

**IN THE SUPREME COURT OF PENNSYLVANIA**

Kerry Benninghoff, individually,	:	
and as Majority Leader of the	:	
Pennsylvania House of	:	
Representatives,	:	
	:	
Petitioners,	:	No. 11 MM 2022
	:	
v.	:	
	:	
2021 Legislative Reapportionment	:	
Commission,	:	
	:	
Respondent.	:	

**ANSWER OPPOSING PETITIONER’S APPLICATION  
TO AMEND THE COURT’S FEBRUARY 17, 2022 ORDER TO ALLOW  
FOR REPLY BRIEFS AND ORAL ARGUMENT**

The Court should deny Petitioner’s Application, because:

1. On March 4, 2022, the Court denied a similar request made in *Covert v. 2021 Legislative Reapportionment Comm’n*, 4 WM 2022, on which Petitioner here admittedly bases this application. (See Application at 1.)  
  
This Court should deny this Application for the same reasons it denied the application in *Covert*.

2. Petitioner has known about the Court's scheduling order for fifteen days, but waited until the weekend before any petitioners' briefs are due to request relief.

3. Petitioner's argument that the Commission caused significant delay by reallocating certain prisoner data is belied by the record.

4. Contrary to Petitioner's representations, census data was only available to the Commission after it was determined to be usable by the Legislative Data Processing Center and its selected GIS vendor, the Penn State Data Center.

5. Even without considering the reallocation of prisoner data, the census data only became usable on October 5, 2021. The reallocated data was delivered in usable form on October 14, 2021. Therefore, the Commission's decision to reallocate prisoner data, at most, only required an extra nine days.

6. The Commission more than compensated for this time by adopting its Preliminary Plan twenty-seven days ahead of the constitutionally mandated deadline and adopting its Final Plan thirteen

days ahead of the deadline in Article II, § 17(c) of the Pennsylvania Constitution.

7. Nor is Petitioner prejudiced by any delay in transmission of the record.

8. The Commission provided its Certified Record to the Court on February 23, 2022.

9. Since that date, the Commission has supplemented that record by filing transcripts from the Commission's hearings.

10. Most of those transcripts have been available, and continue to be available, on the Commission's website for months.

11. For the more recent hearings and meetings, anyone interested could view videos of these proceedings on the Commission's website. Indeed, Petitioner referenced and cited to the videos in his Petition for Review.

12. Nor can Petitioner claim any prejudice from not having access to the Commission's Certified Record or transcripts. Petitioner is a member of the Commission and therefore had access to the materials contained in

the Certified Record, even prior to the Commission's transmission of the record. Moreover, Petitioner—along with members of his legal team, including lawyers who are representing him in this Court, and other staff—attended the hearings, for which transcripts now have been made available.

13. Petitioner has offered no persuasive reason for the Court to alter the scheduling order already entered.

14. At the time the Court entered the scheduling order, the Court was well aware of the importance of the challenges to the Commission's Final Plan and determined that the schedule imposed would provide the Court sufficient time to provide "meaningful appellate review." *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 723 (Pa. 2012). The Court is in the best position to determine the time it needs to provide such review to all the challenges to the Final Plan.

15. The Court is similarly in the best position to decide whether oral argument would be helpful, and that is precisely what the Court has done in its scheduling orders. There is no right to oral argument, and the

Court has dispensed with oral argument in other exigent circumstances. The circumstances are exigent here because of the delays caused by the pandemic-related late delivery of 2020 census data suitable for redistricting and the impending primary election. Those circumstances fully justify the Court's requiring more streamlined and expedited review procedures than in the past.

16. There is no basis for the claim that due process somehow requires a reply brief or oral argument. (Application at ¶ 6.) If that were true, the next assertion will be that due process requires rebuttal during oral argument. There is no authority for such a proposition.

17. Petitioner also has no basis to claim that a reply or oral argument is needed because Petitioner has no way of knowing what the Commission will argue in response to his Petition for Review and brief. (Petition at ¶ 5.)

18. The Chair of the Commission filed a Report on Friday, March 4, 2022, outlining the arguments in support of the Final Plan. Simultaneously with its filing, copies of the Report were provided to each Commissioner

and to counsel for each of the caucuses. The Chair's Report is attached as Exhibit A. No guesswork by Petitioner is needed.

19. Moreover, because Petitioner was a Commission member and attended all but one relatively early meeting, and his legal staff attended all the meetings, Petitioner and his staff are fully versed in the Commission's reasons for each aspect of the Final Plan that they have challenged.

