No. 17-1700

In the Supreme Court of the United States

MICHAEL C. TURZAI, ET AL.,
Petitioners,

v.

GRETCHEN BRANDT, ET AL.,
Respondents.

AMICUS BRIEF FOR AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITION FOR WRIT OR CERTIORARI

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AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI

INTEREST OF AMICUS CURIAE[1]

Amicus Curiae American Civil Rights Union (ACRU) is a non-partisan 501(c)(3) tax-exempt organization dedicated to protecting the civil rights of all Americans by publicly advancing a Constitutional understanding of our essential rights

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

and freedoms. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed amicus curiae briefs on various constitutional and election issues in cases nationwide, including redistricting cases. It also filed an amicus brief, with a proposed redistricting plan, before the Pennsylvania Supreme Court in this case.

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

SUMMARY OF THE ARGUMENT

The petition for certiorari presents a straightforward question. Under Article I, Section 4, may a state court serve as a state "legislature?" Here, the Pennsylvania Supreme Court took it upon itself to draw congressional districts for the state. In doing so, it followed the example of the Colorado Supreme Court, which previously held that a state court was a "legislature" under Art. I, § 4. The Pennsylvania court's actions were a logical extension of this earlier state behavior. If allowed to stand, they will render meaningless the term "legislature" in Article I, § 4.

In drawing congressional districts Pennsylvania Supreme Court in fact acted like a lawmaking body. During the previous statewide judicial elections, two of the court's seven members expressly campaigned for office on a platform that condemned the legislatively-drawn maps, and those candidates stated that the court should take action against what they perceived to be partisan gerrymandering. But the justices did not recuse themselves, and instead participated throughout the court's mapmaking actions. This behavior is appropriate for legislators, but not judges.

In addition, the court abandoned traditional court procedures to draw new congressional maps, thus acting like a legislature and not a court. It took extraordinary jurisdiction over this matter, it did not hear evidence or hold a hearing to determine how best to draw maps, it hired a special master, and it

produced congressional maps without any explanation or justification. In short, the Pennsylvania Supreme Court did not act like a court – rather it acted as a legislative, lawmaking body.

Finally, the court's map violated the very principles it articulated in striking down the legislatively-drawn map. The court received, but rejected, at least one map that better met the court's articulated criteria. The court's map was an illegal, extreme partisan outlier, based upon the expert analysis and "lay commentary" the court used to strike down the legislature's map. And the court's map contained numerous "ismuthses and tentacles" that the court previously condemned in the legislature's congressional map.

This departure from any articulated legal principle is explained by a quest to achieve proportional representation in congressional districts. The Pennsylvania Supreme Court had no authority to do this. And while proportional representation may be a permissible goal for legislative mapmakers, the Pennsylvania Supreme Court does not have this lawmaking authority under Art. I, § 4.

ARGUMENT

I. THIS COURT MUST DETERMINE WHETHER A COURT CAN ACT AS A "LEGISLATURE" UNDER ARTICLE I, SECTION 4.

This case presents a straightforward question: May a court act as a legislature under U.S. Const. art. I, § 4? As this court has firmly held, "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking." *Arizona State Legislature v. Arizona Independent Redistricting Com'n*, 135 S.Ct. 2652, 2668 (2015).

Here, the Pennsylvania Supreme Court acted like a legislative body, not a court that adjudicates disputes. Pennsylvania Supreme Court justices are elected by Pennsylvania's voters. Two justices specifically campaigned on a platform that rejected Pennsylvania's Congressional districts as a partisan gerrymander, and then they refused to recuse themselves. The court assumed control of the mapmaking process, and in developing a map acted like a legislature, not an adjudicatory body. And the court itself produced a partisan gerrymander, according to its own, articulated criteria.

Although the Pennsylvania Supreme Court's behavior might be considered an extreme example of a court wresting control of the mapmaking process from an elected legislature, in fact this behavior is a direct and logical outgrowth of *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1234 (Colo. 2003). There, the Colorado Supreme Court held that "the word 'legislature' in Article I" included "any means permitted by state law," and that because state courts "have the authority to evaluate the constitutionality of redistricting laws," the term "legislature" in the Elections Clause "encompasses

court orders." *Id*. at 1232.

