

IN THE SUPREME COURT OF PENNSYLVANIA

No. 7 MM 2022

CAROL ANN CARTER, et al, Petitioners,

v.

LEIGH M. CHAPMAN, et al., Respondents.

Review of the Recommended Findings of Fact and Conclusions of Law of the Commonwealth Court of Pennsylvania, entered on February 7, 2022, at Nos. 464 MD 2021 & 465 MD 2021.

**BRIEF OF AMICI CURIAE
CONCERNED CITIZENS FOR DEMOCRACY
IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICUS CURIAE

Concerned Citizens for Democracy (CCFD) is a think-tank composed of lawyers, computer scientists, and engineers dedicated to developing nonpartisan, judicially manageable standards for redistricting in Pennsylvania. Since February 2017, CCFD, a 501(c)(3) nonpartisan, Pennsylvania non-profit association, has been studying partisan redistricting techniques and how to prevent them. When, as here, the political processes have broken down and the political actors are unable to agree upon fair redistricting maps, the Court will benefit from guidance provided by nonpartisan groups such as CCFD. Such groups not only have proposed individual maps to govern a particular election, but also have developed standards for drawing fair maps and for determining when the resultant electoral districts provide for free and equal elections.

INTRODUCTION

This Court set forth standards for evaluating partisan gerrymandering in *League of Women Voters of Pa. v. Commonwealth of Pa.*, 645 Pa. 1, 178 A.3d 737 (Pa. 2018) (“LWV”). This Court noted four neutral criteria – compactness, contiguity, population equality, and minimization of political subdivision splits – set out in Article II, Section 16 of the Pennsylvania Constitution, which set a constitutional floor for the fair drafting of electoral districts. But the Court recognized that these four factors might not be sufficient to ensure the fair representation of Pennsylvania’s citizens. In order to satisfy Article I, Section 5’s separate requirement of “free and equal” elections, this Court should explicitly hold, contrary to the Special Master’s reasoning, that “partisan fairness” is a crucial fifth criterion for evaluating the constitutional

validity of voting districts.

This Court today faces the unenviable task of choosing among several redistricting proposals, at least several of which arguably satisfy the relevant constitutional criteria that the Court heretofore has developed. In addition to choosing a map to decide this case, it would be helpful if the Court were to discuss in more detail the neutral line-drawing procedures that are most likely to result in legislative districts that satisfy constitutional requirements. To that end, in Part III of this brief, CCFD describes its simple, step-by-step redistricting procedure that results in nonpartisan, fair and equal electoral districts. The CCFD method can be used to draft any legislative map while concomitantly serving as a judicially manageable standard to evaluate maps that have been drawn and then are challenged as the product of impermissible gerrymandering.

CCFD is also submitting an expert report (Exhibit A). One of its authors, Anne Hanna, is a data scientist who testified as an expert witness in *Agre v. Wolf*, 284 F. Supp. 3d 591 (E.D. Pa. 2018), the federal anti-gerrymandering case that challenged the 2011 Pennsylvania congressional map before a federal three-judge panel. The report (a) presents a model 17-seat Congressional redistricting map drafted utilizing the CCFD method, (b) identifies the subordinate criteria that then were chosen to be incorporated into the draft CCFD map, and explains why that was done, and (c) details, in a transparent manner, how the draft map was modified to accommodate the subordinate criteria. The report also analyzes the Special Master's Report, specifically the Report's findings and conclusions and map selection recommendations.

I. IN CHOOSING AMONG MAPS, THE COURT SHOULD BE GUIDED BY THE CONSTITUTION’S OVERARCHING GOAL OF ACHIEVING *EQUAL* VOTING RIGHTS, WHICH REQUIRES CONSIDERATION OF THE PARTISAN FAIRNESS OF ANY PROPOSED MAP.

In *League of Women Voters of Pennsylvania*, this Court held that the Commonwealth’s citizens are entitled to free and equal participation in the electoral process and that electoral maps cannot be drawn to benefit one political party over another. This Court concluded that, contrary to the Pennsylvania Constitution’s guarantees of free and equal elections, the Congressional redistricting plan the State Legislature adopted in 2011 was an impermissible gerrymander. This Court created a judicially manageable standard in *LWV*, and the expert the Court appointed used that standard to create a fair, non-gerrymandered Congressional map.

For redistricting purposes, the two relevant provisions of the Pennsylvania Constitution are Article II, Section 16 and Article I, Section 5. Article II, Section 16 provides:

§ 16. Legislative districts.

The Commonwealth shall be divided into 50 senatorial and 203 representative districts, which shall be composed of compact and contiguous territory as nearly equal in population as practicable. Each senatorial district shall elect one Senator, and each representative district one Representative. Unless absolutely necessary no county, city, incorporated town, borough, township or ward shall be divided in forming either a senatorial or representative district. (Apr. 23, 1968, P.L. App. 3, Prop. No. 1)

The second provision, Article I, Section 5 – the Free and Equal Elections Clause (“FEEC”) – is more general. It 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.” This Court gave a full-throated support of the broadest possible interpretation of the FEEC. *See, e.g.*, 178 A.3d at 804, 814 (“the Clause should be given the broadest interpretation, one which

governs all aspects of the electoral process . . .”)

This Court provided clear guidance for determining the minimum criteria that a legislative redistricting map must meet to satisfy constitutional requirements. This Court found that a legislative redistricting plan must:

- (1) be composed of compact and contiguous territory;
- (2) be as nearly equal in population as practicable; and
- (3) not divide any county, city, incorporated town, borough, township, or ward, except where necessary to ensure equality of population.

