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IN THE SUPREME COURT OF PENNSYLVANIA

CAROL ANN CARTER; MONICA PARRILLA; REBECCA POYOUROWN; WILLIAM TUNG; ROSEANNE MILAZZO; BURT SIEGEL; SUSAN CASSANELLI; LEE CASSANELLI; LYNN WACHMAN; MICHAEL GUTTMAN; MAYA FONKEU; BRADY HILL; MARY ELLEN BALCHUNIS; TOM DEWALL; STEPHANIE MCNULTY; & JANET TEMIN, Petitioners v. LEIGH M. CHAPMAN, in her official capacity as the Acting Secretary of the Commonwealth of Pennsylvania; JESSICA MATHIS, in her official capacity as Director for the Pennsylvania Bureau of Election Services and Notaries, Respondents	7 MM 2022

CONSOLIDATED WITH

PHILIP T. GRESSMAN; RON Y. DONAGI; KRISTOPHER R. TAPP; PAMELA GORKIN; DAVID P. MARSH; JAMES L. ROSENBERGER; AMY MYERS; EUGENE BOMAN; GARY GORDON; LIZ MCMAHON, TIMOTHY G. FEEMAN; & GARTH ISAAK, Petitioners v. LEIGH M. CHAPMAN, in her capacity as Acting Secretary of the Commonwealth of Pennsylvania; & JESSICA MATHIS, in her capacity as Director for the Pennsylvania Bureau of Election Services and Notaries, Respondents	

Brief of Amici Khalif Ali, Maryn Formley, Richard Rafferty, Patrick Beaty, Susan Gobreski, Barbara Hill, Judy Hines, Jodi Greene, John Thompson, Cynthia Alvarado, and Timothy L. Kauffman

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INTRODUCTION

The Special Master recommended selecting the congressional plan proposed by the Republican Legislative Intervenors (HB 2146). This recommendation is premised on serious legal and factual errors and should be rejected. As a legal matter, a plan passed by the General Assembly but vetoed by the Governor deserves no deference whatsoever. And the Report's selection of HB 2146 is premised on arbitrary and flawed preferences about which local government units to split.

The Court should instead select one of several superior plans in the record, the best of which is the Ali Plan, which keeps key communities of interest intact and counts prisoners at their home addresses. In the alternative, the Court should appoint an expert to craft its own fair and neutral plan, drawing on the best features of the Ali Plan.

INTERESTS OF THE AMICI

Amici are Khalif Ali, Maryn Formley, Richard Rafferty, Patrick Beaty, Susan Gobreski, Barbara Hill, Judy Hines, Jodi Greene, John Thompson, Cynthia Alvarado, and Timothy L. Kauffman.[1] All of the Amici are Pennsylvania voters who have demonstrated a longstanding commitment to free and equal elections. They come from across the Commonwealth, belong to different political parties, and have all advocated at the local or state level for better redistricting for Pennsylvania. None is a politician. All are active in their communities and believe their communities should be fully and fairly represented in any congressional districting plan. Amici share a belief in the fundamental importance of neutral, nonpartisan standards for congressional redistricting.

The Ali Plan builds on Governor Wolf's Plan, proposing two modifications: (1) the use of prison-adjusted population data, a step already taken by the Legislative Reapportionment Commission (LRC) for redrawing legislative districts; and (2) adjustments to communities of interest, concentrating in three

[1] This brief was paid for and authored entirely by amici; counsel for amici; and staff, contractors, and volunteers from Common Cause, the League of Women Voters of Pennsylvania, and Fair Districts PA.

different parts of the Commonwealth, to ensure the integrity of those communities.[2]

Khalif Ali

Khalif Ali was born and raised in Pittsburgh and has spent the last five years living in the Hazelwood neighborhood. Since November of 2020, Mr. Ali has served as the Executive Director of Common Cause Pennsylvania, a nonpartisan nonprofit organization dedicated to upholding the core values of American democracy, including working to create open, honest, and accountable government that serves the public interest; promote equal rights, opportunity, and representation for all; and empower all people to make their voices heard in the political process. Common Cause Pennsylvania has approximately 35,000 members and supporters across the Commonwealth, including members in every congressional district. As Executive Director, Mr. Ali has been heavily involved in advocating for a fair, transparent, and representative redistricting process, including by submitting testimony to the relevant committees, lobbying individual members of the legislature and executive branch, as well as organizing and educating activists across Pennsylvania to make their voices heard in the process.

[2] Details about the crafting of the Ali Plan are available in the Brief of Amici Khalif Ali *et al.* (Jan. 24, 2022) at 1-2 & n.2, and the Expert Report of Sarah Andre (attached as Exhibit to *id*.).

Maryn Formley

Maryn Formley is a voter in Allegheny County and is the founder and Executive Chair for the Voter Empowerment Education and Enrichment Movement (VEEEM), a non-profit organization dedicated to increasing voter turnout in Allegheny County. She believes that representation is the core of our democracy and works to educate and empower voters, particularly Black voters, to make their voices heard.

Richard Rafferty

Richard Rafferty is a voter in Lafayette Hill, Montgomery County, and has been consistently voting in congressional elections there for some 30 years. After retiring as an IT Director five years ago, Mr. Rafferty joined Fair Districts PA as a volunteer. In 2019, he became the Montgomery County Local Lead for Fair Districts PA, leading organizing and advocacy across the county in support of transparent, impartial, and fair redistricting.

Patrick Beaty

Patrick Beaty is a voter in Huntingdon Valley, Montgomery County. He is a retired attorney who served for many years in state government. For the last five years, he has volunteered as the Legislative Director for Fair Districts PA, a nonpartisan, statewide coalition of organizations and individuals working to create a process for redistricting that is transparent, impartial, and fair. As a leader of Fair

Districts PA, he has been heavily involved in the coalition's efforts to educate and mobilize Pennsylvanians around ending gerrymandering, and he has given testimony in both houses of the General Assembly regarding congressional redistricting.

Susan Gobreski

Susan Gobreski is a voter in Philadelphia who serves on the Board of Directors for the League of Women Voters of Pennsylvania. As the League's Board Director for Government Policy, she works to protect voting rights. In that capacity she testified before the House State Government Committee on Congressional Redistricting on October 19, 2021. There she advocated for a fair process and outcome, including that the congressional plan follow the imperatives stated in the Pennsylvania Constitution; that the geography of the plan make sense, with minimal division of existing governance structures; and that there be no discriminatory effect on the basis of voters' political affiliations or preferences.