In *Salazar*, there was no question that the lower Colorado trial court properly imposed a congressional redistricting plan; the Colorado General Assembly had deadlocked and been unable to pass a map, thus requiring the court to remedy the resulting equal protection violation. Accordingly the issue in *Salazar* was whether the Colorado Supreme Court could prohibit the Colorado General Assembly from subsequently drawing a new map after it resolved the deadlock.

By contrast, here the Pennsylvania Supreme Court created a new map from whole cloth, removing control from the Pennsylvania General Assembly and acting like a lawmaking body, not a court. Accordingly, the Pennsylvania Supreme Court's actions raise a critical and timely question: Does Art. I, Section 4, allow a state supreme court to act as a legislature when drawing legislative districts? If allowed to stand, the Pennsylvania Supreme Court's actions will signal to all state Supreme Courts that they have unfettered authority to implement redistricting plans. In other words, the Pennsylvania Supreme Court's actions erase any meaning to the word "legislature" in Art. I, § 4.

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

A. Two justices campaigned against Congressional political

gerrymandering and refused to recuse themselves.

Two of the seven justices on the Pennsylvania Supreme Court — Justice Wecht and Justice Donohue — were elected to the Pennsylvania Supreme Court by statewide vote in November, 2016. These two justices explicitly campaigned on statements that (1) gerrymandered districts violated the constitution, and (2) Pennsylvania's congressional districts were illegally gerrymandered. These campaign statements – followed by prompt action to implement their campaign platforms – show that Justices Wecht and Donohue acted like legislators, not judges.

Justice Wecht was particularly aggressive in his comments; he frequently and specifically disapproved of Pennsylvania's congressional districts, and he indicated that the Pennsylvania Supreme Court could remedy his perceived problem. Several of his public statements amply demonstrate his campaign platform:

> There are a million more democrats in this Commonwealth – I want to let that sink in – a million more Democrats in this Commonwealth, but there's a Republican state house, there's a Republican state senate, and there are only five Democrats in the Congress, as opposed to 13 Republicans. Think about it. Do we need anew Supreme Court? I think you know the answer.

Spring 2015 Judge Candidate Forum, Neighborhood Networks and MoveOn Philly, https://www.youtube.com/watch?v=713tnbv55mU&feature=youtu.be, at time code 18:00. (accessed July 23, 2018).

> In 2014, I believe, there were at least more than 200,000 votes for Democratic candidates for U.S. Congress than Republicans and yet we elected 13 Republicans and five Democrats, and there are more than 1,000,000 more Democrats . . . . I'm not trying to be partisan, but I have to answer your question, frankly. We have more than a million more democrats in Pennsylvania, we have a state senate and a state house that are overwhelmingly Republican. You cannot explain this without partisan gerrymandering.

Get to Know the Candidates for State Supreme Court, Lancaster Online, http://lancasteronline.com/news/local/get-to-know-the-candidates-for-state-supreme-court/article_65c426d4-6d45-11e5-b74f-6babb36c03bb.html, at time code 38:15 (accessed July 23, 2018).

> Right nearby here, by way of just one example, Montgomery County, a county or two over here, is represented in

> pieces by I think five different members of Congress. That's unbelievable. So I don't know and I can't tell you what the map would be, and it's not for me to say, and I don't know how I would rule on any given map, but I can tell you the Constitution says "one person, one vote," and it does not allow for unconstitutional gerrymandering.

Get to Know the Candidates for State Supreme Court, Lancaster Online, http://lancasteronline.com/news/local/get-to-know-the-candidates-for-state-supreme-court/article_65c426d4-6d45-11e5-b74f-6babb36c03bb.html, at time code 39:30 (accessed July 23, 2018).

> Stop this insane gerrymandering. … And we are one of the most gerrymandered states in the nation. And people who are disenfranchised by this gerrymandering abomination eventually lose faith and grow more apathetic, why, because their voting power has been vastly diluted and they tend to figure "well, I can't make a difference, I'll just stay home."

Get to Know the Candidates for State Supreme Court, LANCASTER ONLINE, http://lancasteronline.com/news/local/get-to-know-the-candidates-for-state-supreme-court/article_65c426d4-6d45-11e5-b74f-

6babb36c03bb.html, at time code 35:58 (accessed July 23, 2018).

And Judge Wecht continued with this campaign theme immediately following his election, stating "[e]xtreme gerrymandering is an abomination and antithetical to the concept of one person, one vote." Sean Ray, *Newly Elected Judge David Wecht on His Plans for the State Supreme Court*, 90.5 WESA, http://wesa.fm/post/newly-elected-judge-david-wecht-his-plans-state-supreme-court#stream/0, at time code 32:25 (accessed July 23, 2018).

