner in each district (i.e., "winner-takes-all" electoral systems) and no proportional distribution of extra mandates to smaller parties tend to create two-party systems. This effect, labeled *Duverger's law* by political scientists, was described by Maurice Duverger.[53]

Using fixed districts

Another way to avoid gerrymandering is simply to stop redistricting altogether and use existing political boundaries such as state, county, or provincial lines. While this prevents future gerrymandering, any existing advantage may become deeply ingrained. The United States Senate, for instance, has more competitive elections than the House of Representatives due to the use of existing state borders rather than gerrymandered districts—Senators are elected by their entire state, while Representatives are elected in legislatively drawn districts.

The use of fixed districts creates an additional problem, however, in that fixed districts do not take into account changes in population. Individual voters can come to have very different degrees of influence on the legislative process. This malapportionment can greatly affect representation after long periods of time or large population movements. In the United Kingdom during the Industrial Revolution, several constituencies that had been fixed since they gained representation in the Parliament of England became so small that they could be won with only a handful of voters (*rotten*

boroughs). Similarly, in the U.S. the Alabama Legislature refused to redistrict for more than 60 years, despite major changes in population patterns. By 1960 less than a quarter of the state's population controlled the majority of seats in the legislature.[54] This practice of using fixed districts for state legislatures was effectively banned in the United States after the *Reynolds v. Sims* Supreme Court decision in 1964, establishing a rule of one man, one vote.

Objective rules to create districts

Another means to reduce gerrymandering is to create objective, precise criteria to which any district map must comply. Courts in the United States, for instance, have ruled that congressional districts must be contiguous in order to be constitutional.[55] This, however, is not a particularly effective constraint, as very narrow strips of land with few or no voters in them may be used to connect separate regions for inclusion in one district, as is the case in Illinois's 4th congressional district.

Depending on the distribution of voters for a particular party, metrics that maximize compactness can be opposed to metrics that minimize the efficiency gap. For example, in the United States, voters registered with the Democratic Party tend to be concentrated in cities, potentially resulting in a large number of "wasted" votes if compact districts are drawn around city populations. Neither of these metrics take into consideration other possible goals,[56] such as proportional representation based on other demographic characteristics (such as race, ethnicity, gender, or income), maximizing competitiveness of elections (the greatest number of districts where party affiliation is 50/50), avoiding splits of existing government units (like cities and counties), and ensuring representation of major interest groups (like farmers or voters in a specific transportation corridor), though any of these could be incorporated into a more complicated metric.

Minimum district to convex polygon ratio

One method is to define a minimum district to convex polygon ratio . To use this method, every proposed district is circumscribed by the smallest possible convex polygon (its convex hull; think of stretching a rubberband around the outline of the district). Then, the area of the district is divided by the area of the polygon; or, if at the edge of the state, by the portion of the area of the polygon within state boundaries.

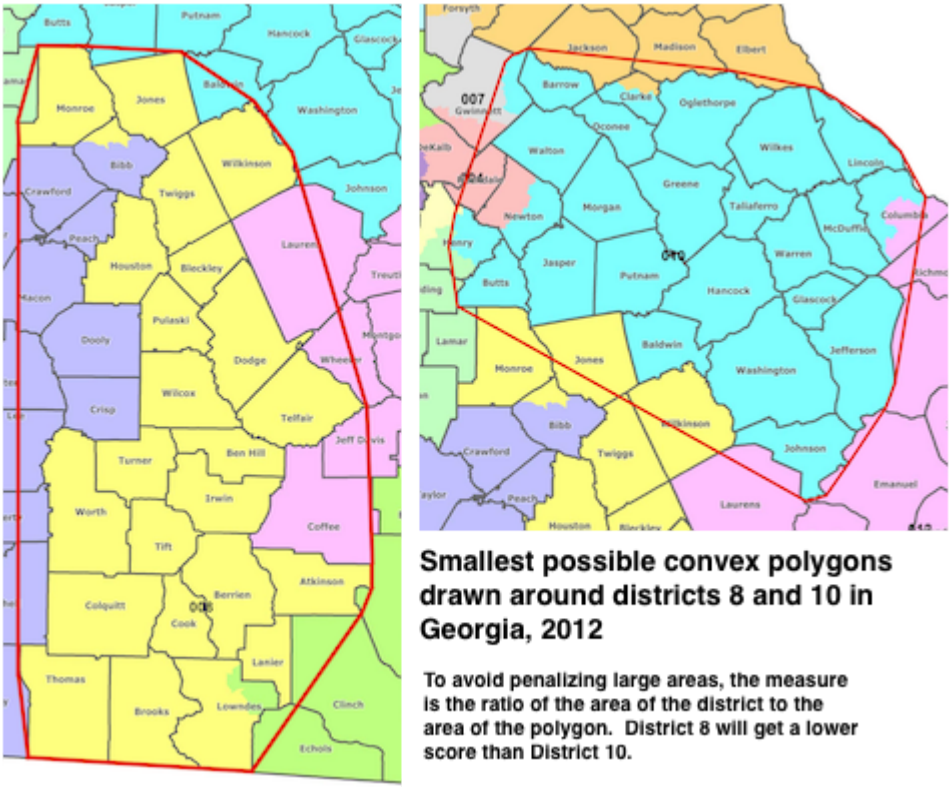
The advantages of this method are that it allows a certain amount of human intervention to take place (thus solving the Colorado problem of splitline districting); it allows the borders of the district to follow existing jagged subdivisions, such as neighbourhoods or voting districts (something isoperimetric rules would discourage); and it allows concave coastline districts, such as the Florida gulf coast area. It would mostly eliminate bent districts, but still permit long, straight ones. However, since human intervention is still allowed, the gerrymandering issues of packing and cracking would still occur, just to a lesser extent.

Shortest splitline algorithm

The Center for Range Voting has proposed[57] a way to draw districts by a simple algorithm.[58] The algorithm uses only the shape of the state, the number *N* of districts wanted, and the population distribution as inputs. The algorithm (slightly simplified) is:

1. Start with the boundary outline of the state.

2. Let *N*=A+B where *N* is the number of districts to create, and A and B are two whole numbers, either equal (if *N* is even) or differing by exactly one (if *N* is odd). For example, if *N* is 10, each of *A* and *B* would be 5. If *N* is 7, *A* would be 4 and *B* would be 3.
3. Among all possible straight lines that split the state into two parts with the population ratio A:B, choose the *shortest*. If there are two or more such shortest lines, choose the one that is most north–south in direction; if there is still more than one possibility, choose the westernmost.
4. We now have two hemi-states, each to contain a specified number (namely *A* and *B*) of districts. Handle them recursively via the same splitting procedure.
5. Any human residence that is split in two or more parts by the resulting lines is considered to be a part of the most north-eastern of the resulting districts; if this does not decide it, then of the most northern.



Minimal convex polygon, showing how to rate district shape irregularity

This district-drawing algorithm has the advantages of simplicity, ultra-low cost, a single possible result (thus no possibility of human interference), lack of intentional bias, and it produces simple boundaries that do not meander needlessly. It has the disadvantage of ignoring geographic features such as rivers, cliffs, and highways and cultural features such as tribal boundaries. This landscape oversight causes it to produce districts different from those a human would produce. Ignoring geographic features can induce very simple boundaries.

While most districts produced by the method will be fairly compact and either roughly rectangular or triangular, some of the resulting districts can still be long and narrow strips (or triangles) of land.

Like most automatic redistricting rules, the shortest splitline algorithm will fail to create majority-minority districts, for both ethnic and political minorities, if the minority populations are not very compact. This might reduce minority representation.

Another criticism of the system is that splitline districts sometimes divide and diffuse the voters in a large metropolitan area. This condition is most likely to occur when one of the first splitlines cuts through the metropolitan area. It is often considered a drawback of the system because residents of the same agglomeration are assumed to be a community of common interest. This is most evident in the splitline allocation of Colorado.[59] However, in cases when the splitline divides a large

metropolitan area, it is usually because that large area has enough population for multiple districts. In cases which the large area only has the population for one district, then the splitline usually results in the urban area being in one district with the other district being rural.

As of July 2007, shortest-splitline redistricting pictures, based on the results of the 2000 census, are available for all 50 states.[60]

Minimum isoperimetric quotient

It is possible to define a specific minimum isoperimetric quotient,[61] proportional to the ratio between the area and the square of the perimeter of any given congressional voting district. Although technologies presently exist to define districts in this manner, there are no rules in place mandating their use, and no national movement to implement such a policy. One problem with the simplest version of this rule is that it would prevent incorporation of jagged natural boundaries, such as rivers or mountains; when such boundaries are required, such as at the edge of a state, certain districts may not be able to meet the required minima. One way of avoiding this problem is to allow districts which share a border with a state border to replace that border with a polygon or semi-circle enclosing the state boundary as a kind of virtual boundary definition, but using the actual perimeter of the district whenever this occurs inside the state boundaries. Enforcing a minimum isoperimetric quotient would encourage districts with a high ratio between area and perimeter.[61]

Efficiency gap calculation

The efficiency gap is a simply-calculable measure that can show the effects of gerrymandering.[62] It measures wasted votes for each party: the sum of votes cast in losing districts (losses due to cracking) and excess votes cast in winning districts (losses due to packing). The difference in these wasted votes are divided by total votes cast, and the resulting percentage is the efficiency gap.

In 2017, Boris Alexeev and Dustin Mixon proved that "sometimes, a small efficiency gap is only possible with bizarrely shaped districts". This means that it is mathematically impossible to always devise boundaries which would simultaneously meet certain Polsby–Popper and efficiency gap targets.[63][64][65]

Use of databases and computer technology

The introduction of modern computers alongside the development of elaborate voter databases and special districting software has made gerrymandering a far more precise science. Using such databases, political parties can obtain detailed information about every household including political party registration, previous campaign donations, and the number of times residents voted in previous elections and combine it with other predictors of voting behavior such as age, income, race, or education level. With this data, gerrymandering politicians can predict the voting behavior of each potential district with an astonishing degree of precision, leaving little chance for creating an accidentally competitive district.

On the other hand, the introduction of modern computers would allow the United States Census Bureau to calculate more equal populations in every voting district that are based only on districts being the most compact and equal populations. This could be done easily using their Block Centers based on the Global Positioning System rather than street addresses. With this data, gerrymandering politicians will not be in charge, thus allowing competitive districts again.

Online web apps such as Dave's Redistricting have allowed users to simulate redistricting states into legislative districts as they wish.[66][67] According to Bradlee, the software was designed to "put power in people's hands," and so that they "can see how the process works, so it's a little less mysterious than it was 10 years ago."[68]

Markov chain Monte Carlo (MCMC) can measure the extent to which redistricting plans favor a particular party or group in election, and can support automated redistricting simulators.[69]

Voting systems

First-past-the-post

Gerrymandering is most likely to emerge, in majoritarian systems, where the country is divided into several voting districts and the candidate with the most votes wins the district. If the ruling party is in charge of drawing the district lines, it can abuse the fact that in a majoritarian system all votes that do not go to the winning candidate are essentially irrelevant to the composition of a new government. Even though gerrymandering can be used in other voting systems, it has the most significant impact on voting outcomes in first-past-the-post systems.[70] Partisan redrawing of district lines is particularly harmful to democratic principles in majoritarian two-party systems. In general, two party systems tend to be more polarized than proportional systems.[71] Possible consequences of gerrymandering in such a system can be an amplification of polarization in politics and a lack of representation of minorities, as a large part of the constituency is not represented in policy making. However, not every state using a first-past-the-post system is being confronted with the negative impacts of gerrymandering. Some countries, such as Australia, Canada and the UK, authorize non-partisan organizations to set constituency boundaries in attempt to prevent gerrymandering.[72]

Proportional systems

The introduction of a proportional system is often proposed as the most effective solution to partisan gerrymandering.[73] In such systems the entire constituency is being represented proportionally to their votes. Even though voting districts can be part of a proportional system, the redrawing of district lines would not benefit a party, as those districts are mainly of organizational value.