20. Finally, Petitioners' counsel are highly experienced in redistricting litigation, in Pennsylvania and elsewhere. It strains credulity for them to assert that they cannot anticipate and discuss in their brief the arguments that the Commission will be making in support of the Final Plan. Under all the circumstances, fairness does not require a reply brief any more than it requires a surreply.

21. This Court has engaged in a Herculean effort to deal with the Congressional and Legislative redistricting processes in the face of the exigent circumstances created by the global pandemic, without delaying the primary election. If the Court determines, after reviewing the briefs, that one or more of the challenges to the Final Plan requires more in depth

consideration, this Court has allowed room for expanded consideration.

There simply is no justification for the Court to alter the schedule preemptively.

Respectfully submitted,

March 7, 2022

/s/ Robert L. Byer

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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 from non-confidential information and documents.

*/s/ Robert L. Byer* \_\_\_\_\_



# **Exhibit A**

**REPORT OF MARK A. NORDENBERG**  
**CHAIR OF THE 2021 PENNSYLVANIA LEGISLATIVE**  
**REAPPORTIONMENT COMMISSION**  
**REGARDING THE COMMISSION'S FINAL PLAN**

**MARCH 4, 2022**

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## I. Introduction

In his concurring and dissenting opinion in *Holt v. 2011 Legislative Reapportionment Commission*, 38 A.3d 711 (Pa. 2012) (“*Holt I*”), former Justice Eakin offered a perspective that almost certainly would resonate with anyone who has been deeply involved in the redistricting process:

The process of redistricting is complex beyond words. The need to consider all the factors necessary—contiguity, compactness, equality of population, respecting political subdivisions down to the ward level, avoiding disenfranchising racial and ethnic groups, the federal Voting Rights Act—makes this a daunting task for the [Legislative Reapportionment Commission (“LRC”)]. The result of changing any one area of its plan was likened by counsel to squeezing a water balloon: if you squeeze here, it will bulge over there. If you change one line, it causes ripples that necessitate changes elsewhere.<sup>1</sup>

*Id.* at 762-63 (Eakin, J., concurring and dissenting).

In that same opinion, Justice Eakin also described one particular difficulty faced by the Supreme Court in reviewing the challenges brought to it:

An inherent problem in reviewing challenges to the ultimate plan is that no mechanism exists for the LRC to justify or explain its considerations or decisions. For better or for worse, there are no means for it to explain individual lines or boundaries. It is never “absolutely necessary” to

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<sup>1</sup> Because of these difficulties and ripple effects, the Supreme Court will only invalidate the Commission’s Final Plan if the Plan as a whole is contrary to law. *See Holt I*, 38 A.3d at 733. Any appeal presenting a localized challenge to the way a district was drawn or complaining that a municipality was divided necessarily fails. *See Holt v. Legislative Reapportionment Comm’n*, 67 A.3d 1211, 1217 n.2 (Pa. 2013) (“*Holt II*”).

draw a line in any spot—it could always go elsewhere, but there is no process articulating what considerations were behind the decision to put it where the LRC did.

*Id.* at 763 (Eakin, J., concurring and dissenting).

In his opinion for the Court in that same case, former Chief Justice Castille also addressed this latter challenge, suggesting that the Commission consider “a process in its development of a Final Plan where it provides explanations or responds to objections.” *Id.* at 737.

Building on the commitment to openness that has been a hallmark of this Commission, this Report attempts to provide the better-developed sense of context that was called for by the Court and that also will be of interest to the public.<sup>2</sup> Much of what has been included here already is in the record and can be found in the transcripts of the Commission’s public meetings. However, providing that same information, supplemented as appropriate, in the form of a report should make it far more usable. The Report also could be seen as functioning like an opinion or adjudication from an administrative agency, which is typically the work product reviewed by the Supreme Court.<sup>3</sup>

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<sup>2</sup> In keeping with the Commission’s commitment to transparency, this Report is also being published on the Commission’s website: [www.redistricting.state.pa.us](http://www.redistricting.state.pa.us).

<sup>3</sup> It also should be noted that Resolutions 8A 2-4-22 and 8B 2-4-22, which were adopted unanimously by the Commission at its February 4, 2022 meeting, direct the Chair and Executive Director to prepare a Commission report. Though that final report will be somewhat more expansive, this document will be a part of it.

