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464 MD 2021 and additional consolidated case(s)

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 464 M.D. 2021

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 Bachunis; Tom DeWall; Stephanie McNulty; and Janet Temin,

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.

No. 465 M.D. 2021

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.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF HOUSE REPUBLICAN INTERVENORS KERRY BENNINGHOFF, MAJORITY LEADER, AND BRYAN CUTLER, SPEAKER, OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES IN SUPPORT OF PROPOSED CONGRESSIONAL REDISTRICTING MAP

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These cases are before the Court after a two-day bench trial on January 27 and 28, 2022, in which the Court heard expert witness testimony relating to various proposed congressional redistricting plans for the Commonwealth of Pennsylvania. The Pennsylvania General Assembly has drawn a map that fulfills all the traditional redistricting criteria. That map is on par with—if not better than—the previous map adopted by the Supreme Court in 2018 and the other maps submitted to this Court, in terms of equal population, compactness, and minimizing political subdivision splits. It also creates more competitive districts than any other map submitted to the Court.

Due to the infinite number of ways a congressional map can be drawn, and the competing criteria, there is no "best" or "optimal" map. But the map approved by the people's elected Representatives and Senators, which meets the traditional redistricting criteria, is a constitutional map and is demonstrably fair.

This Court is tasked with serving as a neutral decision-maker, not correcting some perceived inequity between the two major political parties. Because there are inherently political judgments involved in deciding between multiple potentially acceptable maps, the Court should credit the General Assembly's map, and reject the various arguments raised in these cases that effectively ask this Court to rig the map in one party's favor by assigning voters to districts on the basis of partisan affiliation. Drawing lines to negate a Republican tilt that results from the clustering

of Democratic voters in dense areas means drawing lines to benefit one political party over another. Such intervention would just be another form of gerrymandering and would subvert the separation of powers inherent to Pennsylvania's system of government.

With these realities in mind, the House Republican Legislative Intervenors respectfully submit the following proposed findings of fact and conclusions of law.

PROPOSED FINDINGS OF FACT

A. History and Development of H.B. 2146

1. It is the General Assembly's prerogative to redraw the state's congressional districts under Article I, § 4, of the United States Constitution and the Pennsylvania Constitution.

2. Consistent with its prerogative and duty under both the United States and Pennsylvania Constitutions, the House and Senate have passed House Bill ("H.B. 2146"), which redistricts the Commonwealth into 17 congressional districts.

3. H.B. 2146 was first introduced and referred to State Government Committee on December 8, 2021. *See* Bill History, attached as Exhibit E to Republican Legislative Intervenors' Opening Brief. The bill introduced, for what might be a first in the history of the Pennsylvania House, a plan proposed by a citizen and good-government advocate, Ms. Amanda Holt, in unaltered form. The State Government Committee selected Ms. Holt's proposal from among 19 submitted by

the public because, as Rep. Seth Grove indicated, it was drawn without political influence, met constitutional standards, limited the splits of townships and other municipalities, and offered districts that were compact and contiguous. 1.6.22 Grove Letter, Ex. A to Schaller Affidavit ("Grove Letter").

4. A total of 399 comments were received from citizens and numerous changes made based upon those requests. *See* Grove Letter. H.B. 2146 was amended (PN 2541) and reported from the State Government Committee on December 15, 2021. *See* Bill History.

5. Although changes were made, the resulting map was 95 percent the same as the map originally drawn by Ms. Holt in terms of population and surface area. Many of the changes that were made were to increase the compactness of specific districts or to address comments received during the process. In particular, certain changes were made to ensure communities of interest were kept whole and to address inclusion of certain communities within particular congressional districts at the request of citizens. *See* Grove Letter.

6. From the time the bill was amended in 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 House's proposed congressional plan. *See* Grove Letter.

7. 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 House Bill 2146. It received third consideration and final passage in the House on January 12, 2021.

8. The bill was referred to the Senate State Government Committee, which passed it on January 12, 2022. The Senate gave H.B. 2146 first consideration on January 18, 2022 and second consideration on January 19, 2022. The Senate passed H.B. 2416 on January 24, 2022. *See* Bill History.

9. Governor Tom Wolf ("Wolf") vetoed H.B. 2146 on January 26, 2022.

10. Because H.B. 2146 was passed in the Senate and has been approved by the full General Assembly, it represents the will of the people of Pennsylvania speaking through their elected Representatives and Senators. It is the only plan that has undergone a full, transparent, and democratic process.

B. H.B. 2146 Adheres to Traditional Redistricting Criteria

11. H.B. 2146 meets all traditional redistricting criteria – equal population, contiguity, minimization of county, municipal, and precinct splits, and compactness. None of the parties disputed that H.B. 2146 adheres to these traditional redistricting criteria.

12. On political subdivision splits, H.B. 2146 performs exceptionally well. It splits only 15 counties. *See* Schaller Affidavit, Exhibit 2, attached as Exhibit I to Republican Legislative Intervenors' Opening Brief.

13. H.B. 2146 splits only 16 municipalities – as low as any of the submitted plans. *Id.*

14. In addition, the range of precinct splits in the plans offered by parties and amici is from nine to 38. H.B. 2146 splits only nine precincts, the lowest of any plan by seven precincts. *Id.* at Exhibit 4.

15. On compactness, H.B. 2146 also performs well. The total range of average Polsby-Popper ("PP") scores in the various plans is from .28 to .40. (Barber Reb. Rep. at 8, Table 1.) House Bill 2146 has an average PP compactness score of .32 – near the middle. (*Id.*)

16. In addition, H.B. 2146 creates five competitive districts—more than any other plan. (Barber Rep. at 21, Figure 2; *see also* Tr. 359:14-24.) When analyzing districts that have a Democratic vote share of .48 to .52, a common range when analyzing competitive elections, H.B. 2146 creates five competitive seats. (Barber Reb. Rep. at 13.) Only one other plan comes close (that one creates four competitive seats), and most are between one and three. (*Id.*) Of the five competitive districts in H.B. 2146, *four* lean Democratic. (Barber Rep. at 19).