Barbara Hill

Barbara Hill is a voter in Stroudsburg, Monroe County. She has been a member of the League of Women Voters for decades, joining chapters wherever she lived. As a volunteer with the Monroe County League of Women Voters, Ms. Hill has worked on publishing their Voters Guide and their Government Directory. She believes a fair congressional plan is fundamental to democracy.

Judy Hines

Judy Hines is a voter in Mercer in Mercer County. She is an active member of the League of Women Voters of Mercer County, where she has regularly participated in advocating for a fairer, more representative congressional redistricting process. She also has served as the membership chair of the Mercer County NAACP and has been active in political campaigns.

Jodi Greene

Jodi Greene is a voter in Birdsboro in Berks County and a professor of history at Reading Area Community College. She is active in her community, including having served as President of the League of Women Voters of Berks County. She has regularly advocated for a fair, representative, and transparent redistricting process, including organizing in Berks County to ensure residents understand the impact of redistricting on their daily lives.

John Thompson

John Thompson is a lifelong Philadelphian. From 1980 to 2016, Mr. Thompson was incarcerated in a series of Pennsylvania State Correctional Institutions, most recently in SCI Smithfield. Immediately upon his release from prison in 2016, Mr. Thompson returned home to Philadelphia and registered to vote. Since 2020, Mr. Thompson has been employed as a social and political organizer with the Abolitionist Law Center, primarily working and advocating to

eliminate death by incarceration, solitary confinement, and the release of all aging and geriatric prisoners.

Cynthia Alvarado

Cynthia Alvarado grew up in and still lives in Philadelphia. From 2008 to 2020, Ms. Alvarado was incarcerated in the State Correctional Institution at Muncy, in Lycoming County, where she had no community ties outside the prison's walls. While growing up in the deeply impoverished Badlands section of Philadelphia, Ms. Alvarado felt politically disempowered and did not vote. But during her time in prison, she had a political awakening, and she is now an outspoken member of her community, promoting criminal-justice reform at the federal, state, and local levels. She recently registered to vote for the first time in her life and looks forward to voting in the 2022 congressional elections.

Timothy L. Kauffman

Timothy L. Kauffman was born in Lancaster City and graduated from JP McCaskey High School. He attended Gettysburg College and joined the Reserve Officer Training Corps in 1968. Dr. Kauffman served in the United States Army Reserves for 39 years, during which time he regularly encouraged his military associates to register and vote. He resides in Manheim Township in Lancaster County. Dr. Kauffman is concerned for the new congressional plan to fairly and adequately represent his community.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

The scope of review is plenary. 42 Pa.C.S. § 726. The standard of review is *de novo*. *E.g.*, *League of Women Voters of Pa. v. Commonwealth* (*LWV-PA*), 178 A.3d 737, 802 n.62 (Pa. 2018).

QUESTIONS INVOLVED

1. In an impasse case, how much deference should a court extend to a congressional plan passed by the General Assembly but vetoed by the Governor?

   Proposed answer: None.

2. Do considerations of minimizing splits of local government units and protecting communities of interest support the selection of HB 2146 over the Ali Plan?

   Suggested answer: No.

3. Should the Court prioritize a plan that treats prisoners as residents of their homes instead of their cells?

   Suggested answer: Yes.

SUMMARY OF ARGUMENT

The Special Master pressed a heavy hand on the scale in favor of the congressional plan described in HB 2146 on the grounds that the General Assembly had approved that plan in the name of the people. But HB 2146 did not secure a single bipartisan vote, and the Governor vetoed it. The Special Master committed a serious legal error in giving preeminence to the politically charged HB 2146 plan. This Court should not compound the error by issuing a judicial stamp of approval to a failed bill passed by one party in the middle of impasse litigation. That would send the wrong message to future lawmakers and is hardly the way to instill confidence in the fairness of the judicial mapmaking process now forced on the Court.

Because of the failure of the legislative process, this Court must now select or draw a plan based on neutral principles. The Special Master rejected the Ali Plan and others for splitting Pittsburgh and Bucks County, but the decision to prioritize these splits over others was arbitrary. Indeed, the Ali Plan does a better job overall of keeping key local government units and communities of interest intact. Moreover, only the Ali Plan properly accounts for the treatment of prisoners. Nothing prohibits the selection of a plan that counts prisoners at their homes, and indeed this is a plus factor in favor of the Ali Plan.

ARGUMENT

I. The Elections Clause Does Not Stack the Deck for the General Assembly

In a casino, the house always wins; in a redistricting case, the House enjoys no such advantage, nor the Senate. Under binding decisional law, when the General Assembly and the Governor disagree about a proposed congressional plan, the Elections Clause deals the General Assembly nothing—***zero***—in the nature of special powers, freestanding authority, or entitlement to judicial deference.

The Special Master's Report endorses a radical theory of the General Assembly's prerogatives that is contrary to controlling precedents and ruinous to the separation of powers. In the proceedings below, the Senate Republicans insisted that HB 2146 "is entitled to deference from the Court." Brief of Senate Republicans (Jan. 24, 2022), at 12. Similarly, the House Republicans urged that the Special Master "should adopt the House Plan regardless of whether it is ultimately vetoed by the Governor." Brief of House Republicans (Jan. 24, 2022), at 12. The Report adopts this theory. Although the Special Master declined to "summarily" defer to HB 2146 without a hearing, Report at 208 ¶ 61, the Report ultimately selects HB 2146 on the grounds that courts should defer to a vetoed but otherwise constitutional congressional plan, *id.* at 216 ¶ 97.

The U.S. Supreme Court and this Court have squarely rejected this dangerous theory over and over again. The Court should put it to rest.

A. *Smiley v. Holm* Rejects Any Special Role in Redistricting for the General Assembly Vis-à-vis the Governor

In an impasse just like the one now before the Court, the 1930 Census cost Minnesota one seat in the U.S. House of Representatives, and after the Minnesota House and Senate passed a new congressional districting plan, Governor Floyd B. Olson vetoed it. *Smiley v. Holm*, 285 U.S. 355, 361 (1932). A legal dispute ensued as to whether he ***could*** veto it, in light of Article I, § 4 of the U.S. Constitution (the "Elections Clause"), which says: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Prefiguring the Special Master's theory, the Supreme Court of Minnesota held that the Elections Clause empowered the state legislature to act alone in congressional redistricting, and that "[i]t follows that the Governor's veto herein was a nullity." *State ex rel. Smiley v. Holm*, 238 N.W. 494, 499 (Minn. 1931).