Mixed systems

In mixed systems that use proportional and majoritarian voting principles, the usage of gerrymandering is a constitutional obstacle that states have to deal with. However, in mixed systems the advantage a political actor can potentially gain from redrawing district lines is much less than in majoritarian systems. In mixed systems voting districts are mostly being used to avoid that elected parliamentarians are getting too detached from their constituency. The principle which determines the representation in parliament is usually the proportional aspect of the voting system. Seats in parliament are being allocated to each party in accordance to the proportion of their overall votes. In most mixed systems, winning a voting district merely means that a candidate is guaranteed a seat in parliament, but does not expand a party's share in the overall seats.[74] However, gerrymandering can still be used to manipulate the outcome in voting districts. In most democracies with a mixed system, non-partisan institutions are in charge of drawing district lines and therefore Gerrymandering is a less common phenomenon.

Difference from malapportionment

Gerrymandering should not be confused with malapportionment, whereby the number of eligible voters per elected representative can vary widely without relation to how the boundaries are drawn. Nevertheless, the *-mander* suffix has been applied to particular malapportionments. Sometimes political representatives use both gerrymandering and malapportionment to try to maintain power.[75][76]

Examples

Several western democracies, notably Israel, the Netherlands and Slovakia employ an electoral system with only one (nationwide) voting district for election of national representatives. This virtually precludes gerrymandering.[77][78] Other European countries such as Austria, Czechia or Sweden, among many others, have electoral districts with fixed boundaries (usually one district for each administrative division). The number of representatives for each district can change after a census due to population shifts, but their boundaries do not change. This also effectively eliminates gerrymandering.

Additionally, many countries where the president is directly elected by the citizens (e.g. France, Poland, among others) use only one electoral district for presidential election, despite using multiple districts to elect representatives.

Australia

National

Gerrymandering has not typically been considered a problem in the Australian electoral system largely because drawing of electoral boundaries has typically been done by non-partisan electoral commissions. There have been historical cases of malapportionment, whereby the distribution of electors to electorates was not in proportion to the population in several states.

In the 1998 Australian federal election, the opposition Australian Labor Party, led by Kim Beazley, received 50.98% of the two-party-preferred vote in the House of Representatives, but won only 67/148 seats (45.05%). The incumbent Liberal National Coalition government led by Prime Minister John Howard won 49.02% of the vote and 80 of 148 seats (54.05%). Compared to the previous election, there was a swing of 4.61% against the Coalition, who lost 14 seats. After Howard's victory, many Coalition seats were extremely marginal, having only been won by less than 1% (less than 1200 votes). This election result is generally not attributed to gerrymandering or malapportionment.

South Australia

Sir Thomas Playford was Premier of the state of South Australia from 1938 to 1965 as a result of a system of malapportionment, which became known as the Playmander, despite it not strictly speaking involving a gerrymander.[79]

More recently the nominally independent South Australian Electoral Districts Boundaries Commission has been accused of favouring the Australian Labor Party, as the party has been able to form government in four of the last seven elections, despite receiving a lower two-party preferred

vote.[80]

Queensland

In the state of Queensland, malapportionment combined with a gerrymander under Country Party Premier Sir Joh Bjelke-Petersen (knighted by Queen Elizabeth II at his own request) became nicknamed the Bjelkemander in the 1970s and 1980s.[81]

The malapportionment had been originally designed to favour rural areas in the 1930s-1950s by a Labor government who drew their support from agricultural and mine workers in rural areas. This helped Labor to stay in government from 1932–1957. As demographics and political views shifted over time, this system came to favour the Country Party instead.

The Country Party led by Frank Nicklin came to power in 1957, deciding to keep the malapportionment that favoured them. In 1968, Joh Bjelke-Petersen became leader of the Country Party and Premier. In the 1970s, he further expanded the malapportionment and gerrymandering which then became known as the *Bjelkemander*. Under the system, electoral boundaries were drawn so that rural electorates had as few as half as many voters as metropolitan ones and regions with high levels of support for the Labor Party were concentrated into fewer electorates, allowing Bjelke-Petersen's government to remain in power for despite attracting substantially less than 50% of the vote.

In the 1986 election, for example, the National Party received 39.64% of the first preference vote and won 49 seats (in the 89 seat Parliament) whilst the Labor Opposition received 41.35% but won only 30 seats.[82] Bjelke-Petersen also used the system to disadvantage Liberal Party (traditionally allied with the Country Party) voters in urban areas, allowing Bjelke-Petersen's Country Party to rule alone, shunning the Liberals.

Bjelke-Petersen also used Queensland Police brutality to quell protests, and Queensland under his government was frequently described as a police state. In 1987 he was eventually forced to resign in disgrace after the Fitzgerald Inquiry revealed wide-ranging corruption in his cabinet and the Queensland Police, resulting in the prosecution and jailing of Country Party members. Before resigning, Bjelke-Petersen asked the Governor of Queensland to sack his own cabinet, in an unsuccessful attempt to cling to power. Labor won the next election, and have remained the dominant party in Queensland since then. The Country Party and Liberal Party eventually merged in Queensland to become the Liberal-National Party, while the Country Party in other states was renamed as the National Party.

Bahamas

The 1962 Bahamian general election was likely influenced by gerrymandering.[83]

Canada

Gerrymandering used to be prominent in Canadian politics, but is no longer prominent, after independent redistricting commissions were established in all provinces.[84][85] Early in Canadian history, both the federal and provincial levels used gerrymandering to try to maximize partisan power. When Alberta and Saskatchewan were admitted to Confederation in 1905, their original district boundaries were set forth in the respective Alberta and Saskatchewan Acts. Federal Liberal cabinet

members devised the boundaries to ensure the election of provincial Liberal governments.[86] British Columbia used a combination of single-member and dual-member constituencies to solidify the power of the centre-right British Columbia Social Credit Party until 1991.

Since responsibility for drawing federal and provincial electoral boundaries was handed over to independent agencies, the problem has largely been eliminated at those levels of government. Manitoba was the first province to authorize a non-partisan group to define constituency boundaries in the 1950s.[84] In 1964, the federal government delegated the drawing of boundaries for federal electoral districts to the non-partisan agency Elections Canada which answers to Parliament rather than the government of the day.

As a result, gerrymandering is not generally a major issue in Canada except at the civic level.[87] Although city wards are recommended by independent agencies, city councils occasionally overrule them. That is much more likely if the city is not homogenous and different neighborhoods have sharply different opinions about city policy direction.

In 2006, a controversy arose in Prince Edward Island over the provincial government's decision to throw out an electoral map drawn by an independent commission. Instead, they created two new maps. The government adopted the second of them, which was designed by the caucus of the governing Progressive Conservative Party of Prince Edward Island. Opposition parties and the media attacked Premier Pat Binns for what they saw as gerrymandering of districts. Among other things, the government adopted a map that ensured that every current Member of the Legislative Assembly from the premier's party had a district to run in for re-election, but in the original map, several had been redistricted.[88] However, in the 2007 provincial election only seven of 20 incumbent Members of the Legislative Assembly were re-elected (seven did not run for re-election), and the government was defeated.

Chile

The military government which ruled Chile from 1973 to 1990 was ousted in a national plebiscite in October 1988. Opponents of General Augusto Pinochet voted NO to remove him from power and to trigger democratic elections, while supporters (mostly from the right-wing) voted YES to keep him in office for another eight years.

Five months prior to the plebiscite, the regime published a law regulating future elections and referendums, but the configuration of electoral districts and the manner in which National Congress seats would be awarded were only added to the law seven months after the referendum.[89][90]

For the Chamber of Deputies (lower house), 60 districts were drawn by grouping (mostly) neighboring communes (the smallest administrative subdivision in the country) within the same region (the largest). It was established that two deputies would be elected per district, with the most voted coalition needing to outpoll its closest rival by a margin of more than 2-to-1 to take both seats. The results of the 1988 plebiscite show that neither the "NO" side nor the "YES" side outpolled the other by said margin in any of the newly established districts. They also showed that the vote/seat ratio was lower in districts which supported the "YES" side and higher in those where the "NO" was strongest.[91][92] In spite of this, at the 1989 parliamentary election, the center-left opposition was able to capture both seats (the so-called *doblaje*) in twelve out of 60 districts, winning control of 60% of the Chamber.

Senate constituencies were created by grouping all lower-chamber districts in a region, or by dividing a region into two constituencies of contiguous lower-chamber districts. The 1980 Constitution allocated a number of seats to appointed senators, making it harder for one side to change the Constitution by itself. The opposition won 22 senate seats in the 1989 election, taking both seats in three out of 19 constituencies, controlling 58% of the elected Senate, but only 47% of the full Senate. The unelected senators were eliminated in the 2005 constitutional reforms, but the electoral map has remained largely untouched (two new regions were created in 2007, one of which altered the composition of two senatorial constituencies; the first election to be affected by this minor change took place in 2013).

France

France is one of the few countries to let legislatures redraw the map with no check.[93] In practice, the Parliament of France sets up an executive commission. Districts called *arrondissements* were used in the Third Republic and under the Fifth Republic they are called *circonscriptions*. During the Third Republic, some reforms of arrondissements, which were also used for administrative purposes, were largely suspected to have been arranged to favor the kingmaker in the National Assembly, the Radical Party.

The dissolution of Seine and Seine-et-Oise départements by de Gaulle was seen as a case of Gerrymandering to counter communist influence around Paris.[94]

In the modern regime, there were three designs: in 1958 (regime change), 1987 (by Charles Pasqua) and 2010 (by Alain Marleix), three times by conservative governments. Pasqua's drawing was known to have been particularly good at gerrymandering, resulting in 80% of the seats with 58% of the vote in 1993, and forcing Socialists in the 1997 snap election to enact multiple pacts with smaller parties in order to win again, this time as a coalition. In 2010, the Sarkozy government created 12 districts for expats.

The Constitutional council was called twice by the opposition to decide about gerrymandering, but it never considered partisan disproportions. However, it forced the Marleix committee to respect an 80–120% population ratio, ending a tradition dating back to the Revolution in which *départements*, however small in population, would send at least two MPs.

Germany

When the electoral districts in Germany were redrawn in 2000, the ruling center-left Social Democratic Party (SPD) was accused of gerrymandering to marginalize the left-wing Party of Democratic Socialism (PDS). The SPD combined traditional PDS strongholds in the former East Berlin with new districts made up of more populous areas of the former West Berlin, where the PDS had very limited following.