178 A.3d at 742 (citing Order, 1/22/18 at ¶ “Fourth”). These four criteria essentially required compactness, contiguity, equal population, and minimization of divisions of political subdivisions.¹

After quoting from Article II, Section 16, this Court in *LWV* noted that, in addition to the four essential criteria, there were additional factors, such as the maintenance of prior district lines or incumbent protection, that historically had played a role in the drawing of districts. *LWV*, 178 A.3d at 817. This Court held that such other factors, if they are considered, must be “wholly subordinate” to the four mentioned criteria. *Id.* These criteria provide a “‘floor’ of protection for an individual against the dilution of his or her vote” in the creation of legislative districts, and subordination of these neutral criteria to other considerations, particularly partisan gerrymandering, creates a constitutional violation. *Id.* at 816-17.

To be sure, there are a multitude of maps that can satisfy the four criteria. But it is clear that partisan advantage cannot play *any* role in the construction of a permissible electoral map.

¹ Although *LWV* dealt with Congressional districts that the Pennsylvania state legislature drew, the rationale and holdings of *LWV* apply to both state and federal redistricting.

As this Court noted:

When . . . 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. . . . [T]his 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.

178 A.3d at 817 (emphasis added). This language, which highlights the requirement that the four criteria not be subordinated to other considerations, ensures that, as a practical matter, applying the four criteria must be the first step in constructing a map that adheres to constitutional requirements.

In *League of Women Voters*, this Court was keenly aware that satisfying the four criteria enumerated in Article II, Section 16 – compactness, contiguity, equal population, and minimization of divisions of political subdivisions – constituted a floor, not the ceiling, of what the Constitution requires.

These neutral criteria provide a “floor” of protection for an individual against the dilution of his or her vote 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.

178 A.3d at 817 (emphasis added).

When, as now, the Court has before it a number of proposed maps that satisfy the four

“floor criteria” explicit in Section 16, then the Court must determine what additional factor or factors will be necessary to satisfy Article I, Section 5’s requirement of “free and equal” elections.

The crucial next factor for the Court to consider is partisan fairness. Partisan fairness can be defined as attempting to ensure that the anticipated seat shares of the parties (Democratic, Republican, or other parties) of a proposed electoral map will approximate the statewide vote share of each party, based on statewide elections, over a reasonable period of time. For example, if the vote shares of two parties over the last decade had been 53% and 47%, respectively, then the anticipated statewide seat share of a fairly drawn 17-seat map, should be 9-8, but no more pronounced. Stated alternatively, a party’s anticipated seat share should not exceed the party’s vote share in statewide elections over a reasonable period of time. For a more detailed analysis of partisan fairness, *see* Ex. A (CCFD Expert Report).

The Special Master mistakenly concluded that it *violates* the Free and Equal Elections Clause to attempt to minimize any partisan advantage that results from concentrations of political party supporters in, for example, urban versus rural areas. *See* Report at 197, para. 40. The opposite is true. The Pennsylvania Constitution’s guarantee of equal voting rights for individuals does not recognize any so-called “natural advantage” for one set of voters or one political party over another. Nothing in *LWV* supports such a conclusion. Indeed, as this Court noted, “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.” *LWV*, 178 A.3d at 809 (emphasis added); *see also id.* at 812 (“The [FEEC] was specifically intended to equalize the power of

voters in our Commonwealth’s election process, and it explicitly confers this guarantee.”).

Equalizing the voting power of individuals necessarily implies that each voter should have an equal opportunity to have his party obtain majority status in a legislature when a majority of the state’s voters agree with his or her voting preference. Democracy is not well-served when (a) large numbers of like-minded voters are packed together in districts where their votes are likely to be wasted, and (b) control of the legislature systematically favors a small number of voters in a different geographic area. As this Court observed:

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.

178 A.3d at 814 (emphasis added). That is why, in *LWV*, this Court explicitly adopted a “broad interpretation” of Article I, Section 5 – to “guard[] 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.’” 178 A.3d at 814.

The egregious violation of the four “floor” criteria in Pennsylvania’s 2011 Congressional map, in pursuit of extreme, durable, and disproportionate partisan advantage, was the basis of this Court’s decision to overturn that map as an unconstitutional partisan gerrymander. The 2011 map was egregious precisely because, by design, the anticipated share of Republican seats far exceeded the anticipated share of seats for Democratic candidates. Indeed, and as demonstrated

by the elections of 2012, 2014, and 2016, the predictable result of these elections was 13 seats for Republican candidates and 5 seats for Democratic candidates, despite close to even state-wide election results.

In Pennsylvania, at the present time, there is a tendency for Democratic voters to self-pack in cities, suburbs, and factory towns, making them easy targets for packing and cracking. If this Court were to ignore this phenomenon and allow parties to carefully draw maps with subtle gerrymanders that further pack Democratic voters into cities and towns, this would permanently dilute the equal power of these voters to influence both the state legislature and Congress.² As is evident from the various expert reports submitted, maps drawn with complete indifference to partisan outcomes have a tendency to pack voters who prefer Democratic candidates in cities and inner ring suburbs, thereby putting a finger on the scales against their representation interests, despite their approximately equal statewide prevalence.

