

IN THE SUPREME COURT OF PENNSYLVANIA  
Middle District  
No. 11 MM 2022

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KERRY BENNINGHOFF,  
individually, and as Majority Leader of the Pennsylvania House of  
Representatives,  
Petitioner-Appellant,  
v.  
2021 LEGISLATIVE REAPPORTIONMENT COMMISSION,  
Respondent-Appellee.

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**BRIEF OF AMICI CURIAE THE LEAGUE OF WOMEN VOTERS  
OF PENNSYLVANIA, FAIR DISTRICTS PA, AND THE  
COMMITTEE OF SEVENTY**

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## STATEMENT OF INTEREST OF *AMICI CURIAE*

The League of Women Voters of Pennsylvania (“LWVPA”), a nonpartisan political organization, has since 1920 encouraged the informed and active participation of citizens in government. Since the 1980s, LWVPA has advocated for a less partisan redistricting process. LWVPA was a lead plaintiff in the historic redistricting case *League of Women Voters of Pennsylvania v. Commonwealth of Pennsylvania*, 645 Pa. 1 (2018) (*LWV II*).

Fair Districts PA (“FDPA”), a project of LWVPA, is a nonpartisan coalition of Pennsylvania organizations working together to ensure fair maps and a fair redistricting process. Since its start in early 2016, FDPA has held over 1,100 public meetings attended by over 43,000 Pennsylvanians and has collected over 100,000 petition signatures asking for an independent citizens’ redistricting commission.

For the past two years, LWVPA and FDPA have been active participants in the national League of Women Voters People Powered Fair Maps initiative. Together with other organizations, FDPA and LWVPA organized six regional forums to explain the importance of counting incarcerated persons in their home communities and co-hosted well-attended virtual forums to train citizens to give testimony on district maps, to assess map metrics, and to understand the importance of racial equity in the mapping process.

The Committee of Seventy is a nonpartisan civil leadership organization that advances representative, ethical and effective government in Philadelphia and Pennsylvania through citizen engagement and public policy advocacy. It was established in 1904 for the express purpose of improving the voting process, bringing people of competence and integrity into government, combatting corruption, and informing and engaging citizens in the critical affairs of the day. Among the projects of the Committee of Seventy is Draw the Lines PA, a nonpartisan education and engagement initiative that has attempted to demonstrate that ordinary Pennsylvanians, when given the same digital tools and data used in the political redistricting process, can, through a fair and transparent process, produce voting districts that are objectively better by standard mapping metrics.

## SUMMARY OF THE ARGUMENT

The Legislative Reapportionment Commission (“LRC”) incorporated public input in exemplary fashion to produce LRC Final Plan Maps that meet all legal requirements. The current process, in which caucus leaders draw district maps for their colleagues and themselves, fosters conflicts of interest. *Amici* have advocated for legislation creating a truly independent citizens’ redistricting commission with prohibitions on districts drawn to favor or disfavor one person or party, and with clear, enforceable criteria. Even while laboring under the inherently partisan process mandated by current law, the LRC performed admirably. The objections to the LRC Final Plan raised by those challenging it are meritless and should be rejected. A fair map is, by definition, one that limits partisan bias. The Final Plan maps significantly limit partisan bias and are therefore fair.

Petitioners’ primary objection to the LRC Final Plan is that it is impermissibly partisan. This assertion is erroneous as a matter of fact and law. Additionally, petitioners’ assertion that the LRC Final Plan should be overturned because it creates jurisdictional splits that are not “absolutely necessary” is unfounded. Contrary to petitioners’ fundamental underlying premise, the partisan advantage Pennsylvania republicans currently enjoy is not a “baked-in” result of natural political geography. Likewise erroneous is the argument that the LRC Final Plan is impermissibly representative of minority voices. The population deviation

of the LRC Final Plan is squarely within both United States and Pennsylvania Supreme Court precedent and in line with the population deviation that exists in other state legislative maps. Finally, Mr. Benninghoff's suggestion that the court adopt the current Pennsylvania legislative map over the LRC Final Plan is both baseless and self-serving.

No map is perfect, and amici themselves would prefer maps that differ in certain respects. The LRC Final Plan is, however, the result of a robust and appropriate process and complies with all state and federal requirements. *Amici* therefore respectfully suggest that the LRC Final Plan should be upheld.

## **ARGUMENT**

### **A. Introduction**

The LRC, the entity responsible for drawing Pennsylvania's House and Senate district maps is, by design, a highly political, highly partisan body with four powerful party leaders asked to draw districts for themselves and their colleagues. The first task of the four leaders is to select a fifth member, the LRC chair. The inability to do so, in this decade as in decades past, demonstrates the challenge of negotiation and compromise inherent in the LRC's composition.

When agreement is impossible, the task of selection falls to this Court, as described in the Pennsylvania Constitution. In 2021 this Court made an exceptional choice in Mark A. Nordenberg. Nominated for that role in the past by Republican

leaders and rejected by their Democratic counterparts, Chairman Nordenberg led the LRC with particular and appropriate focus on soliciting public input.

Under the leadership of Chairman Nordenberg, the LRC carried out a far more public and transparent process than in past decades, exceeding requirements proposed in LWVPA and FDPA supported legislation. The LRC held eight public hearings before creation of the preliminary maps and eight additional hearings for public response to those maps. All hearings included the opportunity for citizens to participate remotely, allowing input from every corner of the Commonwealth. Hearings included nationally known experts on redistricting metrics and voting rights, as well as leaders from multiple good government groups and minority organizations.

In preparation for the LRC mapping process, in the summer of 2021, FDPA promoted its own PA House and Senate mapping competition. Using winning maps as a starting point, volunteer mappers then facilitated dozens of virtual community mapping conversations with local Leagues, community groups, municipal leaders and others to create the FDPA People's Maps, submitted to the LRC on November 15, 2021.

In 2016, the Committee of Seventy created Draw the Lines PA (DTL) as a civic engagement project designed to put redistricting tools in the hands of Pennsylvania citizens. Since then, DTL hosted a number of districting

competitions that engaged over 12,000 Pennsylvanians, with 7,200 citizens participating in map-drawing competitions. These competitions resulted in citizen mappers submitting 1,500 congressional maps. Using the citizen-generated maps as guidance, forty of the most skilled and active DTL citizen mappers created The Citizens' Map to be a reflection of everyday Pennsylvanians' redistricting priorities. While the Citizens' Map was ultimately not selected by this Court, DTL continues to be a resource for Pennsylvanians to engage directly in the redistricting process. DTL has received 60 legislative maps from citizen mappers.

As active participants in testimony, mapping, and map assessment, *amici* are well aware of the challenges of balancing legal mapping criteria. We understand that giving priority to one mapping value can undermine others. We know that limiting split jurisdictions in one area can force splits in others. We have also wrestled with the important questions surrounding minority representation and the fine line between vote dilution and packing of minority voters to address representation.