After having won four seats in Berlin in the 1998 national election, the PDS was able to retain only two seats altogether in the 2002 elections. Under German electoral law, a political party has to win either more than five percent of the votes or at least three directly elected seats, to qualify for top-up seats under the Additional Member System. The PDS vote fell below five percent thus they failed to qualify for top-up seats and were confined to just two members of the Bundestag, the German federal parliament (elected representatives are always allowed to hold their seats as individuals). Had they won a third constituency, the PDS would have gained at least 25 additional seats, which would have been enough to hold the balance of power in the Bundestag.

In the election of 2005, The Left (successor of the PDS) gained 8.7% of the votes and thus qualified for top-up seats.

The number of Bundestag seats of parties which previously got over 5% of the votes cannot be affected very much by gerrymandering, because seats are awarded to these parties on a proportional basis. However, when a party wins so many districts in any one of the 16 federal states that those seats alone count for more than its proportional share of the vote in that same state does the districting have some influence on larger parties—those extra seats, called "Überhangmandate", remain. In the Bundestag election of 2009, Angela Merkel's CDU/CSU gained 24 such extra seats, while no other party gained any;[95] this skewed the result so much that the Federal Constitutional Court of Germany issued two rulings declaring the existing election laws invalid and requiring the Bundestag to pass a new law limiting such extra seats to no more than 15. In 2013, Germany's Supreme Court ruled on the constitutionality of Überhangmandate, which from then on have to be added in proportion to the second vote of each party thereby making it impossible that one party can have more seats than earned by the proportionate votes in the election.

Greece

Gerrymandering has been rather common in Greek history since organized parties with national ballots only appeared after the 1926 Constitution. The only case before that was the creation of the Piraeus electoral district in 1906, in order to give the Theotokis party a safe district.

The most infamous case of gerrymandering was in the 1956 election. While in previous elections the districts were based on the prefecture level (νομός), for 1956 the country was split in districts of varying sizes, some being the size of prefectures, some the size of sub-prefectures (επαρχία) and others somewhere in between. In small districts the winning party would take all seats, in intermediate size, it would take most and there was proportional representation in the largest districts. The districts were created in such a way that small districts were those that traditionally voted for the right while large districts were those that voted against the right.

This system has become known as the three-phase (τριφασικό) system or the baklava system (because, as baklava is split into full pieces and corner pieces, the country was also split into disproportionate pieces). The opposition, being composed of the center and the left, formed a coalition with the sole intent of changing the electoral law and then calling new elections. Even though the centrist and leftist opposition won the popular vote (1,620,007 votes against 1,594,992), the right-wing ERE won the majority of seats (165 to 135) and was to lead the country for the next two years.

Hong Kong

In Hong Kong, functional constituencies are demarcated by the government and defined in statutes,[96] making them prone to gerrymandering. The functional constituency for the information technology sector was particular criticized for gerrymandering and voteplanting.[97]

There are also gerrymandering concerns in the constituencies of district councils.[98]

Hungary

In 2011, Fidesz politician János Lázár has proposed a redesign to Hungarian voting districts; considering the territorial results of previous elections, this redesign would favor right-wing politics according to the opposition.[99][100] Since then, the law has been passed by the Fidesz-majority National Assembly.[101] By the political think tanks and media close to the opposition, it took twice as many votes to gain a seat in some election districts as in some others. However, their findings are controversial. [102]

Ireland

Until the 1980s Dáil boundaries in Ireland were drawn not by an independent commission but by government ministers. Successive arrangements by governments of all political characters have been attacked as gerrymandering. Ireland uses the single transferable vote, and as well as the actual boundaries drawn, the main tool of gerrymandering has been the number of seats per constituency used, with three-seat constituencies normally benefiting the strongest parties in an area, whereas four-seat constituencies normally help smaller parties.

In 1947 the rapid rise of new party Clann na Poblachta threatened the position of the governing party Fianna Fáil. The government of Éamon de Valera introduced the Electoral (Amendment) Act 1947, which increased the size of the Dáil from 138 to 147 and increased the number of three-seat constituencies from fifteen to twenty-two. The result was described by the journalist and historian Tim Pat Coogan as "a blatant attempt at gerrymander which no Six County Unionist could have bettered."[103] The following February the 1948 general election was held and Clann na Poblachta secured ten seats instead of the nineteen they would have received proportional to their vote.[103]

In the mid-1970s, the Minister for Local Government, James Tully, attempted to arrange the constituencies to ensure that the governing Fine Gael–Labour Party National Coalition would win a parliamentary majority. The Electoral (Amendment) Act 1974 was planned as a major reversal of previous gerrymandering by Fianna Fáil (then in opposition). Tully ensured that there were as many as possible three-seat constituencies where the governing parties were strong, in the expectation that the governing parties would each win a seat in many constituencies, relegating Fianna Fáil to one out of three.

In areas where the governing parties were weak, four-seat constituencies were used so that the governing parties had a strong chance of still winning two. The election results created substantial change, as there was a larger than expected collapse in the vote. Fianna Fáil won a landslide victory in the 1977 Irish general election, two out of three seats in many cases, relegating the National Coalition parties to fight for the last seat. Consequently, the term "Tullymandering" was used to describe the phenomenon of a failed attempt at gerrymandering.

Italy

A hypothesis of gerrymandering was theorized by constituencies drawn by the electoral act of 2017, so-called Rosatellum.[104]

Kuwait

From the years 1981 until 2005, Kuwait was divided into 25 electoral districts in order to over-represent the government's supporters (the 'tribes').[105] In July 2005, a new law for electoral reforms was approved which prevented electoral gerrymandering by cutting the number of electoral districts

from 25 to 5. The government of Kuwait found that 5 electoral districts resulted in a powerful parliament with the majority representing the opposition. A new law was crafted by the government of Kuwait and signed by the Amir to gerrymander the districts to 10 allowing the government's supporters to regain the majority.[106]

Malaysia

The practice of gerrymandering has been around in the country since its independence in 1957. The ruling coalition at that time, *Barisan Nasional* (BN; English: "National Front"), has been accused of controlling the election commission by revising the boundaries of constituencies. For example, during the 13th General Election in 2013, Barisan Nasional won 60% of the seats in the Malaysian Parliament despite only receiving 47% of the popular vote.[107] Malapportionment has also been used at least since 1974, when it was observed that in one state alone (Perak), the parliamentary constituency with the most voters had more than ten times as many voters as the one with the fewest voters.[108] These practices finally failed BN in the 14th General Election on 9 May 2018, when the opposing *Pakatan Harapan* (PH; English: "Alliance of Hope") won despite perceived efforts of gerrymandering and malapportionment from the incumbent.[109]

Malta

The Labour Party that won in 1981, even though the Nationalist Party got the most votes, did so because of its gerrymandering. A 1987 constitutional amendment prevented that situation from reoccurring.

Nepal

After the restoration of democracy in 1990, Nepali politics has well exercised the practice of gerrymandering with the view to take advantage in the election. It was often practiced by Nepali Congress, which remained in power in most of the time. Learning from this, the reshaping of constituency was done for constituent assembly and the opposition now wins elections.

Philippines

Congressional districts in the Philippines were originally based on an ordinance from the 1987 Constitution, which was created by the Constitutional Commission, which was ultimately based on legislative districts as they were drawn in 1907. The same constitution gave Congress of the Philippines the power to legislate new districts, either through a national redistricting bill or piecemeal redistricting per province or city. Congress has never passed a national redistricting bill since the approval of the 1987 constitution, while it has incrementally created 34 new districts, out of the 200 originally created in 1987.

This allows Congress to create new districts once a place reaches 250,000 inhabitants, the minimum required for its creation. With this, local dynasties, through congressmen, can exert influence in the district-making process by creating bills carving new districts from old ones. In time, as the population of the Philippines increases, these districts, or groups of it, will be the basis of carving new provinces out of existing ones.

An example was in Camarines Sur, where two districts were divided into three districts which allegedly favors the Andaya and the Arroyo families; it caused Rolando Andaya and Dato Arroyo, who would have otherwise run against each other, run in separate districts, with one district allegedly not even surpassing the 250,000-population minimum.[110] The Supreme Court later ruled that the 250,000 population minimum does not apply to an additional district in a province.[111] The resulting splits would later be the cause of another gerrymander, where the province would be split into a new province called Nueva Camarines; the bill was defeated in the Senate in 2013.[112]

Singapore

In recent decades, critics have accused the ruling People's Action Party (PAP) of unfair electoral practices to maintain significant majorities in the Parliament of Singapore. Among the complaints are that the government uses gerrymandering.[113] The Elections Department was established as part of the executive branch under the Prime Minister of Singapore, rather than as an independent body.[114] Critics have accused it of giving the ruling party the power to decide polling districts and polling sites through electoral engineering, based on poll results in previous elections.[115]

Members of opposition parties claim that the Group Representation Constituency system is "synonymous to gerrymandering", pointing out examples of Cheng San GRC and Eunos GRC which were dissolved by the Elections Department with voters redistributed to other constituencies after opposition parties gained ground in elections.[116]

South Africa

The landmark 1948 general election was influenced by provisions of the Constitution granting rural areas more constituencies in Parliament than urban areas. Thus the white-supremacist National Party won a plurality against the more moderate United Party despite receiving fewer votes and implemented apartheid.[117][118]

Spain

Until the establishment of the Second Spanish Republic in 1931, Spain used both single-member and multi-member constituencies in general elections. Multi-member constituencies were only used in some big cities. Some gerrymandering examples included the districts of Vilademuls or Torroella de Montgrí in Catalonia. These districts were created in order to prevent the Federal Democratic Republican Party to win a seat in Figueres or La Bisbal and to secure a seat to the dynastic parties. Since 1931, the constituency boundaries match the province boundaries.[119]

After the Francoist dictatorship, during the transition to democracy, these fixed provincial constituencies were reestablished in Section 68.2 of the current 1978 Spanish Constitution, so gerrymandering is impossible in general elections.[42] There are not *winner-takes-all* elections in Spain except for the tiny territories of Ceuta and Melilla (which only have one representative each); everywhere else the number of representatives assigned to a constituency is proportional to its population and calculated according to a national law, so tampering with under- or over-representation is difficult too.

European, some regional and municipal elections are held under single, at-large multi-member constituencies with proportional representation and gerrymandering is not possible either.