In February 2022, the North Carolina Supreme Court, in *Harper v. Hall*, NC Supreme Court Case No. 21 CVS 200085 (Feb. 4, 2022), interpreting its analogous state constitution,

² In selecting the map proposed by the Republican Legislators, the Special Master repeatedly stated that the map satisfied the principal goal underlying the holding in *LWV*: protecting “communities of interest.” *See, e.g.*, Report at 152, n.46. This is a misconstruction of *LWV*’s holding. *LWV* did not hold that protecting communities of interest (“COI”) is the principal—or even a significant—criterion in drawing a map that protects an individual voter’s right to an undiluted vote. Rather, *LWV* held that the FEEC applies to ensure that electoral redistricting is not marred by partisan unfairness. As such, under *LWV*, where mapping decisions intended to prevent partisan unfairness impinge to some degree on the COI issue, the policy of preventing partisan fairness must supersede concerns with alleged COI. This conclusion is bolstered by the fact that (1) the four neutral criteria themselves go a long way to ensuring the protection of COI, and (2) the concept of a “community of interest”—unlike the four neutral criteria—is amorphous and subjective and, as such, currently does not and cannot provide a judicially manageable standard.

agreed that partisan balance is a crucial determinant, not a subsidiary factor, in determining whether an individual’s equal voting right is infringed. That Court held unconstitutional a legislatively approved redistricting plan that “systematically makes it harder for one group of voters to elect a governing majority than another group of voters of equal size,” finding that the plan “unconstitutionally infringe[d] upon [the] fundamental right to vote.” Order at 5, para. 4. The Court noted that “[t]he fundamental right to vote includes the right to enjoy ‘substantially equal voting power and substantially equal legislative representation.’” *Id.*³

This Court should similarly hold that the FEEC prohibits redistricting maps that either are intended to or have the effect of incorporating a partisan advantage into them. This conclusion requires the drafter to make some level of adjustments to their maps (as in Step 6 of the CCFD method, *see infra*) to ensure that electoral districts do not confer unfair partisan advantage to any political party in violation of the FEEC.

When boundary adjustments are made to achieve partisan fairness, two principles must be respected. First, the mapmaker should explicitly note and explain the basis of any adjustment so that a reviewing court (or Commission) can see and understand the changes. Second, the adjustments should be limited to the minimum number and degree necessary to accomplish the goal of partisan fairness. For example, adjustments to increase a political party’s expected seat share can meet, but not exceed, a party’s likely statewide vote share. So if a party has a 10-year

³ *Cf. League of Women Voters of Ohio v. Ohio Redistricting Comm.*, Slip Op. No. 2022-Ohio-65 (January 12, 2022) (Ohio Constitution, as amended by voters, requires that “[t]he statewide proportion of districts whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party shall correspond closely to the statewide preferences of the voters of Ohio.” Slip Op at 4 (quoting Ohio Constitution, Article XI, Section 6)).

statewide average vote share of 53%, the party can make minor adjustments in boundary lines to seek an anticipated seat share of 53%, but not one seat higher. Thus, if we are looking at a proposed 17-seat Congressional map, and a party with a vote share of 53%, that party's anticipated seat share should be nine seats, and the anticipated seat share of the party with 47% of the statewide vote should be eight seats. It is important for a reviewing court to carefully examine this step to ensure that a drafter has not engaged in stealth gerrymandering by over-adjusting in the name of "partisan fairness."⁴

II. INCUMBENT PROTECTION SHOULD BE DISFAVORED, SINCE IT FAILS TO ADVANCE THE CENTRAL GOALS OF FREE AND EQUAL ELECTIONS.

One redistricting consideration that has often played a role in maps that state legislatures in particular have drawn is "incumbent protection," *i.e.*, designing districts that minimize the chance that incumbent legislators will lose their seats. Incumbent protection can take various forms, *e.g.*, keeping the centers of prior district boundaries from changing to preserve the advantage of incumbency or making competitive seats either more conservative or more liberal by adding or subtracting territory to achieve the drafter's intended partisan advantage. The goal of incumbent protection is inconsistent with this Court's reasoning in *LWV*. This Court emphasized at the very beginning of its opinion that "[i]t is a core principle of our republican

⁴ Although voter preferences are not fixed from election to election, non-partisan political analysts are able to calculate likely seat share and vote share ranges using *objective numerical standards*. Likely seat share and vote share ranges can be determined by evaluating a particular map against a representative sample of statewide and district elections from the most recent election cycles preceding the redistricting. The results of many such analyses have been accepted as reliable in past redistricting cases in Pennsylvania and across the nation. As a result, this guidance can provide a neutral basis for redistricting authorities, courts, and their experts to ensure defensible, fair maps. For a more extensive analysis, *see* Ex. A.

form of government ‘that the voters should choose their representatives, not the other way around.’” 178 A.3d at 740-41. Incumbent protection, of course, is the quintessential example of representatives choosing their voters, rather than the other way around. Indeed, the desire to protect incumbents places the interests of elected representatives above the interests of the voters themselves.

A plan designed to protect incumbents also impermissibly favors one group of political candidates over another. As this Court noted in *LWV*, the first version of the Free and Equal Elections Clause 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; 178 A.3d at 806-07 (emphasis added). Thus, the initial version of the FEEC included the right not only to cast a free and equal vote, but also a free and equal right to be elected into office. Although the language was changed in the final version of Article I, Section 5, that language was “revised to remove all prior ambiguous qualifying language,” 178 A.3d at 808, *i.e.*, in order to expand, not restrict, its scope. As this Court further explained:

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.