While no map is perfect, the LRC Final Plan Maps are both squarely in compliance with existing reapportionment requirements and score far better than the heavily gerrymandered reapportionment maps of the last few decades on nearly every metric. The LRC Final Plan is vastly more equitable, less partisan, and more reflective of today's Pennsylvania than the 2012 reapportionment map. Petitioners'

arguments under Article II Section 16 of the Pennsylvania Constitution, as well as their claims of partisanship and impermissible minority representation, are unfounded. Although amici support certain changes to the redistricting process, current Pennsylvania law remains the only legitimate measure of any Pennsylvania reapportionment plan. Under that law, the LRC Final Plan should be upheld.

### **B. Legal Standards**

No party disputes (nor could they) that the LRC was validly constituted under the Pennsylvania Constitution or that the 2021 LRC Final Plan, which was adopted by the LRC by a 4-1 vote, reflects the decision of the LRC. As such, the 2021 Final Plan should only be reconsidered if this Court finds that it runs afoul of state or federal constitutional principles. It does not.

In *League of Women Voters of Pennsylvania v. Commonwealth*, 645 Pa. 1 (2018) (“*LWV II*”), this Court laid out the redistricting standards that are necessary to comply with the Free and Equal Elections Clause in the Pennsylvania Constitution, Article I, Section 5. Specifically, this Court explained that the key factors in assessing the constitutionality of a proposed reapportionment plan were “the neutral criteria of compactness, contiguity, minimization of the division of political subdivisions, and maintenance of population equality among congressional districts.” *LWV II*, 645 Pa. at 122; *see also* Pa. Const. Art. II Sec. 16 (Pennsylvania constitutional mandate that the Commonwealth be divided into 50

senatorial and 203 representative districts “which shall be composed of compact and contiguous territory as nearly equal in population as practicable,” and which do not divide municipalities “[u]nless absolutely necessary”).

Beyond these neutral constitutional principles, this Court also recognized that factors such as “preservation of prior district lines, protection of incumbents, [and] the maintenance of the political balance which existed after the prior reapportionment” have historically “played a role” in legislative redistricting but held that these factors should be viewed as “wholly subordinate” to the neutral factors articulated above. *LWV II*, 645 Pa. at 121-122.

In addition to state requirements, a proposed redistricting map must also comply with both the Fourteenth Amendment to the United States Constitution and the federal Voting Rights Act. Section 2 of the Voting Rights Act prohibits changes to voting practices that discriminate against minorities by diluting minority voting strength. *See* 52 U.S.C.A. §10301; *Thornburg v. Gingles*, 478 U.S. 30, 44-45 (1986).

**C. The LRC Final Plan Appropriately Reduces Partisan Bias.**

When politicians manipulate district boundaries to keep themselves or their party in power, it is an abuse of our political system that has a corrosive effect on our democracy. Gerrymandered districts give voters less voice and less choice, and lead to legislative polarization instead of problem-solving. Gerrymandering

reduces or eliminates competitive elections, makes politicians less responsive to the people, empowers those with extreme views, and further marginalizes already disempowered groups such as minorities or low-income voters. Pennsylvania is one of the most gerrymandered states in the country. Creating fair districts through a fair redistricting process help reestablish an accountable government that represents the people of Pennsylvania — not partisan politicians or outside interests.

A fair legislative map is one that avoids partisan bias. As this Court observed in *LWV II*:

It is axiomatic that a diluted vote is not an equal vote, as all voters do not have an equal opportunity to translate their votes into representation. This is the antithesis of a healthy representative democracy. Indeed, for our form of government to operate as intended, each and every Pennsylvania voter must have the same free and equal *opportunity* to select his or her representatives....

[O]ur Commonwealth's commitment to neutralizing factors which unfairly impede or dilute individuals' rights to select their representatives was borne of our forebears' bitter personal experience suffering the pernicious effects resulting from previous electoral schemes that sanctioned such discrimination. Furthermore, adoption of a broad interpretation guards against the risk of unfairly rendering votes nugatory, artificially entrenching representative power, and discouraging voters from participating in the electoral process because they have come to believe that the power of their individual vote has been diminished to the point that it 'does not count.' A broad and robust interpretation

of [the Elections Clause] serves as a bulwark against the adverse consequences of partisan gerrymandering.

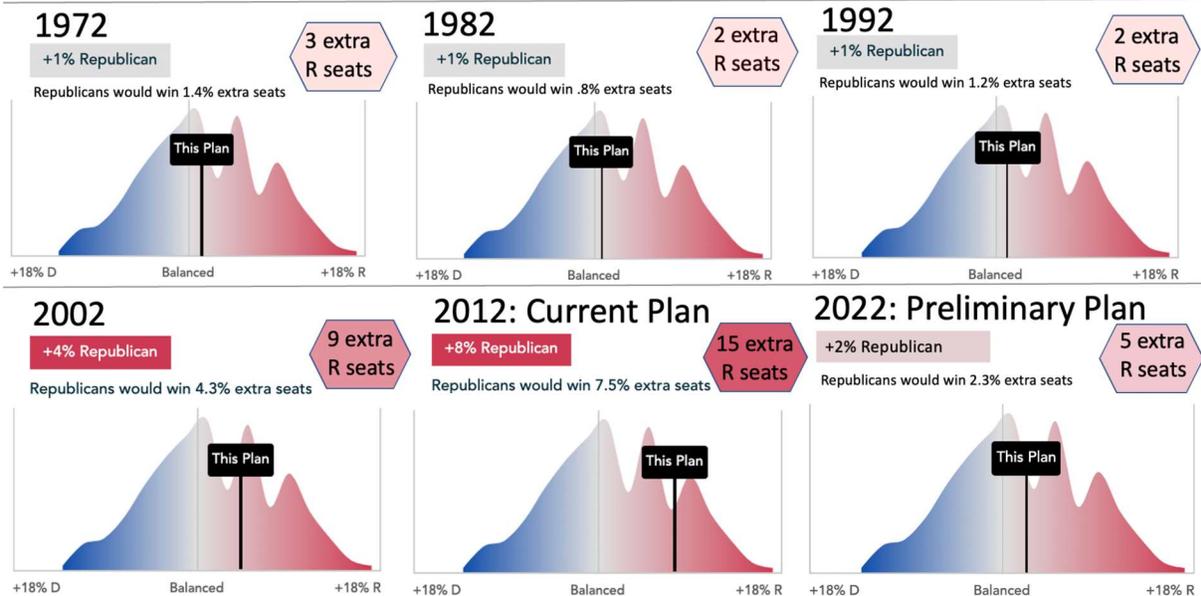
645 Pa. at 117.

