

RONALD K. CHEN

CENTER FOR LAW & JUSTICE
123 WASHINGTON ST.
NEWARK, NJ 07102
973-353-5378

November 23, 2018

The Honorable Paul Sarlo
Chair, Senate Budget & Appropriations Committee
New Jersey Senate
496 Columbia Blvd., 1st Floor
Wood-Ridge, NJ 07075

Re: SCR43/ACR60

Dear Senator Sarlo:

I understand that SCR43/ACR60 will be considered before the Budget & Appropriations Committee this Monday. I thank you in advance for the opportunity to convey my thoughts and concerns on this bill through this letter.¹

I commend the sponsors of this bill for focusing attention on one of the most important civil rights issues of our time: a fair, transparent and democratic election system. There are many parts of the bill that are very positive, including the requirement of public hearings, and of public access to information about the reapportionment process through a public website.

I have grave concerns, however, about sections 2(c) to 2(f) of the bill. These provisions require that legislative districts be deemed “fair” between the two major political parties, and that at least 10 districts also be deemed “competitive,” but under definitions of “fair” and “competitive” that are skewed towards one of those parties (in this case, my own party, the Democratic). These provisions will facilitate—and indeed inevitably require—the type of partisan gerrymandering that is contrary to our democratic principles of government.

Section (c) defines fairness and competitiveness in terms of the past ten years’ election results for President, U.S. Senator, and Governor. If this calculation were performed today, it would

¹ By way of background, I am currently a University Professor, Distinguished Professor of Law, and the Judge Leonard I. Garth Scholar at Rutgers Law School. I recently stepped down after five and ½ years as Co-Dean of the Law School (resident in Newark) and, before the 2015 merger of the two Rutgers law schools, as Dean of Rutgers School of Law—Newark. I teach in the Rutgers Constitutional Rights Clinic, and have frequently litigated voting rights cases in New Jersey courts.

From 2006 to 2010, I served as the Public Advocate of New Jersey in the administration of Governor Jon S. Corzine, and voting rights were an important part of the Department’s agenda. I am also currently one of the three General Counsel of the national American Civil Liberties Union, a member of the boards of the national ACLU and the ACLU of NJ, and a member of the Advisory Board of the League of Women Voters of New Jersey. Both the ACLU and the League are non-partisan organizations that advocate in order to protect the rights of voters.

In 2011, I served as the counsel to the Hon. John Farmer (my predecessor as dean of the law school and former New Jersey Attorney General), in his capacity as Chair of the New Jersey Redistricting Commission, <http://www.njredistrictingcommission.org/>. With the assistance of Rutgers law students I provided legal advice and assistance to Chairman Farmer in the task of redrawing the 2012-2021 map of New Jersey’s congressional districts.

My comments in this letter are of course solely my own and do not necessarily express the views of any of the entities with which I am or have been affiliated.

result in a 54.9% to 45.1% advantage in favor of the Democratic Party.² Thus, a proposed district whose prior voting pattern indicates a 54.0%/46.0% advantage for Democratic candidates would be labelled as *favoring* the Republican Party since the percentage of votes received in that district would still exceed the statewide average for Republicans.

Simple arithmetic and common sense contradict the assertion that a 54%D/46%R district favors the Republicans. Under section (d), however, this finding would then trigger a requirement that an offsetting “competitive” district be created that was equally favorable to Democrats, i.e. approximately 55.8%D/44.2%R. The range of so-called “competitive districts” would thus be from 49.9%D/50.1%R to 59.9%D/40.1%R. Even a casual political observer would understand that very little within that 10% range would actually be competitive for Republicans.

Moreover, as I observed when I was working with Dean Farmer in the 2011 Redistricting Commission, each of the two major political parties has access to extremely sophisticated mapping technologies and other proprietary expertise, such that even ostensibly moderate differentials in percentages can be amplified in effect, making the district non-competitive for the other party.

