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IN THE SUPREME COURT OF PENNSYLVANIA

No. 7 MM 2022

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,

vs.

Leigh M. Chapman, in Her Capacity as Acting Secretary of the Commonwealth of Pennsylvania; and Jessica Mathis, in Her Capacity as Director of the Bureau of Election Services and Notaries,

Respondents.

Philip T. Gressman; Ron Y. Donagi; Kristopher R. Tapp; Pamela A. Gorkin; David P. Marsh; James L. Rosenberger; Amy Myers; Eugene Boman; Gary Gordon; Liz McMahon; Timothy G. Feeman; and Garth Isaak

Petitioners,

vs.

Leigh Chapman, in her Official Capacity as the Acting Secretary of the Commonwealth of Pennsylvania; and Jessica Mathis, in Her Official Capacity as Director of the Bureau of Election Services and Notaries,

Respondents.

BRIEF OF INTERVENORS BRYAN CUTLER, SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, AND KERRY BENNINGHOFF, MAJORITY LEADER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, IN SUPPORT OF JUDGE MCCULLOUGH'S REPORT AND RECOMMENDATION

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INTRODUCTION

This Court's decision in *League of Women Voters v. Com.*, 178 A.3d 737 (Pa. 2018) ("*LWV*"), striking down the 2011 congressional plan, re-affirmed the primacy of adherence to traditional districting criteria and held that subordination of those traditional principles for partisan advantage violated the Free and Equal Elections Clause. The General Assembly took the guidance from this Court in *LWV* to heart, and passed House Bill 2146 ("H.B. 2146") to redistrict the Commonwealth into seventeen congressional districts through the fairest and most transparent redistricting process in modern history. H.B. 2146 is not the 2011 congressional plan. It adheres to all traditional redistricting criteria and is a fair map—creating nine Democratic-leaning districts, eight Republican-leaning districts, and several highly competitive districts in this closely-divided state. An honest process yielded an honest map that does not discriminate against voters on the basis of their political views—consistent with the holding of *LWV*.

The Commonwealth Court issued an exhaustive 222-page report and recommendation after conducting a thorough analysis of the politics of this State, hearing the testimony of several expert witnesses, and reviewing hundreds of pages of briefing concerning the 13 proposed plans. That exhaustive record confirms that H.B. 2146 fulfills all the constitutional criteria and provides a plan that does not unfairly dilute the vote of any citizen of the Commonwealth on account of

partisanship. Due to the practically infinite number of ways a congressional map can be drawn, and the competing criteria, there is no "best" or "optimal" map other than one that achieves the goals of the map-drawer. But those are decisions best left to the Representatives and Senators elected by the people of Pennsylvania who are best suited to make those policy choices, and to whom the Framers of the U.S. Constitution assigned that responsibility. *See* U.S. Const. art. I, § 4.

The same cannot be said for many of the other map submissions. As set forth more fully herein and in the Special Master's Report, several of the plans submitted—including those by the *Carter* Petitioners, the *Gressman* Petitioners, Governor Wolf, the Senate Democratic Caucus (Maps 1 and 2), and the House Democratic Caucus—either subordinate traditional districting principles for partisan gain, or otherwise intentionally draw districts for unfair partisan advantage. In particular, the Governor's Plan and both Senate Democratic Caucus Plans split the City of Pittsburgh in half for partisan purposes, and the House Democratic Caucus kept Pittsburgh whole but instead drew a Freddy Krueger Claw district to "grab" Pittsburgh and combine it with Republican-leaning areas to the north.

Additionally, the *Carter* Petitioners, *Gressman* Petitioners, Governor Wolf, the Senate Democratic Caucus, and the House Democratic Caucus all gerrymander their proposed plans by drawing the four most competitive districts in their simulated plans to be as strongly Democratic-leaning as possible. Through this and other

means, those parties manage to draw plans that contain *ten* Democratic-leaning districts—a highly uncommon outcome when compared to a set of 50,000 simulated plans created without political data and that follow this state's traditional criteria.

Several of these parties have attempted to defend their rigged proposed plans by saying those plans counteract or "override" a slight, naturally occurring Republican tilt in the state's political geography. Such a methodology is an express invitation for the Court to override the actual voting patterns and preferences of the voters as expressed at the ballot boxes in their community, which is the literal subordination of political subdivision integrity in favor of partisan advantage. Judge McCullough rightly rejected this argument as a "subspecies" of unfair partisan gerrymandering of the sort prohibited in *LWV*, and so should this Court.

The *Carter* Petitioners also urge the adoption of their plan on the grounds that it is a "least change" plan from the Court's 2018 remedial plan in *LWV*. However, they ground this argument on a fundamental misunderstanding of the "least change" case law (which does not apply here), and as a factual matter, their plan takes the remedial plan's politically even, 9-9 plan and converts it to a heavily Democratic-advantaged 10-7 plan. Surely that is not a "least change" plan.

In the end, Judge McCullough recommended that:

> our Supreme Court adopt and implement HB 2146 as a matter of state constitutional law as it meets all of the traditional criteria of the Free and Equal Elections Clause, and does so in respects even noted by the Governor's expert, as well as the other considerations noted by the

> courts, it compares favorably to all of the other maps submitted herein, including the 2018 redistricting map, it was drawn by a non-partisan good government citizen, subjected to the scrutiny of the people and duly amended, it creates a Democratic leaning map which underscores its partisan fairness, and, otherwise, is a reflection of the "policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature."

Report of Special Master, 464 M.D. 2021, at 216 (Feb. 7, 2022) (bold removed, underline in original) (citing *Perry v. Perez*, 132 S. Ct. 934, 941 (2012)).

For all the reasons set forth in this brief as well as in the House Republican Legislative Intervenors' briefing to the Commonwealth Court, and any further arguments advanced in response to any Exceptions filed by other parties, the House Republican Legislative Intervenors urge the Court to adopt the Special Master's Report in its entirety and to select H.B. 2146 as the congressional district plan to govern the Commonwealth's congressional elections.

FACTUAL AND PROCEDURAL BACKGROUND

I. Framework of Redistricting

At issue in this case is the congressional redistricting process mandated by the U.S. Constitution. Every ten years, a national census is conducted, and the 435 voting members of the U.S. House of Representatives are reapportioned among the states on the basis of population. U.S. Const. art. I, § 2. The federally conducted census determines the number of House seats apportioned to each state, and Congress can and does make regulations which govern the states' redistricting

process. *See* U.S. Const. art. I, § 4. For example, if a state loses a seat in the apportionment process and fails to enact a new, valid redistricting plan, that state's House delegation "shall be elected from the State at large." 2 U.S.C. § 2a(c)(5).

In the first instance, the Constitution entrusts the "Times, Places and Manner" of House elections, including the task of drawing congressional districts, to state legislatures. *See id*. Thus, each decade, pursuant to this delegated constitutional authority, the Pennsylvania General Assembly, on behalf of the People of the Commonwealth, is tasked with creating a new congressional map for the Commonwealth that reflects the results of the latest census. As a general rule, each of these districts will have one member and will be of equal population, consistent with the one person, one vote principle, though minor deviations to achieve traditional redistricting objectives may be permissible. *See, e.g., Karcher v. Daggett*, 462 U.S. 725, 740 (1983) ("Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives."); *see also Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019) ("[E]ach 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 influential in proportion to its number of supporters.").

This familiar framework has received further elaboration in Pennsylvania law. In Pennsylvania, congressional redistricting plans are handled as regular legislation—that is, a congressional redistricting plan must pass both chambers of the General Assembly and be signed into law by the Governor in order to take effect. *See* Pa. Const. art. IV, § 15. A plan that emerges from the constitutionally created state legislative process is subject to review by the judicial branch, as occurred in 2018. *LWV*, 178 A.3d at 742-43.

Impasse cases, like this one, arise when the political branches deadlock and fail to redistrict the Commonwealth following the decennial census and apportionment. *See Mellow v. Mitchell*, 607 A.2d 204, 214 (Pa. 1992). Prior to Intervenors' intervention, the Commonwealth Court entered an order on December 20, 2021 essentially finding that an impasse had occurred. Unfortunately, after failing to engage with the legislature during the process, Governor Wolf vetoed H.B. 2146 only a day before trial—in the apparent hope that this Court would adopt a map he publicly proposed only on January 15, 2022.

The Court has described the task of selecting a congressional map as an "unwelcome obligation." *LWV*, 178 A.3d at 823 (citation and internal quotation marks omitted). But in assuming this unhappy task in the past, the Court has also clearly articulated the controlling constitutional and legal principles that govern

congressional redistricting plans in this Commonwealth. Those principles are worth recounting here.

The Court was last presented with an impasse situation similar to the one it faces now in 1992. *See Mellow*, 607 A.2d at 204-05. The 1990 census found that Pennsylvania was entitled to only 21 House members, where it previously had 23. *Id.* at 205. The General Assembly then failed to pass a 21-member map. *Id*. Thus, in the absence of a map approved by the General Assembly, the Court decided to select an appropriate redistricting plan. *Id*. at 205-07, 211.