17. Applying the traditional redistricting criteria specifically to the Pittsburgh area, and to the other plans' treatment of Pittsburgh, considerations of compactness and minimizing boundary splits favor keeping Pittsburgh whole, because splitting Pittsburgh is not strictly necessary to achieve or advance any constitutionally enshrined redistricting criteria. (Tr. 365:5-22.) H.B. 2146 keeps the City of Pittsburgh within one congressional district.

18. Splitting Pittsburgh results in two Democratic-leaning seats, and likely still safe Democratic districts, evidencing a subordination of neutral redistricting criteria for partisan purposes. (Tr. 357:15-358:5.)

C. The Political Fairness of H.B. 2146

19. H.B. 2146 is a politically fair map, which does not subordinate political factors to traditional districting criteria, is fair to both parties, and produces competitive maps.

20. Pennsylvania's congressional delegation is currently represented by nine Democrats and nine Republicans.

21. H.B. 2146 is predicted, based upon a set of all statewide elections from 2012-2020, to result in 9-Democratic leaning seats and 8 Republican-leaning seats. (Barber Rep. at 23, Figure 3). The most common outcome in the 50,000 simulated maps generated by Dr. Barber, however, was only eight Democratic-leaning seats. *Id.* This means that H.B. 2146 creates one more Democratic-leaning seat than would

be expected in the most common result from drawing districts following traditional redistricting criteria. But both outcomes are in the heartland of the range of outcomes estimated by Dr. Barber's model.

22. At a district-by-district level, H.B. 2146 reflects partisan fairness consistent with the range of outcomes seen in simulated plans. (Tr. 367:9-15.) For each district, H.B. 2146 sits in the middle of the distribution of the simulations. (Barber Rep. at 23-24, Figure 4).

23. On other partisan fairness metrics, including mean-median, efficiency gap, and a uniform swing analysis, H.B. 2146 is demonstrated to be very nearly unbiased. Also, when comparing these metrics to a set of simulated plans that are drawn based only on traditional redistricting criteria and with no partisan data, H.B. 2146 appears more favorable to Democrats than the majority of the simulated plans. This further demonstrates that H.B. 2146 is fair. (Barber Rep. at 27-34, Figures 5-7).

24. Experts for other parties that all maps performed within a broadly reasonable range on traditional redistricting criteria. (Tr. 184:17-22; 231:9-15.)

D. Deficiencies of Alternative Plans

25. Multiple experts testified that their preferred plan was "best," but, as one expert witness acknowledged that there were as many opinions as experts. (Tr. 316:10-12.)

26. The Carter Petitioners' Map and the House Democrats Map deviate from the requirement of population equality. (Tr. 136:11-17.)

27. In deciding where to split political subdivisions as they created their map, the Gressman Petitioners did not consider communities of interest. (Tr. 219:18-21.)

28. In competitive districts, the maps from the Gressman Petitioners and the Governor were the most favorable to Democratic candidates when compared to the simulated maps that Dr. Barber generated. (Tr. 365:20-366:9.)

29. The Governor, House Democrat, and both Senate Democrat plans, as well as several of the plans submitted by amici (the Citizens Map/Draw the Lines map and the Ali map), split the City of Pittsburgh. (Barber Reb. Rep at 8-11).

30. Unlike H.B. 2146, which includes nine Democratic-leaning districts (as noted above), eight of the proposed maps include ten or more Democratic-leaning districts, which, according to the simulated plans that Dr. Barber generated, is not a typical outcome. (Barber Reply at 14-15.)

31. It is undisputed that no other plan other than H.B. 2146 was vetted and passed by both the Senate and House.

E. Testifying Expert Witnesses

1. Michael Barber (House Republicans)

32. Dr. Michael Barber ("Barber") testified that political geography, which he described as the spatial distribution of voters throughout a state or other political unit, is unavoidable in the drawing of boundaries. (Tr. 345:3-10.)

33. Dr. Barber specifically examined the political geography of Pennsylvania and concluded that partisan tendencies are not evenly distributed throughout the Commonwealth. (*See* Barber Rep. at 8, Figure 1.)

34. There are two intense areas of Democratic support in and around Philadelphia and Pittsburgh and in a few smaller and middle-sized cities. The rest of the Commonwealth tends to be more Republican-leaning, often heavily so. This natural political geography heavily impacts the ability of Democrats to translate votes into congressional seats. (Tr. 345:25-347:10.)

35. Dr. Barber testified that it would be misguided and likely ineffective to try to adjust maps for the existing distribution of partisan preferences. First, map-drawers might be "fighting the last war," as partisan distributions and preferences shift over time even within a given historical sample. Second, trying to adjust districts to control for partisan affiliations will often require subordination of traditional redistricting criteria. (Tr. 348:1-13.)

36. Dr. Barber conducted a simulation analysis that compared proposed maps with a set of 50,000 simulated maps, a common practice in redistricting and redistricting litigation. (Tr. 352:17-20.)

37. Dr. Barber identified the methodology for the algorithmic creation of simulated maps discussed in his reports.

38. The parameters of the simulation analysis conducted by Dr. Barber included only the traditional redistricting criteria, not partisan data. (Tr. 350:7-15.)

39. In Dr. Barber's main simulation, the model is unaware of any racial data. A secondary simulation that did feature racial data was later conducted to permit comparison of the two sets of maps on an apples-to-apples basis. (Tr. 350:16-24.)

40. The simulation analysis performed by Dr. Barber demonstrates that H.B. 2146 is predicted to result in nine Democratic-leaning seats and eight Republican-leaning seats using an index of statewide elections from 2012-2020, whereas the most likely outcome in his 50,000 simulated maps, created without using partisan data, is eight Democratic-leaning seats and nine Republican-leaning seats. (Barber Rep. at 23, Figure 3).

41. Use of an index of elections to predict the partisan outcomes of proposed plans is a common methodology employed by political scientists. (Barber Rep. at 15.)

42. In other words, the House Plan is *more* favorable to Democrats than the most likely outcome of 50,000 computer drawn maps using no partisan data.

43. Only one other expert prepared a simulation analysis,[1] and no expert included a simulation analysis disclosing the predicted partisan distribution of seats for the simulated plans. (*See* Barber Reb. Rep. at 20.)