One of the chief successes of the LRC Final Plan is the significant reduction in partisan bias as compared to prior maps. In fact, according to the nonpartisan PlanScore, the LRC Final House Map would allow Republicans to win five extra seats in a hypothetical perfectly tied election,<sup>1</sup> in contrast to the extra fifteen seats of the current plan, or the nine extra seats of the plan enacted in 2002.<sup>2</sup>

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<sup>1</sup> PlanScore, *Pennsylvania 2021 State House Final Reapportionment Plan* (Feb. 7, 2022), <https://planscore.campaignlegal.org/plan.html?20220207T162001.827086135Z> (last visited Mar. 10, 2022).

<sup>2</sup> PlanScore, *2014-2020 Redistricting Plan: State Houses: Partisan Bias* (7.5% pro-Republican partisan bias under current plan, and 4.3% pro-Republican bias under 2002 plan), <https://planscore.campaignlegal.org/pennsylvania/#!2014-plan-statehouse-pb> (last visited Mar. 10, 2022).



Despite this, one of the challengers’ core contentions is that the LRC Final Plan is a “blatant” partisan gerrymander that favors Democrats over Republicans. In fact, the LRC map *favors Republicans*, with 104 Republican-leaning districts, and 99 Democratic-leaning districts.<sup>3</sup> Although that is significantly less imbalanced than the current, highly gerrymandered map of 118 Republican-leaning districts, this change is not a sign of unfairness or bias. Rather, it is a sign that Republicans’ successful gerrymandering of the House and Senate maps in 2012 (when they

<sup>3</sup> Christopher Warshaw, *An Evaluation of the Partisan Fairness of the Pennsylvania Legislative Reapportionment Commission’s Proposed State House Districting Plan 4* (Jan. 7, 2022) (three different analyses of the partisan fairness of the proposed State House plan “indicate that the proposed map is fair with just a small pro-Republican bias”), <https://www.redistricting.state.pa.us/resources/Press/2022-01-14%20Warshaw%20Testimony.pdf>.

controlled both the legislature and the governor’s mansion) cannot persist in the face of a changing electorate. As Chairman Nordenberg noted, “The map itself is a map that favors Republicans.... It doesn’t favor them as much as the current map does, but that is a product of the changing demographics.”<sup>4</sup>

None of the proffered “evidence” of excessive gerrymandering bears scrutiny. As explained below, neither population deviation nor the splitting of certain municipalities goes beyond permissible—and indeed, common—bounds, and neither is evidence of excessive partisanship. *See* Sections II.C & II.E, *infra*. Mr. Benninghoff’s speculation that it “cannot have been by accident” that the Plan pairs eight Republican incumbents against each other, Br. of Petitioner-Appellant at 61 (“Benninghoff Br.”), is just that—speculation. There is no evidence that these pairings were driven by anything other than Pennsylvania’s growing population, increasing urbanization, and changing demographics.

Nor does the evidence support the claim that the LRC Final Plan House Map is “an extreme partisan outlier” on the basis of work provided by Dr. Michael Barber. Benninghoff Br. at 47. As Mr. Nordenberg has explained in detail, Dr. Barber’s methodology did not consider racial factors at all—even though such

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<sup>4</sup> Jonathan Lai & Julia Terruso, *Pennsylvania Republicans are going on the attack against a new map for state House districts*, Phil. Inquirer (Dec. 22, 2021), <https://www.inquirer.com/news/pennsylvania-redistricting-state-house-map-nordenberg-republicans-20211222.html>.

considerations are legally mandated in some circumstances—and his testimony is refuted by multiple experts.<sup>5</sup> Notably, some of these experts, who used the same methodology that Dr. Barber purported to use, were unable to recreate his results, and once majority-minority districts are factored it becomes clear that the LRC Final Plan is *not* an outlier. *Id.*

Perhaps most striking is Mr. Benninghoff’s claim that the LRC was wrong to draw the LRC Final Plan in a way that counterbalances the “natural skew resulting from the natural concentration of Democratic voters in cities and urban areas.” Benninghoff Br. at 54. This Court should reject the blinkered and ahistorical view that there is such a thing as a “natural” political geography. It is certainly true that at present urban areas generally lean Democratic and rural areas generally lean Republican with suburban areas being more mixed. But the urban-rural political divide is no more “natural” than, for example, the type of redlining and relatively limited economic opportunities that disproportionately channelled minorities into urban areas throughout the twentieth century,<sup>6</sup> or any of the

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<sup>5</sup> Mark A. Nordenberg, *Report Regarding The Commission’s Final Plan* at 7 (Mar. 4, 2022) (“Nordenberg Report”) at 55-60, <https://www.redistricting.state.pa.us/resources/Press/2022-03-04%20Report%20Chair%20of%202021%20LRC%20Final%20Plan.pdf>.

<sup>6</sup> *See, e.g.,* Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017).

continued social forces that manifest in the current Democratic and Republican coalitions.

Mr. Benninghoff also posits that a video clip of House Minority Leader Joanna McClinton is evidence of her intent to gerrymander the House map. Benninghoff Br. at 6. In this exchange, Rep. McClinton was asked how the Democrats expected to gain a majority of the House, and her response was, “Redistricting.”<sup>7</sup> To suggest that this shows Rep. McClinton’s intent to gerrymander her way to a majority is to ignore the last decade of distorted, pro-Republican maps effecting the makeup of the Pennsylvania House. Rep. McClinton’s view instead reflect the reality that, with the current map deliberately drawn to give the GOP 15 extra seats in any hypothetical 50-50 election, a Democratic majority is almost impossible. With fairly drawn maps and a more level playing field—which is not to say an entirely level playing field given the continued Republican advantages under the Final Plan—Rep. McClinton’s party will be better positioned to gain a majority of seats in the House, but that hardly makes the Final Plan a Democratic gerrymander. Rather, it reflects the levelling of an uneven playing field that has existed for over a decade.

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<sup>7</sup> Rep. Joanna McClinton Remarks (Oct. 18, 2021), <https://s3.us-east-2.amazonaws.com/pagopvideo/634363247.mp4>.

Without question there are parts of both LRC Final Plan Maps that some community members, including *amici*, might prefer to see drawn differently. There is evidence of deference to incumbents from both parties in the LRC Final Plan Maps, an expected outcome when party leaders provide four of five commission votes. While *amici* support legislation that would prohibit districts drawn to advantage or disadvantage any candidate, there is at present nothing in Pennsylvania law to prohibit deference to incumbents so long as legal criteria are not subordinated.

The LRC Final Plan reflects legal metrics of compactness, contiguity and as few split jurisdictions as possible, while enhancing minority representation and providing far more hope of free and equal elections—not partisan bias.