The U.S. Supreme Court unanimously reversed in a decision that eliminates any notion the General Assembly has primacy in an impasse case:

> We find no suggestion in the federal constitutional provision of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted. Whether the Governor of the state, through the veto power, shall have a part in the making of state laws, is a matter of state polity.

Smiley, 285 U.S. at 367-68. In other words, the term "Legislature" in the Elections Clause refers not narrowly to the State House and State Senate, but broadly to the lawmaking power of the State, which includes a role for the Governor. *See Smiley*, 285 U.S. at 372-73 ("[T]here is nothing in Article I, section 4, which precludes a State from providing that legislative action in districting the State for congressional elections shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power.").

In companion cases decided the same day as *Smiley*, the Court reiterated that where the two state houses have agreed on a congressional redistricting plan but the governor has not approved it, a state court has the power to end the impasse with a redistricting plan that differs from that passed by the two houses. *Koenig v. Flynn*, 285 U.S. 375, 379 (1932) (noting that a state court can reject a congressional plan that passed both houses but does not meet "the requirements of the Constitution of the state in relation to the enactment of laws," including gubernatorial approval); *accord Carroll v. Becker*, 285 U.S. 380, 381-82 (1932).

This is as true in Pennsylvania in 2022 as it was in Minnesota in 1932. *See, e.g.*, *Scarnati v. Wolf*, 173 A.3d 1110, 1120 (Pa. 2017) ("By conferring upon the Governor the authority to nullify legislation that has passed both legislative houses, [Pa. Const. art. IV,] Section 15 entrusts him with the obligation both to examine the provisions of the legislation within the ten days allotted by Section 15 and to

either approve it or return it, disapproved, for legislative reconsideration."); *id.* ("The Governor is thereby an integral part of the lawmaking power of the state. No bill may become law without first being submitted to the Governor for approval or disapproval." (quotation marks and citation omitted)); *id.* ("[W]e have described the Governor's authority to veto a bill as a form of 'limited legislative power.'" (quoting *Jubelirer v. Rendell*, 953 A.2d 514, 529 (Pa. 2008))). In other words, as a matter of Pennsylvania law, the term "Legislature" as used in the Elections Clause encompasses both the General Assembly and the Governor.

B. Post-*Smiley* Precedents Reaffirm the General Assembly's Lack of Primacy in Congressional Redistricting Impasses

The Report cites a single U.S. district court case that extended some deference to a vetoed congressional plan. Report at 43, 216 (citing *Donnelly v. Meskill*, 345 F. Supp. 962, 963 (D. Conn. 1972)).[3] *Donnelly* failed to mention *Smiley*, *Koenig*, or *Carroll* and was wrongly decided. And even the court in *Donnelly* made adjustments to the vetoed plan. *See* 345 F. Supp. at 965.

Since *Donnelly* the U.S. Supreme Court has reemphasized *Smiley*'s core holding. In 2015, the Court underlined that *Smiley* means that for Elections Clause

[3] The Report mentions two other cases alongside *Donnelly* in its deference discussion. Report at 43 (citing *Perry v. Perez*, 565 U.S. 388 (2012) (per curiam) and *Upham v. Seamon*, 456 U.S. 37 (1982) (per curiam)). *Perry* and *Upham* are of no relevance to this issue, because both concerned congressional plans that passed the Texas House and Senate ***and*** were signed by the Governor.

purposes, "Minnesota's legislative authority includes not just the two houses of the legislature; it includes, in addition, a make-or-break role for the Governor." *Ariz. State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 806 (2015); *accord id.* at 808 ("Thus 'the Legislature' comprises the referendum and the Governor's veto in the context of regulating congressional elections.").

Of dispositive significance to the present case, *Arizona* states: "Nothing in [Article I, § 4] instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." *Id.* at 817-18. In Pennsylvania, a controlling "provision of the State's constitution" is Article IV, § 15, which directs that a bill not approved by the Governor shall not become law.

Even the *Arizona* dissent acknowledged that "the state legislature need not be exclusive in congressional districting, but neither may it be excluded." 576 U.S. at 842 (Roberts, C.J., dissenting). More recently, Chief Justice Roberts wrote a majority opinion recognizing that "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply" when evaluating congressional plans that exhibit "excessive partisan gerrymandering." *Rucho v. Common Cause*, 139 S.Ct. 2484, 2507 (2019). *Rucho* forecloses any suggestion that the Elections Clause obligates state courts to rubber-stamp even

congressional plans passed by both houses and signed by the governor, let alone vetoed plans.

In Pennsylvania, this Court has recognized both that "the primary responsibility for drawing congressional districts rest[s] squarely with the legislature," *League of Women Voters of Pa. v. Commonwealth*, 181 A.3d 1083, 1085 (Pa. 2018), and that "legislature" in this context means the General Assembly ***plus*** the Governor, *see id.* ("[I]n the eventuality of the General Assembly not submitting a plan to the Governor, or the Governor not approving the General Assembly's plan within the time specified, it would fall to this Court expeditiously to adopt a plan . . . ."); *id.* at 1086 ("The General Assembly failed to pass legislation for the Governor's approval, thereby making it impossible for our sister branches to meet the Court's deadline."). That decision is fully consistent with *Smiley* and *Arizona*, and it eliminates any inkling that Pennsylvania law entitles the General Assembly, acting alone, to deference or special treatment when an impasse forces a court to draw a congressional plan.

C. The Special Master's Deference Theory Would Radically Alter the Separation of Powers

Apart from being barred by nearly a century of precedent, the Special Master's deference theory would work an astonishing reallocation of power among Pennsylvania's three co-equal branches of government. Under this theory, every time the General Assembly and Governor negotiate a congressional plan, the

General Assembly gets dealt an extra ace. If there is an impasse, the General Assembly can play its ace, by marching into court and demanding judicial "deference" to its preferred plan—deference neither the Governor nor any other party would enjoy.

For the General Assembly to clinch permanent advantage over the Governor, and a superpower before the judiciary, would represent a stunning departure from basic constitutional principles of checks and balances. It should not be countenanced by this Court. *See generally* The Federalist No. 48 (James Madison) (J.R. Pole ed., 2005) ("It is agreed on all sides, that the powers properly belonging to one of the departments, ought not to be directly and compleatly administered by either of the other departments. It is equally evident, that neither of them ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it.").