44. Dr. Barber also examined the predicted seat share for the other maps submitted to the Court. (Barber Reb. Rep. at 15, Table 3.) He concludes that the House Democrats map is predicted to result in 11 Democratic-leaning seats and is an outlier because none of his 50,000 simulated plans generates this outcome. (*Id.* at 15.) There are eight plans that generate ten Democratic-leaning seats: Governor, Carter Petitioners, Gressman Petitioners, Senate Democrats 1 & 2, CCFD, Draw the Lines, and Ali Intervenors. (*Id.*) Although not an outlier, ten Democratic-leaning seats is a much more uncommon outcome in the simulation (*see* Barber Reb. Rep. at 14, Figure 4) and not in line with the most common outcome. (*Id.* at 20.)

45. There are four districts where the simulations generate both Republican-leaning and Democratic-leaning districts. These are the most competitive districts and have Democratic vote shares between .48 and .52. (*Id.* at 17.) The plans that predict ten Democratic-leaning seats universally create districts

[1] Dr. Duchin performed such an analysis, and supported selecting a map that was an "outlier" to putatively correct for the naturally occurring partisan effects of Pennsylvania's political geography. (Tr. 313:5-314:3.)

that are at the most Democratic edge of the simulations in these competitive districts. (*Id.*)

46. For example, in these four middle competitive districts, the Governor's plan draws districts in the 97th, 98th, 99th, and 100th percentile of the simulations. (*Id.* at 17-18, Figure 5.) Even worse, all four of the middle, most competitive districts in the Gressman Petitioners' plan are in the 100th percentile. (*Id.*) "This indicates that in nearly 100% of cases (in 49,983 of the 50,000 simulations) the districts where partisan control is most up for grabs were more Democratic in the Gressman plan than the simulations." (*Id.*) Similar results are seen for the other plans that generate ten Democratic-leaning districts. (*Id.* at 19, Table 4.) Thus, H.B. 2146 stands out as the least biased of all the plans submitted. (*Id.*)

47. Overall, when compared to the set of non-partisan simulations, nine of the plans are partisan outliers because in the most competitive districts these plans are extreme outliers: Governor, Carter Petitioners, Gressman Petitioners, Senate Democrats 1 & 2, House Democrats, CCFD, Draw the Lines, and Ali Intervenors. These plans are more favorable to the Democratic Party than nearly 100 percent of the simulations in these most highly competitive districts. (Barber Reb. Rep. at 23.)

48. Consistent with this analysis, in competitive districts, the maps proposed by Governor Wolf and the Gressman Petitioners were the most favorable

to Democratic candidates, corresponding with the 98th or 99th percentile of simulated maps, in terms of Democratic lean. (Tr. 365:20-366:9.)

49. Other partisan fairness metrics prove that H.B. 2146 is fair and will allow both parties the opportunity to translate their votes into seats.

50. Based on Dr. Barber's review and analysis, H.B. 2146 is demonstrably fair when compared to the other submitted maps based upon partisan fairness metrics, including mean-median, efficiency gap, and a uniform swing analysis, despite the conclusions of other experts, even though these metrics do not take into account the political geography of the state. Dr. Barber calculated these metrics for each of the submitted plans. (*See* Barber Reb. Rep. at 21, Table 5.)

51. The calculations of these metrics can change based upon the set of elections data being utilized. (Barber Reb. Rep. at 20.) Thus, Dr. Barber used a broad array of all statewide elections from 2012-2020 for his analysis. (Barber Reb. Rep. at 20.)

52. Dr. Barber also determined how these calculations compare to the unbiased simulated plans on these same metrics. Again, claiming a partisan bias based upon the results of these metrics alone is problematic because one cannot know the cause of the bias. (Barber Rep. at 27-34, Figures 5-7.)

53. Dr. Barber concluded that the mean-median for all of the plans has a slight pro-Republican bias, but at the same time, all of the plans – including House

Bill 2146 – are more Democratic-leaning than the most common result in the simulation. (*Id.* at 21.)

54. However, many of the plans, including the Governor, Carter Petitioners, Gressman Petitioners, House Democrats, Senate Democrats 1 & 2, and CCFD are more Democratic-leaning than 97 percent or more of Dr. Barber's simulations. (*Id.*)

55. The efficiency gap shows the same conclusion. (*Id.* at 22.) The submitted plans that generate nine Democratic-leaning seats, like House Bill 2146, have an efficiency gap in the middle of the range of the efficiency gaps calculated for the simulations. (*Id.*)

56. The plans that have ten Democratic-leaning seats have efficiency gaps that are positive, meaning they are biased in favor of Democrats and are more extreme when compared to the simulations. (*Id.*) "The House Democrats plan stands out as an extreme outlier with an efficiency gap value of .093, indicating significant bias for Democrats." (*Id.*) H.B. 2146, however, lands nearly in the middle of the simulation results (44th percentile) on a uniform swing analysis. (Barber Reb. Rep. at 22.)

57. Moreover, on the other measures of partisan bias, there is a variation across plans, but they all share the common feature that the plans are generally more favorable to Democrats than the non-partisan simulations – including H.B. 2146,

which is often in the middle – but some of them are *much* more favorable to Democrats. (*Id.* at 18, 23.)

58. Overall, Dr. Barber concludes that H.B. 2146 is unbiased, and when compared to the set of simulations using the same metrics, has only a slight Republican lean and occasionally a benefit to Democratic voters. (*Id.* at 39).

2. Jonathan Rodden (Carter Petitioners)

59. Dr. Jonathan Rodden ("Rodden") testified that all plans were in a relatively narrow band in terms of traditional redistricting criteria, including H.B. 2146. (Tr. 94:9-95:1.)

60. Dr. Rodden did not count splits of each of the six political subdivisions enumerated in the Pennsylvania Constitution. (Tr. 90:5-11.)

61. The Carter Map was not analyzed for compliance with the requirements set forth in the Voting Rights Act. (Tr. 125:25-126:18.)

62. Dr. Rodden gave incorrect testimony regarding the number of county splits in the Carter map, understating the number of county splits in comparison to H.B. 2146. (Tr. 98:3-21.)

63. Dr. Rodden agreed that H.B. 2146 was relatively low on voting tabulation district ("VTD") splits, and has fewer split political subdivisions than the Carter map. (Tr. 94:9-95:1.)