**D. The LRC Final Plan Does Not Impermissibly Split Specific Jurisdictions**

The Pennsylvania Constitution mandates that the Commonwealth’s legislative districts “shall be composed of compact and contiguous territory as nearly equal in population as practicable” and that “[u]nless absolutely necessary no county, city, incorporated town, borough, township or ward shall be divided in forming either a senatorial or representative district.” Pa. Const. Art. II Sec. 16. Thus, while minimization of jurisdictional splits is one factor in determining the constitutionality of a proposed reapportionment, it must be balanced against the

competing principles of geographic contiguity, compactness, and population equality. As this Court has observed:

In the Pennsylvania redistricting scheme, the LRC has a constitutional duty to formulate a Final Plan that complies with law. Considerable discretion is reposed in the LRC to accomplish this task, ***which requires a balancing of multiple mandates*** regarding decennial districting, derived from federal and state law, most of which are of organic, constitutional magnitude. The central difficulty of the LRC's task arises not only because of the political and local interests that are affected by any change in the existing scheme, but also because ***accommodating one command can make accomplishing another command more difficult.***

*Holt v. 2011 Legislative Reapportionment Comm'n*, 614 Pa. 364, 408 (2012) (“*Holt I*”).

As the Court recognized, these constitutional principles are sometimes at odds. For example, minimizing split jurisdictions can have a negative impact on equality of population.<sup>8</sup> Further, prioritizing split jurisdictions over other metrics can work in opposition to the constitutional requirement for free and equal elections and can also work to the detriment of minority representation. *See infra* II.E.

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<sup>8</sup> Nordenberg Rpt. at 7 (citing *Holt I*, 614 Pa. at 408).

No map can create zero jurisdictional splits and still meet the remaining constitutional requirements.<sup>9</sup> Further, while Mr. Benninghoff objects to the LRC House Plan because it proposes specific jurisdictional splits that purportedly are not “absolutely necessary,” this argument misses the point. There is no constitutional requirement that the LRC demonstrate that it is “absolutely necessary” to split a specific municipality. Rather, in determining the constitutionality of proposed jurisdictional splits, “the Court’s focus necessarily must be on the *plan as a whole* rather than on individual splits and districts.” *Holt v. 2011 Legislation Reapportionment Comm’n*, 620 Pa. 373 (2013) (“*Holt II.*”)

Viewed as a whole, the LRC Final Plan outperforms the current House and Senate maps by substantially reducing the number of overall municipal splits.<sup>10</sup> The current House map creates 221 county splits, compared with only 186 splits in the 2021 LRC Final House Map.<sup>11</sup> Similarly, the current Senate map creates 53 county splits compared with only 47 splits in the 2021 LRC Final Senate Map.<sup>12</sup>

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<sup>9</sup> *See, e.g.* Nordenberg Rpt. at 6 (noting that, to meet the principle of population equality, the City of Philadelphia must be divided into a minimum of 23 House districts and seven Senate seats).

<sup>10</sup> The analysis of splits, metrics, like all relevant metrics, is intended to help ensure fair representation. Metrics are a means to that end, not an end in and of themselves.

<sup>11</sup> *See, e.g.*, Nordenberg Rpt. at 71.

<sup>12</sup> *Id.* at 70.

These reductions are not just a means unto themselves, they ensure that community representation is not diluted across district lines.

Mr. Benninghoff argues that one reason for extreme Republican advantage in the current redistricting maps is that Democrats are “highly clustered in dense city areas” that lead to an “inefficient distribution of votes.” Benninghoff Br. at 14-15. While Mr. Benninghoff would have this court believe that packing Democratic votes within city lines is an unavoidable consequence of a kind of “natural” political geography, the truth is that refusing to connect city voters with the surrounding areas that make up the greater metropolitan community serves only to entrench Republican partisan advantage. These municipal boundaries, many of which were created long before the advent of the automobile<sup>13</sup>, are often not a guiding factor in the day-to-day lives of citizens, and communities of all kinds regularly can and do cross political boundaries. In the absence of any evidence that the splits proposed in the LRC Final Plan is insufficiently compact or contiguous, the Plan should not be struck down for creating districts that both reflect the nature of modern metropolitan communities and seeking to alleviate baked-in partisan advantage.

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<sup>13</sup> *See, e.g.*, PHILADELPHIA CONSOLIDATION ACT, Act of Feb. 2, 1854, P.L. 21, No. 16 (setting boundaries of City of Philadelphia to be coterminous with the County of Philadelphia).

Petitioners also allege that the LRC Final Map splits are impermissibly motivated by partisanship. Benninghoff Br. at 28. As discussed *supra*, this argument fails as a matter of law. While *amici* continue to support legislative efforts to create a fairer, more principled, and less partisan reapportionment process, such action is not at issue in this matter. Weighing the jurisdictional splits created by the LRC Final Plan against constitutional precedent, there is no evidence to suggest that the LRC splits violate the principle of absolute necessity.

**E. The LRC Final Plan Properly Prioritizes Minority Representation**

Communities of color are, by far, the fastest growing segment of Pennsylvania's population.<sup>14</sup> From 2010 to 2020, Pennsylvania's total population grew by more than 300,000 residents, albeit at very different rates in different regions and among different racial and ethnic groups.<sup>15</sup> Over that period, Pennsylvania's non-white population increased by more than 841,000 while the white population declined by approximately 541,000, meaning that there was a net

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<sup>14</sup> Pennsylvania's Asian population grew by 46% between 2010 and 2020, and its Hispanic and Latino population grew by 45% in that same period. U.S. Census Bureau, *Pennsylvania Population Hit 13 Million in 2020* (Aug. 25, 2021), <https://www.census.gov/library/stories/state-by-state/pennsylvania-population-change-between-census-decade.html>. Compare also *id.* (26.5% of Pennsylvania's 2020 population of 13 million was non-white and/or Hispanic) with 2010 Census: Pennsylvania Profile (reporting that 23.7% of Pennsylvania's 2010 population of 12.7 million were non-white and/or Hispanic), [https://www2.census.gov/geo/maps/dc10\\_thematic/2010\\_Profile/2010\\_Profile\\_Map\\_Pennsylvania.pdf](https://www2.census.gov/geo/maps/dc10_thematic/2010_Profile/2010_Profile_Map_Pennsylvania.pdf).

<sup>15</sup> *Id.*

shift of approximately 1.3 million voters toward a less-white Pennsylvania now as compared to the last redistricting cycle.<sup>16</sup> The most recent census data shows that Black, Indigenous, Latino, and AAPI communities account for 26.5% of Pennsylvania’s total population of 13 million people.<sup>17</sup> Unfortunately, this widespread diversity is not reflected in the General Assembly. Although more than one in four Pennsylvanians is a racial or ethnic minority, as of 2020, the Pennsylvania General Assembly was 90% white (as well as 73% male).<sup>18</sup>

Strong evidence before the LRC—to say nothing of practical experience—shows that whites in many parts of the Commonwealth vote as a block against the preferred candidates of non-white communities, and that minorities are thus constrained in their ability to elect state-level leaders of their choosing.<sup>19</sup> It is both morally imperative and legally required under the VRA and Pennsylvania Constitution that Pennsylvania’s House and Senate district maps evolve with the

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<sup>16</sup> Dr. Matt Barreto, *Voting Rights Act Compliance in Pennsylvania 2* (Jan. 7, 2022) (“Barreto Presentation”), <https://www.redistricting.state.pa.us/resources/Press/2022-01-14%20Barreto%20Testimony.pdf>.