II. Several Plans, Including the Ali Plan, Manage Splits and Communities of Interest Better Than HB 2146

The Special Master followed a two-step process: (1) screen the proposed plans for the bare constitutional minimum and (2) then identify the purportedly best plan from among those that passed the constitutional bar. The first step is one courts have been doing for many years, assisted in recent years by well-established

advances in political science and mathematics. The second step—the selection of a plan from among viable options—presents a judgment call that should not be left to a single jurist randomly chosen on the Commonwealth Court wheel. That is particularly true here where the Special Master arbitrarily zeroed in on splits in Pittsburgh and Bucks County while ignoring unnecessary and harmful splits elsewhere, like HB 2146's splits in of the Capital Region and Northeastern urban areas. Giving pride of place to intactness for Pittsburgh and Bucks County is certainly one way to draw a map, but it is not the only way. The Special Master's recommendation rests on unsupported policy judgments, not legal principle, and pays only lip service to maintaining communities of interest. As such it is entitled to no weight in this Court. Instead, the Court should select (or draw) a plan with better treatment of all these communities.

A. The Special Master Wrongly Elevated Not Splitting Pittsburgh to Quasi-Constitutional Status

The Report's analysis begins on page 137 with a discussion of "Traditional Neutral Criteria." The Report identifies six supposedly "traditional" criteria: (1) contiguity, (2) population equality, (3) political subdivision splits, (4) compactness, ***(5) splitting of Pittsburgh***, and (6) communities of interest. The first four are standard fare in redistricting cases. The last—communities of interest—is another traditional criterion, albeit one that can be difficult to apply.

But the treatment of Pittsburgh is not a "traditional" criterion on par with matters like compactness and equipopulation.

The Special Master proclaimed that any plan that splits Pittsburgh must be rejected as a matter of law, regardless of its merits in other respects. Report at 151, FF16; *see also* Report at 194, ¶ 27. The Report elevated a "never split Pittsburgh" rule to quasi-constitutional status based on the following reasoning:

> It cannot be gainsaid that, under the standards listed in the Pennsylvania Constitution and applied to congressional redistricting by our Supreme Court, boundaries such as those of City of Pittsburgh should not be divided across multiple districts unless it is *absolutely necessary* to achieve population equality. *See* Pa. Const. art. II, § 16 ("Unless absolutely necessary no county, city, incorporated town, borough, township or ward shall be divided . . . ."); *LWV II*, 178 A.3d at 816-17 (congressional districts shall not "divide any county, city, incorporated town, borough, township, or ward, except where necessary to ensure equality of population").

Report at 148, CL1.

The analysis is deeply flawed. The "absolutely necessary" language of Article II, § 16 refers first to counties; yet all of the plans split numerous counties. No single county split is "absolutely necessary," but many such splits *are* necessary when a statewide plan is considered in the aggregate. For the same reason, there is nothing magical about keeping the City of Pittsburgh in one district. Indeed, by splitting Pittsburgh the Ali Plan ensures Allegheny County is split only twice, and also keeps most of Pittsburgh intact, keeps Black communities whole, and respects suburban communities of interest. Expert Report of Sarah

Andre at 11-12 (attached as Exhibit to Brief of Amici Khalif Ali *et al.* (Jan. 24, 2022)). The Special Master could just as easily have excluded all plans that split Dauphin County, the Capital Region, or the Wilkes Barre/Scranton/Hazleton area. By summarily rejecting any split of Pittsburgh, the Special Master made a political judgment that the integrity of that city's boundaries must be given primacy. The Court should not adopt this simplistic approach.

B. The Special Master's Treatment of Bucks County Was Equally Flawed

The Special Master made a similar error regarding the division of Bucks County, declaring a split of this county unacceptable under any circumstance. Report at 195, ¶ 31 ("[A]ny map that divides Bucks County for the first time since the 1860s, including Governor Wolf's map, is not an appropriate choice."). Again, the Special Master failed to look at the entire map in context.

It is common ground that given the size of Philadelphia County, at least one Philadelphia district must incorporate population from a neighboring county—Bucks, Montgomery or Delaware. Report at 149, FF6. The Special Master concluded that splitting Bucks County was inappropriate as a matter of law. Under a sort of cartographic stare decisis theory, the Special Master reasoned that Bucks County has been together in one district for many years, so it would be unacceptable to split it now. There is no logic in this, and indeed, the position is inconsistent with the Special Master's rejection of the "least change" approach on

the ground that "it focuses on the preexisting status of a map's boundary lines" when "in the past 10 years, there has been dramatic population shifts in Pennsylvania," Report at 156-57, FF13. Plans are redrawn after each census for a reason, and district boundaries must change to reflect new demographic realities. The Special Master's denigration of proposed plans that append population from Bucks County, rather than Delaware County, reflects the preferences of the Special Master, not any reasoned legal rule. The thin findings on the subject are conclusory and ultimately rest on subjective testimony about the nature of the Philadelphia collar counties by a biased expert. *See* Report at 210-11, FF70-75. The Special Master's conclusion that Bucks County (and not Delaware County) must be held together at all costs should be rejected.