After the political branches deadlocked, eight Members of the Pennsylvania Senate brought an action requesting judicial intervention. The Court ultimately approved a plan proposed by those eight Senators, and in its opinion, described the factors it considered. First, it evaluated the plans to ensure they complied with the one-person, one-vote standard required by federal law. *Id.* at 207-08. Second, it reviewed for compliance with Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. *Id*. at 208-10. And finally, it reviewed for minimization of political subdivision splits, and to evaluate whether the plan was "politically fair" in terms of the allocation of Democratic and Republican-leaning districts, and, in particular, how the maps dealt with the state's loss of two congressional seats. *Id*. at 210-211.

The Court's recent decision in *LWV* further elucidates this legal framework, although *LWV* arose from a challenge to an enacted map, and not, as here and in

Mellow, from a legislative impasse between the General Assembly and the Governor after a reduction in the number of House seats following the census. In *LWV*, the Court considered the Pennsylvania Constitution's Free and Equal Elections Clause, which 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. The Court concluded that this provision invalidated the then-existing congressional map from 2011 as an unconstitutional partisan gerrymander. *See LWV*, 178 A.3d at 824-25. The Court subsequently ordered the use of a remedial plan that has been in place since the 2018 elections. *League of Women Voters v. Commonwealth*, 181 A.3d 1083 (Pa. 2018) ("*LWV II*").

The reasoning behind the Court's decision in *LWV* was that the Free and Fair Elections Clause requires that "an individual's electoral power not be diminished through any law which discriminatorily dilutes the power of his or her vote . . . ." *LWV*, 178 A.3d at 816. In framing this interpretation, the Court looked to Article II, Section 16, of the Pennsylvania Constitution, in which the Court identified the "neutral benchmarks" that serve to prevent the dilution of individual votes. *Id*. Thus, the Court held that to comply with the Free and Equal Elections Clause, congressional districts must (1) be compact, (2) be contiguous, (3) be "as nearly equal in population as practicable," and (4) not divide any "county, city, incorporated town, borough, township, or ward, except where necessary to ensure

equality of population." *See id.* at 816-17 (citations and internal quotation marks omitted). But while 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," such extraneous, political factors are "wholly subordinate to the neutral criteria of compactness, contiguity, minimization of the division of political subdivisions, and maintenance of population equality among congressional districts." *Id*. at 817.

Thus, in evaluating the constitutionality of a congressional redistricting plan, whose creation is constitutionally committed to the General Assembly in the first instance, the Court must begin with the neutral redistricting criteria identified in *Mellow* and *LWV*. Other relevant factors, such as the preservation of communities of interest, preventing an undue departure from the existing map, and various metrics of partisan fairness may be considered, but not in ways that supplant or detract from the traditional, non-political factors that this Court has articulated over the course of several decades now.

II. Development of H.B. 2146

Exercising their prerogative and fulfilling their duty under both the United States and Pennsylvania Constitutions, the House and Senate passed H.B. 2146, which redistricts the Commonwealth into 17 congressional districts.

H.B. 2146 was first introduced and referred to State Government Committee on December 8, 2021. *See* Bill History, House Republican Legislative Intervenors' Opening Br., Ex. E ("Bill History"). The bill introduced, for what might be a first in the history of the Pennsylvania House, a plan proposed by "well-known nonpartisan citizen," and good-government advocate, Ms. Amanda Holt. *See* Report of The Honorable Patricia McCullough, Special Master, Feb. 7, 2022, 42 ("the Report" or "Rep."). The State Government Committee selected Ms. Holt's proposal from among 19 submitted by the public because, as Rep. Seth Grove indicated, Ms. Holt drew it without political influence, it met constitutional standards, and it limited the splits of townships and other municipalities, offering compact and contiguous districts. House Republican Legislative Intervenors' Opening Br., Ex. A, Grove Letter (Jan. 6, 2022) ("Grove Letter"); Ex. 1 to Ex. I, Affidavit of Bill Schaller.

The State Government Committee received 399 comments concerning the map in H.B. 2146 as introduced. *See* Grove Letter; Rep. at 48, FF8. The legislature considered and implemented changes based on these comments, increasing the compactness of certain districts and ensuring that the map preserved certain communities of interest. Rep. at 48; *see also* Grove Letter. From the time the bill was amended in, and reported from, the House State Government Committee on December 15, 2021, until the bill was passed by the House, the public had 28 days

to view the contents of the bill and review the proposed congressional plan. *See* Grove Letter; Bill History.

Under the Rules of the Pennsylvania House of Representatives, second consideration of a bill is the opportunity for any House Member to introduce and offer amendments to a bill. House Rules 21 and 23. While Members had ample to time to draft and file amendments to the bill, no amendment was timely filed to H.B. 2146. It received third consideration and final passage in the House on January 12, 2021. Rep. at 48.

The Senate then referred H.B. 2146 to the Senate State Government Committee. After being reported from committee without amendment, the Senate gave H.B. 2146 first consideration on January 18, 2022 and second consideration on January 19, 2022. The Senate passed H.B. 2146 on January 24, 2022, by a vote of 29 to 20. *See* Bill History; Rep. at 48.

The legislature then presented H.B. 2146 to Governor Tom Wolf on January 24, 2022. As described above, this bill included a map subject to public comment, review, and multiple revisions in response to those comments. At that point, 40 days had passed since H.B. 2146 had last been amended in the House State Government Committee. But only one day before this trial began, on January 26, 2022, Governor Wolf vetoed H.B. 2146. Throughout this process, the Governor had refused to meet with the legislature. *See* Grove Letter. He did not negotiate a redistricting plan with

either the House or the Senate, but instead proposed his own map, absent any legislative input.

III. <u>Proceedings Below</u>

Before the commencement of the present action, the Carter Petitioners filed a case in the Commonwealth Court ("*Carter I*") challenging the 2018 remedial plan as constitutionally deficient based on the 2020 census results. *See* Rep at 4 n.10. Subsequently, a three-judge panel of the Commonwealth Court dismissed that action without prejudice for lack of standing and ripeness. *Id.*

On December 17, 2021, the *Carter* Petitioners filed the instant Petition for Review ("*Carter II*") directed to the Commonwealth Court's original jurisdiction, again claiming that the 2018 remedial congressional map was malapportioned and that the judiciary needed to step in and adopt the *Carter* Petitioners' plan for the upcoming 2022 elections. Rep. at 4. On the same day, the *Gressman* Petitioners filed their own petition for review, making substantially similar claims and offering up their own map for the Commonwealth Court's adoption. *Id.* at 7-8.

By order dated December 20, 2021, the Commonwealth Court consolidated both petitions for review, set December 31, 2021 as the deadline for applications to intervene, and ruled that any party to the consolidated cases could submit a proposed 17-district congressional redistricting plan. *Id.* at 10. The Commonwealth Court's December 10 order further provided that the Commonwealth Court would select

from among the timely filed plans if a legislatively enacted plan was not in place by January 30, 2022. *Id.* at 10-11.

Immediately after the Commonwealth Court's December 20 order, both the *Carter* and *Gressman* Petitioners filed applications for extraordinary relief, requesting that this Court exercise extraordinary jurisdiction over these matters. *Id.* at 11. This Court denied those applications on January 10, 2022. *Id.* at 12.

By order dated January 14, 2022, the Commonwealth Court granted applications to intervene by (i) the Speaker and Majority Leader of the Pennsylvania House of Representatives ("House Republican Legislative Intervenors") and the President Pro Tempore and Majority Leader of the Pennsylvania State Senate ("Senate Republican Legislative Intervenors") (collectively, "Republican Legislative Intervenors"), (ii) Pennsylvania State Senators Maria Collett, Katie J. Muth, Sharif Street, and Anthony H. Williams ("Democratic Senator Intervenors")[1]; (iii) Tom Wolf, Governor of the Commonwealth of Pennsylvania ("Governor"); (iv) Senator Jay Costa and members of the Democratic Caucus of the Senate of Pennsylvania ("Senate Democratic Caucus Intervenors"); (v) Representative Joanna E. McClinton, Leader of the Democratic Caucus of the Pennsylvania House of Representatives ("House Democratic Caucus Intervenors"); and (vi) Congressman

[1] The Democratic Senator Intervenors and Senate Democratic Caucus Intervenors were joined as a single party. Rep. at 12-13, n.21.

Guy Reschenthaler, Swatara Township Commissioner Jeffrey Varner, and former Congressmen Tom Marino, Ryan Costello, and Bud Shuster ("Congressional Intervenors"). *Id.* at 12-13. The remaining applications to intervene were denied, but the entities that filed them were permitted to submit plans, briefs, and supporting materials as *amici*. *Id.* at 14.