To be clear, this Report does not attempt to reflect the views of all of the Commission members. However, it does reflect my views as the Commission's Court-appointed Chair, and because the other Commissioners, as a matter of choice and custom, focused all of their efforts exclusively on their own Chamber, only the Chair and the Commission's staff were actively engaged in developing the entire plan.

It also should be noted that Majority Leader Benninghoff, the only Commission member to dissent in the 4-1 vote favoring the Final Plan's adoption, already has filed exceptions and a Petition for Review. He presumably also will be filing a brief. This Court, then, will have easy access to statements of his positions. In fact, because that Petition already has been filed and consists of a broad-based attack against the Final Plan, there will be somewhat frequent reference to it in this Report. Hopefully, that will also be helpful to the Court and of interest to the public.

The fact that one member did dissent from the vote to approve the Final Plan also underscores another decision-making challenge faced by the Commission. Most other efforts to develop new legislative maps, such as the mapping efforts promoted by good-governance groups or the work of court-appointed special masters, are undertaken by a single individual or by a group of largely like-minded individuals. Those must be the mapping experiences that sometimes are described

as easy. However, the composition of the Commission essentially guarantees that its processes, though hopefully civil, will be strongly influenced by partisan interests and will largely be adversarial. Having direct experience with them, I now can say, without hesitation, that the Commission's processes are anything but easy.

Article II, § 17(b) of the Pennsylvania Constitution provides, “[t]he Commission shall consist of five members: four of whom shall be the Majority and Minority Leaders of both the Senate and the House of Representatives.” It would be surprising if each of those four caucus leaders, elected to a leadership position by his or her caucus members, was not highly motivated to secure the adoption of a plan that would best advance the interests of that caucus. Those interests can include the wishes of individual caucus members but mainly involve the conflicting goals of caucuses seeking to protect a majority and caucuses seeking to gain a majority.

That observation is not intended to suggest that the composition of the Commission necessarily should change. Among other things, it is not yet clear how successful the independent commissions created in other states will have been during this redistricting cycle. Further, as the drafters of the Commission envisioned, legislative leaders bring important experiences, knowledge, and perspectives to the process. However, when four of the five members of the Commission are driven by frequently competing interests, it does mean that



concessions will need to be made and compromises will need to be struck to gain the votes necessary to secure even a majority decision, much less a bipartisan or unanimous decision, which presumably would be the goal of every Chair.

## **II. The Challenges of Redistricting in Pennsylvania**

The Pennsylvania Constitution is, as it must be, the starting point for the Commission’s reapportionment process. This foundational document states that “[i]n each year following the year of the Federal decennial census, a Legislative Reapportionment Commission shall be constituted for the purpose of reapportioning the Commonwealth.” Pa. Const. art. II, § 17(a). Under the Constitution, the “Commonwealth shall be divided into 50 senatorial and 203 representative districts, which shall be composed of compact and contiguous territory as nearly equal in population as practicable.” Pa. Const. art. II, § 16. In addition to the requirements of compactness and contiguity, the Constitution provides that, “[u]nless absolutely necessary[,], no county, city, incorporated town, borough, township or ward shall be divided in forming either a senatorial or representative district.” *Id.*

### **A. Legal Framework**

#### *1. Requirements of Article II, § 16*

Pennsylvania’s population is 13,002,700, according to the 2020 federal census, which means that the ideal Senate district has 260,054 people, and the ideal

House district has 64,053 people.<sup>4</sup> Thus, redistricting involves creating 50 Senate districts and 203 House districts with populations that are as close to this ideal as practicable, that are compact and contiguous, and that avoid splitting counties, cities, incorporated towns, boroughs, townships, and wards, unless absolutely necessary. This task is all the more difficult because, in addition to having one of the nation’s largest legislatures, our Commonwealth has more local government units than almost any other state. Pennsylvania has 67 counties, 56 cities, 955 boroughs, 2 incorporated towns, and 1,547 townships. *See* 124 Pennsylvania Manual § 6-3 (2020). In all, Pennsylvania has 2,560 recognized municipalities and 67 counties—all of which should not be split unless absolutely necessary. That is a daunting task simply as a matter of geometry.