178 A.3d at 804 (emphasis added).

Incumbent protection, *even if done on a bipartisan basis*, serves to entrench the power of

the current Congressional representatives, making it more difficult for voters to change elected representatives who have displeased them. As this Court noted:

adoption of a broad interpretation [of Article I, Section 5] 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.”

178 A.3d at 814.

This Court’s only express discussion of incumbent protection in *LWV* implied that the practice would not be permissible since the goal of incumbent protection must be subordinated to the four criteria. *See* 178 A.3d at 818 n.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 . . .*”) (emphasis added). To the extent that incumbent protection is considered at all when drawing district boundaries, it should be *wholly subordinate* to the other more neutral redistricting criteria adopted by this Court. District boundaries that are moved to accommodate incumbents should be examined by courts with careful scrutiny.

This Court also should be aware that partisan party mapmakers, rather than protecting incumbents, sometimes attempt to gain unfair advantage through gerrymandered districts that target, rather than protect, incumbents. Partisan mapmakers can purposefully create districts that pit the opposing party’s incumbents against each other, thereby dramatically increasing the odds that at least one of the opposing party’s incumbents will be defeated in a primary or general election. Regardless of whether the goal is to protect or attack incumbents, drafting decisions that are designed to help or hurt individual candidates deprive all candidates of an equal opportunity

to be elected, and therefore are inconsistent with Article 1, Section 5 of the Pennsylvania Constitution. ⁵

III. CCFD'S REDISTRICTING METHOD PROVIDES A STEP-BY-STEP GUIDE TO NEUTRAL REDISTRICTING THAT CAN ASSIST THIS COURT IN EVALUATING THE PROPOSED MAPS.

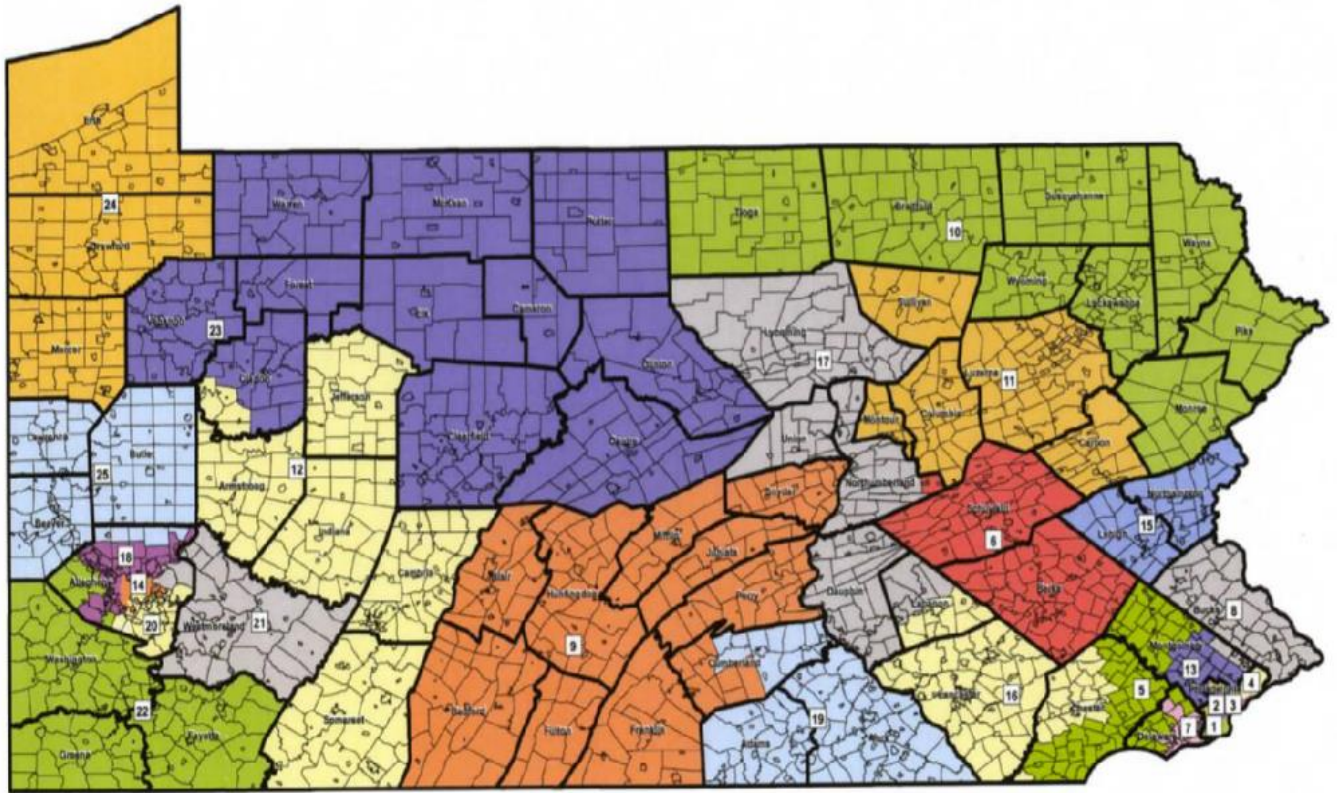
A. The History and Development of the CCFD Method

The CCFD method of redistricting was developed by examining the characteristics of the Pennsylvania Congressional maps from the 1930s to the 1970s. Such maps appeared to have been drawn in good faith to provide the requisite number of seats required by each census; blatant partisan gerrymandering by cracking and packing opposing party voters was absent. We observed that such districts invariably were uniformly compact and composed of unbroken counties, townships, and other political subdivisions. We further observed that after the United States Supreme Court's decision in *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Congressional maps consisted of districts composed of whole counties assembled compactly and portions of larger population counties divided compactly.