The Commonwealth Court's January 14 order also superseded the prior procedural schedule and required submission, by each party, of one or two proposed congressional plans and a supporting brief and/or expert report by January 24, 2022, with responsive briefs and/or expert reports by January 26, 2022. *Id.* at 13. The Commonwealth Court also directed the filing of a joint stipulation of facts and accelerated the trial to January 27 and 28, 2022. *Id.* at 14. The Commonwealth Court further indicated that it planned to issue an opinion based on the parties' submissions and the record evidence if a legislative plan was not enacted by January 30, 2022. *Id.*

The parties submitted their briefs and expert reports in due course on January 24 and 26. Consistent with the Commonwealth Court's amended procedural schedule, the Court conducted the trial on January 27 and 28, 2022. *Id.* at 58. Each party conducted a one-hour direct examination of one expert witness, with each party permitted to conduct a fifteen-minute cross-examination of every other party's expert witness. *Id.* Each party was permitted to make an opening and closing

statement. *Id.* The expert reports and testimony submitted by the parties and *amici* are summarized in the Report. *See generally id.* at 58-114. The Report further provided that "exhibits introduced in trial and attached briefs were admitted into evidence. All exhibits are part of the record in this matter." *Id.* at 117.

The day after trial, on Saturday, January 29, 2022, the parties made written post-hearing submissions.

Then, on January 29, 2022, the Carter Petitioners renewed their application for extraordinary relief, which this Court had previously denied on January 10. *Id.* at 15. On February 2, 2022, this Court granted the application for extraordinary relief, assumed jurisdiction over the proceedings, designated Commonwealth Court Judge McCullough as Special Master, and directed Judge McCullough to identify proposed findings of fact and conclusions of law, and a recommendation as to which plan should be selected and as to potential election calendar revisions, no later than February 7, 2022. Order, No. 7 MM 2022, 1-2 (Feb. 2, 2022.) The Court further ordered that parties and *amici* could file exceptions to the Special Master's Report by February 14, and set oral argument for February 18. *Id.* at 2.

Judge McCullough's Report was filed on February 7, 2022. The Report, coming in at 222 pages, exhaustively recounts the procedural history of these cases, the controlling constitutional and legal principles, proposed findings of fact and conclusions of law, a detailed analysis and comparison of each proposed map, and a

recommendation regarding which map should be selected and how the 2022 election schedule should be revised. *See generally* Report. Judge McCullough recommended adoption of H.B. 2146. *Id.* at 216.

Following the release of the Report, the Court issued a *per curiam* order dated Friday, February 11, 2022, in which it denied a joint application for leave to file briefs in response to exceptions and directed that parties and *amici* file any briefs in support of the Report by Monday, February 14, 2022. Order, No. 7 MM 2022, 2 (Feb. 11, 2022).[2]

The House Republican Legislative Intervenors now respectfully submit this brief in support of the Report.

LAW AND ANALYSIS

I. The Commonwealth Court Correctly Recognized that H.B. 2146 Adheres to the Traditional Redistricting Criteria Set Forth in Article II, Section 16, of the Pennsylvania Constitution, Which this Court Recognized as Neutral Benchmarks to Be Used in Detecting Gerrymanders.

There is no dispute that H.B. 2146 adheres to the traditional redistricting criteria set forth in Article II, Section 16, of the Pennsylvania Constitution, which this Court indicated were "neutral benchmarks" in determining whether a plan violates the Free and Equal Elections Clause of the Pennsylvania Constitution. *LWV*,

[2] Unfortunately, due to the denial of this application, the House Republican Legislative Intervenors will not be able to file a comprehensive brief responding to the various Exceptions anticipated to be filed challenging the Report and its recommendation that this Court adopt H.B. 2146.

178 A.3d at 815-16. H.B. 2146 is comprised of contiguous districts and has at most a plus/minus one-person population deviation between districts. Rep. at 137-39. Moreover, with a Polsby-Popper score of .324, it is reasonably compact and similar to the compactness score of the map adopted by this Court in *LWV II*, 181 A.3d 1083, 1087. *See* Rep. at 141, 211. It also does considerably well on political subdivision splits, splitting only 15 counties, 16 municipalities, and 18 wards. *Id*. at 144. H.B. 2146 splits the fewest municipalities of any plan. *Id*. at 146. As the Governor's expert, Dr. Duchin, opined, "[t]he Congressional districting plan passed by the Pennsylvania House of Representatives (HB - 2146) is population-balanced and contiguous, shows strong respect for political boundaries, and is reasonably compact." Duchin Opening Rep. at 2.

Not all plans even meet these neutral benchmarks. Unlike H.B. 2146, two plans have a population deviation of greater than one person. Both the Carter Plan and the House Democratic Caucus Plan have deviations of two-persons. Rep. at 138. While that might not seem like a big difference, the U.S. Supreme Court has recognized that congressional districts must be mathematically equal in population unless necessary to achieve a legitimate state objective. *Karcher*, 462 U.S. at 730, 740. Neither the *Carter* Petitioners nor the House Democratic Caucus identify a reason for their departure from mathematical equality. That other plans, like H.B. 2146, were able to achieve such equality without sacrificing other redistricting

criteria demonstrates that these plans are unconstitutional. Thus, Judge McCullough appropriately gave them less weight. Rep. at 139.

In addition, many of the plans unnecessarily split the City of Pittsburgh, including the Governor, Senate Democratic Caucus, Draw the Lines, and Ali *amici* plans. None of these parties or *amici* provide an explanation for splitting the state's second largest city. *Id.* at 151-52. The lack of any explanation is telling. As Dr. Barber found, splitting the city may allow a plan to use Pittsburgh's Democratic-leaning population to create two districts in the immediately surrounding area that are likely Democratic-leaning, instead of only one. *Id.* at 149. But achieving this partisan advantage at the behest of traditional redistricting criteria of avoiding city splits violates the principles enunciated by this Court in *LWV*. In addition, the City of Pittsburgh is a community of interest that should be preserved to best respect the interest of its residents. *Id*. at 149-50. Absent explanation, any plan that unnecessarily splits the City of Pittsburgh for partisan gain violates the Free and Equal Elections Clause as stated by this Court in *LWV*. Thus, Judge McCullough appropriately gave plans that split Pittsburgh with no explanation less weight. *Id.* at 195.

In addition, many plans unnecessarily split Bucks County and pair portions of it with Philadelphia to more evenly distribute Democratic voters. But the only evidence before the Court demonstrates that splitting Bucks County unnecessarily

divides a community of interest for partisan gain. *Id.* at 157-60. H.B. 2146 protects this community of interest and does not split Bucks County. Based upon this undisputed evidence, Judge McCullough appropriately gave less weight to maps that split Bucks County. Rep. at 195.

As such, Judge McCullough properly recognized based upon all the evidence submitted, including testimony from experts of proponents of other submitted plans, that "HB 2146 does not contravene, and in fact sufficiently satisfies, the standards of the Free and Equal Elections Clause of the Pennsylvania Constitution, the other criteria discussed by our Supreme Court in *LWV*, and further, reflects a non-partisan tilt in favor of Democrats." Rep. at 191.

II. The Commonwealth Court Correctly Recognized that H.B. 2146 Is Fair to the Political Parties.

A. Dr. Barber's Simulation Analysis

Dr. Barber conducted a simulation analysis generating 50,000 simulated congressional redistricting plans for Pennsylvania following only the constitutional criteria outlined in this Court's decision in *LWV.* Barber Opening Rep. at 13-14. Notably, this simulation analysis is very similar to the simulation analyses utilized by Dr. Chen and Dr. Pegden and relied upon by this Court in *LWV*. 178 A.3d at 770-75, 776-77.[3] Dr. Barber's simulation, like those of Dr. Chen and Dr. Pegden, use a

[3] During the hearing, Dr. Barber's simulation analysis was weakly attacked as unreliable because the algorithm he utilized was not peer reviewed. However, the

set of unbiased alternative maps to compare to a proposed map, like H.B. 2146, and to determine if the proposed map is an outlier from the simulated maps. Barber Opening Rep. at 11; Tr. 515-17. Dr. Barber's simulated plans do not consider partisanship, race,[4] the location of incumbent legislators, or other political factors. They only consider the traditional redistricting criteria of contiguity, compactness, equalizing population, and minimizing political subdivision splits. Barber Opening Rep. at 13-14; Rep. at 87. Thus, if a map, like H.B. 2146, "significantly diverges from the set of simulated maps, it suggests that some other criteria that were not used in drawing the comparison set of maps may have guided the decisions made in drawing the proposed map." *Id.*

Based upon an index of statewide elections from 2012-2020,[5] Dr. Barber predicts that H.B. 2146 will result in nine Democratic-leaning seats and eight

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algorithm has been validated. Tr. 662:7-25. And, the same algorithm has been used by other experts and relied upon in the recent Ohio redistricting litigation by Dr. Kosuke Imai. Tr. 663:24-664:4. Indeed, Dr. Imai used the same algorithm to provide a report and testimony before the Pennsylvania Legislative Reapportionment Commission who likewise relied upon his analysis. In addition, Judge McCullough, who had the benefit of viewing Dr. Barber's testimony during the hearing, credited his opinions and methodology. Rep. at 165.

[4] Dr. Barber did, however, check the impact of race on his results. He reviewed a subset of his 50,000 simulations that contained two majority-minority districts, and ran a second set of simulations that drew three minority-influence districts, to check the robustness of his results. Barber Opening Rep. 35-37. His results were robust. *Id.*

[5] In *LWV*, Dr. Chen likewise used an index of statewide elections from 2008 and 2010, and this Court found his methodology reliable and utilized it in holding the 2011 congressional plan unconstitutional. *LWV*, 178 A.3d at 772-73, 818-21.