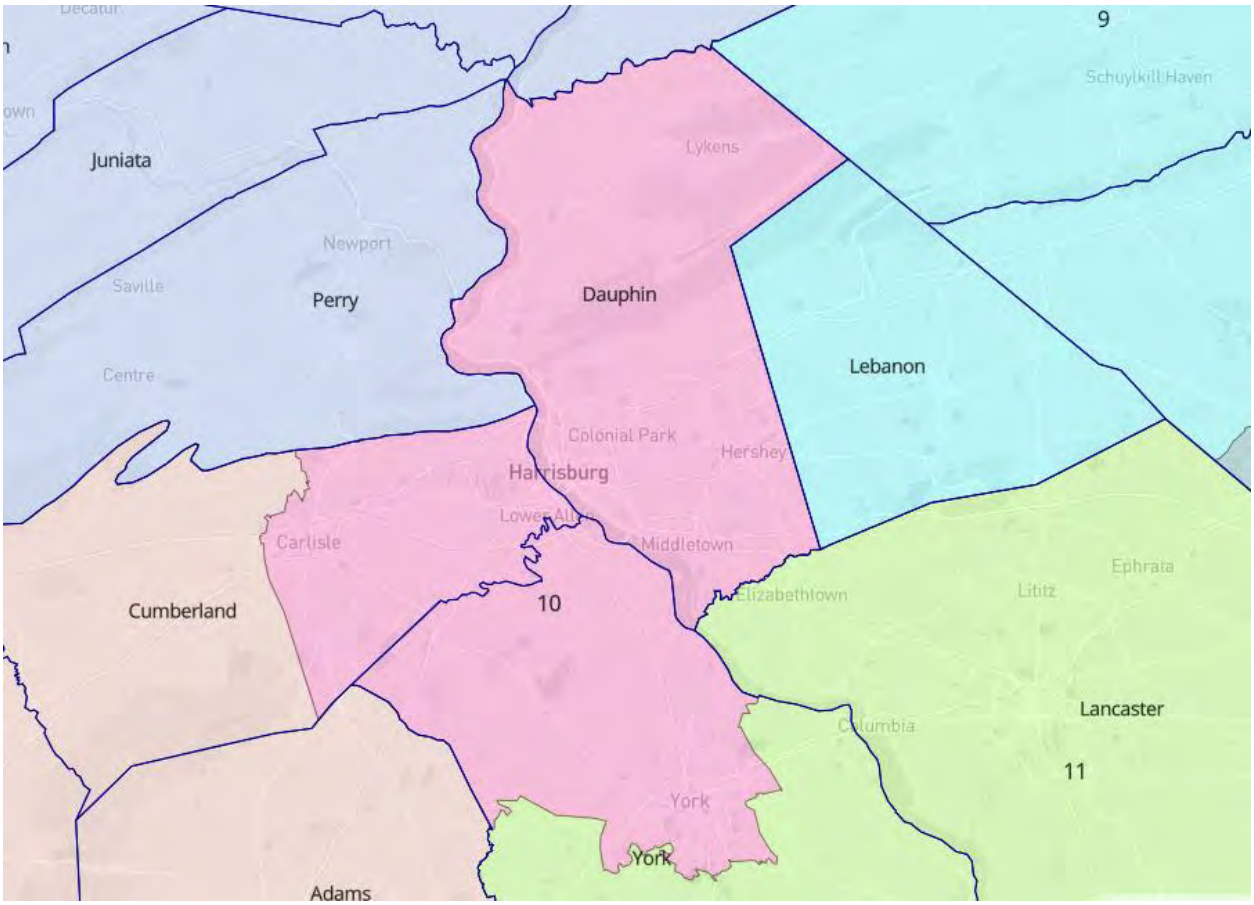
C. The Special Master Arbitrarily Ignored Other Communities of Interest That This Court Grouped Together in the 2018 Plan

While heavy on discussion of Pittsburgh and Bucks County, the Report barely addresses the treatment of Harrisburg and Northeastern Pennsylvania, including the cities of Scranton, Wilkes Barre, and Hazleton. In these areas, HB 2146 departs dramatically from the plan this Court adopted just four years ago.

1. The Harrisburg Area

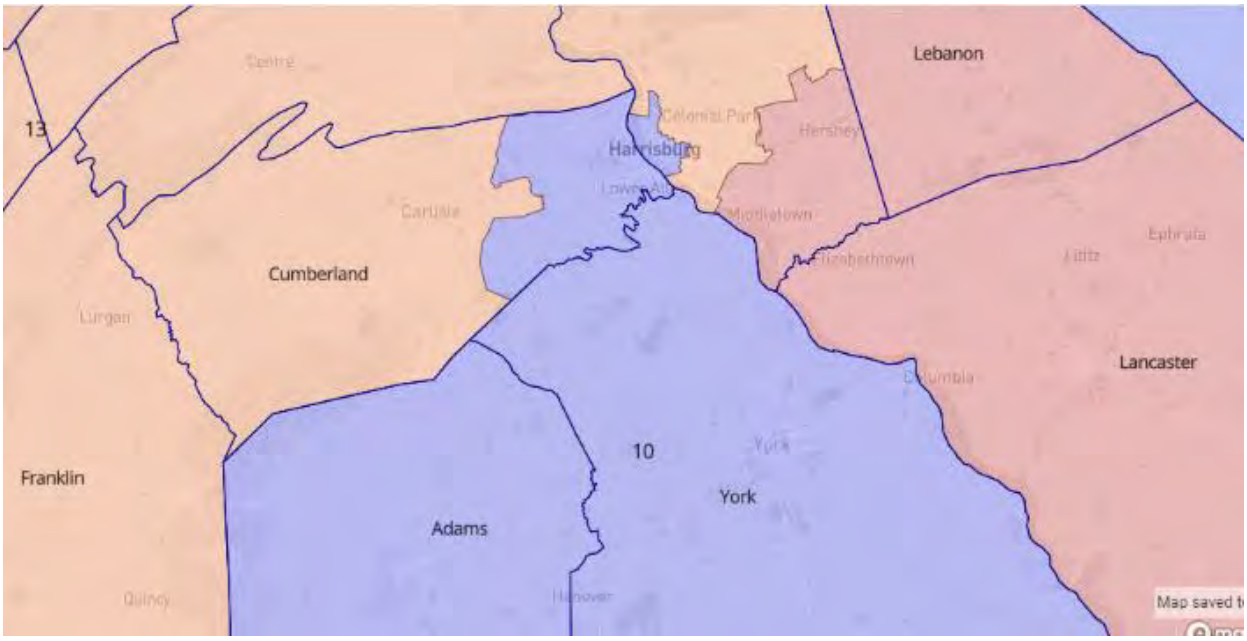
According to the 2020 Census, Dauphin County has 286,401 residents. The ideal population for a Pennsylvania congressional district is 765,536. Thus, as with

Pittsburgh, it is readily possible to put all of Dauphin County in a single district. The current District 10, as drawn by this Court in 2018, does just that. District 10 encompasses the entirety of Dauphin, eastern Cumberland County including Carlisle, and northern York County including the city of York:



See League of Women Voters of Pa. v. Commonwealth, 181 A.3d 1083, 1097 (Pa. 2018).

HB 2146 trisects Dauphin County. It separates the City of Harrisburg from its southeastern suburbs, as well as the airport, and then carves out the northern suburbs, splitting off Penbrook and Colonial Park:



See Brief of Senate Republicans (Jan. 24, 2022), at 191. No good reason was offered for dividing these communities of interest.