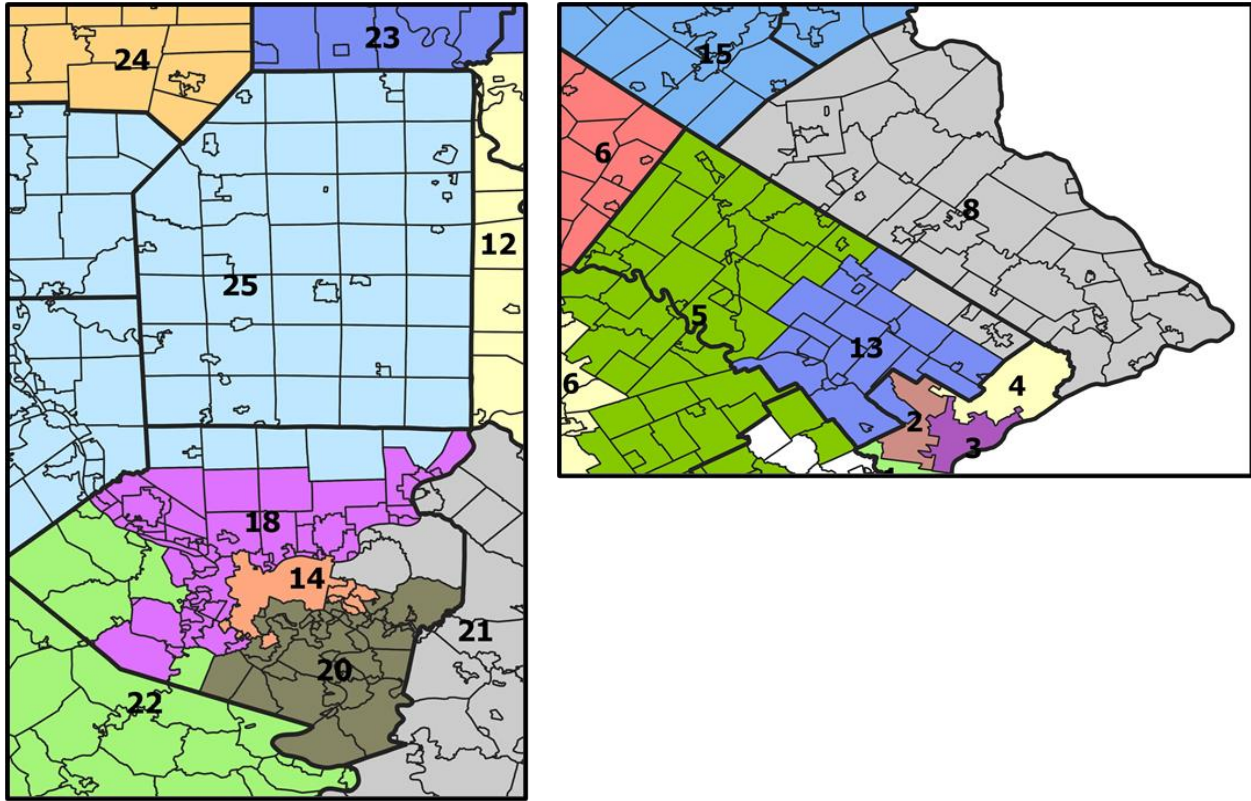
The 1972 Pennsylvania Congressional map was the true inspiration for the CCFD method

⁵ If the drafter is permitted to separate incumbent candidates in drafting their districts, this should be done so as not to give any party a seat share in excess of what is anticipated (looking at statewide vote shares over enough elections to ensure partisan fairness). When the division of incumbents into separate districts is done by exchanging territory with a similar partisan vote history, the statewide seat share will be unaffected. On the other hand, where conservative territory is exchanged for liberal voting territory to separate incumbents, or vice versa, separating incumbents can be used as an excuse for seeking partisan advantage. Again, a court must look carefully at any final adjustments to an electoral map to make sure that final proposed map approximates the will of the voters.

and is still relevant for ideal reapportionment today.



Specifically, the boundary choices along the Bucks County-Montgomery County border and the Allegheny County-Butler County border in that map are still a model for redistricting today. See District 8 on the Eastern border in grey and District 26 on the western border in light blue.



In each of the above instances, equal population was achieved by adding territory composed of whole townships and other political subdivisions in layers along a common border.

CCFD members then considered the following: “What if there were a set of rigorous design guidelines for drawing maps, consistent with Article II, Section 16 of the Pennsylvania Constitution, that made it extremely difficult to draw a unfair map, that is, a partisan gerrymandered map?” Thus, the CCFD method was developed. Rooted in Article II, Section 16 of the Pennsylvania Constitution, all districts must be composed of compactly assembled counties or other larger political subdivisions, and then whole pieces consisting of the next smaller political subdivision are added in layers along the district boundaries until equal population is achieved. In many ways, the layering of whole political subdivisions along a

common border is simply a means to create highly compact districts.

To make the method easier for map drawers to apply, CCFD devised a step-by-step guide to neutral redistricting, which was submitted to this Court in two amicus briefs in 2018 during the *LWV* litigation. We have worked to improve the articulation of the method over time.