64. Dr. Rodden identified two "coin toss" districts in the Carter plan and did not identify more than three such "coin toss" districts in any plan. (Tr. 99:21-100:1; 101:2-7.)

65. Despite having written extensively about simulation analysis methodologies in the past, and despite being a routinely cited author in that area, Dr. Rodden did not perform a simulation analysis in this case. (Tr. 101:24-102:14.)

66. Dr. Rodden only based his assessment that H.B. 2146 is an outlier on a comparison to the other proposed maps in this case, not the neutral simulation analysis that he was capable of. (Tr. 102:15-17.)

3. Daryl DeFord (Gressman Petitioners)

67. Dr. Daryl DeFord ("DeFord") testified that H.B. 2146 performed broadly within the same range as the other plans with respect to traditional redistricting criteria. (Tr. 184:17-22.)

68. Dr. DeFord did not consider precinct splits in his analysis of the plans. (Tr. 185:15-19.)

69. Dr. DeFord did not believe an ensemble analysis using simulations was necessary in this case, even though he had used such analysis in the past in work he conducted in redistricting in Colorado. (Tr. 189:21-190:3.)

70. Dr. DeFord understood that the Gressman plan was prepared using an algorithmic technique, but could not explain what technique was used, and did not

disagree that the Gressman map algorithm was attempting to maximize for factors other than the traditional redistricting criteria, as explained in page 14 of the Gressman petition itself. (Tr. 191:2-22.)

71. The map submitted by the Gressman Petitioners did not consider communities of interest when deciding where to split political subdivisions. (Tr. 219:18-21.)

72. Dr. DeFord recognized that there is no single measure that can be used to measure the partisan fairness of a redistricting map. (Tr. 147:10-12.)

73. The majoritarian responsiveness assessment attempts to measure how well voters translate a majority vote share into a majority seat share. (Tr. 200:4-11.)

74. Majoritarian responsiveness does not necessarily account for split-ticket voting, incumbency, fundraising, or other considerations. (Tr. 200:13-201:14.)

75. Majoritarian responsiveness does not indicate the extent to which an outcome would be deemed antimajoritarian (*e.g.*, by one percent or thirty percent). (Tr. 206:16-22.)

76. Dr. DeFord admitted that he considered H.B. 2146's District 5 to be minority-effective, even though it had less than 50 percent minority voting-age population. (Tr. 194:12-195:13.) Although Dr. DeFord claimed not to recall the minority voting-age population in H.B. 2146's District 5, (Tr. 281:1-282:10), it is

undisputed that the district had a 32.8% minority voting-age population. Barber Reb. Rep. at 35.

77. Dr. DeFord stated that he was not offering an opinion on legally significant racially polarized bloc voting in Pennsylvania. (Tr. 195:24-196:2.) There is, therefore, no evidence in the record establishing the existing of legally significant racially polarized voting in the Philadelphia region or anywhere else in Pennsylvania.

78. Dr. DeFord admitted that all three minority-effective districts in the Gressman plan had *more* than fifty percent minority voting-age population. (Tr. 194:4-8.) And he did so despite admitting that H.B. 2146's District 5 with only 32.8% minority voting-age population in it was *also* a minority-effective district, meaning that drawing a district to more than 50% minority voting-age population is not necessary to make a district effective for Philadelphia's minority community.

4. Moon Duchin (Governor Wolf)

79. Dr. Moon Duchin ("Duchin") acknowledged that H.B. 2146 was population-balanced, contiguous, and shows strong boundary respect, yet did not meet her standard for "excellence." (Tr. 302:10-303:2.)

80. Dr. Duchin acknowledged that on splits, whether by county, municipalities, or precincts, H.B. 2146 outperformed Governor Wolf's plan. (Tr. 303:3-7.)

81. The split of Pittsburgh in the Governor's plan was one factor in the Governor's relatively higher compactness scores. (Tr. 303:11-15.)

82. Dr. Duchin could not say whether the division of Pittsburgh created two Democratic-leaning seats, because she did not look at the surrounding seats. (Tr. 303:16-25.)

83. Despite being asked to testify as an expert witness on behalf of the Governor's plan, Dr. Duchin could not say who drew the Governor's plan. (Tr. 304:1-7.) Dr. Duchin also could not say whether partisan data was used to draw the Governor's plan. (*Id.* 304:8-13.)

84. Dr. Barber testified that unlike Dr. Duchin, he provided details in his report about how she created her maps. Because Dr. Duchin failed to provide such detail, Dr. Barber testified that he could not evaluate the veracity of the maps she generated. (Tr. 349:7-18.) Dr. Duchin's failure to include information about the methodology she utilized to generate her ensemble of maps renders it unreliable.

85. Given the natural political geography of Pennsylvania, Dr. Duchin believes that it is important to draw a plan that gives Democrats a better chance to get elected, in the name of partisan fairness. (Tr. 307:14-25.)

86. Dr. Duchin admitted that she agreed "emphatically" with the proposition that fairness and neutrality are not the same thing. (Tr. 321:23-322:10.)

87. Dr. Duchin supported selecting a map that was an "outlier" to correct for the naturally occurring partisan effects of Pennsylvania's political geography. (Tr. 313:5-314:3.)

5. Keith Naughton (Congressional Intervenors)

88. Dr. Keith Naughton ("Naughton") worked on political campaigns in Pennsylvania for approximately fifteen years. (Tr. II 3:13-22.)

89. Based on his experience of and knowledge of political campaigns at all levels of Pennsylvania politics, Dr. Naughton opined that Pennsylvania is a diverse state, and that politics in Pennsylvania are highly driven by regional and local factors, which in turn affects the political geography and the functioning of political campaigns. (Tr. II 5:15-6:18.)

90. Dr. Naughton testified that in his experience, most Pennsylvania voters are not hyper-partisan and are focused on receiving responsive and good government services. (Tr. II 8:15-9:21.)

91. Dr. Naughton testified regarding the political geography and communities of interest of Pittsburgh and Allegheny County, and of Philadelphia and Bucks County. (Tr. II 28:6-9; 30:18-31:17.)

92. Communities of interest, setting aside partisan affiliation or preferences, are an essential consideration in the redistricting process. (Tr. II 28:6-30:17.)

