

IN THE SUPREME COURT OF PENNSYLVANIA

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DOCKET NO. 12 WM 2022

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EDWARD J. KRESS

v.

2021 LEGISLATIVE REAPPORTIONMENT COMMISSION

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**BRIEF OF SENATOR JAY COSTA AS LEADER OF THE SENATE  
DEMOCRATIC CAUCUS AND COMMISSIONER OF THE  
LEGISLATIVE REAPPORTIONMENT COMMISSION IN SUPPORT OF  
THE 2021 LEGISLATIVE REAPPORTIONMENT COMMISSION**

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Appeal from Matter Before the  
2021 Legislative Reapportionment Commission

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*On behalf of Senator Jay Costa  
Amicus Curiae*

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## I. INTEREST OF AMICUS CURIAE

Senator Jay Costa is an elected member of the Pennsylvania Senate, and thus has an interest in ensuring that the Reapportionment Plan, under which he must run for reelection for the next decade, comports with the Pennsylvania Constitution, including the requirement that the Plan must avoid diluting the votes of Pennsylvania's voters. Senator Costa also has an interest in ensuring that the Pennsylvania law that applies to the drawing of state legislative districts fully protects the votes of Pennsylvania's citizens from being diluted for partisan advantage. Senator Costa asserts these interests as a member of the Legislative Reapportionment Commission ("LRC").

He thus has an interest in the outcome of the proceedings before this Court. He seeks to support the LRC and its Final Plan. Senator Costa, as *amicus curiae*, file this brief pursuant to Pa. R.A.P. 531(b)(1)(i). He discloses that no other person or entity other than *amicus curiae* or counsel paid, in whole or in part, for the preparation of this brief or authored, in whole or in part, this brief. *See* Pa. R.A.P. 531(b)(2).

## II. ARGUMENT

Article II, § 16 of the Pennsylvania Constitution sets forth the traditional redistricting criteria that state legislative districts must satisfy to be constitutionally valid. That section provides that the districts must be "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.” Several parties before this Court insist that these criteria are to be read in isolation, as the only considerations for state legislative districts.

Article II, § 16 is not, however, the only provision of the Pennsylvania Constitution that is relevant to the creation of legislative districts. Article I, § 5 provides that “[e]lections shall be free and equal.” This Court has held that Article I, § 5 includes the right of voters not to have their votes diluted in the pursuit of unfair partisan advantage. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 814 (Pa. 2018) (“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 Court reaffirmed the Pennsylvania Constitution’s prohibition on vote dilution with its March 9, 2022 decision in *Carter et al. v. Chapman*, \_\_A.3d\_\_, 7 MM 2022, slip op. at 23 (Pa. filed Mar. 9, 2022). The Court made clear that “[p]artisan fairness metrics provide tools for objective evaluation of proposed [] districting plans to determine their political fairness” so that courts can ensure that the approved map avoids vote dilution and thus complies with Article I, § 5’s guarantee. *Id.* The Court acknowledged that, for a map to be constitutional, it need not absolutely minimize splits or absolutely

maximize compactness; tradeoffs exist even among the neutral floor criteria set forth in Article II, § 16. *Id.* at 28-29. This Court analyzed the proposed Congressional maps holistically, both in assessing the traditional criteria and partisan fairness. *Id.* at 33, 35. Thus, the inquiry is not a simple exercise of minimizing splits and maximizing partisan fairness; rather because some of these criteria “work at cross-purposes to each other,” the exercise is instead one of balancing. *Id.* at 39.

Various petitioners have asked this Court to read Article II, § 16 in isolation and to assess the LRC’s Final Plan only in terms of its number of splits, or of its overall population deviation. This Court has consistently made clear, however, that the Pennsylvania Constitution must be read as an integrated whole. *Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1126 (Pa. 2014). When interpreting the Constitution, this Court has held that “effect must be given to all of its provisions whenever possible.” *Robinson Twp., Washington County v. Commonwealth*, 83 A.3d 901, 946 (Pa. 2013) (quoting *Cavanaugh v. Davis*, 440 A.2d 1380, 1382 (Pa. 1982)); *see also Jubelirer v. Rendell*, 953 A.2d 514, 528 (Pa. 2008). In considering the Constitutional requirements here, both Article II, § 16 Article I, § 5 must be given effect.

Nothing in the text of Article I, § 5 limits its application to federal legislative districts. Indeed, this Court has interpreted Article I, § 5 to apply outside of

redistricting contexts entirely. *See Working Families Party v. Commonwealth*, 209 A.3d 270, 282 (Pa. 2019) (analyzing the Election Code’s anti-fusion balloting provisions under Article I, § 5). It is thus clear that the constitutional prohibition on vote dilution applies more broadly than to Congressional districts alone. The constitutional prohibition on vote dilution also applies to state legislative districts. Senator Costa, as *amicus curiae*, urges this Court formally to apply *League of Women Voters* and *Carter*, and to hold that the guarantee of maps free of vote dilution in Article I, §5 applies not only to Congressional maps but also applies to state legislative maps. The Final Plan balances compliance with the neutral floor criteria of Article II, § 16 with the partisan fairness that Article I, § 5 requires.

### III. CONCLUSION

Based on the foregoing, Senator Costa supports the LRC’s Final Plan, which should be upheld.

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## **CERTIFICATE OF COMPLIANCE**

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.

/s/ Clifford Levine

CLIFFORD LEVINE



**CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing document was served upon all counsel of record on March 11, 2022, by this Court's electronic filing system.

/s/ Clifford Levine  
CLIFFORD LEVINE

## **CERTIFICATE OF LENGTH**

Pursuant to Pennsylvania Rule of Appellate Procedure 2135(a), I hereby certify that this brief has a word count of 857, as counted by Microsoft Word's word count tool.

s/ Clifford B. Levine  
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