B. A Step-by-Step Guide to Neutral Redistricting (for Congressional Maps)

The CCFD method utilizes the following step-by-step approach to neutral redistricting:

Step 1. The drafter of a new Congressional map should divide the state by the number of required districts based on the most recent decennial apportionment. In this case, 17 districts should be formed using whole counties or whole pieces of the largest political subdivisions in a visually compact manner.

For a political subdivision with a population larger than a single Congressional district, the drafter first must draw as many districts as possible within that political subdivision, using as much of the subdivision's territory as possible in a compact manner. The drafter then should add any unused territory to no more than two adjacent districts in need of additional population.

For a political subdivision with a population smaller than a single Congressional district, the drafter should begin by assembling larger political subdivisions (*e.g.*, counties) compactly to create the required number of districts. If necessary to divide a larger political subdivision, it should not be divided between more than two districts.

Step 2. The drafter then should add or subtract whole territory of the next smaller political subdivisions along the borders of counties or other larger political subdivisions in a compact manner.

In practice, this usually means that additional whole townships, towns, or boroughs are added along the whole length of a common boundary of a larger political subdivision (*e.g.*, counties) before moving to the next layer of smaller political subdivisions. The drafter shall continue to add whole political subdivisions of the next smaller size, in a layer-by-layer manner, until nearly equal population is achieved.

This layered method creates compact districts in the first instance and deprives the drafter of discretion to, for example, produce long "tentacles"

or odd-shaped districts, reaching from one district into another for purposes of partisan gerrymandering.

Step 3. The drafter then should divide one, and only one, smaller political subdivision along the common border between two proposed districts to achieve the target population of each district (plus or minus one resident), that is, population equality, based on the 2020 Census.

The division of this single political subdivision should be accomplished in a compact manner using the layered approach set forth in Step 2. For example, one can add precincts one by one to the boundary of a township to reach population equality.

Step 4. The drafter then should measure the compactness of the resulting districts using commonly accepted mathematical compactness measures such as Polsby-Popper, Schwartzberg, and Reock scores. Districts that perform poorly when measured in this manner, given constraints imposed by other mandatory criteria, should be adjusted to bring them into compactness ranges considered acceptable for these measures.

Step 5. The drafter then should verify that the resulting map does not inadvertently divide racial or linguistic minority groups and make adjustments necessary to ensure that the map does not violate the Voting Rights Act, 52 U.S. Code § 10101, et seq. (“VRA”). Often, little or no further adjustment will be required as compact districts generally result in intact community representation, which leads to compliance with the VRA.

Step 6. The drafter should then make adjustments, if any, needed to achieve the fifth primary criterion—assuring partisan fairness—and making the most minimal adjustments to achieve any subordinate goals/criteria that do not result in, or serve simply as proxies for, partisan gerrymandering.

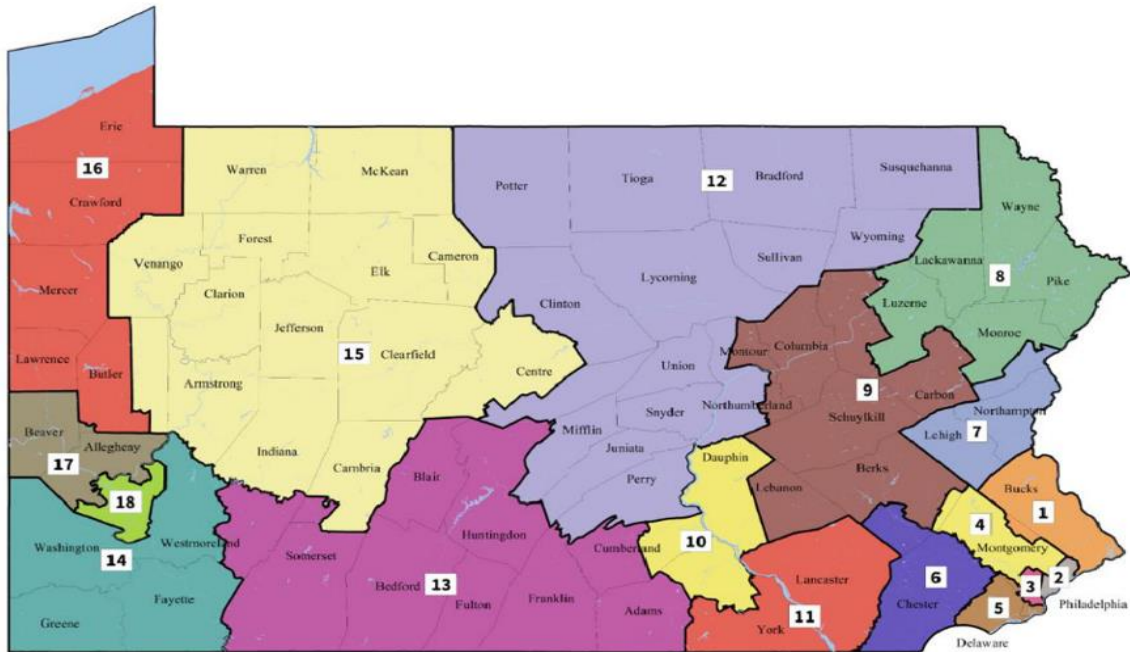
The CCFD method results in a map that (a) does not consider partisan leanings of residents until after, if at all, a draft map is formed, (b) is transparent, because the decisions made to draw district lines result from the rigorous application of this method, and (c) provides for a judicially manageable redistricting standard, because courts can easily see when other maps choose boundaries that are non-compact and contain split political subdivisions or irregular boundaries in the absence of a layered approach to equalizing population.