Of course, some divisions are absolutely necessary based purely on population alone. For example, Philadelphia has a population of 1,603,797, which means Philadelphia must be divided into a minimum of 25 House districts and 7 Senate districts.<sup>5</sup> Pittsburgh has a population of 302,971 people, which translates to a minimum of 5 House districts and 2 Senate districts.<sup>6</sup> Berks County has a population of 428,849 people, Lehigh County has a population of 374,557 people,

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<sup>4</sup> *See* <https://data.census.gov/cedsci/all?q=pennsylvania>

<sup>5</sup> *See* <https://data.census.gov/cedsci/all?q=philadelphia>

<sup>6</sup> *See* <https://data.census.gov/cedsci/all?q=pittsburgh>

and Westmoreland County has a population of 354,663 people. (*See Penn State Data Center, County and Municipal Population Change Table.*)<sup>7</sup> All these counties, among others, must be split in both the Senate and House maps. Thus, the requirement to avoid splitting political subdivisions is often at odds with the requirement of having as close to equal population in each district as is practicable. *Holt I*, 38 A.3d at 738 (“The central difficulty of the LRC’s test arises not only because of the political and local interests that are affected by any change in the existing scheme, but also because accommodating one command can make accomplishing another command more difficult.”).

One type of local government unit that is *not* mentioned in the Constitution is school districts, of which there are 500 in Pennsylvania. *See* 124 Pennsylvania Manual § 6-3 (2020). The Commission heard from many citizens that school districts are important “communities of interest” and that these entities, too, should be kept whole. Communities of interest, such as school districts, can be a “legitimate factor in drawing fair and politically sensitive districts.” Ken Gormley, *Racial Mind-Games and Reapportionment: When Can Race Be Considered (Legitimately) in Redistricting*, 4 U. Pa. J. Const. L. 735, 779-80 (2002). However, because school districts are not expressly listed in Article II, § 16 as a priority for

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<sup>7</sup> Available at [https://pasdc.hbg.psu.edu/Portals/48/Features/CountyAndMunicipalPopulationChange\\_2010to2020.xlsx?ver=2021-08-24-080135-920](https://pasdc.hbg.psu.edu/Portals/48/Features/CountyAndMunicipalPopulationChange_2010to2020.xlsx?ver=2021-08-24-080135-920)

keeping whole, the consideration given to counties, cities, incorporated towns, boroughs, townships, and wards must necessarily be given greater weight.

Achieving nearly equal populations and minimizing divisions of political subdivisions are not the only requirements in Article II, § 16 of the Constitution. That section of the Constitution also requires districts to be compact and contiguous. “[A] contiguous district is ‘one in which a person can go from any point within the district to any other point (within the district) without leaving the district, or one in which no part of the district is wholly physically separate from any other part.’” *Holt v. 2011 Legislative Reapportionment Comm’n*, 67 A.3d 1211, 1242 (Pa. 2013) (“*Holt II*”) (quoting *Commonwealth ex rel. Specter v Levin*, 293 A.2d 15, 23 (Pa. 1972)). While this may seem like an easy criterion to satisfy, Pennsylvania’s political geography sometimes makes literal compliance impossible. The Commonwealth has seven political subdivisions that are, themselves, discontinuous. *Id.* The Supreme Court has generally found that the Commission’s plan complies with the Constitution’s contiguity requirement where the only discontinuous sections of the district are the result of keeping the discontinuous municipalities whole. *Id.*

Compactness is harder to define. The Supreme Court has never adopted a particular standard for measuring compactness. *Id.* Two common measures—the Reock and Polsby-Popper tests—are often cited by both federal and state courts

when considering redistricting standards. *See id.*; *League of Women Voters v. Commonwealth*, 178 A.3d 737, 772 (Pa. 2018); *Cooper v. Harris*, 137 S. Ct. 1455, 1475 (2017); *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elec.*, 835 F. Supp. 2d 563, 570 (N.D. Ill. 2011) (three-judge district court).

All of these constitutional criteria—near population equality, compactness, contiguity, and minimization of political subdivision splits—must be balanced against each other. *See Holt I*, 38 A.3d at 759.

## 2. *Additional State Constitutional Criteria*

Although the requirements of Article II, § 16 tend to be the focus of many redistricting challenges and court decisions, other provisions of the Pennsylvania Constitution are also relevant to the Commission’s work. One such provision is the Free and Equal Elections Clause of Article I, § 5, which states, “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. art. I, § 5.