<sup>17</sup> U.S. Census Bureau, *Pennsylvania Population Hit 13 Million in 2020* (Aug. 25, 2021), <https://www.census.gov/library/stories/state-by-state/pennsylvania-population-change-between-census-decade.html>.

<sup>18</sup> National Conference of State Legislatures, *State Legislator Demographics: Pennsylvania* (Dec. 1, 2020), <https://www.ncsl.org/research/about-state-legislatures/state-legislator-demographics.aspx> (last visited Mar. 9, 2022).

<sup>19</sup> Barreto Presentation at 5 (“data across more than a dozen elections points to a clear pattern of racially polarized voting [in Pennsylvania.]”).

Commonwealth’s changing demographics. As Dr. Matt Barreto explained in testimony to the LRC, assuming each House district comprises 64,000 residents, the 2010 to 2020 decline in Pennsylvania’s white population “represents a loss of about 8.4 districts” while the increase in Pennsylvania’s minority population represents “roughly the equivalent of 13.1 *new* districts.”<sup>20</sup> “Thus statewide redistricting should consider these shifts in order to recognize the large population changes Pennsylvania experienced in the last decade, not just by region, but among minority voters who are considered a protected class under the VRA.”<sup>21</sup>

1. **The FDPA People’s Maps Process, Which Employed Extensive Public Input To Create Maps To Enhance Minority Representation, Provided Valuable Models For The LRC Maps.**

Minority representation in Harrisburg is essential to the vitality of our democracy, and was a topic of many community mapping conversations as we drew FDPA’s People’s Maps. Through the map-drawing process, we observed up close how two essential means of promoting minority representation exist in tension with each other. Expanding the number of districts in which minorities are a significant portion of the voting age population necessarily involves spreading minority populations across districts and thus will result in lower minority voting

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<sup>20</sup> Barreto Presentation at 2.

<sup>21</sup> *Id.*

age populations in the resulting districts.<sup>22</sup> At the same time, a larger minority voting age population within districts can result in lower overall representation in Harrisburg because it packs minorities into fewer districts and thus reduces the ability of minority populations to form voting coalitions in districts where their numbers are smaller. *Id.* In other words, creating “safe” districts for minority representation stands in tension with maximizing minority representation.

The FDPA mapping process began with a contest, inviting citizen mappers to share their best efforts at drawing maps that reflect the criteria that were embedded in the Legislative and Congressional Redistricting Act (LACRA).<sup>23</sup> Mapping experts helped select the best of these, and ideas and solutions from winning maps were incorporated creating initial draft maps, after which communities across PA were invited to meet, discuss and offer ideas and feedback as the new maps were revised.

FDPA hosted three statewide town halls on mapping as well as a forum Mapping toward Racial Equity, that helped clarify the historical importance and

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<sup>22</sup> See, e.g., Brennan Center for Justice, *Does the Anti-Gerrymandering Campaign Threaten Minority Voting Rights* (Oct. 10, 2017) <https://www.brennancenter.org/our-work/analysis-opinion/does-anti-gerrymandering-campaign-threaten-minority-voting-rights>; Kim Soffen, *How racial gerrymandering deprives black people of political power* (June 9, 2016) <https://www.washingtonpost.com/news/wonk/wp/2016/06/09/how-a-widespread-practice-to-politically-empower-african-americans-might-actually-harm-them/>.

<sup>23</sup> SB 222 and HB 22.

complex legal framework for Voting Rights Section 2 districts. Local coordinators in every part of Pennsylvania elicited input from a wide mix of stakeholders, including city administrators, township supervisors, county commissioners, local press, academics, local chapters of the League of Women Voters, NAACP, denominational action committees, and dozens of local and statewide advocacy groups. One clear principle governed the process: when in doubt, ask local residents.

Throughout the process, key values were constantly held in tension, including representation for racial and language minorities; compactness; minimizing splits to counties and municipalities where possible; respect for communities of interest, as defined by school districts and local residents; and reduction in partisan bias. How to maximize representation for Black and Brown communities was of great importance in the process. The House and Senate drafts include input from Black and Brown community leaders in key parts of the commonwealth. The House map also incorporates unity maps developed by Pennsylvania Voice and the more than forty Pennsylvania organizations they partner with. FDPA mappers also searched the commonwealth for places where minority influence could be maximized.

FDPA's experience in creating the People's Maps showed that any good map will require cycles of collaboration, compromise, review and revision. There

is no perfect final map. There is no map that will please everyone completely. We believe that FDPA's People's Maps are the first of their kind in the Commonwealth of Pennsylvania: house and senate maps that reflect the hopes and determination of Pennsylvanians who believe in government of, by and for the people.

The resulting People's Maps are far more compact, have far fewer split counties and municipalities, and far better responsiveness metrics. They are far more reflective of voters' wishes regarding geographic boundaries and communities of interest, and do a far better job of keeping school districts intact. They also provide greater opportunity for racial and language minority voters to elect candidates of their choice.

The People's Maps project met the current number of majority-minority Senate districts (five) and surpassed that for the House, with 28 majority-minority districts (up from 25).<sup>24</sup> However, FDPA also paid close attention to crossover

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<sup>24</sup> Spotlight Pennsylvania, *See how the final Pennsylvania state House map scores in every key area*, (Feb. , 2022) <https://www.spotlightpa.org/news/2022/02/pennsylvania-redistricting-final-state-house-map-analysis-score/>.

districts<sup>25</sup> and influence districts<sup>26</sup>. A district need not always be super-majority Black or Hispanic to elect a Black or Hispanic legislator. In fact, insistence on a numerical majority of minority voting age population can prevent a minority group from having influence in a second nearby district, and thereby reduce the minority group's total voting strength.<sup>27</sup>

The LRC House map incorporated much of what was suggested in the Unity Maps and the People's Map, but also provided influence districts in places FDPA mappers had not identified.