C. The Court's 2018 Remedial Map Largely Comports with the CCFD Method.

A detailed CCFD review of the 2018 remedial Congressional map below revealed that this Court's expert appears to have used the CCFD method of assembling counties compactly in the first instance and then layering whole townships and other political subdivisions at the district boundaries to equalize population. Assembling counties compactly can be seen clearly in districts 1-5, 7, 8, 10, 11, and 15-17. Layering smaller political subdivisions can be seen in districts 1 and 4 (Bucks-Montgomery County border), districts 7 and 8 (the Northampton-Monroe County border), and districts 15 and 16 (the Butler-Armstrong County border). The technique of minimizing county and other political subdivision splits can be seen throughout the 2018 remedial map.

The 2018 remedial map led CCFD to other insights about the merits of applying in a strict or rigorous manner the four criteria mandated by *LWV*. First, the remedial map resulted in a fair distribution of seats. The map was tested twice, in the 2018 and 2020 elections. In both, the 2018 map resulted in a 9-9 Republican-Democratic seat share for a state whose voters vote fairly evenly on a statewide basis. In addition, highly compact districts deprive the partisan drafter of discretion he/she otherwise would have to crack and pack opposing party voters.

D. The Emergence of a Judicially Manageable Standard



By requiring that districts be composed of compactly assembled whole political subdivisions, this Court has created a neutral, judicially manageable standard. Each of the four criteria are subject to mathematical analysis and comparison. Compactness can be measured by common mathematical techniques, which can be used to compare one proposed map to another. Divided political subdivisions can be totaled up and compared from one map to another. Maps with elongated districts or many municipal splits are strong evidence of partisan drafting. Packing opponent’s voters, cracking concentrations of an opponent’s voters, and carefully distributing votes to give the drafter’s party an electoral advantage often require drawing districts with irregular borders or split municipalities. Likewise, partisan fairness, the fifth criterion that we urge this Court to adopt, can be proven mathematically as noted above and in the attached expert report, by using commonly accepted metrics of partisan fairness. *See Ex. A.*

Where a drafter deviates from the principles enshrined in these criteria, this Court should find that a *prima facie* case of gerrymandering has occurred. Given a well-defined model for fair electoral mapmaking, the burden should shift to a map's proponent to offer a neutral explanation for any deviations, which the competing parties then could debate. There could be innocent explanations, for example, leftover territory between two well drafted districts, or ensuring diversity of representation in a legislature. However, where the final map's adjustments from the neutral criteria cannot be adequately explained by the drafter, then the process has gone awry. Either the parties should repair the map or this Court should step in to repair the map for them.

E. CCFD Endorses Other Amici Maps That Follow the Principles Reflected in the Court's 2018 Remedial Map and Offers an Illustrative 17-Seat Congressional Map Applying Its Methodology.

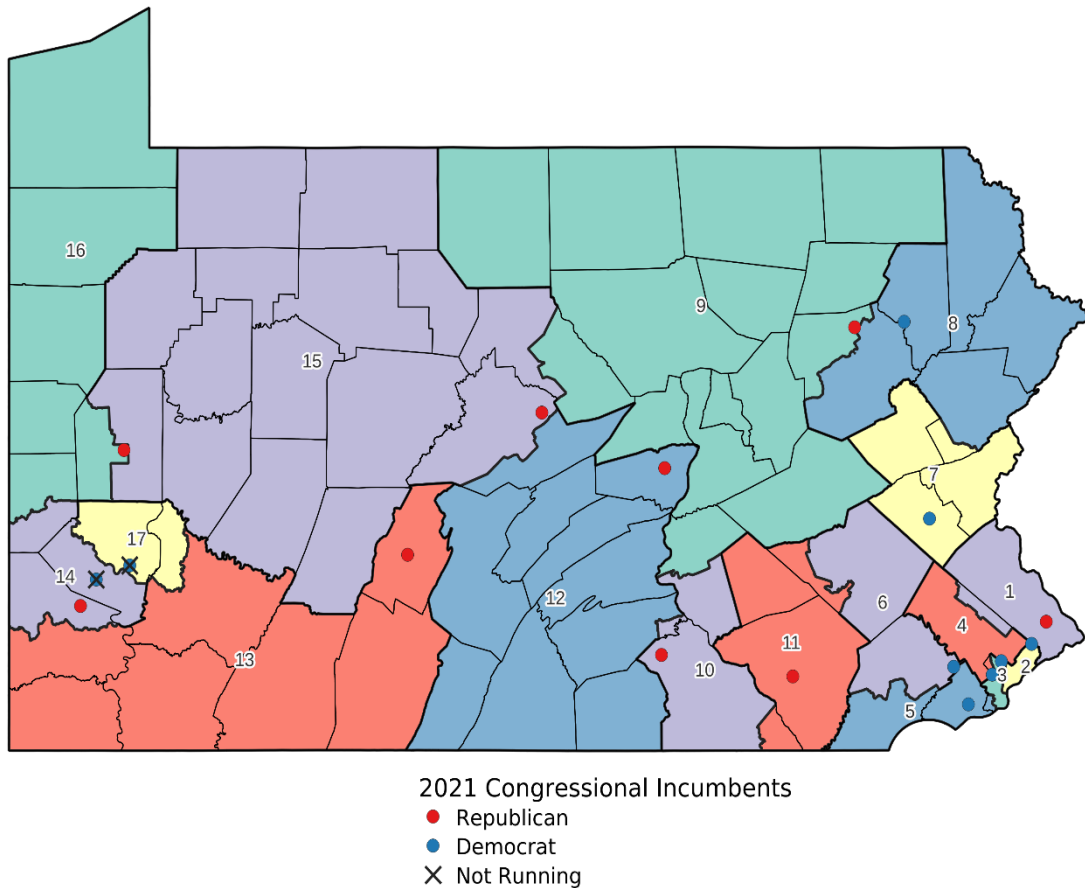
CCFD endorses the following four maps that the following parties and amici have submitted as excellent examples of applying the principles embodied in the 2018 remedial map to a 2022 17-seat Congressional map: the Carter petitioners (Prof. Jonathan Rodden); the Gressman Petitioners; the Governor Wolf map (Prof. Moon Duchin); and the Draw the Lines Map (citizen mappers). These maps rigorously apply this Court's four criteria as well as the recommended additional requirement that maps incorporate partisan fairness. Each of these maps are highly compact and contiguous, minimize split political subdivisions, and (if relevant) do not exceed the anticipated seat share of the drafting party. For additional information regarding these recommendations See Ex. A CCFD Expert Report at ___