93. Computer models do not take into account specific factors of individual races. (Tr. II 22:5-25:21.)

94. Based on the unusual physical geography of Pittsburgh, and the unique local political dynamics created by, for example, shared services (*e.g.*, emergency services, schooling) across municipal boundaries and commuting patterns between municipalities and neighborhoods, Dr. Naughton concluded that splitting Pittsburgh into two districts was a "terrible" idea. (Tr. II 26:1-27:2; 28:6-9.)

95. Because federal funds flow through city government, having unified representation for all of Pittsburgh can promote specialization in constituent services and committee selection, and such benefits would in turn be enjoyed regardless of party, and indeed, without respect to whether someone voted at all. (Tr. II 100:6-101:8.)

96. Dr. Naughton also testified that splitting, for example, the South Side and South Hills of Pittsburgh off from the rest of the city and combining it with less similar suburban communities, could result in representatives and candidates devoting less attention to campaigning and constituent services in the communities perceived as less politically favorable to them. (Tr. II 22:5-25:21.)

97. Dr. Naughton opined that Bucks County should remain whole and that lower Bucks County should not be combined with the City of Philadelphia, because

Bucks County is a cohesive political unit and that folding it in with Philadelphia might dilute its visibility and the quality of its representation. (Tr. II 30:18-31:17.)

6. Devin Caughey (Senate Democrats)

98. Dr. Devin Caughey ("Caughey") testified solely on partisan fairness. (Tr. 310:3-9.)

99. Dr. Caughey could not opine that H.B. 2416 is unfair.

100. Dr. Caughey could not specify which maps he reviewed for partisan fairness, or whether he reviewed all maps. (Tr. 309:11-310:2.)

101. Dr. Caughey did not personally calculate partisan fairness scores for his report, relying instead on PlanScore, a website, into which he loaded map files and received partisan fairness scores, which anyone can do. (Tr. 292:20-293:10.)

102. The scores that Dr. Caughey generated were based only on 2020 voting data as a baseline, relying on prior data only to project the variability of voting behavior moving forward. (Tr. 295:16-296:1.)

103. Dr. Caughey admitted that he endorsed the partisan fairness of an Oregon congressional redistricting plan with a projected efficiency gap of 8.5 percent, yet criticizes H.B. 2146 with an efficiency gap of only 6.3 percent. (Tr. 301:10-303:1.)

104. Dr. Caughey's metrics for partisan fairness do not account for political geography. (Tr. 307:2-13.)

105. Dr. Caughey was unable to say what level of partisan bias he sees in H.B. 2146 is attributable to political geography. (Tr. 308:15-23.)

F. Other Expert Witness

1. Thomas Brunell (Congressional Intervenors)

106. Dr. Thomas Brunell ("Brunell") considered whether Pennsylvania is required to draw majority African-American districts based on a racial bloc voting analysis. (Brunell Rep. at 10.)

107. Using 2020 U.S. Census data on the racial makeup of Philadelphia County merged with election data from three different general elections featuring a white Republican and an African-American Democrat, Brunell's regression analysis found that a majority of both African-American and white voters supported the African-American candidate in all three elections examined, indicating an absence of racially polarized voting. (*Id.*)

108. Brunell conducted a similar analysis using Democratic primary election data to determine whether racial bloc voting was occurring in the primary, even if not in the general election. Again, Brunell found that the two racial groups were not polarized in their voting behavior.

PROPOSED CONCLUSIONS OF LAW

A. Legal Framework For Impasse Litigation

1. Impasse cases, like this one, arise when the political branches deadlock and fail to redistrict the Commonwealth following the decennial Census and apportionment. The Court concludes an impasse has occurred in this case because Governor Wolf vetoed H.B. 2146 only a day before trial—in the apparent hope that this Court would adopt instead a map he publicly proposed only on January 15, 2022.

2. Because Pennsylvania's apportionment of seats to the U.S. House of Representatives decreased by one seat following the 2020 Census, the current 18-district plan cannot be used for this Fall's elections of Representatives to the 118th Congress. This impasse litigation is necessary to bring Pennsylvania's congressional plan into compliance with federal law and to avoid at-large elections for Pennsylvania's congressional delegation. *See* 2 U.S.C. § 2a(c)(5).

3. The last time impasse occurred in Pennsylvania was 1992. *Mellow v. Mitchell*, 607 A.2d 204, 205 (Pa. 1992). 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. 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. *Id.* at 210-211.

4. Since *Mellow,* the Supreme Court of Pennsylvania decided *League of Women Voters of Pa. v. Commonwealth* ("LWV"), which set forth additional standards for judging the constitutionality of a congressional redistricting plan under the Pennsylvania Constitution's Free and Equal Elections Clause, Art. I, § 5. 645 Pa. 1 (2018). The Pennsylvania Supreme Court interpreted the Free and Equal Elections Clause to require that "an individual's electoral power not be diminished through any law which discriminatorily dilutes the power of his or her vote..." *LWV*, 645 Pa. at 120.

5. To help assess that question, the Court relied upon the Article II, Section 16 factors applicable for legislative redistricting

> [g]iven the great concern of the delegates over the practice of gerrymandering occasioned by their recognition of the corrosive effects on our entire democratic process through the deliberate dilution of our citizenry's individual votes, the focus on these neutral factors must be viewed, then, as part of a broader effort by the delegates to that convention to establish 'the best methods of representation to secure a just expression of the popular will.' Consequently, these factors have broader applicability beyond setting standards for the drawing of electoral districts for state legislative office.

Id. at 119 (internal citation omitted). It also found that

> the use of compactness, contiguity, and the maintenance of the integrity of the boundaries of political subdivisions maintains the strength of an individual's vote in electing a congressional representative. When 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 the 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. This approach inures to no political party's benefit or detriment. It simply achieves the constitutional goal of fair and equal elections for all of our Commonwealth's voters.

Id. at 120-21.

6. The Court relied upon the Article II, Section 16 criteria as a basis to strike down the 2011 congressional plan, finding that when "it is demonstrated that, in the creation of congressional districts, these neutral criteria have been subordinated, in whole or in part, to extraneous considerations such as gerrymandering for unfair partisan political advantage, a congressional redistricting plan violates Article I, Section 5 of the Pennsylvania Constitution." *Id*. at 122.