Sri Lanka

Sri Lanka's new Local Government elections process has been the talking point of gerrymandering since its inception.[120] Even though that talk was more about the ward-level, it is also seen in some local council areas too.[121][122]

Sudan

In the most recent election of 2010, there were numerous examples of gerrymandering throughout the entire country of Sudan. A report from the Rift Valley Institute uncovered violations of Sudan's electoral law, where constituencies were created that were well below and above the required limit. According to Sudan's National Elections Act of 2008, no constituency can have a population that is 15% greater or less than the average constituency size. The Rift Valley Report uncovered a number of constituencies that are in violation of this rule. Examples include constituencies in Jonglei, Warrap, South Darfur, and several other states.[123]

Turkey

Turkey has used gerrymandering in the city of Istanbul in the 2009 municipal elections. Just before the election Istanbul was divided into new districts. Large low income neighborhoods were bundled with the rich neighborhoods to win the municipal elections.[124]

United Kingdom

Northern Ireland

Parliamentary Elections

Prior to the establishment of Home Rule in Northern Ireland, the UK government had installed the single transferable vote (STV) system in Ireland to secure fair elections in terms of proportional representation in its Parliaments. After two elections under that system, in 1929 Stormont changed the electoral system to be the same as the rest of the United Kingdom: a single-member first past the post system. The only exception was for the election of four Stormont MPs to represent the Queen's University of Belfast. Some scholars believe that the boundaries were gerrymandered to under-represent Nationalists.[103] Other geographers and historians, for instance Professor John H. Whyte, disagree.[125][126] They have argued that the electoral boundaries for the Parliament of Northern Ireland were not gerrymandered to a greater level than that produced by any single-winner election system, and that the actual number of Nationalist MPs barely changed under the revised system (it went from 12 to 11 and later went back up to 12). Most observers have acknowledged that the change to a single-winner system was a key factor, however, in stifling the growth of smaller political parties, such as the Northern Ireland Labour Party and Independent Unionists. In the 1967 election, Unionists won 35.5% of the votes and received 60% of the seats, while Nationalists got 27.4% of the votes but received 40% of the seats. This meant that both the Unionist and Nationalist parties were over-represented, while the Northern Ireland Labour Party and Independents (amounting to more than 35% of the votes cast) were severely under-represented.

After Westminster reintroduced direct rule in 1973, it restored the single transferable vote (STV) for elections to the Northern Ireland Assembly in the following year, using the same definitions of constituencies as for the Westminster Parliament. Currently, in Northern Ireland, all elections use STV except those for positions in the Westminster Parliament, which follow the pattern in the rest of the United Kingdom by using "first past the post."

Local authority Elections

Gerrymandering (Irish: *Claonroinnt*) in local elections was introduced in 1923 by the Leech Commission. This was a one-man commission: Sir John Leech, K.C. was appointed by Dawson Bates, Northern Ireland's Minister of Home Affairs, to redraw Northern Ireland's local government electoral boundaries.[127]:68 Leech was also chairman of the Advisory Committee who recommended the release or continued detention of the persons that the Northern Irish government was interning without trial at that time.[128] Leech's changes, together with a resultant boycott by the Irish Nationalist community, resulted in Unionists gaining control of Londonderry County Borough Council, Fermanagh and Tyrone County Councils, and also retaking eight rural district councils. These county councils, and most of the district councils, remained under Unionist control, despite the majority of their population being Catholic, until the United Kingdom government imposed Direct Rule in 1972.[129][130]

Leech's new electoral boundaries for the 1924 Londonderry County Borough Council election reduced the number of wards from four to three, only one of which would have a Nationalist majority. This resulted in election of a Unionist council in every election, until the County Borough Council's replacement in 1969 by the unelected Londonderry Development Commission, in a city where Nationalists had a large majority and had won previous elections.[131][125]

Some critics and supporters spoke at the time of "A Protestant Parliament for a Protestant People".[132] This passed also into local government, where appointments and jobs were given to the supporters of the elected majorities.[130] Stephen Gwynn had noted as early as 1911 that since the introduction of the Local Government (Ireland) Act 1898:

> In Armagh there are 68,000 Protestants, 56,000 Catholics. The County Council has twenty-two Protestants and eight Catholics. In Tyrone, Catholics are a majority of the population, 82,000 against 68,000; but the electoral districts have been so arranged that Unionists return sixteen as against thirteen Nationalists (one a Protestant). This Council gives to the Unionists two to one majority on its Committees, and out of fifty-two officials employs only five Catholics. In Antrim, which has the largest Protestant majority (196,000 to 40,000), twenty-six Unionists and three Catholics are returned. Sixty officers out of sixty-five are good Unionists and Protestants.[133]

Initially Leech drew the boundaries, but from the 1920s to the 1940s the province-wide government redrew them to reinforce the gerrymander.[125]:1(c)[134]

United Kingdom – Boundary review

The number of electors in a United Kingdom constituency can vary considerably, with the smallest constituency currently (2017 electoral register) having fewer than a fifth of the electors of the largest (Scotland's Na h-Eileanan an Iar (21,769 constituents) and Orkney and Shetland (34,552), compared

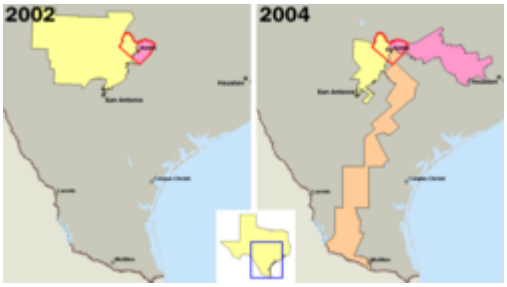
to England's North West Cambridgeshire (93,223) and Isle of Wight (110,697)). This variation has resulted from:

- Scotland and Wales being favoured in the Westminster Parliament with deliberately smaller electoral quotas (average electors per constituency) than those in England and Northern Ireland. This inequality was initiated by the House of Commons (Redistribution of Seats) Act 1958, which eliminated the previous common electoral quota for the whole United Kingdom and replaced it with four separate national quotas for the respective Boundaries commissions to work to: England 69,534; Northern Ireland 67,145, Wales 58,383 and in Scotland only 54,741 electors.
- Current rules historically favouring geographically "natural" constituencies, this continues to give proportionally greater representation to Wales and Scotland.
- Population migrations, due to white flight and deindustrialization tending to decrease the number of electors in inner-city districts.

Under the Sixth Periodic Review of Westminster constituencies, the Coalition government planned to review and redraw the parliamentary constituency boundaries for the House of Commons of the United Kingdom. The review and redistricting was to be carried out by the four UK boundary commissions to produce a reduction from 650 to 600 seats, and more uniform sizes, such that a constituency was to have no fewer than 70,583 and no more than 80,473 electors. The process was intended to address historic malapportionment, and be complete by 2015.[135][136] Preliminary reports suggesting the areas set to lose the fewest seats historically tended to vote Conservative, while other less populous and deindustrialized regions, such as Wales, which would lose a larger proportion of its seats, tending to have more Labour and Liberal Democrat voters, partially correcting the existing malapportionment. An opposition (Labour) motion to suspend the review until after the next general election was tabled in the House of Lords and a vote called in the United Kingdom House of Commons, in January 2013. The motion was passed with the help of the Liberal Democrats, going back on an election pledge. As of October 2016, a new review is in progress and a draft of the new boundaries has been published.

United States

The United States, among the first countries with an elected representative government, was the source of the term *gerrymander* as stated above.



U.S. congressional districts covering Travis County, Texas (outlined in red), in 2002, left, and 2004, right. In 2003, the majority Republicans in the Texas legislature redistricted the state, diluting the voting power of the heavily Democratic county by parceling its residents out to more Republican districts.

The practice of gerrymandering the borders of new states continued past the American Civil War and into the late 19th century. The Republican Party used its control of Congress to secure the admission of more states in territories friendly to their party—the admission of Dakota Territory as two states instead of one being a notable example. By the rules for representation in the Electoral College, each new state carried at least three electoral votes regardless of its population.[137]

All redistricting in the United States has been contentious because it has been controlled by political parties vying for power. As a consequence of the decennial census required by the United States Constitution, districts for members of the House of Representatives typically need to be redrawn whenever the number of members in a state changes. In many states, state legislatures redraw boundaries for state legislative districts at the same time.

State legislatures have used gerrymandering along racial lines both to decrease and increase minority representation in state governments and congressional delegations. In Ohio, a conversation between Republican officials was recorded that demonstrated that redistricting was being done to aid their political candidates. Furthermore, the discussions assessed the race of voters as a factor in redistricting, on the premise that African-Americans tend to back Democratic Party candidates. Republicans removed approximately 13,000 African-American voters from the district of Jim Raussen, a Republican candidate for the House of Representatives, in an apparent attempt to tip the scales in what was once a competitive district for Democratic candidates.[138]

Shaw v. Reno was a United States Supreme Court case involving the redistricting and racial gerrymandering of North Carolina's 12th congressional district *(pictured)*.

With the Civil Rights Movement and passage of the Voting Rights Act of 1965, federal enforcement and protections of suffrage for all citizens were enacted. Gerrymandering for the purpose of reducing the political influence of a racial or ethnic minority group was prohibited. After the Voting Rights Act of 1965 was passed, some states created "majority-minority" districts to enhance minority voting strength. This practice, also called "affirmative gerrymandering", was supposed to redress historic discrimination and ensure that ethnic minorities would gain some seats and representation in government. In some states, bipartisan gerrymandering is the norm. State legislators from both parties sometimes agree to draw congressional district boundaries in a way that ensures the re-election of most or all incumbent representatives from both parties.[139]

Rather than allowing more political influence, some states have shifted redistricting authority from politicians and given it to non-partisan redistricting commissions. The states of Washington,[140] Arizona,[141] and California[142] have created standing committees for redistricting following the 2010 census. It has been argued however that in California's case, gerrymandering still continued despite this change.[143] Rhode Island[144] and New Jersey[145] have developed *ad hoc* committees, but developed the past two decennial reapportionments tied to new census data. Florida's amendments 5 and 6, meanwhile, established rules for the creation of districts but did not mandate an independent commission.[146]

Michigan voters in 2018 approved a proposal to create an independent commission to draw new congressional maps following the 2020 United States Census, thereby removing the responsibility from the state legislature. Additionally, Ohio voters in 2018 modified their existing redistricting statutes to have a commission draw new maps. However, the ability of the state legislature to draw congressional maps remained, and this proposes the risk of gerrymandering. Other states that have implemented commissions in the 2018 midterm cycle include Colorado.

International election observers from the Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights, who were invited to observe and report on the 2004 national elections, expressed criticism of the U.S. congressional redistricting process and made a recommendation that the procedures be reviewed to ensure genuine competitiveness of Congressional election contests.[147]

In 2015, an analyst reported that the two major parties differ in the way they redraw districts. The Democrats construct coalition districts of liberals and minorities together with conservatives which results in Democratic-leaning districts.[148] The Republicans tend to place liberals all together in a district, conservatives in others, creating clear partisan districts.[149][150]

In June 2019, the United States Supreme Court ruled in *Lamone v. Benisek* and *Rucho v. Common Cause* that federal courts lacked jurisdiction to hear challenges over partisan gerrymandering.[151]

Venezuela

Prior to the 26 September 2010 legislative elections, gerrymandering took place via an addendum to the electoral law by the National Assembly of Venezuela. In the subsequent election, Hugo Chávez's political party, the United Socialist Party of Venezuela drew 48% of the votes overall, while the opposition parties (the Democratic Unity Roundtable and the Fatherland for All parties) drew 52% of the votes. However, due to the re-allocation of electoral legislative districts prior to the election, Chávez's United Socialist Party of Venezuela was awarded over 60% of the spots in the National Assembly (98 deputies), while 67 deputies were elected for the two opposition parties combined.[152]

Related terms

In a play on words, the use of race-conscious procedures in jury selection has been termed "jurymandering".[153][154]

See also

- Electoral fraud
- Gerrymandering in the United States
- *Gill v. Whitford*
- Schelling's model of segregation
- Voter suppression
- Wasted vote
- Boundary problem (spatial analysis)

Notes

a. Pronounced with a hard "g", as if spelled "Gherry"

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External links

- Articles from the ACE Project (http://www.aceproject.org/)

  Alleged Gerrymandering in Malaysia: Over-representation of rural districts (http://www.aceproject.org/ace-en/topics/bd/bdy/bdy_my) Archived (https://web.archive.org/web/20070928010507/http://www.aceproject.org/ace-en/topics/bd/bdy/bdy_my) 28 September 2007 at the Wayback Machine
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- Metric Geometry and Gerrymandering Group (https://mggg.org/) – consortium of Boston-area researchers

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Gerrymandering Suits Pile Up As States Finalize New Maps

By **Justin Wise**

Law360 (December 3, 2021, 4:48 PM EST) -- The decennial redrawing of congressional and legislative boundaries has all the signs of engendering a decade full of court battles that could help determine which party controls the House of Representatives and various statehouses, as well as how fairly represented certain communities may be in their respective states.