While the readily-accessible record of Justice Donohue's campaign statements is less extensive than Justice Wecht's, she also made explicit statements and promises. For example, at a League of Women Voters' Forum, she promised that "gerrymandering will come to an end" if she and other Democrat judges were elected. Eric Holmberg, *Forums put spotlight on PA Supreme Court candidates*, at www.publicsource.org/forums-put-spotlight-on-pa-supreme-court-candidates (accessed July 23, 2018). Likewise, during her campaign she publicly stated that "gerrymandering disenfranchises the people." Nathan Kanuch, *Democratic Supreme Court Candidates Attend Forum*, POLITICSPA, http://www.politicspa.com/democratic-supreme-court-candidates-attend-forum/63228/ (accessed July 23, 2018)

These statements were no small matter.

Justices Wecht and Donohue discussed congressional gerrymandering, stated that the current congressional districts were gerrymandered, and indicated (or promised) that the Pennsylvania Supreme Court could remedy the perceived problem. These campaign statements were no different than explicit statements by judicial nominees indicating how they would rule in a specific controversy. Furthermore, several of these statements were made at a forum hosted by the League of Women Voters, who then filed this lawsuit and claimed political gerrymandering.

Justices Wecht and Donohue also played a critical role in these proceedings. For example, on November 9, 2017, the Pennsylvania Supreme Court assumed jurisdiction over this matter when it voted, four to three, to grant the League of Women Voters' application for extraordinary jurisdiction. Without Wecht and Donohue, that application would have been denied.

In failing to recuse themselves, it seems clear that both judges violated the Due Process standards set forth in *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009). In *Caperton*, a West Virginia Supreme Court Justice was required to recuse himself, because large electoral spending in the "judicial election process" created a "risk of actual bias." *Id*. at 886. Here, campaign statements and promises in the "judicial election process" did more than create a risk — they demonstrated actual bias.

To be sure, the *Petition for Writ of Certiorari*

does not ask this Court to review a Due Process claim. But, importantly for this case, the campaign statements and failure to recuse demonstrate that Justices Wecht and Donohue acted like legislators, not judges. The justices made explicit campaign statements and promises, and then promptly went about fulfilling those promises. This behavior, of course, is absolutely proper for elected legislators, who are expected to enact certain policies that they articulate during a political campaign. But the Pennsylvania Supreme Court is not, under Article I, Section 4, a legislature. By the margin of their votes, however, Justices Wecht and Donohue transformed the Pennsylvania Supreme Court into a super-legislature for redistricting.

B. The court abandoned traditional court procedures to create a new map out of whole cloth.

Normally, appellate courts such as the Pennsylvania Supreme Court leave fact-finding and the development of a redistricting plan up to the trial court. Even in *Salazar*, the Colorado Supreme Court did not itself create a map, but rather endorsed the map developed by the trial court. But here, the Pennsylvania Supreme Court seized control of the mapmaking process to an alarming extent. It exercised extraordinary jurisdiction, articulated wholly-new legal standards, and then promptly used those legal standards to develop its own map — without hearing evidence, without allowing parties to introduce evidence, and without allowing parties to respond to evidence, argument,

and without allowing parties meaningful input into the court's reasoning process.

First, the court eagerly assumed control of the mapmaking process. Following an application from petitioners, the Pennsylvania Supreme Court exercised "extraordinary jurisdiction" over the proceeding. Order, February 7, 2018, *Petition for Writ of Certiorari*, Turzai, No. 17-1700, App. 39. It did not allow the district court to develop a remedial map. It did not allow extensive party input into the new remedial map. Instead, it decided to develop an original map, from scratch.

Second, even though the court decided to create a map itself, it did not accept evidence — such as testimony or expert analysis — to develop a record to support its decisions. To be sure, the court accepted proposals. But this is much different than developing a record based on admissible evidence, subject to cross examination and close scrutiny. Courts do not — and should not — simply ask for proposals and make decisions absent evidence. It is, however, within a legislature's plenary power to do just that.