## 2. **The LRC House Plan Prioritizes Minority Representation.**

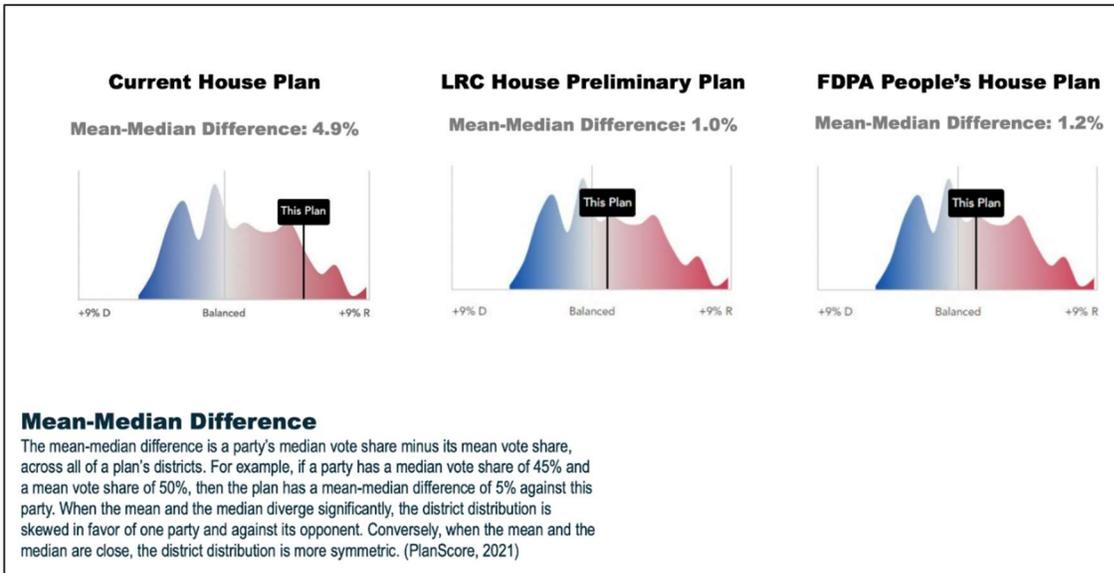
Our analysis of the LRC House plan shows that it significantly and appropriately reduces the partisan bias baked into the current House districting plan.

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<sup>25</sup> *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) (“[A] crossover district one in which minority voters make up less than a majority of the voting-age population. But in a crossover district, the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate”).

<sup>26</sup> *Id.* (an “influence district” is one “in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected”).

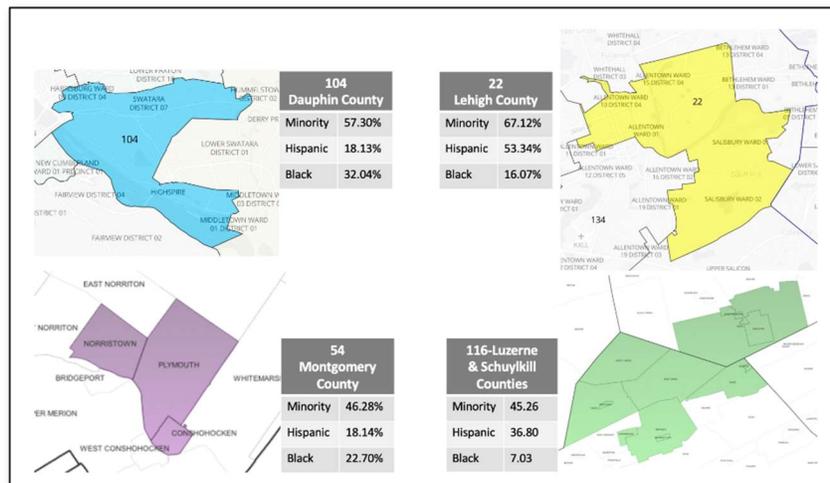
<sup>27</sup> Dr. Matt Barreto, *Assessment of Population Change and Voting Patterns In Pennsylvania* 9 (Jan. 14, 2022) (presentation to LRC), <https://www.redistricting.state.pa.us/resources/Press/2022-01-14%20Barreto%20Presentation.pdf>.



The LRC Final Plan appropriately prioritizes minority representation, and does so consistent with state and federal law. When circumstances permitted the LRC to do so, and after ensuring compliance with all aspects of state and federal law, the LRC fashioned districts to create additional opportunities beyond the minimum requirements of the Voting Rights Act, positioning voters in racial and language minority groups to influence the election of candidates of their choice. Going beyond these minimum requirements not only is consistent with the Voting Rights Act, but also is consistent with, and possibly required by, both the Free and Equal Elections Clause and the Racial and Ethnic Equality Clause of the Pennsylvania Constitution. When able to do so, the LRC team sought to create minority opportunity and influence districts without an incumbent, so as to provide the greatest potential for racial and language minority voters to influence the election of candidates of their choice. Again, the LRC did so while being mindful

of and adhering to the traditional redistricting criterial of Article II, § 16 and other constitutional mandates.<sup>28</sup>

The LRC Final Plan’s successes include the creating of several new minority districts, including 22 (Leigh County), 54 (Montgomery County), 104 (Dauphin County), and 116 (Lazerne and Schuylkill Counties).



Mr. Benninghoff claims that the Final Plan “systematically divides and dilutes minority communities.” Benninghoff Br. at 78. But the same maps Petitioner points to show that this argument against “cracking” is a thinly disguised argument for diluting minority votes through packing.

Mr. Benninghoff particularly protests that the LRC Final Plan splits the votes of minorities by splitting certain cities between House districts. Benninghoff Br. at 25-32. For example, Mr. Benninghoff points to the City of Reading, which has a 64% Hispanic voting age population, and is divided into three House districts

<sup>28</sup> Nordenberg Rpt. at 45.

with Hispanic voting age populations of 33.2% (HD 126), 51.1% (HD 127), and 34.4 (HD 129), respectively. *Id.* at 29-30. Mr. Benninghoff’s preferred approach would reduce the Reading Hispanic community’s voting strength by packing Hispanic voters into a single minority-*supermajority* district. *Id.* at App’x A page 61. Petitioner’s preferred map would hurt, not help, minority representation by preventing minority voters from having influence in other nearby districts. The LRC Map not only creates one Reading-area district in which Hispanic voters are a majority, it also creates two neighboring districts in which Hispanics are approximately one third of the voting age population and where this significant voting share likely will be able to influence elections and elected leaders.<sup>29</sup> This and other influence districts incorporated the Final Plan are vital to the ability of Hispanics and other non-white communities to elect their preferred representatives to the General Assembly.

Petitioner cherry-picks certain public comments to suggest that the Final Plan was adopted over the objection of minority communities. In fact, the record shows substantial minority support for the Final Plan. For example, in opening

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<sup>29</sup> When considering minority-performing districts, courts will often look at performance analysis to assess if the district will “perform” consistent with minority voting preferences. There is no magic threshold: where there are large Black populations, courts have upheld districts which are at least 35% minority. *See Page v. Bartels*, 144 F. Supp. 2d 346, 353 (D.N.J. 2001) (upholding new district with a 35% Black voting age population as one that would give “African Americans [] a reasonable opportunity to elect candidates of their choice”).

comments on the February 4 voting meeting, Chairman Nordenberg shared a letter received from three Latino members of the House, Representatives Danillo Burgos, Angel Cruz and Manuel Guzman:

We applaud the work that [the LRC] ha[s] done to ensure these communities, which have been underrepresented in the legislature for far too long, are fairly represented. . . .