GOP-led legislatures adopting new maps this fall in states including Texas, North Carolina, Ohio and Alabama met immediate legal responses. Several groups and individuals sued within days, arguing they are illegal partisan or racial gerrymanders handing Republicans an unfair advantage or diluting the voting power of racial minorities.

Republicans are mostly playing defense, as they control the process in most states where legislatures are responsible for map drawing. Democrats are defending in states including Nevada and Oregon, where litigants argue that state leaders instituted illegal partisan gerrymanders of their own in their new legislative and congressional boundaries.

The various challenges presage what will likely be the most litigated redistricting cycle in U.S. history, said Doug Spencer, a University of Colorado law professor who maintains the online database All About Redistricting, which has tracked lawsuits in more than a dozen states so far.

Redistricting is a once-a-decade process where political boundaries are redrawn to account for changes in the U.S. population. While some states use commissions, many give the final say on new maps to legislatures, which, as in the previous cycle, have moved to entrench the political party in power.

The latest redistricting round has taken place as advocacy groups and the public place more scrutiny on issues around voting, and it follows a decade of U.S. Supreme Court jurisprudence that will impact the way gerrymandering cases are fought, attorneys and redistricting experts told Law360.

The high court's decision in Shelby in 2013 to overturn Section 5 of the 1965 Civil Rights Act means certain jurisdictions with a history of racial discrimination no longer have to gain clearance from the U.S. Department of Justice for new political boundaries, which some attorneys predict will lead to more litigation over racial gerrymandering.

In 2019's Rucho v. Common Cause, the court also ruled that federal courts should not weigh in on battles over partisan gerrymandering, a move that will shift the focus for litigants to state courts, most of which have never issued rulings on the matter.

"Now I think there's an incentive to file a lawsuit in all 50 states, because one, you never know, the standard is brand new," Spencer said. "If you're riding on a blank slate, every argument is available to be made, nothing has been taken off the table."

Thirty states have a clause in their constitution that elections must be "free," according to the National Conference of State Legislatures. But past litigants have argued that the equal protection clause of the U.S. Constitution outlawed gerrymandering that unfairly favored one party over the other.

It was not until the last decade that groups in Pennsylvania and North Carolina successfully brought

claims that legislative or congressional maps were partisan gerrymanders that violated their state constitutions.

> The focus at that time was bringing partisan gerrymandering claims in federal court. Now in light of the SCOTUS decision, everyone is switching to state courts.

Elisabeth Theodore

Arnold & Porter

"The focus at that time was bringing partisan gerrymandering claims in federal court, and we were the ones to sort of shift the focus," said Elisabeth Theodore, an Arnold & Porter partner who helped represent the plaintiffs in both states. "Now in light of the SCOTUS decision, everyone is switching to state courts."

How successful those challenges are "will vary state by state," said Michael Li, an elections expert at New York University's Brennan Center for Justice. "Some state constitutions have courts much friendlier to these sorts of claims."

In North Carolina, a group of residents made the state constitution-based argument in a complaint filed a day after the legislature's completion of its new congressional map on Nov. 4. The new boundaries give Republicans 10 safe seats, Democrats three safe seats, and just one competitive district, in a state where President Joe Biden lost the popular vote by 1.3 percentage points, according to the complaint.

The residents, represented by prominent Democratic attorney Marc Elias' law firm and Arnold & Porter, say the new maps violate the state's constitution's free elections clause and ask the court to order new maps be drawn for the 2022 primary and midterm elections.

The suit is one of many targeting a GOP-controlled legislature that, prior to crafting the new lines, reportedly approved criteria to ignore partisan and racial data. State Rep. Destin Hall, who chaired North Carolina's redistricting committee, has emphasized this in public statements and accused the Democrats of using a strategy to "sue till Blue" following a challenge to the legislature's refusal to consider racial data.

Hall has also said the approach was endorsed by Democrats in 2019 after the legislature was ordered to draw new maps.

A similar approach was taken in Texas, where Republican state Sen. Joan Huffman said in September that its legislature drew congressional and state boundaries on a "race-blind" basis.

The National Republican Redistricting Trust, a group that coordinates the GOP's redistricting strategies, has said this tactic could work in certain states to avoid claims of boundaries that harm

minority voters.

"If you turn off the race data and only look at the political data, then you haven't drawn on the basis of race," the group's general counsel, Jason Torchinsky of HVJT Consulting LLC, told The Wall Street Journal, noting that the notion demographics would determine how people would vote includes assumptions that won't hold up in the long term. Torchinsky did not respond to Law360's request for comment for this story.

The methods preview a defense that some states could use in response to racial gerrymandering claims under the Voting Rights Act, some attorneys said, given that the Supreme Court has already shut the door on the federal judiciary hearing partisan claims.

Arguments noting what candidates a racial minority group has typically favored could face obstacles because of that precedent, some said.

"Particularly in states where there is significant overlap between partisan affiliation and racial identity, I think the federal courts are going to really struggle to differentiate between what's a partisan gerrymander and a racial gerrymander," said Adam Podowitz-Thomas, senior legal strategist at the Princeton Gerrymandering Project, a nonpartisan group that analyzes and grades gerrymandering in district maps.

Racial gerrymandering claims often follow moves that pack people of color into districts or spread them across multiple districts, allegedly to dilute their voting power. Groups such as the American Civil Liberties Union and Voto Latino made these arguments in recently filed lawsuits in Alabama and Texas.

Some Texas lawsuits take aim at the state's population growth from the previous decade, which handed it two additional congressional seats. Ninety-five percent of that growth came from communities of color, but the new boundaries leave racial minorities even fewer districts with a reasonable opportunity to elect their preferred candidates, one complaint says.

The Texas attorney general's office moved to dismiss Voto Latino's case, claiming the group and individual plaintiffs lack standing and a private cause of action. One of its central claims is that the suit doesn't identify voters injured by the new district boundaries.

Some voting rights advocates link aggressive gerrymanders to the Supreme Court's elimination in Shelby of the DOJ clearance for states that had a history of racial discrimination. During previous redistricting cycles, those states had to conduct their own analyses to show that their planned maps wouldn't leave minority voters worse off, said Sophia Lakin, the deputy director of the ACLU's voting rights project.

"It really changes the sort of nature of the litigation and puts a lot more burden on the litigants that are challenging the maps," Lakin said. "You're going to see potentially more aggressive maps that harm black and brown voters that we wouldn't have seen otherwise, which in and of itself creates more litigation."

> [The concern is this] kind of litigation takes a long time … [and] you have maps that are ultimately found to be discriminatory in place for multiple election cycles.

Sophia Lakin

ACLU Voting Rights Project

The concern is "this kind of litigation takes a long time … [and] you have maps that are ultimately found to be discriminatory in place for multiple election cycles," she said.

Every decade this century, redistricting has drawn lawsuits. In the five years after the 2010 Census, the nonprofit group Ballotpedia tracked lawsuits pertaining to redistricting in 37 states.

Some groups are devoting increasing attention to the issue. The National Republican Redistricting Trust started in 2017 to coordinate Republican strategies on redistricting, around the time former Attorney General Eric Holder's National Democratic Redistricting Committee launched.

The delay in the release of the U.S. census has also helped spur litigation; **some groups have filed suits** asking state courts to redraw maps in the event of impasses that prevent new ones from being drawn in time.

A big question right now is how fast courts will move on these cases, considering candidate filing deadlines for the 2022 primary elections are around the corner in a number of states.

Some early signs are that state courts are moving quickly; courts in Oregon, North Carolina and Wisconsin made significant judgments on partisan gerrymandering in recent weeks.

A North Carolina state court denied a motion to preliminarily block the administration of its 2022 primary elections with new maps, finding there is "reasonable doubt" to the claim that the congressional and legislative districts are unconstitutional.

In Oregon, a special judicial panel dismissed a petition challenging a map that plaintiffs said unfairly projects to give Democrats five of the state's six congressional seats, finding that petitioners did not demonstrate the legislature "made choices that no reasonable legislative assembly would have made."

It's up in the air as to how other courts will analyze questions of political fairness, said Spencer of All About Redistricting, reinforcing the notion that litigation may spread across the U.S.

"There is no way to predict what kind of standard they will apply, what kind of evidence they will find

persuasive, or what kind of holding they will issue," Spencer said. "It's all up in the air. That said, I expect that some states will look to other states for guidance, so these early rulings are potential signals to other cases in the pipeline."

--Editing by Brian Baresch and Emily Kokoll.

Ohio And Alabama Rulings Set Tone For Redistricting Fight

By **Ryan Boysen**

Law360 (February 4, 2022, 12:04 PM EST) -- About halfway through the current redistricting cycle, two recent court decisions in Ohio and Alabama provide a glimpse of what's to come as litigation nationwide over newly drawn political maps shifts into overdrive in the coming months.

In Ohio, the state's Supreme Court struck down an aggressive gerrymander drawn by Republican legislators, which the court said flew in the face of a 2018 amendment to the state constitution that bans partisan gerrymanders. Meanwhile, a panel of three federal judges in Alabama ruled its new congressional map violated the Voting Rights Act by diluting the voting power of the state's Black population.

Both decisions were intensely local in most respects and are unlikely to directly affect the flurry of redistricting lawsuits underway in other states, experts said.

But in a broader sense, the rulings highlight two themes that could determine the outcome of the once-in-

a-decade redistricting fight: The outsized importance of state supreme courts and the centrality of race in many redistricting legal battles.

The Ohio case hinged on the 2018 amendment that forbids legislators from drawing up congressional maps that "unduly favor" one party over the other. A similar 2015 amendment applied to maps for state legislature districts.

Voters passed those amendments overwhelmingly with 75% in favor, fed up with the aggressively gerrymandered maps Republican legislators had drawn up in the 2010 redistricting cycle.

When the time came to draw new maps in 2021, however, the legislature, still in Republican control, produced a congressional map that gave the GOP 12 out of 15 House seats, even though the party only gets about 55% of the vote in Ohio. The maps for state races drawn up by a commission would have also resulted in a Republican stranglehold on the state legislature.

Several voting rights groups sued, and in a pair of decisions on Jan. 12 and 14, a bare 4-3 majority of Ohio's Supreme Court struck down the new maps.

The court said it was "clear beyond all doubt that the General Assembly did not heed the clarion call sent by Ohio voters to stop political gerrymandering."