If the Pennsylvania Supreme Court had chosen to act like a court – rather than a legislature — it would have remanded to the lower trial court to develop a remedial plan based upon evidence and the court's newly articulated partisan gerrymandering standards. Indeed, the Pennsylvania Supreme Court itself recognized that the commonwealth court was capable of moving quickly – that it worked with

"commendable speed, thoroughness, and efficiency" to develop a record for the gerrymandering claims. Order, February 7, 2018, *Petition for Writ of Certiorari*, Turzai, No. 17-1700, App. 40. That same trial court could — and should — have held appropriate hearings to develop a map, which the Pennsylvania Supreme Court could then review for adherence to legal standards.

Lastly, the Court refused to explain how it arrived at its map, beyond saying it was "superior or comparable" to other maps. It did not explain which parties' or amici briefs it found helpful. It did not explain how its map was "comparable" to others. It did not explain why it made certain political choices and not others. And it did not explain why it arrived at the map it did. This is particularly surprising in a high-profile, important and controversial case involving 18 congressional seats.

Creating even more suspicion, however, the Pennsylvania court barred its special master from even discussing the map he drew for the court. Nate Cohn, *Democrats Didn't Even Dream of This Pennsylvania Map. How Did It Happen?* The New York Times: The Upshot (February 21, 2018), https://www.nytimes.com/2018/02/21/upshot/gerrymandering-pennsylvania-democrats-republicans-court.html (last visited on March 4, 2018). This has thrust litigants and the American public into the position of former Sovietologists, searching buried sentences in the latest issue of *Pravda* to infer the true motives behind a decision.

Overall, these flaws are not minor procedural errors. They go to the heart of what a court system should do. The Pennsylvania Supreme Court should have articulated legal standards for litigants and the trial court. A trial court should have taken those standards, developed evidence, and crafted a remedy. Then the Pennsylvania Supreme Court should have reviewed that remedy for legal error. But instead, this court eagerly short-circuited the very procedures and policies that result in credible adjudication and engender public respect for our courts. It then imposed a map, without evidence, without explanation, and without legal authority.

C. According to its own standards, the court produced a partisan gerrymander.

According to its own standards, the Pennsylvania Supreme Court produced a partisan gerrymander that starkly favored one political party. This can be demonstrated three ways. First, it rejected at least one map that better met its own articulated standards. Second, the court's map failed its own expert analysis. And third, the court relied on lay commentary, which overwhelmingly demonstrates a partisan gerrymander. Ultimately, the court's goal to impose proportional representation explains this partisan gerrymander.

1. The court rejected at least one map that better met its articulated standards.

The court's map violated its articulated standards, by failing to meet its own standards for creating a new map. According to the Pennsylvania Supreme Court:

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

Order, January 22, 2018, *Petition for Writ of Certiorari*, Turzai, No. 17-1700, App. 209.

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

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

> precincts split by each district and the plan as a whole.

Order, January 26, 2018, *Petition for Writ of Certiorari*, Turzai, No. 17-1700, Appendix A, A-3-4.

In its order dated February 19, 2018, the Pennsylvania Supreme Court stated that the remedial map is "superior or comparable" to all plans submitted by the parties, intervenors, and amici. Order, February 19, 2018, *Petition for Writ of Certiorari*, Turzai, No. 17-1700, App. 234. But ACRU respectfully disagrees. The court produced a map that did not optimize its traditional redistricting criteria, as demonstrated by comparing the court's map to the map submitted by ACRU in its amicus brief before the Pennsylvania Supreme Court. Appendix B, A-5.

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

First, with respect to compactness tests, the ACRU proposal outperformed the court's map on four out of five measures, when taking the average of all districts. ACRU's map scores higher on the two

most widely accepted measures of compactness (Polsby-Popper and Roeck), scores higher on the two polygon-based measures (Population Polygon and Minimum Convex Polygon) and scores slightly lower on the perimeter based test (Schwartzberg), as shown by the following chart (better scores are highlighted in bold):

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

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

Second, the ACRU map also scores better with respect to political subdivision splits. The ACRU map has fewer overall splits; it splits fewer municipalities and Voting Districts.[2] The court plan

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

split one less county than the ACRU map, as shown by the following chart (better scores are highlighted in bold):

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

To be fair, the court in its order argues that it only split 13 counties. Order, February 19, 2018, *Petition for Writ of Certiorari*, Turzai, No. 17-1700, App. 233. This does not, however, change the above analysis. Overall, the ACRU map has substantially fewer total splits, outperforming the court's plan.