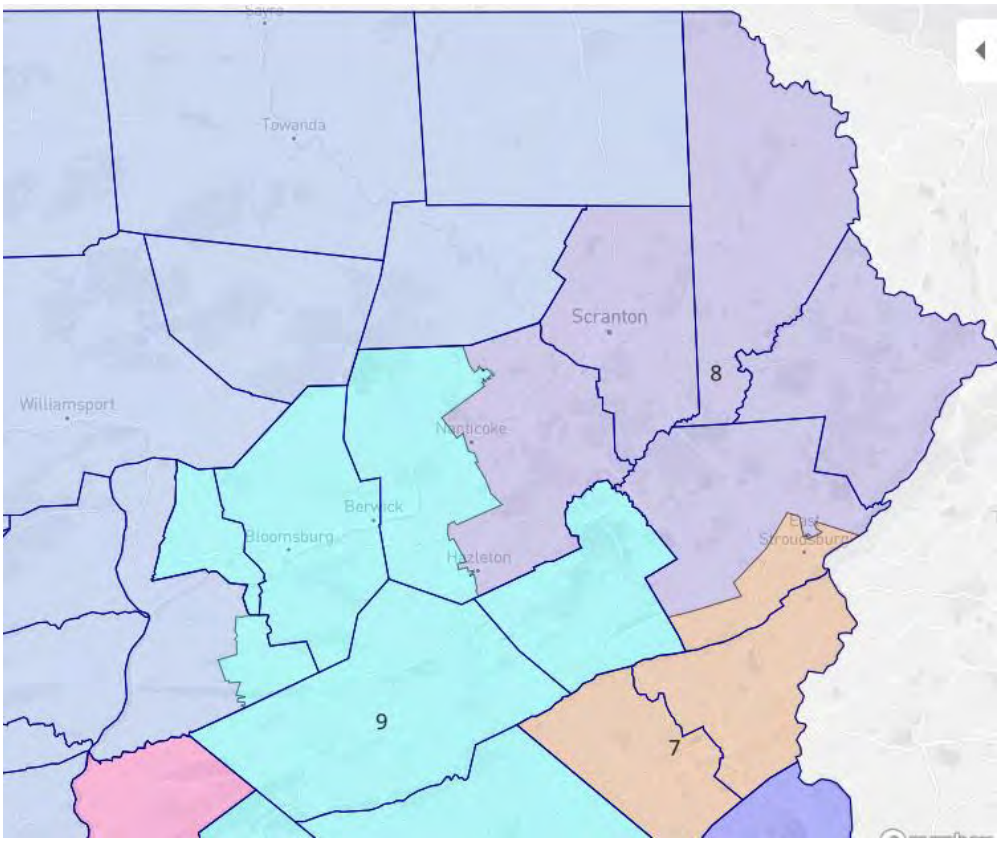
This configuration directly harms the Capital Region community of interest by cleaving the Black and Latino population in Dauphin County into two parts, undermining the ability of these groups to elect a representative of their choice. Expert Report of Sarah Andre at 10 (attached as Exhibit to Brief of Amici Khalif Ali *et al.* (Jan. 24, 2022)). This configuration breaks up the long-standing economic community of interest that surrounds the Capital Region. *Id.* (describing the Capital Region's economic community of interest).

Nor does the Report acknowledge that the proffered configuration in HB 2146 is an outlier. Of the proposed plans, only HB 2146 and the Congressional

Republicans' plans fracture Dauphin County into three parts. All the rest followed this Court's lead in the current plan, leaving these communities of interest intact.

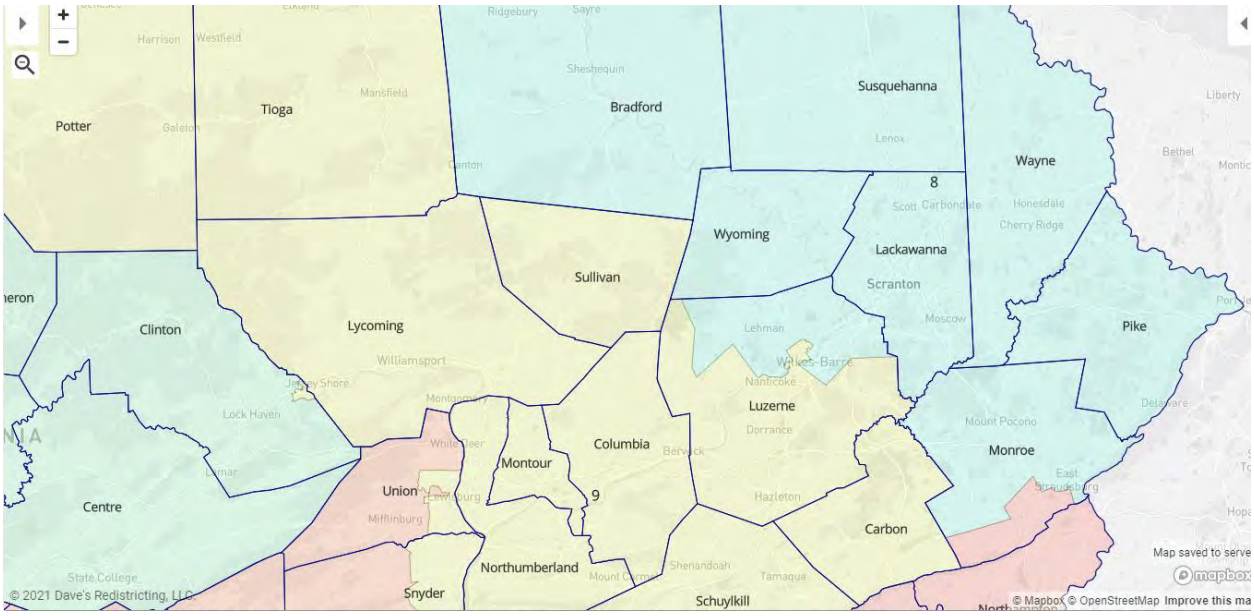
2. Northeastern Pennsylvania

The Northeastern Pennsylvania region is anchored by the community of interest connecting Scranton, Wilkes-Barre, and Hazelton. The current plan groups these cities in a single district, District 8:



See 181 A.3d at 1095.

HB 2146 would divide the municipalities of Scranton/Wilkes-Barre/Hazelton into two separate districts:



See Brief of Senate Republicans (Jan. 24, 2022), at 189-90. HB 2146 and the Congressional Republicans' plans were the only proposals to split these cities. Wilkes-Barre, Scranton, and Hazelton have significant Latino and Black populations. Holding these communities in a single district would allow these groups to have a greater voice in electing a representative of their choice. Expert Report of Sarah Andre at 7 (attached as Exhibit to Brief of Amici Khalif Ali *et al.* (Jan. 24, 2022)).