Chief Justice Maureen O'Connor, a Republican appointee, sided with the court's three Democratic appointees to form the majority. The court's three other Republican appointees dissented.

"It felt like the final safeguard held," said Yurij Rudensky, a redistricting attorney at the left-leaning Brennan Center for Justice, who is involved in one of the Ohio suits.

"If you take the text of the 2015 and 2018 amendments seriously, then these lawsuits never should have been necessary in the first place," he said. "But Republicans drew the maps they did, and voters were forced to respond. These lawsuits were about determining whether those provisions were mandatory and enforceable, or just meaningless window dressing."

A fairer Ohio map could result in Democrats gaining two to three seats in Congress, underscoring the high stakes of redistricting legal battles ahead of the 2022 elections.

"This is a major impact on the national balance of power," said Nick Stephanopoulos, a Harvard Law School professor who studies and litigates redistricting cases. "The Ohio decision is the most important thus far in terms of the future composition of the House of Representatives."

The case is still in flux, after Ohio's legislature drew up a new set of maps in response to the ruling that were then immediately challenged by the plaintiffs as woefully insufficient. Another ruling on those new maps is expected any day now.

Several attorneys representing Ohio in the cases declined to comment, and the National Republican Redistricting Trust did not respond to a request for comment.

The Ohio ruling was the first to overturn a congressional map this redistricting cycle, and it's also the first time a congressional map has been overturned in the wake of the U.S. Supreme Court's 2019 ruling in Rucho v. Common Cause.

That landmark ruling essentially forbade federal courts from taking on lawsuits challenging partisan gerrymanders, leaving state courts as the only avenue to do so.

That means state supreme courts will have the final say on partisan gerrymandering claims this redistricting cycle, leaving Republicans and Democrats nervously eyeing the partisan makeup of the justices in key battleground states.

In Wisconsin, for example, the Supreme Court's four conservatives recently sided against its three

Democratic appointees to leave in place a congressional map that favors Republicans.

A decision is expected any day now by North Carolina's Supreme Court that could decide the congressional balance of power, and on Wednesday the Pennsylvania Supreme Court took up a challenge to the congressional map there.

Many other states still haven't released their new maps, making it all but certain that even more high-profile cases will end up before other state supreme courts in the weeks to come.

There are other ways to challenge gerrymandered maps in federal court, however, as with the Alabama ruling.

In that Jan. 24 decision, a three-judge district court panel unanimously found the Republican legislature violated Section 2 of the Voting Rights Act by diluting the voting power of the state's Black population when drawing new congressional maps.

One of the panel's members was appointed to the bench by President Bill Clinton, and two by President Donald Trump.

"Black voters have less opportunity than other Alabamians to elect candidates of their choice to Congress," the panel wrote in a sweeping 225-page opinion.

Section 2 bars states with a history of racial discrimination from drawing districts that would intentionally prevent minority voters from being able to elect politicians of their choice. In this case, the court's decision means Alabama will have to draw a second district with a majority Black population.

Black residents make up 27% of Alabama's population, but the state's congressional delegation consists of one majority-Black district that's solidly Democratic and six districts that are majority white and lean Republican. The creation of a second majority-Black district would therefore likely hand the Democrats a second seat.

The ruling was hailed by left-leaning groups and law professors as breathing new life into a Voting Rights Act that's been battered by the U.S. Supreme Court in recent years, showing it's still possible to challenge racial gerrymanders in federal court even if partisan gerrymanders are off limits after Rucho.

It could also bode well for other Section 2 lawsuits down the line. Similar cases are already pending in Texas and Georgia, and some experts have speculated that the Alabama decision could inspire others to file suit in other southern states like South Carolina or Louisiana.

But Deuel Ross, one of the lead attorneys on the Alabama case, is quick to point out that the facts in other states are often messier than they were here, echoing several other attorneys and experts who described the suit as a "textbook" Section 2 case.

"This case is not a legal unicorn," said Ross, who is senior counsel at the NAACP Legal Defense and Educational Fund Inc. "There's nothing complicated about this case. When you apply the facts to the relevant precedent, there's only one result you can reach. And I think the decision shows that the court agreed."

The Alabama decision is doubly important because it could now decide the fate of Section 2 for years to come. Immediately after the ruling was issued, Alabama's attorney general appealed directly to the U.S. Supreme Court, a move that's standard in Section 2 lawsuits. The Supreme Court is still mulling whether to take up the case or not.

If it does, many of the same voices that cheered the Alabama decision now worry it could end up gutting Section 2, given the Supreme Court's general hostility to voting rights legislation under Chief Justice John Roberts, reflected in a series of party-line decisions that have weakened the VRA and other voting laws over the past 15 years.

Marina Jenkins, director of litigation and policy at the National Democratic Redistricting Committee, which works to support Democrats in redistricting battles and was involved in the Alabama case, said it will be a close call.

On the one hand, she said the court's newly supercharged conservative majority bodes ill, but on the other hand the Alabama ruling is so straightforward that undoing it would require the justices to squarely confront and overturn the 1986 Supreme Court decision that underlies it, Thornburg v. Gingles.

"This case is not making new law," Jenkins said. "It's just applying Gingles and Section 2 to the facts on the ground in Alabama. We're not breaking new ground here in any way."

For that reason, "this does not feel like the case for them to do something new and different with regards to Section 2," she said.

Stephanopoulos, the Harvard Law redistricting expert, agreed with Jenkins' appraisal of the situation but said anything is possible.

As a young attorney in the Reagan administration "John Roberts cut his teeth opposing the modern version of the VRA," Stephanopoulos said. "The chance to completely handicap that law might be quite tempting."

"If they do somehow hold that you don't win a Section 2 case with the facts in this case ... that is a massive blow," he continued. "It would bode very poorly for any future VRA lawsuits."

Gerrymandering: How it's being exposed and how it affects your state

Analysis by Zachary B. Wolf, CNN
Updated 8:00 AM ET, Sat November 20, 2021

Analysis: New congressional map helps GOP protect their power 04:02

A version of this story appeared in CNN's What Matters newsletter. To get it in your inbox, sign up for free here.

(CNN) — Here's how politicians game the system: The same group of people can vote on the same Election Day with very different results.

The gaming happens by drawing congressional and state legislative maps to politicians' advantage. Republicans have benefited more in recent elections, and they're off to a solid start this year as states draw new congressional district boundaries to account for the 2020 Census.

Some estimates suggest Republicans at large will pick up the five seats needed for a House majority in 2022 simply by redrawing state congressional maps.

I'm going to spend more time looking at this issue in the newsletter since gerrymandering, along with restricting access to the ballot box, have emerged as the major challenges to the US form of democracy.

I went to Sam Wang, a professor at Princeton University and director of the Princeton Gerrymandering Project, for more on what's happening right now and what it will mean for US politics in the coming years. Our conversation,

How exactly does gerrymandering work?

WHAT MATTERS: *Help people understand. If states like Texas and North Carolina have seen growth predominantly in urban areas and with minority communities, how can the maps be drawn to help Republicans?*

WANG: More and more in recent years, neighboring voters have similar opinions. Voters have also become more consistent in their political loyalty, independent of the candidate. That reliability makes it easy to predict how they will vote in the next election.

To disempower Democratic-leaning voters in urban and minority areas, Republican legislators can split them down the middle so they can't win a race -- or pack them into districts so they win very few races. Either way, it's possible to use Census and voting data to predetermine the partisan outcome.

A Republican-favoring statewide map can be drawn by building lots of efficient Republican wins with 55%-60% of the vote. Then give Democrats very few wins with 65% or more of the vote -- or split them up to stick them with Republican majorities.

Using Texas as an example, the Houston and Dallas/Fort Worth areas have been cracked to split up Democratic voters as well as Black, Hispanic and Asian communities. Odd-shaped districts radiating out of the metro areas pair urban voters with rural majorities.

This year, gerrymandering offenses are quickly exposed to the light of day, thanks to software, citizen engagement and expert organizations like the Princeton Gerrymandering Project. Casting a harsh light on the process can moderate some of the worst acts and document the offenses in real time.

The resulting trail of evidence can help courts undo some of the most extreme maps.

Are Democrats just as bad?

WHAT MATTERS: *What's the inverse? How do Democrats draw their own friendly maps in places like Illinois?*

WANG: Note that even without gerrymandering, there is a basic cause of low competition in US politics: geographic clustering of voters, which makes it hard to draw competitive districts in most places.

Redistricting could repair this, but legislators don't prioritize competition. Instead, they draw the lines to take away the ability of voters of either party to influence election outcomes.

Relying on dependable voter habits and armed with mapping technology, both Republicans in Texas and Democrats in Illinois were able to eliminate competition in their new maps, both Congressional and legislative.

Democrats have a slightly harder time gerrymandering, because rural and white voters are slightly less lopsided in their voting habits. But rural voters still can be put into districts that snake out from city centers. Or, they can be packed together in an artfully spread-out district.

Such Democratic gerrymanders can have lots of county splits and unnatural boundaries.

Who are the worst offenders?

WHAT MATTERS: *You give letter grades to states for their maps. Which states have the worst grades and why?*

That might be it for big-state extreme gerrymanders, since Florida's legislative and Congressional drafts look better than expected and a Virginia state court appears to be focused on meeting fair-districting criteria.

The "F" states' legislatures -- and it was always a legislature that got an F -- put partisan control ahead of other aims such as competition, minority representation and keeping counties whole and districts compact.

In all cases, the common factor was that one political party controlled both the legislature and the governorship. The exception was North Carolina, where the state constitution excluded the governor from the process.

Can Republicans guarantee a House majority before the 2022 election occurs?

WHAT MATTERS: *Republicans control more state legislatures and so they have more control over this process nationwide. Do you think they'll get the five seats they need for a House majority simply through redistricting?*

WANG: We may not find out in 2022, since midterm elections are usually bad for the President's party, and Congressional control is so closely divided.

Even without gerrymandering, the effect may be dozens of seats. It may take until 2024 to get clarity where redistricting is the key deciding factor.

In the meantime, here is what we do know: in 2021, combining the large states that have gotten F grades with single-seat shifts in Utah, Oregon, and Arkansas, we estimate a net shift of five seats to Republicans so far.

We still have to see what will happen in Tennessee, Maryland, Missouri and New York, as well as other states.

Is it enough by itself to matter in 2022? It's right on the edge.

But don't forget the big picture: partisan gerrymandering was far worse in 2011, when Republicans got an immediate advantage of at least 15 seats.

Since that time, commissions have taken the redistricting power away from legislatures in Michigan, Colorado and Virginia. Divided control in Wisconsin and Pennsylvania should make redistricting more fair. In most of these states, the law requires public input and consideration of communities of interest.

One consolation is that even where legislators are in control, state legislative maps are sometimes gerrymandered a little less than congressional maps, perhaps because some state laws require counties and other structures to be preserved. These are mostly under the radar of national reporters, but they are very important for local governance.

Is there a solution?

WHAT MATTERS: *Numerous states have enacted changes to end gerrymandering. Do these nonpartisan commissions work? Is there a better way to solve the problem of gerrymandering?*

WANG: Redistricting outcomes tend to be better if the process is decided by independent commissions and courts, or on a bipartisan basis.

Overall, there's been a lot of progress: commissions in Michigan, California, Colorado and Virginia, and divided government in Wisconsin and Pennsylvania.