2. The court's map failed its own expert analysis.

The Pennsylvania Supreme Court relied heavily on the analysis of Dr. Jowei Chen to strike down the Pennsylvania General Assembly's redistricting map. According to the court, "[p]erhaps the most compelling evidence concerning the 2011 Plan derives from Dr. Chen's expert testimony." Order, February 7, 2018, *Petition for Writ of Certiorari*, Turzai, No. 17-1700, App. 154. Briefly stated, Dr. Chen ran two simulated series of 500 redistricting plans each, one of which used only the

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March 4, 2018).

"traditional criteria" of population equality, compactness and minimization of county and municipality splits. (The other simulation included incumbency protection). Order, February 7, 2018, *Petition for Writ of Certiorari*, Turzai, No. 17-1700, App. 48. From the first simulated series, Dr. Chen answered three questions:

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

Order, February 7, 2018, *Petition for Writ of Certiorari*, Turzai, No. 17-1700, App. 47-48.. The court rejected the 2011 legislative map because it was an extreme outlier that advantaged Republicans.

But the court's own plan also fails under Dr. Chen's analysis, because independent analysis showed that the plan failed Dr. Chen's second and third prong. With respect to the second prong, the court's map produced "overall Democratic performance" that "arguably would have been better than" every single one of Dr. Chen's simulations, as shown by the following chart (the court's plan is

labeled "adopted plan"):

See Chart, Appendix G, A-23.

Nate Cohn, *Hundreds of Simulated Maps Show How Well Democrats Fared in Pennsylvania*, The New York Times: The Upshot (February 26, 2018), https://www.nytimes.com/2018/02/26/upshot/democrats-did-better-than-on-hundreds-of-simulated-pennsylvania-maps.html (accessed July 23, 2018).

And with respect to Dr. Chen's third prong, the same analysis shows that the court's plan resulted in a greater number of Democratic congressional victories than 499 out of 500 of Dr. Chen's simulations:

See Chart, Appendix H, A-24.

Id.

Even though the court relied heavily on Dr. Chen's statistical analysis to strike down the legislature's map, it did not use that same analysis for its own map — a map that fails under its own standards.

3. Other court standards — "lay examination" and "isthmuses and tentacles" — show a partisan gerrymander.

In addition to relying on Dr. Chen's analysis, the court noted that "Dr. Chen's testimony in this

regard comports with a lay examination of the Plan," Order, February 7, 2018, *Petition for Writ of Certiorari*, Turzai, No. 17-1700, App. 155-156. By that same standard, the conclusion that the court enacted a Democratic gerrymander "comports with lay examination." But that same "lay examination" has strongly and consistently condemned or praised court's map for heavily tilting the playing field to create a partisan map.

First, the court's map provides a better partisan advantage than the partisans themselves requested. "[T]he new map is better for Democrats — by nearly every measure — than the maps that Democrats themselves proposed." Nate Cohn, *Democrats Didn't Even Dream of This Pennsylvania Map. How Did It Happen?* The New York Times: The Upshot (February 21, 2018), https://www.nytimes.com/2018/02/21/upshot/gerrymandering-pennsylvania-democrats-republicans-court.html (accessed July 23, 2018). Indeed, the following chart graphically illustrates how the court gifted an unexpected windfall to Democratic partisans:

See Chart, Appendix I, A-25.

Id.

Second, numerous commentators and articles have endorsed the identical conclusion — that the court's map greatly helps Democrats;

- "And the new map is positively fantastic news

for Democrats in their effort to take back the House this fall," Andrew Prokop, *What Pennsylvania's new congressional map means for 2018*, Vox, (February 21, 2018), https://www.vox.com/policy-and-politics/2018/2/21/17032936/pennsylvania-congressional-districts-2018 (accessed July 23, 2018).

- "Democrats couldn't have asked for much more from the new map. It's arguably even better for them than the maps they proposed themselves." Nate Cohn, Matthew Bloch, and Kevin Quealy, *The New Pennsylvania Congressional Map, District by District*, The New York Times: The Upshot (February 19, 2018), https://www.nytimes.com/interactive/2018/02/19/upshot/pennsylvania-new-house-districts-gerrymandering.html (accessed July 23, 2018).