The Supreme Court emphasized the relevance of this provision in the redistricting context in *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018), which held that the Commonwealth’s 2011 Congressional districts were an impermissible partisan gerrymander. The Court explained that the first clause of Article I, § 5 “mandates clearly and unambiguously, and in the broadest possible terms, that *all* elections conducted in this Commonwealth must be ‘free

and equal.” *Id.* at 804. By using this language, the Constitution’s framers intended that “all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth.” *Id.* The clause also protects, “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.” *Id.* In other words, all citizens have an equal right to elect their representatives, and “all voters have an equal opportunity to translate their votes into representation.” *Id.*

The Free and Equal Elections Clause has at least two specific implications for redistricting. First, the Clause prohibits partisan gerrymandering, because such gerrymandering “dilutes the votes of those who in prior elections voted for the party not in power to give the party in power a lasting electoral advantage.” *Id.* at 814. Partisan gerrymandering dilutes the votes of citizens favoring the party out of power by placing those voters “in districts where their votes are wasted on candidates likely to lose (cracking), or by placing such voters in districts where their votes are cast for candidates destined to win (packing).” *Id.*

Second, the Clause recognizes that voters should not have their votes diluted based on where they live. *See id.* at 809 (explaining that previous versions of the Free and Equal Elections Clause were meant to “exclude not only all invidious discriminations between individual electors, or classes of electors, but also

between different sections or places in the State” (quotation omitted)); *see also id.* at 808 (noting that the 1790 convention was motivated, in part, by “the primary cause of popular dissatisfaction which undermined the governance of Pennsylvania: namely, the dilution of the right of the people of this Commonwealth to select representatives to govern their affairs based on considerations of the region of the state in which they lived”).

In all, the Free and Equal Elections Clause serves to protect the fundamental precept that “the voters should choose their representatives, not the other way around.” *Id.* at 740-41. In this way, the constitutional criteria in Article II, § 16 are linked to the Free and Equal Elections Clause. Adherence to each of these criteria helps guard against vote dilution. *See id.* at 815-16. In fact, violence to the neutral redistricting criteria of Article II, § 16 is one indication of a partisan gerrymander and a dilution of disfavored votes. *Id.* at 816.

The other major constitutional provision impacting the Commission’s redistricting efforts is of much more recent origin. Just last year, the voters of Pennsylvania adopted Article I, § 29, which prohibits discrimination on the basis of race and ethnicity. This provision states: “Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the race or ethnicity of the individual.” Pa. Const. art. I, § 29. Although there are not yet any Supreme Court opinions discussing the impact of this amendment, either in

the redistricting context or more generally, the importance of ensuring that the right to vote is not abridged or denied based on the race or ethnicity of the person voting is central to the ideals of democracy and equality.

### 3. *Federal Constitutional and Statutory Requirements*

The Pennsylvania Constitution is not the only source of law impacting the Commission’s work in redistricting the Commonwealth. The federal Constitution—in particular, the 14th Amendment to the United States Constitution—and the federal Voting Rights Act, 52 U.S.C. § 10301, *et seq.*, also impose certain requirements and limits on any redistricting efforts. When these provisions conflict with state law, the federal requirements necessarily take precedence. *See* U.S. Const. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”); *Holt I*, 38 A.3d at 738 (acknowledging the impact of federal law on state redistricting efforts).

#### B. Problems and Delays in Census Data

The task of the Commission was far more difficult in this census cycle because of the compressed timeline that the Commission faced. The Pennsylvania



Constitution directs that, “[i]n each year following the year of the Federal decennial census, a Legislative Reapportionment Commission shall be constituted for the purpose of reapportioning the Commonwealth.” Pa. Const. art. II, § 17(a). The Commission’s constitutional deadlines are largely tied to receipt of “population data for the Commonwealth as determined by the Federal decennial census.” *Id.* § 17(c). Federal law requires the Census Bureau to transmit census data to the states “as expeditiously as possible,” and further provides, more specifically, that it “shall, in any event, be completed, reported, and transmitted to each respective State within one year after the decennial census date.” 13 U.S.C. § 141(c). In other words, the Census Bureau was required by federal statute to provide Pennsylvania with its population data by April 1, 2021. *Id.*; *see also* 13 U.S.C. § 141(a) (establishing April 1st as the “decennial census date”).

That did not happen. Because of pandemic-related delays, the census was not completed within the statutory timeline. Rather than transmitting census data on or before April 1, 2021, the Census Bureau was first able to provide census data to Pennsylvania, in a “legacy format,” on August 12, 2021. (*See* Oct. 25, 2021 Tr. at 840-41.) Subsequently, the data was provided in a user-friendly version—known as the full redistricting toolkit—on September 16, 2021.<sup>8</sup> At a minimum, then, the

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<sup>8</sup> *See* <https://www.census.gov/newsroom/press-releases/2021/2020-census-redistricting-data-easier-to-use-format.html>

Commission faced a 4.5-month delay in being able to begin the process of redistricting the Commonwealth.