Republican-leaning seats.[6] Barber Opening Rep. at 23; Rep. at 88. Given that the current map adopted by this Court in 2018 has resulted in nine Democratic seats and nine Republican seats for the past two congressional elections, a map predicted to result in nine Democratic seats and eight Republican seats is demonstrably fair.

But Dr. Barber also then compared his prediction for the partisan lean of H.B. 2146 against the 50,000 unbiased simulated plans drawn only using traditional redistricting criteria and with no partisan data. The distribution of predicted seats for his simulated plans is below:

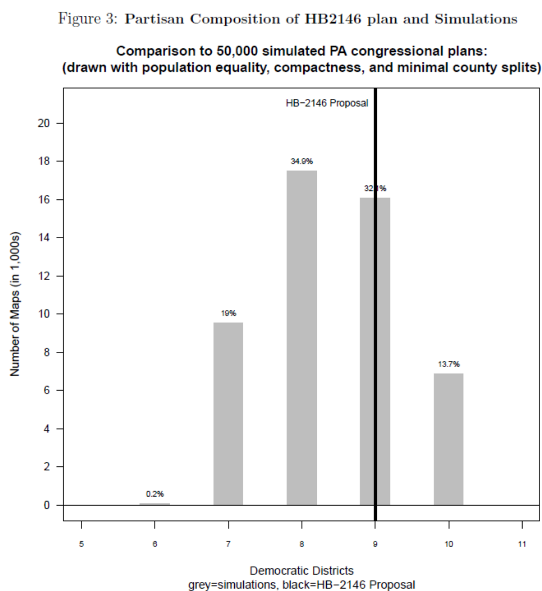


Figure 3: Partisan Composition of HB2146 plan and Simulations

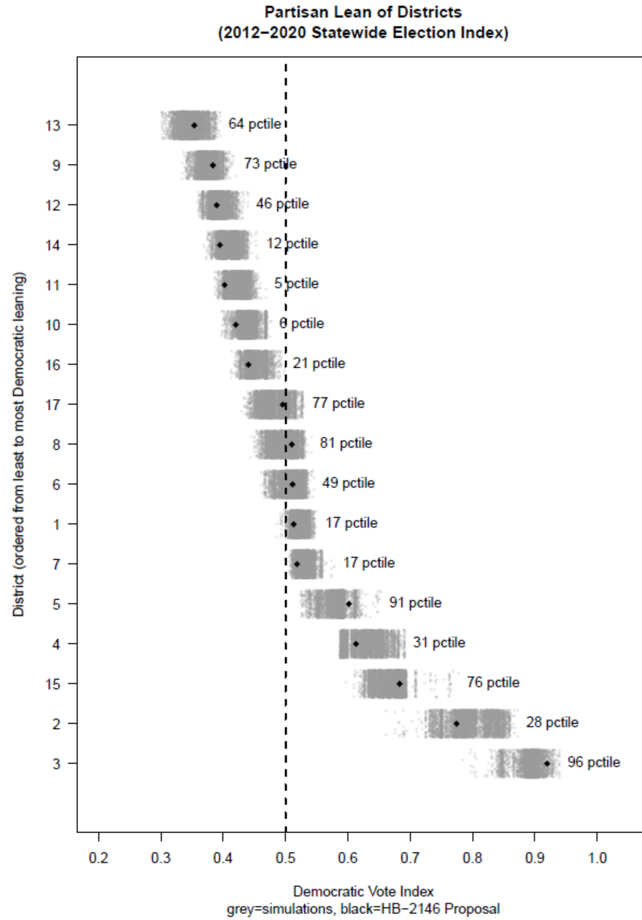
[6] When using an index of statewide elections from 2014-2020, Dr. Barber predicts that H.B. 2146 will result in eight Democratic-leaning seats and nine Republican-leaning seats. Barber Opening Rep. at 44 (App'x A). But this simply shows that different elections can lead to different outcomes. A map that sometimes results in eight Republican seats and sometimes nine Republican seats is fair.

Barber Opening Rep. at 23, Fig. 3. The most common outcome (34.9%) is eight Democratic-leaning seats—one less than Dr. Barber predicts for H.B. 2146. *Id.*; Rep. at 165. Nine Democratic-leaning seats results 32.1% of the time—very consistent with H.B. 2146. Barber Opening Rep. at 22. In other words, unlike the conclusions reached by Dr. Chen and Dr. Pegden in *LWV* that the 2011 plan was a partisan outlier when compared to a set of simulated maps, H.B. 2146 falls well within the range of likely outcomes and on the Democratic-favorable side of outcomes in the distribution of simulated plans. Dr. Barber's analysis demonstrates that H.B. 2146 is not a partisan outlier and is fair to both political parties.

Dr. Barber next analyzed how the other plans submitted to the Commonwealth Court compared to the 50,000 simulated plans. Many of the plans (*Carter*, *Gressman*, Governor, Senate D2, CCFD, Citizen Voters, Draw the Lines, Ali) are predicted to result in 10 Democratic-leaning seats. Barber Reb. Rep. at 15, Table 3. However, only 13.7% of the simulations are predicted to result in 10 Democratic-leaning seats—significantly less than the other likely outcomes. Barber Opening Rep. at 23, Fig. 3. The much more common outcomes are either eight or nine Democratic-leaning seats. The House Democratic Caucus Plan is an extreme outlier, predicted to result in 11 Democratic-leaning seats, which occurs in ***none*** of the 50,000 simulated plans. Barber Reb. Report at 15, Table 3.

H.B. 2146 also creates the most competitive districts of any of the plans. H.B. 2146 creates five districts with a predicted Democratic vote share between .48 and .52. Barber Opening Rep. at 18-21, Fig. 2; Rep. at 89. No other plan creates as many competitive districts, and most create from zero to three such districts. Rep. at 89; Barber Reb. Rep. at 13. What is more, Dr. Barber's analysis further shows that numerous plans draw these most competitive "up for grab" districts to generate more Democratic-leaning seats, making them much less competitive and safer for Democrats. In analyzing the most competitive seats, Dr. Barber found that, for example, both the *Gressman* and Governor plans "systematically generate districts that are at the most Democratic edge of the simulations in these competitive districts." Barber Reb. Rep. at 17. He found similar results with many of the other plans. *Id*. at 19, Table 4. Thus, in the districts that are most up for grabs, these plans create districts that are more Democratic-leaning than nearly every one of the simulated plans. *Id*. This does not occur by accident. These plans are optimized to create more favorable Democratic-leaning seats in the districts that are the most competitive. To the contrary, these same middle districts in H.B. 2146 are generally within the middle range of the simulations:

Figure 4: **Partisan Composition of HB2146 plan and Simulations**



Note: The grey 'clusters' show the range of vote margins for each district, ordered from least Democratic to most Democratic in the 50,000 simulations. The black dot inside of each cluster shows the partisan index for the HB2146 plan. Next to each cluster is the percentile, or relative position of the HB2146 plan within each cluster of simulation results for each district.

Barber Opening Rep. at 26, Fig. 4; Rep. at 89. Thus, H.B. 2146 stands out as the least biased of all the proposals across these most competitive districts. Barber Reb. Rep. at 19.

Finally, during the hearing, several parties made unfounded accusations that Dr. Barber's failure to consider race in his simulations was skewing the partisan results. Not so. Dr. Barber analyzed 1,852 of his 50,000 simulated plans that likewise created two majority-minority districts including one majority-Black district just by

following traditional redistricting criteria. Barber Opening Rep. at 35-36; Rep. at 90-91. He also generated another set of 5,000 simulated plans that had at least three districts that contained 35% or greater non-white voting age population for purposes of comparison. Barber Opening Rep. at 36; Rep. at 9. Even these race-conscious simulations demonstrated that the most common outcome in the simulated plans was eight or nine Democratic-leaning seats, the same as H.B. 2146 or less, and one or two less than the majority of the plans submitted to the Court. Barber Opening Rep. at 35-36; Rep. at 91. In other words, the alleged failure to intentionally draw certain majority-minority districts, for which there is no support in the record, is not the cause of any partisan skew shown by Dr. Barber's analysis.

In sum, Judge McCullough appropriately credited Dr. Barber's methodology and reasoning and found it to be persuasive. Rep. at 209. There is no reason to depart from that finding. Dr. Barber's analysis clearly and unequivocally demonstrates that H.B. 2146 is fair when compared to a set of unbiased maps. Based upon Dr. Barber's analysis, H.B. 2146 is actually the most "fair" map when comparing to a set of unbiased maps. This Court previously relied upon a similar methodology in evaluating the 2011 map's compliance with the Free and Equal Elections Clause and it should do so again here.

B. Partisan Fairness Metrics

1. H.B. 2146's partisan fairness metric scores are good and do not indicate the plan confers an unfair advantage to any political party.

Under numerous partisan fairness metrics, H.B. 2146 is also very fair. Dr. Barber calculated a mean-median of -.015 and an efficiency gap of -.02 for H.B. 2146, which are close to zero but tilt slightly in favor of Republicans. Barber Opening Rep. at 28, 31. This is consistent with the political geography of Pennsylvania that all experts agree results in a natural tilt in favor of Republicans.