Finally, public pushback may have prevented worse outcomes in Arizona, where the commission received public suspicion beforehand but ended up doing fine. Continued pressure in Georgia and Florida will be important.

A second way to address gerrymandering is to sue in court. Lawsuits will challenge maps on racial grounds in Texas and other states, and on partisan grounds in North Carolina and Ohio.

North Carolina and Ohio state supreme courts may each have a slim majority to strike down excessively partisan maps, because of specific conservative-leaning justices who appear likely to adhere to nonpartisan ideals. However, lawsuits can take years to resolve.

All of these solutions rely on state-by-state solutions, which are available in some but not all states. Addressing these problems on a national level requires passing the Freedom to Vote Act and the John Lewis Voting Rights Act. Congressional action on these bills is currently blocked by the current version of the filibuster rule in the Senate.

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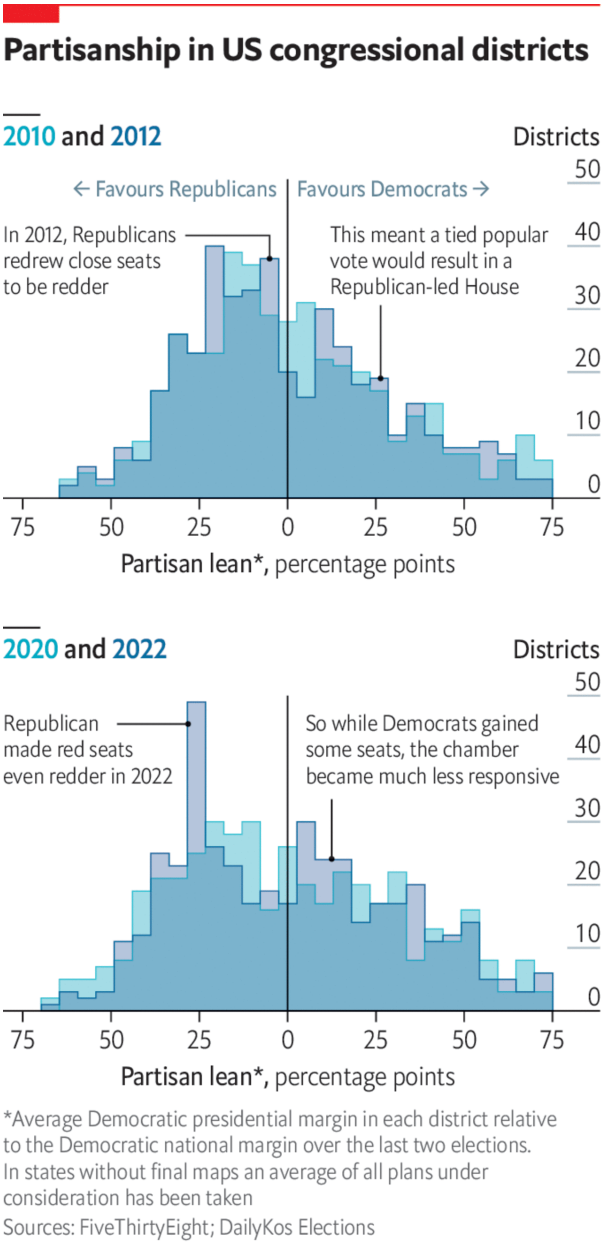
FEBRUARY 11TH 2022

Checks and Balance

The best of our coverage of American politics

America's new congressional districts will be fairer but less responsive to voters



Elliott Morris is a data journalist and correspondent who typically writes this newsletter's data note. Today, he takes over the full newsletter to talk about partisan fairness in congressional redistricting.

In many ways, democracy is the biggest story in America today. The republic's centuries-old experiment in representative, competitive politics is under siege from many sides. On the right, Donald Trump and his Republicans pose a serious threat to the legitimacy and fairness of elections. The country's political institutions, traditions and practices, especially the filibuster, can accentuate the difficulties; they magnify the power of rural voters

at the expense of everyone else and slow policymaking to a snail's pace.

Another threat can be found in partisan gerrymandering—the rigging of legislative boundaries to give one party an advantage over the other. After the census of 2010, Republicans amended the electoral map for the House of Representatives to deprive Democrats of over a dozen seats. So in 2012, the Democrats won the popular vote for the House but only 46% of its seats.

This week, we published a data-driven investigation of America's congressional redistricting for the 2020s. Our findings show an increase in rigging on both sides of the aisle; Democrats have managed to flip close seats in blue states such as Illinois, New Mexico and New York while Republicans have padded their margins, making red districts in Texas and Georgia even redder. As a result, this decade's map will be much fairer—though still slightly biased towards the Republicans. In hypothetical elections in which the parties' shares of the popular vote are evenly split, we calculate that Democrats would be favoured to win approximately 211 seats, up from 198 in 2012.

But this new gerrymandering will also result in fewer competitive congressional districts than at any point in the past three decades. The number of seats that both Republicans and Democrats have a good chance of winning will shrink from 44 to about 40, according to our analysis of the new maps. This will make the House less responsive to changes in national voter behaviour; as the number of close seats declines, each party has to win by larger and larger margins to win the same share of seats they would under fairer maps. The pieces we published this week focus on the fairness of the new maps, so we are devoting this newsletter to explaining the lower responsiveness of the chamber.

Different slopes for different folks

After new census data were released in 2010, Republican state legislators prioritised gerrymanders which took close seats away from the Democrats. They targeted close districts, where the party won with vote shares three or four percentage points higher than

their nationwide popular vote—such as those represented by ideologically moderate “blue-dog” Democrats. The new lines simultaneously packed Democratic voters into fewer, bluer districts in urban areas and divided them among redder suburban and rural seats, splitting left-leaning coalitions into seats dominated by the right. This created a dip in the number of seats where neither party had a large advantage (see chart).

The way in which they gerrymandered, however, created many new seats that could be won with slight changes in voters’ preferences. A swing in the national popular vote towards Democrats by even a few points would result in their winning a larger cache of Republican seats than they would have under fairer maps with more competitive districts. And Republicans also stood to gain if they won the national popular vote by four or five percentage points, pushing the districts with more “packed” Democrats back in their direction. It was an unfair map, but it was a responsive map; the impact of the gerrymander would be weaker if either party won by a very high margin.

The parties have approached redistricting in a new way this year. Blue states have focused on gaining back those competitive red seats they lost in 2012, creating a lot of close seats which they are likely to win in a close, left-leaning election. But Republicans have chosen a different tactic. Instead of taking close blue districts away from the Democrats, they have padded their margins in seats where they were already favoured. This decreases the number of seats Democrats could win in an election where voters are decisively in their favour (see chart). The resulting asymmetry in the competitiveness of districts means a landslide victory for Democrats would earn them about 30 more seats. Republicans would gain about 50 in a similar landslide.

These strategies show how, when gerrymandering new maps, parties tend to fight the last battle. After 2010 Republicans were looking to create an era of dominance: Democrats had been in power for four years, and the previous decade of elections had produced slim House majorities for both parties. So they got rid of as many Democratic districts as they could. But they did not

consider that the maps' bias would decrease in contests that were more lopsided nationally. This year, Republicans are looking to insulate themselves from the losses they suffered in 2018, when Democrats won the national House vote by nearly 10 points; and Democrats want to avoid a repeat of 2012, when they won the popular vote but lost the House.

Lines in the sand

Data provided to *The Economist* by YouGov, an online pollster, show that over 60% of Americans favour various reforms to make districting fairer. A broad majority of Republicans and Democrats want to give map-making power to independent commissions of citizens, for instance, which tend to draw fairer maps. Most also want to ban lobbyists from participating in map-drawing and want officials to listen to public comments on proposed boundaries. Mass support for such reforms makes one thing clear: the unfair maps being drawn up by politicians do nothing to improve democracy for their constituents.

G. Elliott Morris
Data journalist

The best of our United States coverage

Party loyalties

Is Donald Trump losing his grip on Republican voters?

New polling and fundraising figures suggest slippage

Congressional redistricting

Democrats have fared surprisingly well in Congress's new maps

But the boundaries still favour Republicans

Street food

Roadkill is now on the menu in Wyoming

Crashes between cars and wildlife are too common. Salvaging roadkill can help

Lexington

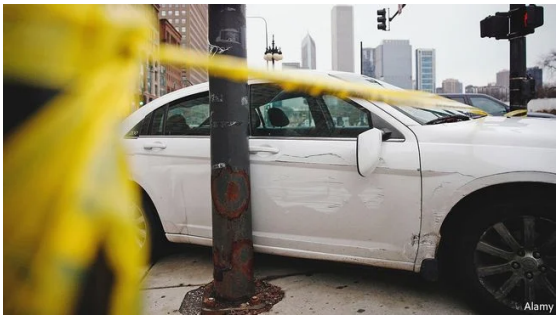
Messing up, Biden-style

The administration's errors have the president's fingerprints all over them

Another exodus?

Rival Jewish congregations feud over America's oldest synagogue

A historic synagogue is at the centre of a power struggle



Carjacking

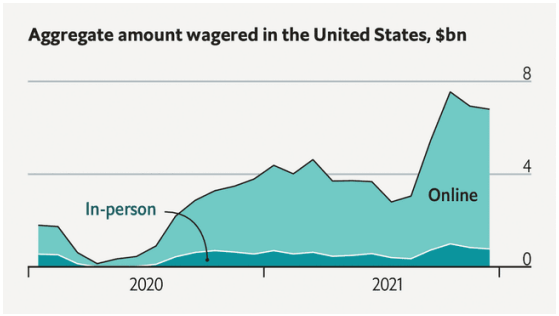
What the carjacking wave says about American policing

It is a fairly easy crime to get away with

TikTok nuns

A group of nuns goes viral for Jesus

TikTok has made them popular outside the convent



Daily chart

Sports betting in America is exploding

But rapid legalisation may also increase harm for addicted gamblers

The Economist Asks: Tim Scott

What should the Republican Party stand for?

We ask Tim Scott, the GOP's only African-American senator, about the future of his party as it prepares for crucial mid-term elections

What our journalists are reading

→ The rampaging pigs of the San Francisco Bay area (*New York Times*)

→ The Chosen Wars (Steven R. Weisman)

→ A movement to fight misinformation... With misinformation (*The Daily podcast*)

Quote of the week

> **We saw what happened. It was a violent insurrection for the purpose of trying to prevent the peaceful transfer of power after a legitimately certified election from one administration to the next. That's what it was.**

Mitch McConnell

The Republican minority leader criticised the RNC's censure of Liz

Cheney and Adam Kinzinger over their participation in the congressional investigation of the January 6th riots.

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Baker v. Carr (decided 1962)

Baker was a Republican living in urban Shelby County, TN . The Tennessee Constitution required that legislative districts for the General Assembly be redrawn every 10 years to provide for districts of substantially equal population. Baker complained that since Tennessee had not redistricted since 1901, the Shelby County district had ten times as many residents as some of the rural districts, meaning that the votes of rural citizens were overrepresented compared to those of urban citizens. He claimed that this discrepancy prevented him from receiving "equal protection of the laws" under the 14th Amendment.

Defendant Joe Carr, as the Secretary of State, did not set district lines but was ultimately responsible for the conduct of elections and the publication of district maps.