Even after data has been received from the Census Bureau, it must be further processed and verified to ensure that the census data is accurate and in a usable format, and thus is available to the Commission. For the last forty years, the Commission has considered the census data to be “available” to the Commission—triggering the Constitution’s ninety-day timeline for developing a preliminary plan—after the data has been reviewed and corrected by the Legislative Data Processing Center. *See* Ken Gormley, *The Pennsylvania Legislative Reapportionment of 1991*, at 22-24 (Commonwealth of Pennsylvania Bureau of Publications 1994); *see also Holt I*, 38 A.3d at 719 n.6.

This long-standing interpretation is based on a March 26, 1981 unpublished order from the then-Chief Justice of the Supreme Court, Henry O’Brien, stating that “in accordance with § 17(c) of Article II of the Constitution of Pennsylvania, the ninety day period begins to run from the date that the Commission receives the population data of the Commonwealth, as determined by the Federal Decennial [sic] Census, in usable form (breakdown of data by precinct and ward) for the Commission’s performance of its Constitutional duties.” *In re Section 17(c) of the Constitution of Pennsylvania*, No. 29 M.D. Misc. Dkt. 1981 (Pa. Mar. 26, 1981); *see also* Gormley, *The Pennsylvania Legislative Reapportionment of 1991*, at 23.

The Commission has generally followed the practice of “certifying” the data as being in usable form and establishing a definitive date for the time periods of Article II, § 17 to begin to run.

As Brent McClintock, the Executive Director of the Legislative Data Processing Center, testified in multiple Commission hearings, work done by the LDPC and its selected GIS vendor, the Penn State Data Center, is vital to the process of making the census data usable for the Commission. The LDPC is often required to make corrections and adjustments in the census data and was required to do so again this redistricting cycle. (*See* Oct. 25, 2021 Tr. at 841-42.) These corrections and adjustments include adjusting election precincts that were altered after December 2019 (when they were provided to the Census Bureau); creating split blocks to reflect the precinct boundary changes that occurred since providing information to the Census Bureau; adjusting population data if needed; and correcting block coding errors and voting district name errors, among other coding errors. (*Id.*) After the Penn State Data Center makes these adjustments to the data and ensures that the adjustments are reflected in the geography files, the LDPC undertakes a comprehensive review of the data to ensure that it is accurate. (*Id.*)

In previous redistricting cycles, this quality assurance process added about four months to the timeline for when the Commission could begin its work. (*See* Aug. 24, 2021 Tr. at 654.) Thanks to the tireless efforts of the LDPC and the Penn

State Data Center, that timeline was significantly reduced this year. More specifically, the LDPC was able to provide traditional census data, for use by the General Assembly in developing new Congressional districts, in a format usable to the Commission on October 5, 2021. (*See* Oct. 25, 2021 Tr. at 843.) Just nine days later, on October 14, 2021, the LDPC was able to provide usable data that had been adjusted to reflect the Commission’s resolution to reallocate the data for certain state prisoners, which is discussed in more detail below. (*Id.*)

The Commission met on October 25, 2021 to certify retroactively that the census data had been available to it on October 14, 2021. (*See* Resolution 6A 10-25-22.) October 14, then, officially marked the beginning of the 90-day period within which the Commission would be required to create a preliminary reapportionment plan for the House of Representatives and for the Senate. It is important to note that the nine days that were required for the LDPC to convert traditional census data to data that had been adjusted to comply with the Commission’s prisoner allocation resolution is the extent of the delay that can be attributed to the Commission’s consideration of that issue. Statements that delays attributable to the Commission’s consideration of that issue were much longer are simply not accurate.<sup>9</sup>

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<sup>9</sup> It is true that the Commission considered the issues presented by so-called “prison gerrymandering” very carefully. The issue was raised by House Democratic Leader Joanna McClinton at the Commission’s initial organizational

Throughout the process, the Commission worked as quickly as possible—while keeping in mind the enormity and importance of the task—to create both a Preliminary Plan and a Final Plan for reapportioning the two chambers of the General Assembly within a time period that would allow for meaningful review by this Court and would accommodate the scheduled May 17, 2022 primary election.