The LRC's Preliminary Plan is responsive to [the] growth of the Latino population in many important ways. Statewide, this plan creates nine districts in which Latino communities should be able to elect their candidates of choice. Three of those districts will be open seats with no incumbent member, meaning a Latino candidate of choice would not need to overcome the power of incumbency in order to be elected. . . .

Latino representation is lacking in Pennsylvania, particularly when you consider the growth that has occurred across Pennsylvania over the last decade. The Preliminary Plan for House Districts makes major strides in correcting this injustice and restoring fairness in representation in Pennsylvania. As Latino members of the House, we embrace the goal of the LRC and applaud their work. We look forward to serving in a more diverse legislature.

Representative Donna Bullock, Chair of the Pennsylvania Legislative Black Caucus, expressed similar sentiments in a letter to Chairman Nordenberg and the LRC:

I have watched the reapportionment process closely. I am truly impressed by the process . . . and the commitment to fairness and transparency that you have demonstrated in the creation of a preliminary map. I am pleased to fully endorse this preliminary plan [as] responsive to the

growth of communities of color across the Commonwealth.

In addition to preserving and expanding districts in which a racial minority group makes up the majority of the population, the preliminary plan takes the important step of including coalition districts.

These districts, in which diverse communities of color make up a majority or plurality of the population, recognize the commonalties of Black, Latino, Asian and Indigenous Pennsylvanians and will allow these communities to fully realize their political power. . . .

I want to thank you . . . for your tireless efforts in the redistricting-cycle and for recognizing that the diversity of this Commonwealth is a strength. Your efforts have led to a plan that will uplift – rather than dilute – our voices.<sup>30</sup>

At the end of the day, Petitioner’s claims of partisan unfairness ring hollow, and his arguments about minority disempowerment are just wrong. The LRC Final Plan House Map favors Republicans, with 104 Republican-leaning districts, and 99 Democratic-leaning districts.<sup>31</sup> Although that is significantly less imbalanced than

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<sup>30</sup> Nordenburg Report at 65; *see also* Written Testimony of Salewa Ogunmefun, Exec. Dir., Pennsylvania Voice (Jan. 6, 2022) (“We believe these maps are a good starting point, an improvement over the maps of the past 30 years, and reflect a commitment by the Legislative Reapportionment Commission to take seriously the cause of racial equity and produce maps that are truly fair to all Pennsylvanians.”), available at <https://www.redistricting.state.pa.us/resources/Press/S%20Ogunmefun%20LRC%20Testimony%20Jan%206th.pdf>.

<sup>31</sup> *See, e.g.*, Jonathan Lai & Julia Terruso, *Pennsylvania Republicans are going on the attack against a new map for state House districts*, Phil. Inquirer (Dec. 22, 2021), <https://www.inquirer.com/news/pennsylvania-redistricting-state-house-map-nordenburg-republicans-20211222.html>; Christopher Warshaw, *An*

the current map of 118 Republican-leaning districts, it is not a sign of unfairness or bias. As Chairman Nordenberg noted, “The map itself is a map that favors Republicans.... It doesn’t favor them as much as the current map does, but that is a product of the changing demographics.”<sup>32</sup>

**F. The LRC Final Plan Appropriately Balances Equal Population**

Population equality is the only metric on which the LRC Final Plan performs somewhat less well than the current map. *See* Nordenberg Rpt. at 68. The Final Plan’s maximum overall deviation among House districts—that is, the deviation between the largest district to the smallest district—is 8.65%, as compared to the 7.87% overall deviation under the current plan. *See* LRC.R-RTab.42b; Nordenberg Rpt. at 71. Petitioner contends that this overall deviation renders the Final Plan unconstitutional, Benninghoff. Pet. at 38-41, but overstates both the relevant law and the facts.

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*Evaluation of the Partisan Fairness of the Pennsylvania Legislative Reapportionment Commission’s Proposed State House Districting Plan 4* (Jan. 7, 2022) (three different analyses of the partisan fairness of the proposed State House plan “indicate that the proposed map is fair with just a small pro-Republican bias”), <https://www.redistricting.state.pa.us/resources/Press/2022-01-14%20Warshaw%20Testimony.pdf>.

<sup>32</sup> Jonathan Lai & Julia Terruso, *Pennsylvania Republicans are going on the attack against a new map for state House districts*, Phil. Inquirer (Dec. 22, 2021), <https://www.inquirer.com/news/pennsylvania-redistricting-state-house-map-nordenberg-republicans-20211222.html>.

While Section 16 requires districts to be “as nearly equal in population as practicable,” this court has held that the Pennsylvania Constitution does not “require that the overriding objective of reapportionment [be] equality of population.” *Holt I*, 614 Pa. at 443. “Rather, the Constitution lists multiple imperatives in redistricting, which must be balanced.” *Id.* To the extent the LRC Final Plan’s population over deviation is greater than the last redistricting cycle, the Commissioner explained that this increase was the result of prioritizing other constitutionally-mandated redistricting criteria while also abiding by other state and federal law mandates. Nordenberg Rpt. at 68. As the Chairman correctly observed: “[I]t has long been recognized that performing better on some metrics often requires sacrificing performance on other metrics.” *Id.* (also noting that the Benninghoff Amendment performs better on population deviations and municipal splits by sacrificing other metrics and is more biased in favor of Republicans according to PlanScore, a source of peer-reviewed measures of partisan fairness); *see also, e.g., Holt I*, 614 Pa. at 408.

Notably Mr. Benninghoff discusses only the maximum overall deviation of the Final Plan, and ignores the 2.1% average deviation of districts from their ideal population—an average deviation that is nearly identical to the 2.0% average deviation of the current House plan. *See Nordenberg Rpt.* at 71. This is strong evidence that the Final Plan is entirely consistent with Section 16’s requirements.

*See, e.g., Gaffney v. Cummings*, 412 U.S. 735, 751 (1973) (noting that a plan with a maximum deviation “of only about 8%” and an “average deviation from the ideal House district [of] about 2%” showed only “minor population variations among districts”).

The LRC Final Plan’s population equality deviation remains consistent with both United States and Pennsylvania Supreme Court precedent. In *Brown v. Thomson*, the United States Supreme Court held that “an apportionment plan with a maximum population deviation under 10% falls within [the] category of minor deviations” that need not be specially justified by the state. 462 U.S. 835, 842 (1983) (citing cases) (sustaining 16% average deviation); *see also Voinovich v. Quilter*, 507 U.S. 146, 161 (1993); *White v. Regester*, 412 U.S. 755 (1973) (sustaining 9.9% maximum deviation); *Gaffney*, 412 U.S. at 735 (sustaining 7.83% maximum deviation); *Swann v. Adams*, 385 U.S. 440, 444 (1967) (“De minimis deviations are unavoidable[.]”).