But these raw scores do not tell you much unless you have something to compare them to. They simply indicate a bias in favor of one party or another; they do not tell you the cause of that bias. Thus, Dr. Barber also calculated the mean-median and efficiency gap scores for each of his 50,000 simulated plans and found that H.B. 2146 has a mean-median that is smaller (more favorable to Democrats) than 85% of the simulated plans, and an efficiency gap that is smaller (more favorable to Democrats) than all of the 50,000 simulated plans. Barber Opening Rep. at 28-29, 32, Figs. 5 & 6. In other words, the bias seen in H.B. 2146 is consistent with the bias seen in plans drawn by a computer with no partisan data, and that simply follow traditional redistricting principles. This proves that the small Republican bias seen in H.B. 2146 is the result of political geography, not any intentional gerrymander. That is in stark contrast with the opinions of Dr. Chen and

Dr. Pegden in *LWV* regarding the 2011 congressional plan—namely, that it was a statistical outlier that could *not* be explained by political geography. *LWV*, *LWV*, 178 A.3d at 772-75, 776-77.

Many of the experts in this case opine that H.B. 2146 is less "fair" than other maps because other maps have partisan fairness metric scores that are closer to zero. Their idea of a "fair" map is one that has partisan fairness metric scores as close to zero as possible. But that is not the correct way of analyzing it. Only Dr. Duchin compares these measures of partisan fairness to any simulation result. *See* Barber Reb. Rep. at 20. As discussed more fully below, her analysis confirms Dr. Barber's conclusions. Without comparing these metrics to a set of unbiased maps one "cannot disentangle any measures of partisan bias from impacts due to the political geography of the state." *Id*.

Dr. Barber calculated the mean-median and efficiency gaps scores for each of the other submitted plans and compared them to the simulated maps. He was the only expert to do such an analysis. He concluded that all of the other plans are ***more*** Democratic-leaning than the non-partisan simulations. *Id*. at 21. In many cases, the other plans are in the 97-100th percentile of the simulations. *Id*. In other words, they are partisan outliers in favor of Democrats. To the contrary, H.B. 2146 is in the middle, Barber Reb. Rep. at 21, demonstrating its fairness when compared to a set of unbiased maps—the same methodology previously adopted by this Court to

evaluate the partisan fairness of the 2011 congressional plan in *LWV*. 178 A.3d at 828 (Baer, J., concurring in part) ("a petitioner may establish that partisan considerations predominated in the drawing of the map by, *inter alia*, introducing expert analysis and testimony that the adopted map is a statistical outlier in contrast with other maps drawn using traditional redistricting criteria . . .").

Dr. Duchin is the only other expert that performed a simulation analysis, though she provided no details on her methodology or the parameters used to generate her "ensemble" of 100,000 maps. Tr. 445:1-23. Still, Dr. Duchin overtly admits, "[r]andom plans tend to exhibit pronounced advantage to Republicans across this full suite of recent elections." Duchin Opening Rep. at 18, Fig. 7. The Governor's plan, and many of the other plans, are drawn to overcome this tendency. *See id*. But in doing so, these plans are partisan outliers in favor of Democrats. Dr. Duchin admitted during cross-examination that the Governor's map was an outlier when compared to her ensemble of maps. Tr. 452:20-25. It had a partisan bias score that was outside all of her ensemble of 100,000 maps. *See* Duchin Opening Rep. at 19, Fig. 8. Dr. Duchin absurdly asserts, however, that an outlier here is good. Tr. 450:10-16. But this Court rejected that notion in *LWV*.

Dr. Duchin's analysis confirms Dr. Barber's work. It confirms that drawing a set of random plans results in plans that have a natural tilt in favor of Republicans. Nobody disputes that H.B. 2146 has a partisan bias consistent with the unbiased

simulated plans. The plans that have lower partisan fairness scores (*i.e.*, closer to zero) based on metrics like mean-median and efficiency gap are drawn to intentionally overcome this unintentional geographic bias, and result in statistical outliers. They demonstrate that partisan considerations dominated the drawing of these maps as opposed to following traditional redistricting criteria, which is why many of them split cities like Pittsburgh, or split Bucks County to pair with parts of Philadelphia. But that is drawing lines to intentionally benefit one political party over another—gerrymandering—and this Court rejected that practice in *LWV*.

2. There is no requirement that partisan fairness metrics get to "zero"; the focus is on whether a plan is within a given range.

In addition, Judge McCullough properly rejected an attempt to "get to zero" on these partisan-fairness metrics. These measures do not point to ideals and condemn small variations from them. "One thing all the measures have in common is that they" look to "the *magnitude* of the bias." Barry Burden & Corwin Smidt, *Evaluating Legislative Districts Using Measures of Partisan Bias and Simulations*, SAGE Publishing, Vol. 10 No. 4, at 2 (2020), https://doi.org/10.1177/2158244020981054.

Indeed, no other approach would make sense. Partisan-fairness measures are imperfect estimates that attempt to forecast future election results based on past results, often from different electoral units. Reading significance into small differences is like seeing two news channels make slightly different weather

forecasts—one predicts 30 degrees and the other 32 degrees—and concluding they are dramatically different when they offer practically the same forecast. Partisan fairness measures are like that—imprecise. They do not command adherence to *zero*. They afford a range and signal cause for concern when plans stray outside the range.

a. The Efficiency Gap. The efficiency gap defines all votes for a losing candidate as "wasted" and creates a measurement of the difference in the parties' "wasted" votes divided by the total number of votes. A party benefitting from a partisan gerrymander will have fewer wasted votes than the burdened party. The authors of the efficiency gap metric did not argue for a "zero" efficiency gap. Rather, they proposed a limit of "two seats for congressional plans and 8 percent for state house plans" above which an efficiency gap score would be identified as a "presumptive[]" gerrymander. Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering & the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 837 (2015). The authors included the important caveat that "plans not be expected, based on sensitivity testing, ever to have an efficiency gap of zero over their lifetimes." Stephanopoulos & McGhee, 82 U. Chi. L. Rev. at 837. In fact, they did not recommend that a court adopt a "zero threshold" for several reasons, including that the efficiency gap's calculation varies so much from election to election. *Id.* at 887. In practice, "beginning in 2000, there was a 'very modest Republican advantage,' but the efficiency gaps 'were never very far from zero'" and some 75% of efficiency

gaps in Pennsylvania ranged from -10% to 10%. *LWV*, 178 A.3d at 778 (citations omitted).

b. The Mean-Median Measure. The mean-median measurement identifies the difference between the median or middle vote share across all districts and the mean or average vote share across all districts. When these numbers diverge significantly, the district vote distribution is skewed in favor of one party and, conversely, when it is close, that distribution is more symmetric. Among those limitations is the reality that it is "sensitive to the outcome in the median district." *Ohio A. Philip Randolph Institute v. Householder*, 373 F. Supp. 3d 978, 1028 (S.D. Ohio 2019) (citation and internal quotation marks omitted), *rev'd on other grounds*, 140 S. Ct. 102. In *LWV,* Dr. Chen found his simulated plans ranged from "a little over 0 percent to the vast majority of them being under 3 percent," a range he explained as "normal." 178 A.3d at 774.

c. Partisan Symmetry. Another measure of partisan fairness is a partisan symmetry analysis that analyzes a "vote-seat curve." The vote-seat curve is a computer-generated graph that plots the portion of seats a party will win for a certain vote share. The theory behind this metric is that a difference between seats won and vote share—*e.g.*, 70% of the seats won with only 50% of the overall votes—would suggest an asymmetrical partisan skew. This partisan symmetry metric was proposed during the 1990s and was the subject of debate in *League of United Latin American*

Citizens v. Perry, 548 U.S 399 (2006) ("*LULAC*"). *See generally* Stephanopoulos & McGhee, 82 U. Chi. L. Rev. at 844-45. Both Justice Stevens, the metric's main proponent, and Justice Kennedy, the "swing" justice, in their respective opinions acknowledged that any departure from zero was not suspect, and the debate—then, as now—is when a deviation exceeds a reasonable range and becomes suspect. *See, e.g.*, *LULAC*, 548 U.S. at 420 (Kennedy, J.) (recognizing the need for a judicially-manageable standard based on partisan symmetry to evaluate "how much partisan dominance is too much"); *id.* at 468 n.9 (Stevens, J., concurring in part) (suggesting either that "deviations of over 10% from symmetry create a prima facie case of an unconstitutional gerrymander" or that "a significant departure from symmetry is one relevant factor in analyzing whether . . . a districting plan is an unconstitutional partisan gerrymander"). One of the principal concerns with the partisan symmetry standard, according to Justice Kennedy, is the measure's resort to hypothetical, or "counterfactual," elections; "the existence or degree of asymmetry may in large part depend on conjecture about where possible vote-switchers will reside." *Id.* at 420 (Kennedy, J.).

d. The use of these partisan metrics as a range, rather than an absolute-zero standard, is consistent with the judicial scrutiny applied to other voting laws. For example, when evaluating a challenge to a voting law under the Voting Rights Act, "the size of the burden imposed by a challenged voting rule is highly relevant."

Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2338 (2021). "The concepts of 'openness' and 'opportunity' connote the absence of obstacles and burdens that block or seriously hinder voting, and therefore the size of the burden imposed by a voting rule is important." *Id.* (edit marks omitted). The same is true under the so-called *Anderson-Burdick* framework for assessing burdens on the fundamental right to vote under the Equal Protection Clause. *See Daunt v. Benson*, 956 F.3d 396, 406-07 (6th Cir. 2020). "The level of scrutiny under this test 'depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.'" *Id.* at 407 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). "[W]hen a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters," no strict-scrutiny standard applies, and "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (quoting *Burdick*, 504 U.S. at 434). The same is true with the one-person, one-vote standard under the federal Equal Protection Clause for congressional districts. *See Tennant v. Jefferson Co. Comm'n*, 567 U.S. 758, 760 (2012) (recognizing the vote-dilution standard "is a 'flexible' one" that depends, among other things, on "the size of the deviations").

e. And using partisan fairness measurements as a comparison to a range, rather than as an absolute zero target, is not only consistent with that body of federal case law, but is also consistent with the Court's treatment of these metrics in *LWV*.

In its discussion of the 2011 Plan, the Court viewed Dr. Chen's simulations analysis as "the most compelling evidence." 178 A.3d at 818. In relevant part, the Court credited Dr. Chen's analysis that showed his set of simulated non-partisan plans exhibited pro-Republican mean-median gap ranging between 0 and 4%, whereas the 2011 Plan's score was 5.9%. *Id.* at 820. The difference between the simulation range and the 2011 Plan was treated as an "outlier"—one that could not be explained as "an attempt to account for Pennsylvania's political geography" or other non-partisan reasons. *Id.*

Likewise, the Court credited Dr. Warshaw's testimony that:

> 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.

Id. (emphasis added). Hence, just four years ago, this Court recognized that there is a range of typical or normal values for these metrics attributable to Pennsylvania's political geography—and this Court struck down the 2011 Plan for exhibiting "unfair partisan advantage," *id.* at 821, in part because the 2011 Plan fell outside that range. All of the Court's analysis and its studious comparison of these scores to a non-partisan baseline (*i.e.*, Dr. Chen's simulated plans) would have been a complete waste if the real test was a comparison between the 2011 Plan and zero.

As demonstrated above, the mean-median and efficiency gap scores for H.B. 2146 fall well within the range of reasonableness as opined by Dr. Chen and Dr. Warshaw four years ago. Although scoring can depend on the elections utilized by the expert, no expert found that H.B. 2146 had a mean-median gap greater than three percent, and no expert found that H.B. 2146 had an efficiency gap greater than seven percent. This demonstrates that the modest bias is the result of political geography, not the result of an intention to create a partisan advantage.

III. Intentionally Drawing District Lines To "Correct For" A Slight, Natural Republican Tilt In The State's Political Geography Is Gerrymandering.

It is an undisputed fact that the present political geography of Pennsylvania has a slight tilt in favor of Republicans. This tilt is not caused by gerrymandering, but simply because voters who support Democratic candidates are densely clustered in urban areas and voters who support Republican candidates are more widely dispersed in the rural and suburban areas. Petitioners and other parties urged the Commonwealth Court to adopt plans with a strong Democratic skew, which they justify in the name of "correcting" that small tilt. But nothing in Pennsylvania's Free and Equal Elections Clause or *LWV* either compels or permits that outcome—sorting voters based on their politics does *not* "equalize" the power of voters. And sorting voters by their partisan preferences is, by definition, gerrymandering.

A. **All experts confirmed that Pennsylvania's political geography has a Republican tilt because Democratic voters are clustered in cities and urban areas, but Republican voters are more evenly distributed in the rest of the state.**

It is an undisputed fact in this case that the natural political geography in Pennsylvania today has a slight Republican tilt due to the geographic concentration of Democratic voters in cities. This Court noted that phenomenon in *LWV*. *See* 178 A.3d at 774 (recognizing a "small" advantage for Republicans). In that case, Dr. Chen attributed the small advantage to "the way that Democratic voters are clustered and Republican voters are a bit more spread out across different geographies of Pennsylvania." Rep. at 162 (quoting *LWV,* 178 A.3d at 774).

As Judge McCullough concluded, the experts in this case confirmed that political geography exists today and results in a small (or slight) tilt. *See, e.g.,* Rep. at 162-64 (citing testimony of Drs. Rodden, DeFord, and Duchin). Most notably, Governor Wolf's expert, Dr. Duchin, created an ensemble of 100,000 simulated redistricting plans for Pennsylvania that were drawn using non-partisan criteria and without partisan data, and she found that her ensemble "tend[ed] to exhibit pronounced advantage to Republicans across this full suite of recent elections." *Id.* at 164 (quoting Duchin Opening Rep. at 18).

B. The Commonwealth Court correctly concluded that deliberate efforts to "correct" for a naturally occurring political tilt in a plan is a subspecies of partisan gerrymandering that this Court found violated the Free and Equal Elections Clause.

This Court recognized in *LWV* the possibility that technological advances "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. Petitioners and certain other parties in this case have, using advanced computational tools, presented the Commonwealth Court—and now this Court—with plans that do just that. They asked the Commonwealth Court to adopt plans that are intended to "overcome" the slight tilt in favor of Republicans found in Pennsylvania's political geography, and have invoked *LWV* to do so. But nothing in Article I, Section 5, gives Petitioners a right to a rigged plan that "overcomes" a neutral and small pro-Republican tilt based on the state's political geography. Their view, in fact, vaults political party interests over those of voters' and turns over 200 years of Pennsylvania history and precedent on its head. Judge McCullough rightly rejected this theory, calling it a "subspecies of unfair partisan gerrymandering," Rep. at 197, and so should this Court.

Pennsylvania elects its Representatives to Congress in single-member districts, a geographic-based system of representation. Respecting the integrity of counties and political subdivisions has *always* been paramount to the

Commonwealth's redistricting policy. Since 1790, standards grounded in "neutral criteria" governed the crafting of General Assembly districts. *LWV*, 178 A.3d at 814. "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." *Id.* The prevention of the "dilution of an individual's vote was of paramount concern" to the framers of the Pennsylvania Constitution, and they "considered maintaining the geographical contiguity of political subdivisions . . . to afford important safeguards against that pernicious prospect." *Id.* at 815.

Balancing the expectation of political parties has not been part of the equation. As this Court found, "[t]he constitutional reapportionment scheme [of Article II, Section 16] does not impose a requirement of balancing the representation of the political parties; it does not protect the 'integrity' of any party's political expectations. Rather, the construct speaks of the 'integrity' of political subdivisions, which bespeaks history and geography, not party affiliation or expectations." *Holt v. 2011 Legislative Reapportionment Comm'n*, 67 A.3d 1211, 1235-36 (Pa. 2013) ("*Holt II*"). That makes sense: redistricting law focuses on the rights of *voters*, not *parties*.

In *LWV*, this Court again recognized the primacy of using *geography*—and not *political preferences*—as the basis for drawing fair representational districts. By focusing on the neutral criteria, a map-drawer "maintains the strength of an individual's vote in electing a congressional representative." 178 A.3d at 816. The Court went on: "[w]hen 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 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." *Id.* Importantly, "[t]his approach inures to no political party's benefit or detriment," but "simply achieves the constitutional goal of fair and equal elections for all of our Commonwealth's voters." *Id.*

But if this Court were to select a plan intended to "overcome" any slight, naturally occurring Republican-leaning tilt in the state's political geography, the Court would thereby place its thumb on the scale for Democrats—an approach that will "inure[]" to the Democratic Party's benefit.

Petitioners believe this thumb-on-the-scale is defensible under *LWV* based on dicta in that case describing the intent of Article I, Section 5, as ensuring that each voter's "power . . . in the selection of representatives be equalized to the greatest degree possible with other Pennsylvania citizens." 178 A.3d at 817. If today's political geography happens to offer a slight advantage to Republicans, to

Petitioners, it is essential to jimmy the district lines until that political geography is "overcome" and Democrats get the number of districts they desire. But when the Court spoke of "equalizing" voting power, it was doing so in the framework of hundreds of years of precedent that spoke of "equality" of representation in terms grounded in the number of people in each district and respecting the integrity of the boundaries of the counties and municipalities that form a major part of Pennsylvanians' daily lives.