D. The Court Should Make its Own Determination, Prioritizing Communities of Interest

The reality is that there is no "one true map," and reducing the mapmaking process to a simple yet arbitrary rule like "never split Pittsburgh" is an inadequate way to solve a complicated problem. The Court must now make its own determination based on neutral principles. In doing so, the Court has a special duty

to respect communities of interest. *LWV-PA*, 178 A.3d at 816. That requires much more than noting the boundaries of the City of Pittsburgh or Bucks County. This Court should rely on publicly available historic, economic, and cultural resources as well as the testimony on communities of interest provided to the Governor's Redistricting Commission, the Pennsylvania General Assembly through its online portal, and the LRC's online comment portal. *See* Expert Report of Sarah Andre at 1 (attached as Exhibit to Brief of Amici Khalif Ali *et al.* (Jan. 24, 2022)). In short, the Pennsylvania Constitution requires an affirmative and unbiased investigation by the Court to ensure that an individual's vote is "equalized to the greatest degree possible with all other Pennsylvania citizens." *LWV-PA*, 178 A.3d at 817.

Happily, the proceedings below have produced a diversity of plans for the Court to choose from; or, of course, the Court can draw its own plan, as it did during the remedial mapping process in 2018. To assist the Court in the analysis, Amici identify how each plan treats the splitting of four important communities of interest discussed at length across the briefing: Pittsburgh, Bucks County, the Capital Region, and the Northeast.

Plan	Pittsburgh	Bucks	Capital Region	Northeast Region
Ali	Split	Split	Whole	Whole
Carter	Whole	Whole	Whole	Whole
Gressman	Whole	Split	Split	Whole
Senate Dem Caucus #1	Split	Split	Whole	Whole
Senate Dem Caucus #2	Split	Split	Split	Whole
Congressional Rs #1	Whole	Whole	Split	Split
Congressional Rs #2	Whole	Whole	Split	Split
Wolf	Split	Split	Split	Whole
House Dem Caucus	Whole	Split	Split	Whole
HB 2146	Whole	Whole	Split	Split
CCFD	Whole	Whole	Split	Whole
Draw the Lines	Split	Whole	Split	Whole
Citizen-Voters	Whole	Whole	Split	Whole
Voters of PA	Whole	Whole	Split	Whole

Amici submit that to the extent the Court prioritizes intactness for any specific subset of local government units and communities of interest, it should focus primarily on keeping both the Capital Region and the Northeast Region cities intact, for the reasons set forth above and at greater length in the Expert Report of Sarah Andre (attached as Exhibit to Brief of Amici Khalif Ali *et al.*, (Jan. 24, 2022)). This would narrow the field to three plans: Ali, Carter, and Senate Democratic Caucus #1.

III. As a Tiebreaker, the Court Should Select a Plan Based on Prisoners' Home Addresses

In drawing new legislative districts, the LRC has made adjustments to U.S. Census Bureau data so that legislative districts will not continue the practice of "prison-based gerrymandering." It has done so by adjusting residence data to return nearly 30,000 state prisoners to their home addresses from their cell addresses. *See* LRC Resolution 4A (Aug. 24, 2021), *available at* https://www.redistricting.state.pa.us/resources/press/Resolution%204A.pdf; LRC Resolution 5A (Sept. 21, 2021), *available at* https://www.redistricting.state.pa.us/resources/press/Resolution%205A.pdf. The Special Master should not have rejected the Ali Plan for using the LRC's prisoner-adjusted data. *See* Report at 56, FF 25; 107, FF 296; 133-34; 139-40, FF 5, CL 5-7; 192-93, ¶¶ 19-21; 199.

In light of Pennsylvania's equipopulation requirement, and principles of fairness and consistency, this Court should select a congressional districting plan that makes use of the same adjusted address data as the LRC's maps. The Ali Plan is the only plan before the Court drawn based on these prisoner-adjusted data. Although Amici do not contend at this juncture that the 2022 congressional plan *must* be drawn on the basis of the LRC's adjusted data, the Court should consider

the Ali Plan's use of this data set as a plus factor that further supports adoption of the Ali Plan.[4]

A. Counting Prisoners in their Cells Unfairly Distorts Districts

As the LRC rightly noted:

> The practice of counting inmates as residents of their prisons rather than from the districts from which they came artificially inflates the population count of districts where prisons are located and artificially reduces the population count of districts from which the inmates came, likely continue to have ties to and likely will return to post incarceration.

LRC Resolution 4A (Aug. 24, 2021). Before this redistricting cycle, home address information for prisoners was unavailable to mapmakers in Pennsylvania,[5] who thus had no choice but to use unadjusted Census data, which counts prisoners at their cells regardless of state residency laws.[6] As a result, in previous decades'

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[4] The Special Master noted that House Resolution 165 rejected the use of the LRC's prisoner-adjusted data set for congressional redistricting. Report at 193 ¶ 21. This Resolution was never presented to the Governor, and should not be a factor in this Court's decision, as detailed in Section I.

[5] The LRC's adjusted address data set reassigns most but not all incarcerated people to their home addresses, omitting people who will be incarcerated beyond April 1, 2030, as well as those in federal and county facilities. LRC Resolution 5A (Sept. 21, 2021). In spite of these omissions, any correction to address data for incarcerated people is better than none. *See Fletcher v. Lamone*, 831 F. Supp. 2d 887, 897 (D. Md. 2011) (three-judge panel) ("Because some correction is better than no correction, the State's adjusted data will likewise be more accurate than the information contained in the initial census reports, which does not take prisoners' community ties into account at all."), *aff'd without opinion*, 567 U.S. 930 (2012).

[6] *See generally Fletcher* 831 F.Supp.2d at 895-96 ("According to the Census Bureau, prisoners are counted where they are incarcerated for pragmatic and

districting plans for Pennsylvania, prisoners swelled the populations of regions near state correctional institutions, even though prisoners cannot vote if serving felony sentences and have no say in those regions' civic life. At the same time, imprisoned people's hometowns—where their families still live, where their children attend school, and where prisoners normally will return when released—have seen their representation diluted in Pennsylvania's congressional delegations. These distortions have especially weakened electoral strength for Black and Latino communities, both because they are overrepresented in the prison population, and because Pennsylvania's state correctional institutions are largely located in areas with few Black or Latino residents.