The state argued that the composition of legislative districts constituted a **non-justiciable political question** rather than a **justiciable question** and that relief for legislative malapportionment had to be won not through the federal courts but through the political process.

The decision in Baker v. Carr was one of the most wrenching in the Court's history and the case had to be reargued because initially no clear majority emerged for either side. A year after the initial argument, the Court split 6-2 in a 163 page decision, essentially holding **that the dilution of votes was, in fact**, denying the residents of Tennessee equal protection of the Fourteenth Amendment and that **"voters should have a full constitutional value of their vote".** The Court held that redistricting qualifies as a **justiciable question** under the 14th Amendment and set forth 6 factors to apply to determine which questions were political, rather than justiciable in nature.

John H. Merrill, Alabama Sec'y of State v. Evan Milligan, et al and John H. Merrill, Alabama Sec'y of State v. Marcus Caster, et al. U.S. Supreme Court (February 7, 2022)

This case arises from a dispute over Alabama's congressional election districts. The State had recently adopted a districting plan that employed the same redistricting plan the State had maintained over several decades. The Plaintiffs sought to establish a second majority-minority congressional district out of seven total districts in Alabama in accordance with the Voting Rights Act ("VRA"). The District Court had concluded that Alabama's redistricting plan likely violated federal voting rights law. The District Court ordered that the plan be completely redrawn within a few weeks and declined to stay its order for the 2022 elections that were to begin in seven weeks. The State sought an emergency stay of the District Court order for the 2022 elections.

In the Supreme Court, the State argued that the District Court's injunction was a prescription for chaos for candidates, campaign organizations, independent groups, political parties, and voters. The State claimed that individuals and entities would not know who will be running against whom in the next month's primaries, that filing deadlines need to be met and candidates won't know what district they should file in, some potential candidates won't even know what district they reside in, and incumbents won't know if they are running against other incumbents.

On top of that, the State argued that state and local election officials need substantial time to plan for elections and running elections statewide is extraordinarily complicated and difficult. They

criticized the District Court's order because it would require "heroic efforts" and even those efforts likely would not be sufficient to avoid chaos and confusion. Therefore, the State argued that any judicial order for congressional districting should not apply to the "imminent" 2022 elections.

Upon an Application for Stays or Injunctive Relief to the Supreme Court, the Court stayed the January 24, 2022 Preliminary Injunctions issued by the District Court. In a concurring opinion, Justices Kavanaugh and Alito relied on the Court's previous opinions that a District Court may never enjoin a State's election laws in the period close to an election. They argued that previously stated principles might be overcome if a plaintiff established that (1) the underlying merits were entirely clearcut in favor of the plaintiff; (2) the plaintiff would suffer irreparable harm absent the injunction; (3) the plaintiff has not unduly delayed bringing the complaint to court; and (4) the changes in question are at least feasible before the election without significant cost, confusion or hardship

Based on these stated requirements, Justices Kavanaugh and Alito concurred in the Supreme Court's stay of the District Court's injunction pending a ruling on the merits.

Chief Justice Roberts **dissented**, citing the governing standard for vote dilution claims under section 2 of the Voting Rights Act ("VRA") set forth in Thornburg v. Gingles (Supreme Court 1986). Gingles stated the requirement as "the minority group … to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." Chief Justice Roberts stated that "The District Court "reviewed submissions of the plaintiffs' experts and explained at length the factbound "bases for its conclusion that the plaintiffs had made that showing."

Justice Kagan, joined by Justices Breyer and Sotomayor, also dissented, citing the "massive factual record" upon which the District Court had found that the State had violated Section 2 of the VRA by unlawfully diluting the votes of the Black population, which comprises 27 % of the State's total population, while 92% of the white population resides in a majority white district. The District Court examined the "extent to which voting…is racially polarized (very), the 'extent to which members of the minority groups have been elected to public office' (rarely), and 'the history of voting rights discrimination in the State' (significant)." The District Court found that the State had done so by "packing" much of the Black population into a single district and "cracking" the remainder over three other districts", resulting in Black citizens having meaningful influence over just 14% of congressional seats. The District Court therefore ordered the State to devise a new plan for the 2022 elections. Justice Kagan further stated that accepting Alabama's contentions in the lawsuit "would rewrite decades of the Court's precedent about [Section 2 of the VRA]". For that reason, she opined that the Court would be "badly wrong" in granting the stay sought by the State. She further stated that "there may or may not be a basis for revising" the Court's VRA precedent, but such a change could properly occur only after full briefing and argument. She opined that the District Court did "everything right under existing law" and, therefore, "Staying its decision forces Black Alabamians to suffer what under that law is 'clear vote dilution'."

As to the practicalities, Justice Kagan stated that the State could not contend that redrawing its map in advance of the 2022 elections would be impossible, given that the State's legislature had enacted its current plan in less than a week and continues to have "all the tools" necessary to redraw the map. Moreover, the State had been on notice "since at least 2018" that "these or similar plaintiffs" after receiving updated census data, would likely assert a Section 2 challenge to any 2021 congressional redistricting plan that did not include two majority Black districts or "districts in which Black voters otherwise have an opportunity to elect a representative of their choice." Justice Kagan noted the timetable set down by the District Court, noting that Alabama was not "just weeks before an election" because the general election was nine months away, the primary date is late May, and the first day of primary voting, which Alabama has leeway to modify, is March 30.

Rucho v. Common Cause, No. 18-422 588 U.S. ____ (2019)

Rucho is a landmark Supreme Court case concerning **partisan** gerrymandering. This case arose in North Carolina and was one of three partisan gerrymandering cases heard in the Supreme Court's 2008 term. Although recognizing that partisan gerrymandering may be "incompatible with democratic principles", the Court ruled that such cases are not reviewable by the federal courts because they present nonjusticiable political questions.

Following the 2010 Census, the new congressional redistricting maps for North Carolina, that were released in 2011, resulted in nine districts favoring Republicans. The redistricting maps were challenged in the District Court as racial gerrymandering that violated the Voting Rights Act of 1965. In 2016, The District Court ruled that the maps were unconstitutional and ordered the General Assembly to revise them, for subsequent approval by the District Court.

The new redistricting committee formed by the Republican-favored General Assembly agreed to principles for the new maps, determining in part that they would not be developed using data on racial makeup, but rather would use the same proportion of voters in each congressional district to maintain a 10-3 advantage for Republicans over Democrats. The District Court approved the 2016 maps, which also were to be used in the 2018 elections.

The 2016 maps were challenged by Common Cause, among others, claiming that the redistricting violated the Equal Protection Clause and the First Amendment, and two principles of Article 1 of the United States Constitution. Of particular concern, North Carolina's 1st and 12th districts, which had been identified as two gerrymandered districts in the 2011 maps, were identified as disproportionally Democratic in the 2016 maps.

Because at this time, the Supreme Court was hearing Gill v. Whitford, a Wisconsin partisan gerrymandering case, the defendants sought a stay pending the ruling in Gill that was denied. In early 2018, The District Court ruled in favor of the plaintiffs, enjoined the use of the 2016 map, and ordered the legislature to draw a new map within 14 days. Thereafter, the Supreme Court stayed the District Court order, given the nearness of the 2018 general elections. In June 2018, the Supreme Court ruled that the plaintiffs in Gill lacked standing, did not address the merits, and subsequently vacated the North Carolina District Court order, ruling that it review Rucho in light of that decision. By August 2018, the District Court issued an order, affirming that the plaintiffs had standing and that the 2016 maps were unconstitutional and, with the acquiescence of the plaintiffs, the 2016 maps could be used given the nearness of the 2018 election.

On June 27, 2019, in the consolidated cases, the Supreme Court ruled that "partisan gerrymandering claims present political questions beyond the reach of the federal courts", and vacated and remanded the cases to the District Courts, with instructions to dismiss for lack of jurisdiction.

Gill v. Whitford, 585 U.S. (2018).

This case concerned the constitutionality of **partisan** gerrymandering. Other forms of gerrymandering based on **racial** or **ethnic** grounds have been found to be unconstitutional, and although the Supreme Court has indicated that extreme partisan gerrymandering also could be unconstitutional, it has yet to determined how such a claim could be justiciable.

This case arose following Wisconsin's 2011 redistricting plan created by Republican legislators to maximize Republicans' ability to secure additional seats in the legislature over the next few election cycles. In 2015, Democratic citizens complained that the redistricting plan caused their votes to be "wasted". In 2016, the District Court decided in favor of the Democrats, based on the evaluation of the "efficiency gap" measure developed for this case and ordered the State to redo its districts by 2017. The State appealed to the Supreme Court, which heard the case in 2017. Political scientists agreed that Wisconsin's map was heavily biased but expected that the outcome would be based on the "efficiency gap" measures and other metrics that would meet the criteria set forth by Justice Kennedy in a previous Supreme Court partisan gerrymandering case.

On June 18, 2018, the Supreme Court remanded the case to the District Court, finding that plaintiffs had not demonstrated standing to demonstrate harm, although the Justices did not define the degree to which plaintiffs must show "concrete and particularized injuries."

By way of background, each state has the number of the House of Representatives proportional to its population determined by the applicable U.S. Census, in every state having more than one representative. Every state having more than one representative must redistrict every ten years after the census to assure that each district continues to have an equal number of people. Residents can vote only in the Representative election for the district in which they reside.

In the District Court, Plaintiffs argued that the map violated the Fourteenth Amendment's guarantee of equal protection, specifically alleging the redrawn maps purposefully diluted Democratic voters so that their votes would be wasted by "cracking", while organizing a small number of districts to "pack" in a large number of Democratic voters to limit the number of seats the party would win.

In 2016, a three judge federal panel allowed the case to proceed to trial. In a 2-1 decision the map was declared to be unconstitutional. In part, the panel used the "efficiency" gap measure, which relates the number of wasted votes for each party across the state to arrive at a fair distribution. The efficiency gap of more than 7% would have allowed the Republicans to retain their advantage through the life of the map. The panel determined that the efficiency gap was 13% and 10% for the 2012 and 2014 elections, respectively.

The panel did not determine a remedy but ordered the State to redraw their districts by November 27, 2017.

In the Supreme Court, he state requested that the case be overturned and the legislature should be permitted to continue drawing its maps. Oral arguments were heard on October 3, 2017.

The Justices were split from the oral argument. Four Justices considered to be liberal appeared to side with the plaintiffs arguing that the redistricting plan was biased and that if the Court did not intervene, Republicans in other states would stack voters in like manner decentivizing voters not favored by redistricting plans. The conservative judges also questioned whether the defendants had legal standing to bring the case.

The Court ruled that the plaintiffs lacked standing and remanded the case so that they could present evidence in favor of standing. Justice Roberts argued that the plaintiffs could not argue harm to them due to redistricting as presented, but suggested there may be other forms of harm that plaintiffs could demonstrate such as the impact of redistricting on the entire state rather than one district.

In the 2018 general election in Wisconsin, following the Supreme Court's decision that retained the existing maps pending hearing of a lower court, further demonstrated significant imbalance in voting profiles. For that State Assembly, 54% of the popular vote supported Democratic candidates, but Republicans maintained their 63-seat majority. The efficiency gap, estimated to be 10% in 2014, increased to 15% based on election results