In pursuit of that goal, the Commission moved more quickly than constitutionally required for all deadlines within its control. The Commission approved its Preliminary Plan on December 16, 2021—63 days (out of the allotted 90 days) after the receipt of usable census data. The Commission, of course, provided the public with the full 30 days provided for in the Constitution to submit exceptions to the Preliminary Plan. Following that period, which expired on January 18, 2022, the Commission adopted its Final Plan on February 4, 2022—17 days (out of the allotted 30 days) after the expiration of the exceptions period.

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meeting on May 26, 2021. It was also the subject of extensive citizen testimony and submissions, as well as expert testimony. During the weeks of summer, the issue was discussed and briefed and members of the Commission staff and caucus teams worked with both the Penn State Data Center and the Department of Corrections to determine whether or not the data essential to altering existing practices could be generated if the Commission decided to make a change. The Commission first voted to reallocate certain prisoner data at its meeting on August 24, 2021, and usable census data (even not accounting for the prisoner reallocation resolution) was not received until early October. For the entire time that the Commission was considering the issue, then, it did not yet have the usable census data even to begin the reapportionment process.

C. Summary of Population and Demographic Shifts

Pennsylvania's population and demographics changed dramatically in the decade between the 2010 and 2020 censuses. Therefore, the districts for the House and the Senate necessarily also must be changed in order to reflect those population shifts adequately and accurately. In particular, two unmistakable trends drove the population changes that inevitably shaped the Commission's work: first, the ongoing shift in population from rural to urban areas—particularly from the north and west of the Commonwealth to the south and east of the Commonwealth; and second, the increase in Pennsylvania's non-white population. (*See* Supplemental Testimony of Kyle C. Kopko, Ph.D., Director, Center for Rural Pennsylvania.)<sup>10</sup>

1. *Population Trends*

The 2020 census revealed that Pennsylvania's population grew from 12,702,379 to 13,002,700, for a total increase of 300,321. In other words, Pennsylvania's population grew by 2.4% during the last decade. (*See* Penn State Data Center Data Brief, August 2021.)<sup>11</sup>

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<sup>10</sup> Available at Tab 16 of the Commission's Certified Record.

<sup>11</sup> Available at [https://pasdc.hbg.psu.edu/sdc/pasdc\\_files/researchbriefs/August\\_2021.pdf](https://pasdc.hbg.psu.edu/sdc/pasdc_files/researchbriefs/August_2021.pdf)

That growth, however, was not evenly distributed across the Commonwealth. Of Pennsylvania's 67 counties, 44 of those counties lost population, and 23 counties grew in population. (*Id.*) The counties that gained in population are largely classified as urban. For example, Philadelphia County remained the most populous county and grew by 5.1% since 2010. Allegheny County remained the second largest county, and experienced 2.2% growth since 2010. (*Id.*) Pennsylvania's next three largest counties—Montgomery County, Bucks County, and Delaware County—all grew at rates greater than Pennsylvania's overall growth rate. (*Id.*) By contrast, the counties that lost population—such as Susquehanna County, Forest County, and Wyoming County—are largely rural.<sup>12</sup> (*See* Kopko Supplemental Testimony.) Indeed, over the past decade, Pennsylvania's rural population actually declined. (*Id.*)

While looking at population growth or loss in percentage terms can provide a helpful sense of these trends, the actual numbers (not percentages) of population growth and loss are far more relevant to the Commission's work. Thus, while a number of witnesses testified that Cumberland County was the fastest growing county in the Commonwealth, with a growth rate of 10.2%, that percentage growth

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<sup>12</sup> Forest County, which houses a substantial number of prisoners in a state correctional institution, experienced significant population loss even when not accounting for the Commission's decision to reallocate some prisoners from the place of their incarceration to their home residence for reapportionment purposes.

rate translates into an absolute increase in population of around 24,000 people, or just a little more than one-third of the population needed to support a single House district. (*See* Penn State Data Center, County and Municipal Population Change Table.) Philadelphia County, by contrast, grew by 5.1%, a much lower percentage. (*Id.*) However, in absolute numbers, Philadelphia’s population grew by approximately 77,000 people (even before considering prisoner reallocation), which is well over the population needed to support a House district. (*Id.*)

Much of Pennsylvania’s growth occurred—both in terms of percentage increase and in terms of absolute numbers—in the Southeastern portion of the state. This area increased in population by 344,075 people in the last ten years, and that growth stands in stark contrast to the rest of the Commonwealth, which experienced a decline in population of 43,754.