7. There is no dispute that H.B. 2146 complies with the traditional redistricting criteria outlined in the *League of Women Voters* decision, and H.B. 2146 does better on many of these criteria than the other submitted plans.

8. Of the traditional criteria, only the elements of minimization of county and political subdivision splits and compactness is fairly in issue; all the plans—except the Carter and House Democratic plans—comply with equal population and contiguity requirements. Of the remaining two factors, the Pennsylvania

Constitution ranks the minimization of political subdivision splits more highly than compactness.

9. Faced with a choice between minimizing county and political subdivision splits and maintaining compactness, the Court is impelled to choose the former. The Pennsylvania Supreme Court has recognized the special importance of minimizing political subdivision splits and favoring plans that accomplish this objective. *See Holt v. 2011 Legislative Reapportionment Comm'n*, 67 A.3d 1211, 1242 (Pa. 2013) (choosing to avoid "additional political subdivision splits" even though it created several insufficiently contiguous districts because of "geographic anomalies" in the Commonwealth). In choosing between a plan that minimizes political subdivision splits and a plan that better maintains compact districts, the more important consideration is minimizing political subdivision splits. In fact, "balancing the factors of population equality and integrity of political subdivisions *necessitates* 'a certain degree of unavoidable non-compactness in any reapportionment scheme'" and that a proposed plan "should not fail simply because 'the shape of a particular district is not aesthetically pleasing.'" *Id.* (emphasis added). *See also League of Women Voters v. Commonwealth*, 178 A.3d 737, 814-815 (Pa. 2018) (recognizing historical importance of the minimization of political subdivision splits dating back to the 1790 Constitution).

10. In this case, H.B. 2146 performs exceptionally well. It only splits 15 counties, 16 municipalities, and nine voting precincts. (Barber Rep. at 16, Table 1.) Even Governor Wolf's expert, Dr. Duchin, opined that H.B. 2146 "is population-balanced and contiguous, shows strong respect for political boundaries, and is reasonably compact." (Duchin Rep. at 2.).

11. Importantly, H.B. 2146 does not split the City of Pittsburgh, a City that is small enough to be contained within one congressional district but constitutes an important community of interest that should be kept whole. (Tr. II 26:1-27:2; 28:6-9.) H.B. 2146 also splits the least number of precincts (a/k/a voter tabulation districts or VTDs), (*see* Tr. 94:9-95:1.), which is important because, as Dr. Rodden testified, it is important for election-administration purposes to keep VTDs whole in all plans to ensure voters receive the proper ballot styles for all elections. (Tr. 56:21-57:25.)

12. As Dr. Barber shows in his report, multiple proposed plans—including those of Governor Wolf, the Senate (D1 and D2), CCFD, and DTL—unnecessarily split Pittsburgh. Barber Rebuttal Report, Exhibit A to Rebuttal Brief of House Rep. Intervenors, at 9–10, And while the House Democratic Plan does not split Pittsburgh, it combines Pittsburgh with more Republican areas to the North and Northwest of the City to create a district shaped like a Freddy Krueger claw. *Id.* at 11–12. Still other plans split up to 17 counties, and up to nineteen municipalities. *Id.* at 8.]

13. H.B. 2146 also performs well on compactness, measuring .32 on Polsby-Popper – nearly the same as the Polsby-Popper score of the 2018 Plan adopted by the Pennsylvania Supreme Court. (Barber Rep. at 16, Table 1).

14. Finally, H.B. 2146 respects communities of interest. (*See* Tr. II 22:5-25:21; 30:18-31:17; *see also* Grove Letter, 7-8.)

B. The Court Must Reject Plans That Impermissibly Use Race in a Manner Inconsistent with the Fourteenth Amendment and U.S. Supreme Court Precedent.

1. Some of the other parties in this case, including the Gressman and Carter Petitioners, and the Senate Democrats, urge the adoption of plans on the basis that their plans were designed with a specific racial composition of the Philadelphia-area districts that, they argue, "complies" with Section 2 of the Voting Rights Act. *See generally* Reb. Br. at 19-27. The Court should reject this approach, because the evidence at trial, including Dr. DeFord's testimony and Dr. Brunell's expert report, showed that there was no legally significant polarized voting in Philadelphia. (*See* Tr. 194:4-8; 194:12-195:13; 195:24-196:2; *see also* Brunell Rep. at 10.)

2. "The Equal Protection Clause forbids 'racial gerrymandering,' that is, intentionally assigning citizens to a district on the basis of race without sufficient justification." *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018) (citing *Shaw v. Reno*, 509 U.S. 630, 641 (1993) (*Shaw I*)). The Court must ask whether "the legislature

[had] a *strong basis in evidence* in support of the (race-based) choice that it has made." *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 801 (2017) (emphasis added) (citation omitted). Here, there is no such "strong" basis, because there is no evidence *at all* of racially polarized voting in Philadelphia.

3. The intentional and unjustified use of race to draw any plan renders it infirm under the Fourteenth Amendment and, if selected, would render the Commonwealth vulnerable to a racial-gerrymandering lawsuit under federal law. *See Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017) ("[i]f a State has good reason to think that all the '*Gingles* preconditions' are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district. But if not, then not.") (citation omitted). In this case, the Gressman Plan and the two Senate Democratic plans were designed with racial goals not supported by a finding of legally significant racially polarized voting. *See, e.g.,* Gressman Opening Br. at 43 (urging adoption of a plan on the basis that it contains three "majority-minority districts" containing "51%, 52%, and 57%" minority voting-age population); Senate Democratic Caucus Opening Br. at 16, 20 (claiming majority-minority and minority "opportunity" districts were drawn because the VRA "mandates" such). The Court declines to walk that path.

C. The Court Should Defer To The General Assembly's Policy Judgments Once It Is Found That The General Assembly's Plan Complies With The Constitutional Criteria.

1. The United States and Pennsylvania Constitutions vest the General Assembly with the authority to redistrict this Commonwealth's congressional districts. Specifically, Article I, Section 4 of the United States Constitution (the "Elections Clause") provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof...." Pursuant to the Elections Clause, as a matter of federal law, "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*,576 U.S. 787, 808 (2015).