In order to demonstrate how principles reflected in the 2018 map can be applied to a 17-seat Congressional map, CCFD offers the following map, which can be accessed on Dave's

Redistricting at the following link:

<https://davesredistricting.org/join/19665c18-15a3-4b94-a254-f93d3feb984c>

The full map data also can be downloaded from Dave’s Redistricting for analysis in and by other redistricting software. The following figure is an image of the CCFD proposed 17-seat



Congressional map showing the location of incumbent Members of Congress.

The technical data for this CCFD map is attached hereto as Exhibit A.

We also note that the CCFD map has the following characteristics: the districts are (1) highly compact; (2) where additional territory is needed to equalize population, whole townships or other political subdivisions are added in layers at county borders; and (3) the map achieves

partisan fairness with an anticipated seat share that matches the statewide distribution of voters. Highly compact districts can be seen in districts 1 to 4, 6 to 8, 10 to 12, and 14 and 15. The remaining districts, 5, 9, 13, and 16, which are slightly less compact, can be explained by neutral separation of incumbent members of Congress, or geographic constraints. The anticipated seat share of the 17-seat CCFD map, based on recent statewide elections, is nine Democrats and eight Republicans.

The aforementioned four fair maps and the CCFD map all have the following favorable attributes:

- a) 17 equal population districts (plus or minus one person) based on the 2020 Census;
- b) Districts are compact, which is healthy for representative democracy and resistant to partisan gerrymandering;
- c) Districts composed of compactly assembled political subdivisions result in seats that reflect regional political views;
- d) Compact districts in areas with conservative, moderate, and liberal voters tend to create a healthy number of competitive districts where candidates usually will have to cross party and ideological lines to get elected; and
- e) The presence of some competitive seats is a desired outcome for the following reasons: (1) competitive seats often generate moderate candidates who compete for votes from members of all parties and independent voters; (2) competitive seats tend to depolarize legislatures; and (3) competitive seats tend to promote dialogue across party lines, compromise, and effective

functioning of legislatures to pass laws.

IV. CONCLUSION

One of the greatest threats to democracy is partisan gerrymandering. The best weapon to end partisan gerrymandering is compliance with all of the following: the four neutral criteria enumerated in Article II, Section 16, the requirement of partisan fairness embodied in Article I, Section 5, and the federal requirement of fair minority representation as defined by the Voting Rights Act.

In general, compact districts, composed of whole political subdivisions, restrain partisan gerrymandering. While it is possible to weaponize compactness as a tool to pack Democrats in cities and inner ring suburbs, in most instances compactness will result in a fair distribution of seats for all political parties, and it therefore is a useful tool for this Court to use to police partisan maps. As long as courts remain open to evidence of compactness being used to achieve an outsized seat share based upon the statewide vote share of a party, this criterion can be policed to prevent partisan gerrymandering.

The United States Supreme Court in *Vieth v. Jubelirer*, 541 U.S. 267, 307-308 (2004), and *Rucho v. Common Cause*, No. 18-422, 139 S. Ct. 2484, 2487, 588 U.S. ____ (2019), said it is impossible to create a judicially manageable standard to evaluate and judge partisan maps, but that is not the case. This Court already has created and applied such a standard in *LWV*, and the resulting remedial map. This standard needs to be honored, reiterated, and extended by this Court in this redistricting cycle. This Court should continue to follow the drafting criteria in *LWV*, and adopt “partisan fairness” (with its attendant accounting for statewide party vote shares) as an

explicit additional primary criterion, thereby preserving the most important tool for fighting partisan gerrymandering that any court in the United States has ever articulated.

Respectfully submitted,

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On behalf of
Concerned Citizens for Democracy

IN THE SUPREME COURT OF PENNSYLVANIA

Carol Ann Carter, et al.
Petitioners

v.

7 MD 2022

Leigh M. Chapman, et al.
Respondents.

CERTIFICATE OF SERVICE

On this date, February 14, 2022, I served a true and correct copy of the foregoing pleading to all parties in this matter via e-filing with this Court's Unified PA Judicial website.

Respectfully submitted,

/s Brian A. Gordon

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