"Political geography" means the will of the voters as expressed in their own communities. Petitioners and other parties treat the voting patterns of Pennsylvania's communities as an obstacle to be "overcome" through clever redistricting using computer algorithms and mathematical metrics. But "overcoming" a "tilt" in the state's "political geography" is not an innocuous act, akin to the old barkeeper's trick of putting sugar packets under an unlevel table leg to prevent the table from tilting. It requires conscious state action to treat the voters of urban areas (that are heavily Democratic) differently than voters in suburban areas (that are politically mixed), and both of those groups differently than rural areas (that are Republican-leaning), to convey a partisan advantage on Democrats. As *Carter* Petitioners' expert, Dr. Rodden, explained in a 2019 book, to overcome this natural tilt, "Democrats would need a redistricting process that intentionally carved up large cities like pizza slices or spokes of a wheel, so as to combine some very Democratic urban areas with some

Republican exurbs in an effort to spread Democrats more efficiently across districts." Rep. at 162-63 (citations omitted); *see also id.* at 177 (quoting public comments of Dr. David Wasserman that the process requires "conscious pro-Dem[ocrat] mapping choices" to give Democrats an advantage). Rather than do the work of persuading voters to elect their preferred candidates to Congress, Petitioners ask this Court to rig the map to spare them the effort. That is the very definition of gerrymandering, and it violates the rights of voters as enshrined in the Free and Equal Elections Clause.

Perhaps this point is illustrated most clearly with Governor Wolf's proposed plan and evidentiary presentation. His expert, Dr. Duchin, praised the plans submitted by the Governor, the *Carter* Petitioners, and the House Democratic Caucus as "dominating the field" on her partisan-fairness metrics. Duchin Reb. Rep. at 5. But the Governor's plan saws the City of Pittsburgh practically in half, placing 176,425 people into one district and 126,546 people into another. Barber Reb. Rep. at 10, Tbl. 2.[7] Governor Wolf's plan also splits Bucks County unnecessarily. Rep. at

[7] This analysis illustrates the danger in just looking at metrics like the number of split cities—doing so can mask important differences between plans. As Dr. Barber explained in his study of the various proposed plans' municipal splits, "aside from necessary divisions of Philadelphia and unnecessary divisions of Pittsburgh [in some plans], . . . all of the remaining municipal splits are of very small municipalities and townships across the state that shift only a small population." Barber Reb. Rep. at 9. Splitting a small municipality to move a few thousand people into another district (*e.g.*, to achieve population equality) is one thing; moving 96,829, 126,546, or

160. Although the House Democratic Caucus plan draws Pittsburgh into a single district, it does so by combining it with northern areas in a shape the Commonwealth Court described as a "Freddy-Krueger like claw." *Id.* at 203. Yet Dr. Duchin defended the Governor's plan—despite her own analysis revealing it to be an "outlier" on partisan metrics—by saying it went the farthest to "overcome" the natural geographic "tilt." Duchin Opening Rep. 2. Although Dr. Duchin may view these plans as "dominating the field" in certain mathematical metrics, Duchin Reb. Rep. at 5, the Pennsylvania Constitution and this Court's precedents would say otherwise. In fact, they are all partisan outliers that draw *ten* Democratic-leaning districts (and eleven, in the case of the House Democratic Caucus plan).

But while several of these plans might "dominate the field" in terms of maximizing the number of Democrat-leaning seats, they do so at representational cost to the voters. As Dr. Naughton testified at trial with respect to Pittsburgh, keeping the City together "unites people's interests for resources" and "gives them a [series] of common interests." Rep. at 96 (quoting Tr. 713.) After all, a Member of Congress represents *all* the constituents of the Member's district—not only those of the Member's party. Splitting Pittsburgh up might serve national Democratic interests by eking out one more Democratic seat, but dividing Pittsburgh's voters

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140,884 Pittsburgh residents into another district is another. *See id.* at 10. Yet the metrics count each as "one" split even though the latter has a much larger impact.

into two districts "dilutes their advocacy" and reduces those voters' power and influence in Washington, D.C. *Id.*

In addition to these other problems, trying to rig a redistricting plan to "correct" for the state's political geography presumes political geography is static—that every blue and red dot on today's map is no more likely to move than the Allegheny Mountains. That assumption is wrong: political geography is dynamic and unpredictable. As Dr. Rodden explained, a "pronounced trend in Pennsylvania" over the past decade was that "places that are gaining population are not only more Democratic to begin with, but are becoming *more* Democratic as they gain population" and that places losing population are becoming more Republican. Rodden Opening Rep. 10 (emphasis in original). Hence, places "like Lancaster and Cumberland, started out with strong Republican majorities, meaning that they are becoming more competitive over time as they gain population." *Id.* After discussing Dr. Rodden's analysis and other data about Pennsylvania voting patterns over the past decade, Dr. Barber concluded:

> The upshot of these patterns is that if a map drawer is using contemporary partisan trends to guide their decision-making, we have no way of knowing if the geographic patterns they are trying to "correct" for will 1.) remain the same, 2.) perhaps become more pronounced, or 3.) reverse in direction. It very well could be the case that over the next 10 years Democratic voters start to win more in suburban and rural areas while Republicans begin to make inroads in the cities. In fact, recent research shows that the issues that divide the parties are shifting from economic to social and educational-based,

> which could easily lead to a shift in the partisan coalitions that looks very different than it does today.

Barber Reb. Rep. 6-7.

At bottom, our nation elects Representatives to Congress using single-member districts—a fundamentally geographic-based system of representation. Our nation does so even though other electoral systems are available that are less tied to geography, like the party-list proportional representation system used in 94 countries. *See* Peter Buisseret et al., *Party Nomination Strategies in List Proportional Representation Systems*, Am. J. Pol'y Sci. (Jan. 14, 2022), https://doi.org/10.1111/ajps.12691, at 1 n.1. And that choice of system matters, and it must be respected—even if the current spatial distribution of voters produces a small advantage for Republicans.

IV. H.B. 2146 Is the Only Plan Submitted to the Commonwealth Court That Went Through Any Meaningful Public Process.

House Bill 2146 not only was legislation passed by both houses of the General Assembly, but it went through an open, public, and transparent process. It was drafted studiously over the course of months, with 11 public hearings, the work of non-partisan activists, and extensive public comments. This Court should not adopt the other proposals drafted under the cover of darkness with little or no public scrutiny.

A. The General Assembly undertook a transparent, deliberative, and meaningful redistricting process that led to the passage of H.B. 2146.

As described *supra*, H.B. 2146 went through a full transparent, deliberative, and meaningful process that ultimately led to its passage by both chambers of the General Assembly. The House began by soliciting proposals, and after evaluating the 19 proposals, chose one drafted by a well-known nonpartisan citizen, Amanda Holt. She drew this map without political influence, met constitutional requirements, and it limited unnecessary splits of communities, while creating compact, contiguous districts. Grove Letter; Ex. 1 to Schaller Aff. The legislature did not stop its request for input there, but again solicited the public's input, this time in the form of public comments. *See* Grove Letter; Rep. at 48. After considering each of the 399 comments they received, the legislature incorporated many of these suggestions to increase compactness and preserve certain communities of interest. *Id.* The public had four weeks to review and comment on every part of this plan. *See* Grove Letter. The legislature had the opportunity to review and amend the bill, and then passed it out of the House on January 12, 2021. The Senate then reviewed and considered the map for twelve days before ultimately passing it as well.

This means that H.B. 2146 was initiated with an open and transparent process. The legislature not only solicited additional input from citizens themselves and from the people's elected representatives in both the House and the Senate, but adjusted

the map in response to Pennsylvanian's concerns and comments. This orderly legislative process allowed appropriate consideration of various parties' concerns and ultimately, created a map that had gone through the entire legislative process with no short cuts or back-room deals. Even the Governor's expert admitted that this process led to a map which fulfilled traditional criteria for evaluating redistricting maps, because H.B. 2146 "is population-balanced and contiguous, shows strong respect for political boundaries, and is reasonably compact." Duchin Opening Rep. at 2.

The voice and will of the people of a state is expressed through their elected representatives, so the actions of the legislature are devices of "monumental import, and should be honored and respected by all means necessary." Rep. at 214. The legislative branch, in this case, the General Assembly, is uniquely equipped to evaluate redistricting maps because of "the knowledge which its members from every part of the state bring to its deliberations, its techniques for gathering information, and other factors inherent in the legislative process." *Butcher v. Bloom*, 203 A.2d 556, 569 (Pa. 1964). The legislature is able to "weigh[] and evaluate[]" key "criteria and standards" and "exercise its political judgment" in a way that no other branch of government can. *Perry v. Perez*, 132 S. Ct. 934, 941 (2012). The legislature's unique position and tools to evaluate necessary criteria for redistricting while expressing the will of the people is why the General Assembly must be "the

organ of government with the primary responsibility for the task of apportionment." *Butcher v. Bloom*, 216 A.2d 457, 458 (Pa. 1966).

B. **The Governor's plan was only published Nine Days before his submission was due in Court, and much of it is shrouded in secrecy.**

Rather than work with the General Assembly to agree on a congressional redistricting plan, or provide any meaningful and valid feedback on how H.B. 2146 was unconstitutional, the Governor simply created his own map. But in contrast to H.B. 2146, the Governor's plan evaded any meaningful review or public input. To begin with, the origins of the Governor's plan are a mystery. The Governor's own expert, Dr. Duchin, does not know who drew the Governor's plan. Tr. 436:24-437:8. There is no information regarding the process or considerations used by the architect of the Governor's plan. Tr. 437:9-13. And the Governor has never shared that information with the public. Tr. 437:14-18. The governor then purposefully avoided any meaningful public review or consideration of his map, by introducing his map on January 15, 2022, less than two weeks before this trial began (and nearly forty days after the legislature introduced H.B. 2146). The governor released his own map only *after* the Commonwealth Court's January 14, 2022 order requiring the intervenors to submit maps in this case, raising the question of whether he would have shared this map for public view *at all* if not required to do so by the court.