2. The Commonwealth's legislative power is vested in the General Assembly. PA. CONST. ART. II, § 1. Congressional districting plans are legislative enactments of the General Assembly, passed like any other legislation. The Pennsylvania Supreme Court has confirmed that the "primary responsibility and authority for drawing federal congressional legislative districts rests squarely with the state legislature." *League of Women Voters v. Com.*, 178 A.3d 737, 821–22 (Pa. 2018), citing *Butcher v. Bloom*, 216 A.2d 457, 458 (Pa. 1966) (identifying the General Assembly as "the organ of government with the primary responsibility for the task of apportionment") and *Growe v. Emison*, 507 U.S. 25, 34 (1993) ("the

Constitution leaves with the States' primary responsibility for apportionment of their federal congressional and state legislative districts").

3. All impasse cases necessarily involve scenarios where the legislature and governor are unable to agree on a redistricting plan. But impasse does not mean that the General Assembly's plan—despite the failure of the Governor to sign it into law—is entitled to *no* special consideration when the judiciary must take up the unwelcome obligation of redistricting the Commonwealth. After all, "[t]he task of reapportionment is…a function which can be best accomplished by that elected branch of government. The composition of the Legislature, 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, make it the most appropriate body for the drawing of [district] lines...." *Butcher v. Bloom*, 203 A.2d 556, 569 (Pa. 1964). Because of the legislature's constitutionally protected role to redistrict, the Court should select a map that reflects "the policy choices of the elected representatives of the people, rather than the remedial directive of a federal court." *Tallahassee Branch of NAACP v. Leon Cty.*, 827 F.2d 1436, 1439 (11th Cir. 1987).

4. In *Donnelly v. Meskill*, 345 F. Supp. 962 (D. Conn. 1972), for example, the legislature passed a congressional plan that the governor vetoed. When the job of redistricting was thrust upon the court, three plans were submitted, including a

plan from the legislature. The court adopted the legislature's proposed plan and explained that "[t]he legislative adoption of Public Act 807 tips the scales in favor of the plan in Exhibit B-1, which provides districts essentially as outlined by the legislature, with adjustments necessary to bring about virtually complete population equality." *Id.* at 965. Recognizing the constitutionally protected role of the legislature in redistricting, the court emphasized that the plan it adopted had "the added advantage that it is basically the plan adopted by the legislature." *Id.*

5. Similarly, in *Skolnick v. State Electoral Bd. of Ill.*, 336 F. Supp. 839 (N.D. Ill. 1971), an impasse occurred after a congressional plan had passed the Illinois House but stalled out in the Senate. The court, in fashioning a remedial plan, considered four proposed plans—including one submitted by three U.S. House Representatives that "was, with one minor exception, the same as the one passed by the Illinois House and introduced into the Senate" but not passed. *Id.* at 842. The court selected that plan because it satisfied the required criteria and, in part, because it had received the "approval of one house of the legislature." *Id.* at 846.

6. H.B. 2146 likewise should receive added consideration because it best reflects State policies and the people's preferences. "[T]he fundamental principle is that reapportionment is primarily a legislative function and that the courts should defer to the legislative judgment where constitutional and statutory standards have been satisfied." *In re Ross Twp. Election Dist. Reapportionment*, 489 A.2d 297, 302–

03 (1985), *aff'd*, 514 Pa. 41, 522 A.2d 553 (Pa. 1987); *see also Newbold v. Osser*, 230 A.2d 54, 59 (Pa. 1967) (recognizing "the importance of permitting reapportionment by the Legislature wherever possible").

7. As discussed above, H.B. 2146 adheres to the constitutional redistricting criteria. This Court should therefore defer to the General Assembly's policy choices regarding which subdivisions are divided to comply with population equality, or where appropriate, sacrificing compactness to preserve a municipality or community of interest.

8. The General Assembly is best positioned to make the innumerable policy choices necessarily involved in the drawing of congressional district lines for the citizens of the Commonwealth, regardless of any veto by the Governor, not a supercomputer drawing a plan without the benefit of a transparent and democratic process. And that is especially true here because it appears the Governor's veto was a strategic ploy to get the Court to draw a plan to his liking, rather than the product of a good-faith negotiation that led to impasse. *See* Grove Letter (discussing how Governor Wolf refused to meet with the legislature or to negotiate a redistricting plan).

D. H.B. 2146 Is Politically Fair And Emerged From A Fair Process, And Courts Need Not And Should Not "Correct" Any Naturally Occurring Imbalance Between the Political Parties Due to the Political Geography of the State.

1. But this is emphatically not about blind deference. House Bill 2146 not only was legislation passed by both houses of the General Assembly, but it was a bill that went through an open, public, and transparent process. It was not drafted in the cover of darkness and passed quickly, without scrutiny; it was put together studiously over the course of months, with 11 public hearings and some six weeks, and heavily involved the work of a non-partisan good-government activist, Ms. Amanda Holt. There has been no evidence in this record of any intentional or unusual advantaging of one political party or another.

2. To the contrary, in *Mellow*, the Pennsylvania Supreme Court looked at whether a proposed impasse plan was "politically fair" in terms of the allocation of Democratic and Republican-leaning districts. 607 A.2d at 210-11. Here, Pennsylvania is going from the 9D to 9R plan implemented by the Pennsylvania Supreme Court in *League of Women Voters* to a plan with only 17 districts. H.B. 2146 generates 9 Democratic-leaning districts and 8 Republican-leaning districts, with five highly competitive districts that can flip between parties in the right electoral conditions. H.B. 2146 therefore meets the notion of fairness recognized in *Mellow*. *See also League of Women Voters*, 645 Pa. at 121 (recognizing, as a valid redistricting principle, "maintenance of the political balance which existed prior to

the prior reapportionment"). This outcome is also in the heartland of expected seatshare generated by Dr. Barber's 50,000 simulated plans drawn without political or racial data and that follow only non-partisan, neutral criteria, which further shows that the plan does not exhibit bias.

3. The Petitioners, Governor Wolf, and certain other parties have instead urged the Court to go beyond that—and to "correct" for any natural geographic advantage for Republicans. But this is not consistent with our Supreme Court's analysis of the Free and Equal Elections Clause.