While this Court has not explicitly taken up the Supreme Court’s 10% threshold, it has recognized that there is “obviously [] discretion vested in the LRC to determine what is most practicable [in achieving population equality].” *Holt II*, 620 Pa. at 418; *see also Holt II* at 394–95 (sustaining 7.88% deviation for the House and 7.96% for the Senate); *Albert v. 2001 Legislative Reapportionment Comm’n*, 567 Pa. 670, 680 (2002) (sustaining 3.98% maximum deviation for the

Senate and 5.54% maximum deviation for the House). Plainly, it is within the LRC's discretion to increase population deviation by less than one percent in order to achieve greater adherence to other constitutional criteria, as well as federal law.

Further, the LRC Final Plan population deviation percentage is in line with deviations in other states. In the 2010 redistricting process, fifteen states using single-member House districts had deviations over 8.65%. Three had deviations over 10%. Additionally, sixteen states using single-member Senate districts had deviations over 9%, with three having deviations of 10% or more.<sup>33</sup>

Both Mr. Benninghoff and Mr. Roe object to population deviations in the House and Senate maps, suggesting that the Final Plan's maximum population variation shows partisan intent. This is weak sauce. As discussed *supra*, there is no basis for the Petitioners' arguments that the LRC Final Plan is impermissibly political. Without such justification, the fact that the LRC Final Plan increased population deviation levels by less than one percent above the previous map cannot by itself be grounds to find the LRC Final Plan constitutionally deficient.

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<sup>33</sup> See National Conference of State Legislatures, *2010 Redistricting Deviation Table*, <https://www.ncsl.org/research/redistricting/2010-ncsl-redistricting-deviation-table.aspx> (last accessed Mar. 9, 2022).

**G. Mr. Benninghoff's Request that the 2022 Elections Be Conducted Under the Current Districting Maps Is Self-Serving and Baseless.**

Mr. Benninghoff asks this Court to not only throw out the LRC Final Plan, but to order that the fast-approaching 2022 elections be conducted using the current 2012 plan districts. Benninghoff. Pet. at 85. There is no basis for Mr. Benninghoff's request that this Court carry forward the current extreme partisan gerrymander of the 2012 plan into another election cycle.

Pennsylvania's current district maps are, of course, based on census data that is more than a decade old. They reflect a Pennsylvania population that was whiter and more rural than Pennsylvania is today.<sup>34</sup> They also reflect an extreme partisan gerrymander that hands Republicans 15 additional House seats and 4.25 additional Senate seats in a 50-50 election.<sup>35</sup> In fact, the same process by which the General Assembly maps were created resulted in a U.S. congressional districting map that was so gerrymandered that this Court declared that it violated the Pennsylvania Constitution and enjoined its use. *LWV II*.

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<sup>34</sup> The percentage of the Pennsylvania population that identifies as white decreased by 6.3% between 2010 and 2020. U.S. Census Bureau, *Pennsylvania Population Hit 13 Million in 2020* (Aug. 25, 2021) <https://www.census.gov/library/stories/state-by-state/pennsylvania-population-change-between-census-decade.html>.

<sup>35</sup> PlanScore, 2014-2020 Redistricting Plan: State Houses: Partisan Bias (7.5% pro-Republican partisan bias under current plan, and 4.3% pro-Republican bias under 2002 plan), <https://planscore.campaignlegal.org/pennsylvania/#!2014-plan-statehouse-pb> (last visited Mar. 10, 2022).

The Final Plan hews to the constitutionally required redistricting criteria far more closely than the 2012 plan. For example, the 2022 House plan splits fewer counties and municipalities, and splits them fewer times than the 2012 plan.<sup>36</sup> Although the two plans have nearly equal average population deviations, the partisan bias of the 2022 plan is much reduced.<sup>37</sup> The Senate plan also reduces the number of county splits, with only a small increase in the number of municipalities split, while also reducing partisan bias.<sup>38</sup> And, as Chairman Nordenberg noted, the Final Plan makes these improvements while also “providing more opportunities for Pennsylvania’s growing minority communities to elect representatives of their choice, consistent with the Voting Rights Act, the Free and Equal Elections Clause, and the Racial and Ethnic Equality Clause.”<sup>39</sup>

As this Court has recognized, every electoral map involves tradeoffs. *Holt I*, 614 Pa. at 443. The LRC Final Plan appropriately balances competing interests and while also complying with both state and federal law. Even if the Final Plan is arguably an imperfect solution, it is inarguably a better solution than the 2012 plan.

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<sup>36</sup> Nordenberg Rpt. at 71.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 70.

<sup>39</sup> *Id.* at 71.

## CONCLUSION

In 2019 two former Republican governors, Governor Arnold Schwarzenegger of California and Governor Larry Hogan of Maryland submitted an amicus brief to the US Supreme Court assessing the harm of partisan gerrymandering.

From their experience in two very different states, they argued that “gerrymandering results in legislative bodies that are more extreme than the electorate as a whole” and that “partisan gerrymandering dilutes the voting strength of moderate voters.” They described the ways that distorted districts created unresponsive, unaccountable legislatures:

Extreme gerrymandering prevents government from functioning properly and can deprive citizens of their constitutional right to “influenc[e] the passage . . . of laws. *See ERR Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961). Partisan gerrymandering thus disenfranchises voters twice: first, by facilitating the election of representatives whose views are more extreme and partisan than the population as a whole and second, by potentially creating one-party rule or, alternatively, legislative gridlock.<sup>40</sup>

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<sup>40</sup> Brief For Governors Arnold Schwarzenegger And Lawrence Joseph Hogan Jr. As Amici Curiae In Support Of Appellees, Nos. 18-422, 18-726, *Rucho v. Common Cause* (S. Ct. filed Mar. 8, 2019), available at <https://www.supremecourt.gov/DocketPDF/18/18->

While reforms proposed by the Redistricting Reform Commission and by organizations including LWVPA and FDPA were not enacted, the LRC, under the leadership of Chairman Nordenberg, was far more transparent than has been the case in decades past. The final maps reflect legal metrics of compactness, contiguity and as few split jurisdictions as possible, while enhancing minority representation and providing far more hope of free and equal elections.

\* \* \*

For all of these reasons, Amici curiae respectfully urge the Court to adopt the Final Plan promulgated by the 2021 Legislative Reapportionment Commission.

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**CERTIFICATE OF COMPLIANCE**

It is hereby certified that this brief is in compliance with the word count limitations of Pennsylvania Rule of Appellate Procedure 2135 because this brief does not exceed 7,000 words as calculated by the Word Count feature of Microsoft Word 2010, excluding the materials specified in Pa. R. A. P. 2135(b).

Dated: March 11, 2022

/s/ John P. Lavelle, Jr.  
John P. Lavelle, Jr.

**CERTIFICATE OF COMPLIANCE**

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

Dated: March 11, 2022

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