The fundamental flaw in the proposed amendment is that it conflates the redistricting principle of “fairness” with the principle of “competitiveness.” Both are recognized redistricting principles but they are often in tension with each other, and as demonstrated above, a map that serves the principle of fairness does not necessarily serve the principle of competitiveness. Both principles, along with other equally important redistricting principles such as preserving communities of interest, compactness, respect for political subdivisions, etc., must be considered as a whole, and it is a mistake, in my view, to promote one of these principles as superseding the others through a formulaic requirement based on past election results.

I am very familiar with the article written by the late Professor Donald Stokes, *Legislative Reapportionment in New Jersey*,³ which was argued with great vigor by very able counsel for the Democratic Party (and my friend) in the 2011 Redistricting Commission proceedings. I do not think that Professor Stokes intended his article to lead to the type of implementation contained in SCR43. First, it is important to note that Professor Stokes was addressing only the principle of fairness and how it might be factored into the overall process of

² The results posted on the Division of Elections website are as follows:

	Democrat	Republican
2018 U.S. Senate	1,480,011	1,220,163
2017 Governor	1,203,110	899,583
2016 President	2,148,278	1,601,933
2014 U.S. Senate	1,043,866	791,297
2013 Governor	809,978	1,278,932
2013 U.S. Senate (Special)	740,742	593,684
2012 President	2,125,101	1,477,568
2012 U.S. Senate	1,985,783	1,329,405
2009 Governor	1,087,731	1,174,445
TOTAL for past 10 years	12,624,600 54.9%	10,367,010 45.1%

³ Available at: <http://www.eagleton.rutgers.edu/research/newjersey/documents/LegReapportionmentNJ.pdf>

reapportionment. He did not intend his analytical methodology to be adopted as the *exclusive* method by which maps were drawn, and he certainly did not intend that other redistricting principles, such as competitiveness, preserving communities of interest, and compactness, be subordinated as a result.

Moreover, Professor Stokes never suggested that past election data from elections for President, U.S. Senator, and Governor, i.e. offices *other* than those for which the maps are being drawn (here the State Legislature), should be used. His study, in fact, aggregated past election results from *state legislative races*. See Stokes, p.13-14. While Professor Stokes recognized that differential turnout in Democratic districts compared to Republican districts might unfairly skew these aggregated results (*id.* p.14-15), he did not suggest that using statewide results for other unrelated offices was the appropriate solution. It is at best an unproved assumption, and at worst a mistaken one, that voters always vote for the same party's candidate whether for President or for State Assemblyman. Especially in New Jersey, where state legislative elections are not held in the same year as federal elections, uncritically imposing the results of one election on the process for an entirely different election is "mixing apples and oranges."

As a general matter, requiring that districts be drawn on order to favor one political party, or even both major political parties, is contrary to sound redistricting practice, and enables partisan gerrymandering. According to the non-partisan National Conference of State Legislatures,⁴ many states, including California and New York, now prohibit favoring or disfavoring an incumbent, candidate or political party, and some expressly prohibit the use of past election results as an unfair advantage to incumbents.

Finally, there is no evidence that this measure is at all necessary in New Jersey to protect partisan fairness. As I noted earlier, the methodology derived from Professor Stokes' article was vigorously promoted by counsel for the Democratic Party in the 2011 Redistricting Commission proceedings, but it was not accepted by Dean Farmer, and he eventually chose the Republican map. Nevertheless in six short years (from 2012 to 2018), the New Jersey Congressional delegation has shifted from 6D-6R to (as of a few days ago) 11D to 1R. The current legislature is 62.5% Democratic in the Senate and 67.5% Democratic in the Assembly. All of these percentages, achieved through the existing process of redistricting, significantly exceed the 54.9% benchmark that this proposed amendment would currently create. It does not seem that there is a problem that needs fixing from a fairness perspective, but great damage could be done to other equally important principles as a result.

I therefore urge the Legislature to delete sections 2(c) to 2(f) of SCR43.

Respectfully yours,



Ronald K. Chen

cc: Hon. Loretta Weinberg
Senate Majority Leader

Hon. Thomas Kean
Senate Minority Leader

⁴ See <http://www.ncsl.org/research/redistricting/redistricting-criteria.aspx>.