4. In *LWV*, the Pennsylvania Supreme Court explained:

> We recognize that other factors have historically played a role in the drawing of legislative districts… However, we view these factors to be wholly subordinate to the neutral criteria of compactness, contiguity, minimization of the division of political subdivisions, and maintenance of population equality among congressional districts. These neutral criteria provide a "floor" of protection for an individual against the dilution of his or her vote in the creation of such districts.
>
> When, however, it is demonstrated that, in the creation of congressional districts, these neutral criteria have been subordinated, in whole or in part, to extraneous considerations such as gerrymandering for unfair partisan political advantage, a congressional redistricting plan violates Article I, Section 5 of the Pennsylvania Constitution.

645 Pa. at 122. Moreover, in analyzing the constitutional criteria for legislative redistricting in Article II, Section 16, the Pennsylvania Supreme Court has stated that "[t]he constitutional reapportionment scheme 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 Commission*, 620 Pa. 373, 413-14 (2013).

5. In *Johnson v. Wisconsin Election Commission*, the Wisconsin Supreme Court was faced with the task of remedying the malapportionment of the state's legislative district after the Governor vetoed the legislature's proposed plan. 2021 WI 87 (2021). In that case, some of the parties sought to have the Court redraw the maps to allocate districts equally between the two political parties. *Id.* at ¶ 2. The Supreme Court rejected that approach. *Id.* at 4.

6. As the Wisconsin Supreme Court stated: "[c]laims of political unfairness in the maps present political questions, not legal ones." *Id.* at ¶ 4. In particular, the Court struggled with what constitutes a "fair' map. *Id.* at ¶ 44. As it further stated: "[d]eciding among . . . different versions of fairness . . . poses basic questions that are political, not legal." *Id.* at ¶ 44.

7. Moreover, the Court stated:

> A proportional party representation requirement would effectively force the two dominant parties to create a 'bipartisan' gerrymander to ensure the 'right' outcome—obliterating many traditional redistricting criteria mandated by federal law and Article IV of the Wisconsin Constitution. See 2 U.S.C. § 2c; Wis. Const. art. IV, §§ 4-5. Democrats tend to live close together in urban areas, whereas Republicans tend to disperse into suburban and rural areas. As a result, drawing contiguous and compact single-member districts of approximately equal population often leads to grouping large

> numbers of Democrats in a few districts and dispersing rural Republicans among several. These requirements tend to preserve communities of interest, but the resulting districts may not be politically competitive—at least if the competition is defined as an inter-rather than intra-party contest.

Id. at ¶ 48.

8. The same is true in Pennsylvania. Nothing in the Pennsylvania Constitution, including the Free and Equal Elections Clause in Article I, § 5, requires the balancing of the equities of the two dominant political parties that may existing from where voters reside. The decision in *League of Women* voters speaks of vote dilution when lines are drawn in a manner that subordinates traditional redistricting criteria for partisan advantage. 645 Pa. at 122. It says nothing about affirmatively needing to correct a political imbalance that results simply from following traditional redistricting criteria, as H.B. 2146 does.

9. Indeed, drawing district lines to expressly "correct" for the naturally occurring partisan effects of Pennsylvania's political geography would be the equivalent of drawing lines for the benefit of one political party and to the detriment of the other. It is expressly placing voters in districts based upon their partisan preferences. But that process has a name: it is called gerrymandering and the decision in *League of Women Voters* forbids it rather than requires it.

E. There Is No Basis to Prefer a Plan That Offers The "Least Change" From The 2018 Remedial Plan.

1. Carter Petitioners' argue that their proposed plan is "better" because it has the "least changes" from the 2018 plan. That argument, however, ignores case law rejecting the same contention.

2. 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). 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 v. 2011 Legislative Reapportionment Comm'n*, 67 A.3d 1211, 1236 (Pa. 2013). When a similar argument was again raised in 2018 in *LWV*, 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." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 817 (Pa. 2018).

3. Aside from the fact that the argument flies in the face of prior precedent, Carter Petitioners' contention that 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. This is so 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.

4. All of the cases that the Carter Petitioners cite on this point are inapplicable. In each case, 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.), *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, but rather 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).

5. Therefore, the goal of a "least change" in those cases was to respect the most recent choices of the legislature, not because of some imagined fidelity to calcified district lines. *See also League of Women Voters*, 178 A.3d at 822 (legislature has the "primary role in districting").

6. Evaluating redistricting plans against the traditional criteria—instead of similarity to previous plans—protects the integrity of the redistricting process by ensuring that the new plan is scrutinized every redistricting cycle against the applicable constitutional and statutory standards, and with reference to population and other changes. By contrast, Carter Petitioners' position would bake any number of choices from a prior plan into future plans—which has nothing to do with constitutional law. For these reasons, comparing the prior map against any proposed map is not a viable or virtuous legal principle for redistricting, as this Court has recognized every time the argument surfaces. Plaintiffs' argument touting the similarity of their plans to the previous map should fare no better than when this same contention was rejected in previous redistricting cycles.

7. Moreover, Petitioners are simply wrong when they argue that the 2018 remedial plan is the "benchmark" for any plan evaluated by this Court, and would impose a new criterion on all redistricting—a criterion that courts have traditionally left to a legislature's discretion to adopt. Courts have recognized that "preserving the cores" of prior districts may be a "legitimate *state* objective[]" in redistricting,

Mellow v. Mitchell, 530 Pa. 44, 52, 607 A.2d 204, 207–08 (1992) (emphasis added), but no cases cited by the Carter Petitioners require *courts* to follow this objective as a constitutional directive. *See Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (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).

8. The Carter Petitioners have asked this Court to, for the first time, transform an optional legislative rationale into a constitutional requirement, while also abandoning the legislature's plan that necessarily must reduce the number of districts in Pennsylvania by one. If this Court adopts the Carter Petitioners' reasoning regarding the supposed benefit of "preserving the core," it will contradict its prior precedents which deferred to legislative intent regarding whether to pursue such a goal.

CONCLUSION

For the foregoing reasons, the House Republican Legislative Intervenors respectfully request that this Court adopt H.B. 2146.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby 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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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2022, a copy of the foregoing filing was served on all counsel of record via PACFile.

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