- "The map, drawn by a court-appointed special master, doesn't just undo the gerrymander that's produced a 13-5 seat GOP edge since 2012. It goes further, actively compensating for Democrats' natural geographic disadvantage in the state." David Wasserman, *New Pennsylvania Map Is a Major Boost for Democrats*, The Cook Political Report, February 20, 2018, https://www.cookpolitical.com/analysis/house/pennsylvania-house/new-pennsylvania-map-major-boost-democrats (accessed July 23,

2018)

- "The new map left Democrats celebrating on Monday." Elena Schneider, *New Pennsylvania map gives Democrats big boost in midterms*, Politico, https://www.politico.com/story/2018/02/19/pennsylvania-redistrict-democrats-midterms-354432 (accessed July 23, 2018).

Finally, the Pennsylvania court criticized the 2011 legislative map because it "often contains 'isthmuses' and 'tentacles,'" Order, February 7, 2018, *Petition for Writ of Certiorari*, Turzai, No. 17-1700, App. 157. Yet the court's map is guilty of the same problems. "*Every* potentially competitive Republican-held district juts out to add Democratic areas, like adding York to the 10th District, Lansdale to the First District, Reading to the Sixth District, Stroudsburg to the Seventh District, South Philadelphia to the Fifth District, or Mount Lebanon and Penn Hills to the 17th." Nate Cohn, *Democrats Didn't Even Dream of This Pennsylvania Map. How Did It Happen?*, The New York Times: The Upshot https://www.nytimes.com/2018/02/21/upshot/gerrymandering-pennsylvania-democrats-republicans-court.html (accessed July 23, 2018) (emphasis supplied).

4. **The quest for proportional representation explains the court's partisan gerrymander.**

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

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

David Wasserman, *New Pennsylvania Map is a Major Boost for Democrats*, The Cook Political Report (February 20, 2018), https://www.cookpolitical.com/analysis/house/pennsylvania-house/new-pennsylvania-map-major-boost-democrats (accessed Juy 23, 2018). As the same analyst made clear, the court map:

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

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

Even those who support the court's map readily recognize that it imposes proportional representation on Pennsylvania's congressional delegation:

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

Steven Wolf, *Pennsylvania's groundbreaking new congressional map isn't just nonpartisan—it's fair*, The Daily Kos (February 19, 2018). And those who neither cheer nor condemn the court's map have also concluded that the court imposed proportional representation; "Over all, the new court-ordered map comes very close to achieving partisan symmetry in an evenly divided state." Nate Cohn, *Democrats Didn't Even Dream of This Pennsylvania Map. How Did It Happen?* The New York Times: The Upshot (February 21, 2018), https://www.nytimes.com/2018/02/21/upshot/gerrymandering-pennsylvania-democrats-republicans-court.html (accessed July 23, 2018).

The court's imposition of proportional representation was a political decision. A legislature may freely develop a redistricting map that achieves proportional representation (provided the map does not run afoul of federal law). Indeed, a state may "allocate political power to the parties in accordance with their voting strength." *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973). These types of political compromises and political decisions often occur within state legislatures, because redistricting is fundamentally a political process, subject to the

political give and take in our representative democracy.

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

By contrast, courts do not have any legal authority to impose proportional representation, absent guidance from the legislature. Here, neither the Pennsylvania constitution nor the Pennsylvania statute gives any court authority to impose proportional representation through the redistricting process. The Pennsylvania Supreme Court itself recognized that the state constitution provided no standards for redistricting, Order, February 7, 2018, *Petition for Writ of Certiorari*, Turzai, No. 17-1700, App. 146 and it could point to no statute that provides such standards.

Further, this Court's decisions make clear that federal law provides no authority to allow a court to impose proportional representation. Plainly stated, a group is not constitutionally entitled to a redistricting map that grants it "legislative seats in proportion to its voting potential." *White v. Regester*, 412 U.S. 755, 765-66 (1973). Likewise, the Constitution "nowhere says that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers." *Vieth v. Jubelirer*, 541 U.S. 267, 288 (2004) (plurality op.); *see also League of United Latin American Citizens v. Perry*, 548 U.S. 399, 419 (2006) (plurality op.) ("there is no constitutional requirement of proportional representation . . . ."); *City of Mobile v. Bolden*, 446 U.S. 55, 75-76 (1980) ("[t]he Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization. . . . [P]olitical groups [do not] themselves have an independent constitutional claim to representation . . . ."); *Chapman v. Meier*, 420 U.S. 1, 17 (1975) ("there is no constitutional requirement of proportional representation . . . .").

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

CONCLUSION

This court should accept the Petition for Writ of Certiorari and resolve these critical issues involving the separation of judicial and legislative powers.

Respectfully submitted this 25th day of July 2018,

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