Amici John Thompson and Cynthia Alvarado have experienced the harms of prison-based gerrymandering firsthand. They are both Philadelphians who have recently returned home after spending a combined total of nearly fifty years in faraway State Correctional Institutions. Today they live in, and regularly work or volunteer in, communities that are among the hardest-hit by the reduced representative power that flows from prison-based gerrymandering. In particular, as a Black man and a Latino woman, both have seen how even after regaining the

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administrative reasons, not legal ones. . . . [A]lthough the Census Bureau was not itself willing to undertake the steps required to count prisoners at their home addresses, it has supported efforts by States to do so.").

right to vote, many former prisoners feel discouraged from participating in democracy because they do not believe their communities are fairly represented in congressional elections.

Through using prisoner home addresses, Philadelphia gains 7,019 residents. And cities including Pittsburgh, Reading, Allentown and Lancaster gain 839, 619, 519, and 450 residents, respectively. Expert Report of Sarah Andre at 3 (attached as Exhibit to Brief of Amici Khalif Ali *et al.* (Jan. 24, 2022)).

B. State Law Treats Prisoners as Residents of Their Homes

The Pennsylvania Election Code states:

> Except as otherwise provided in this subsection, no individual who is confined in a penal institution shall be deemed a resident of the election district where the institution is located. The individual shall be deemed to reside where the individual was last registered before being confined in the penal institution, or, if there was no registration prior to confinement, the individual shall be deemed to reside at the last known address before confinement.

25 Pa.C.S. § 1302(a)(3). In other words, Pennsylvania law defines prisoners to be residents of their hometowns, not their cells. This is consistent with the long-established general legal principle that incarceration does not automatically change one's residence. *See, e.g.*, *United States v. Stabler*, 169 F.2d 995, 998 (3d Cir. 1948); *McKenna v. McKenna*, 422 A.2d 668, 670 (Pa. Super. Ct. 1980).

Since the last redistricting cycle, this Election Code provision has taken on new significance. Congressional districts must be "as nearly equal in population as practicable." *LWV-PA*, 178 A.3d 737, 816 (Pa. 2018). Specifically, this Court

clarified that the equipopulation mandate requires a plan to "accord equal weight to the votes of ***residents*** in each of the various districts." *Id.* at 814 (emphasis added). In other words, the equipopulation standard in Pennsylvania focuses on "residents" of districts, and pursuant to state law prisoners are residents of their home addresses, not their cells.

Under *LWV-PA*, the population distortions caused by prison-based gerrymandering also create tension with Article I, § 5, the Free and Equal Elections Clause. By relying on incarcerated people to meet population requirements in districts with state correctional institutions, past congressional plans have inaccurately reflected where Pennsylvanians actually live. This inequality of voting power is precisely what the Free and Equal Elections Clause restricts. This Court has explained that Article I, § 5 "guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government[,]" and "mandates that all voters have an equal opportunity to translate their votes into representation." *LWV-PA*, 178 A.3d at 804. Thus, "any legislative scheme which has the effect of impermissibly diluting the potency of an individual's vote for candidates for elective office relative to that of other voters will violate the guarantee of 'free and equal' elections afforded by Article I, Section 5." *Id.* at 809. This is all the more true when the inequality disproportionately weakens representation for Black and Latino communities.

C. Districting Plans Can Be Based On Adjusted Census Data

Although the Census Bureau reports imprisoned people's cell addresses, nothing in federal or state law limits the Commonwealth from adjusting Census data to correct for prisoners' home addresses before drawing congressional districts. In the last redistricting cycle, two states made such adjustments to the official 2010 Census data, and courts upheld the resulting maps in both states. *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011) (three-judge panel) (congressional districts), *aff'd without opinion*, 567 U.S. 930 (2012); *Little v. N.Y. State Legislative Task Force on Demographic Research & Reapportionment*, No. 2310-2011 (N.Y. Sup. Ct. Dec. 1, 2011) (state legislative districts), *available at* http://www.prisonersofthecensus.org/little/Decision_and_Order.pdf. More recently, the Supreme Court of Oklahoma found no federal constitutional barriers to a proposed ballot question to end prison-based gerrymandering for congressional and legislative districts that would mandate adjustments to Census data like those made by the LRC. *In re Initiative Petition No. 426, State Question No. 810*, 465 P.3d 1244, 1249-55 (Okla. 2020).

In the current redistricting cycle, at least seven states are making adjustments like this to prisoners' addresses for congressional redistricting. *See* Cal. Elec. Code § 21003; Colo. Rev. Stat. § 2-2-902; Md. Code Ann., Elec. Law,

§ 8-701; Nev. Rev. Stat. §§ 304.065, 360.288; N.J.S.A. §§ 52:4-1.1 to -1.6; Va. Code Ann. § 24.2-304.04(9); Wash. Rev. Code § 44.05.140.

Moreover, numerous states, including the Commonwealth, adjust Census data in other ways when redrawing districts, for example by excluding transient populations such as nonresident military members. *Evenwel v. Abbott*, 578 U.S. 54, 60 & n.3 (2016); *cf. also Bethel Park v. Stans*, 449 F.2d 575, 582 n.4 (3d Cir. 1971) ("Although a state is entitled to the number of representatives in the House of Representatives as determined by the federal census, it is not required to use these census figures as a basis for apportioning its own legislature."). In Pennsylvania, the LRC has routinely made technical adjustments to the official Census reports before drawing legislative districts, such as correcting voting-district code and name discrepancies, municipality name discrepancies, late precinct changes, and problems with split blocks. *See, e.g.*, *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 719 & n.6 (Pa. 2012); LRC, *The Legislative Guide to Redistricting in Pennsylvania* (last updated May 8, 2013), https://tinyurl.com/twmpdcx4. Nothing restricts the Commonwealth from additionally adjusting prisoners' addresses when redistricting. And especially since Pennsylvania's new state legislative districts are being drawn on the basis of prisoners' home addresses, considerations of consistency militate in favor of using the same adjusted data set for drawing congressional districts.

CONCLUSION

The Court should reject the recommendations of the Special Master and should instead select a superior congressional plan. Of the numerous constitutional, fair, and neutral plans before the Court, the Ali Plan is the best option, and the Court should select it, or in the alternative should draw its own plan according to the principles reflected in the Ali Plan.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

I further certify that this brief complies with the length limitation set forth in Pa.R.A.P. 531(b)(3). According to the word count of the word-processing system used to prepare this brief, the brief contains 6,974 words, not including the supplementary matter as described in Pa.R.A.P. 2135(b).

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