The Governor did not approach this redistricting process with the legislature in good faith. Although redistricting is inherently a legislative activity, as discussed

above, the Governor did not communicate at all with the legislature while drafting this plan. *See* Grove Letter. The House State Government Committee released detailed information regarding the choices it made to update H.B. 2146's maps, but the Governor's staff either did not reach out to Rep. Grove for this information or ignored it when it was provided on the "paredistricting.com" website. *Id.* at 3, 8-9. The Governor argued that his only ability to influence the maps was a veto, but that was only because he refused to participate in any earlier discussions. *Id.* A decision that permits the Governor to opt out of the legislative redistricting process, and then adopts his eleventh-hour plan (suited to his own interests) would create a perverse incentive for the executive branch to avoid the legislative process and responsibilities required of it by both state and federal law.[8]

C. **<u>The House and Senate Democratic Caucuses never proposed their plans during the legislative process.</u>**

Similarly, the House and Senate Democratic Caucuses have drafted plans from whole cloth without any input from the legislative process or from the People of Pennsylvania. These maps were never proposed during the lengthy legislative

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[8] During closing argument, the Senate Democratic Caucus argued that the General Assembly's plan should not receive any special consideration because, counsel argued, it would create a perverse incentive for future legislators to refuse to compromise and then demand that the Court blindly defer to their plan. *See* Tr. 1027-28. But that is not what occurred here. It was Governor Wolf and the Democratic caucuses in the General Assembly that did not meaningfully engage in the legislative process—apparently in the hope that this Court would simply rubber-stamp one of their plans.

process, and none of the members of these caucuses proposed any of these maps as amendments to H.B. 2146. *See* Bill History, Republican Legislative Intervenors' Opening Br., Ex. E ("Bill History"). This Court should reject the attempt by a handful of officials to circumvent the legislative process and flood the court with maps that could not garner support in the duly-elected General Assembly.

D. The *Gressman* plan was drawn in secret by a computer "optimization" algorithm.

The *Gressman* plan is the most mysterious of all. Using a "computer algorithmic technique" to draw its districts, Tr. 276:21-22, the *Gressman* plan has no input from anyone besides the *Gressman* plaintiffs. The expert testifying in support of that plan did not know what technique was used—he only knew that it was an algorithm. Tr. 276:19-277:4. And he did not disagree that the "computational techniques" could have included optimizing for partisan fairness. Tr. 278:13-23. This is yet another plan that had no benefit of the legislative process or input from the public.

None of the above plans acknowledge the Legislature's "primary role in redistricting." *LWV*, 178 A.3d at 822. Moreover, they may be motivated by impermissible political criteria, and they involved minimal or no input from the public. Only H.B. 2146 can trace its origins, explain the traditional redistricting criteria and constitutional requirements it achieves, and show its implementation of broad public comment and support.

V. The Commonwealth Court Properly Rejected the "Least Change" Approach Advocated by the Carter Petitioners.

The *Carter* Petitioners argued below that their proposed plan is superior because it "takes a least-change approach" relative to the 2018 plan. Carter Post-Trial Br. at 22. Consistent with this Court's existing case law, Judge McCullough correctly held that "using least-change metrics here is of limited utility because an 18-district plan is being replaced by a 17-district plan," and that there is no legal requirement that the Court defer to its own prior redistricting choices in such circumstances. Rep. at 184, 186. Those conclusions should be affirmed.

First, when a version of the "least changes" argument was pressed in legislative reapportionment litigation a decade ago, the Supreme Court rejected it and reiterated that "the governing 'law' for redistricting" is "applicable constitutional and statutory provisions and on-point decisional law," not "the specifics of prior reapportionment plans 'approved' by the Court." *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 735 (Pa. 2012) ("*Holt I*").

Then, in *Holt II*, the Court again criticized arguments about "the supposed constitutionalization of prior redistricting plans" and emphasized the "limited constitutional relevance" of maintaining the outcomes of previous plans. *Holt II*, 67 A.3d at 1236. When a similar argument was again raised in 2018 in *LWV II*, the Court again rejected it and reiterated that "the preservation of prior district lines" is a consideration that is "wholly subordinate to the neutral criteria of compactness,

contiguity, minimization of the division of political subdivisions, and maintenance of population equality among congressional districts." *LWV*, 178 A.3d at 817.

Aside from the fact that their argument flies in the face of prior precedent, *Carter* Petitioners' contention that making the "least changes" from the previous map is somehow a virtue is not sound. As the Supreme Court explained when rejecting the argument in *Holt I*, prioritizing similarity to a previous plan is not a traditional redistricting principle. That is because "prior 'approvals' of plans do not establish that those plans survived . . . all possible challenges. Instead, in the prior redistricting appeals, this Court merely passed upon the specific challenges that were made." *Holt I*, 38 A.3d at 735-36.

The cases that the *Carter* Petitioners have identified on this point are inapplicable. In each case, unlike Pennsylvania in this cycle, the state "ha[d] not lost or gained any congressional seats," *Johnson v. Wis. Elections Comm'n,* 2021 WI 87, ¶ 15, 399 Wis. 2d 623, 637 (Nov. 30, 2021); *see also LaComb v. Growe*, 541 F. Supp. 145, 154 (D. Minn. 1982), *aff'd sub nom. Orwoll v. LaComb*, 456 U.S. 966, 102 S. Ct. 2228, 72 L. Ed. 2d 841 (1982) (eight district plan was first enacted after the 1960 census, and revised eight district plan was challenged after the 1970 census) (Alsop, J. dissenting); *Hippert v. Ritchie*, 813 N.W.2d 374, 381 (Minn. 2012) (adjusting state house and senate districts). None of the courts in those cases grappled with a map where the number of districts itself had to change. Instead, they

recognized the fundamental principle that "[n]otwithstanding a history of political involvement in redistricting . . . it remains the legislatures' duty," *Johnson*, 2021 WL 87 at ¶ 19 (citations omitted). In other words, the goal of a "least change" approach is to respect the most recent choices of the *legislature*—not some imagined fidelity to calcified district lines. *See LWV*, 178 A.3d at 822 (the legislature has the "primary role in districting").

Moreover, the *Carter* Petitioners are simply wrong when they argue that the 2018 remedial plan is the "benchmark" for any plan evaluated by this Court. Courts have recognized that "preserving the cores" of prior districts may be a "legitimate *state* objective[]" in redistricting, *Mellow*, 607 A.2d at 207-08 (emphasis added), but no cases cited by the *Carter* Petitioners require *courts* to follow this objective as a constitutional directive. *See Karcher*, 462 U.S. at 740 (recognizing that "[a]ny number of consistently applied legislative policies might justify some variance . . . [including] preserving the cores of prior districts"); *see also Abrams v. Johnson*, 521 U.S. 74, 85-86 (1997) (requiring any judicial changes to a legislative plan to be consistent with the legislature's "redistricting principles"); *Stone v. Hechler*, 782 F. Supp. 1116, 1126 (N.D. W.Va. 1992) (deferring to legislature's definition of what "preserving the core" meant).

In addition to lacking a sound basis in the case law, a constitutional enshrinement of the "least change" approach would undermine the integrity of the

redistricting process. Evaluating redistricting plans against the traditional criteria—instead of similarity to previous plans—ensures that the new plan is scrutinized in each and every redistricting cycle against the applicable constitutional and statutory standards, and with reference to population and other changes. By contrast, the *Carter* Petitioners' position would ensure that choices from prior plans would be "frozen" into future plans and tie the hands of future legislators, an outcome that Judge McCullough deemed "deeply troubl[ing]." Rep. at 188.

The record evidence and testimony further reinforce the weakness of the *Carter* Petitioners' "least change" argument. As the Report noted, the *Carter* Petitioners' expert, Dr. Rodden, "admitted in his report and testimony that, in the past 10 years, there has been dramatic population shifts in Pennsylvania and fluctuating levels of density in specific areas throughout the Commonwealth, which presumably would have resulted in differing communities of interest." Rep. at 156-57. Even worse, by the admission of the *Carter* Petitioners' own expert, their putatively "least-change approach" takes the current 9-9 partisan split and produces a 10-7 pro-Democrat map. Rodden Reb. Rep. at 9, Table 5.

For these reasons, comparing the prior map against any proposed map is not a viable or virtuous principle for redistricting, as this Court has recognized every time the argument surfaces. *Carter* Petitioners' arguments touting the similarity of their plan to the previous map should fare no better than when this same contention

was rejected in previous redistricting cycles. This Court should reject them once more, in line with existing precedent.

CONCLUSION

For all these reasons, plus those set forth in the House Republican Legislative Intervenors' briefs before the Commonwealth Court (that are incorporated herein by this reference) and that will be set forth in oral argument, House Republican Legislative Intervenors respectfully request that the Court adopt Judge McCullough's Special Master's Report in its entirety.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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