These population shifts also mean that the current maps, which were approved by the Supreme Court in 2013, now are severely malapportioned and fail to satisfy the constitutional requirement of “one person, one vote.” For example, the current map, when combined with the 2020 census data, reveals that the House districts along the Commonwealth’s northern border are underpopulated, with populations that are between 6% and 11% below the ideal population for a House



district. (*See* Nordenberg Opening Statement, Jan. 6, 2022, at 7.)<sup>13</sup> The same is true along the western border of the Commonwealth, with the exception of some areas of population growth in the Greater Pittsburgh area. (*Id.*) For example, some districts along the western border of the state have populations that are between 10-12% below the ideal population size. (*Id.*)

The converse is true of the southeastern portion of the Commonwealth, where the existing House districts are significantly overpopulated in light of the new census data. Multiple House districts in this region have populations more than 15% over the ideal population size, and one House district is even 21.1% above the ideal population. (*Id.* at 8.)

These population shifts and regional trends have political implications. The rural areas, which lost population, tend to identify as Republican and be represented by Republican members of the General Assembly. The urban areas, which experienced population growth, tend to identify as Democratic and be represented by Democratic members of the General Assembly. Therefore, any attempts to adjust the districts for the House and Senate in response to population changes also necessarily result in changes to the partisan makeup of the maps as a whole.

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<sup>13</sup> Available at Tab 29b of the Commission's Certified Record.

## 2. *Demographic Trends*

In addition to showing the areas in which the population grew or shrank, the 2020 census also revealed that Pennsylvania's population continues to become more diverse. In 2000, approximately 1.97 million people of color lived in Pennsylvania. (*See* Kopko Supplemental Testimony.) According to the 2020 census, that number is now approximately 3.46 million. (*Id.*) In other words, the population of people of color increased by 76% over two decades. (*Id.*)

This trend was true across the Commonwealth, with both rural and urban areas becoming more diverse. Nevertheless, the vast majority of people of color—upwards of 90%—live in urban areas. (*Id.*)

### **III. Reallocating Some State Prisoners Based on Their Residence Prior to Incarceration**

At the Commission's meeting of May 26, 2021, its first meeting after my appointment as Chair, Representative Joanna McClinton, the House Democratic Leader, presented for initial discussion a resolution providing that, for redistricting purposes, inmates incarcerated in state correctional facilities would be considered to be residents of the communities in which they lived prior to their incarceration, rather than as residents of the places of their incarceration. In doing so, she noted that similar adjustments were being made in a growing number of states, driven by a desire to address at least one consequence of mass incarceration and to ensure that the political power of minority and urban voters is not diluted.

The Commission received a large number of written submissions favoring such an approach from citizens and good-governance groups and received testimony from both citizen and expert witnesses. Among those groups and individuals who expressed support for the prisoner reallocation resolution were Fair Districts PA, Common Cause PA, and Governor Wolf. (See Aug. 3, 2021 2PM Tr. at 329-332, 356; Aug. 20, 2021 Letter from Gov. Wolf.<sup>14</sup>)

The legal teams representing the four caucuses were asked to research and brief the issue. Chief Counsel Byer not only had the benefit of those shared perspectives but also conducted his own research and then presented his legal findings and recommendations to the Commission prior to its August 24, 2021 vote on this issue. Let me quickly summarize the guidance he provided.

First, Mr. Byer concluded that neither the United States Constitution nor the Pennsylvania Constitution would be violated either if the Commission chose to maintain the current practice of considering prisoners to be residents of the place of their incarceration for reapportionment purposes or chose to change the current practice, as proposed in Leader McClinton's resolution.

Second, Mr. Byer advised that the provisions of the Election Code and the Voter Registration Act concerning residents and prisoners for purposes of voter

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<sup>14</sup> Available at Tab 14m of the Commission's Certified Record.

registration and voting do not control where prisoners are counted for purposes of redistricting. However, he advised that those statutes do express a public policy that the Commission may consider.

Third, because the 1968 amendments to the Pennsylvania Constitution adopting Article II, § 17 in its current form and rescinding former Article II, § 18 were intended to remove the General Assembly from its role in legislative redistricting and to instead place those responsibilities with the Commission, legislation would not be required for the Commission to make the changes proposed in Leader McClinton's resolution. In other words, in amending the Constitution to create the Commission, the voters removed the power of the General Assembly over legislative redistricting and placed that power exclusively in the Commission.

In summary, Mr. Byer concluded that the Commission had the legal authority to choose to count prisoners based on their place of residence prior to incarceration, but that the Commission was not required to do so. Therefore, it was a policy choice for the Commission to make.

The Commission exercised its authority to adopt the resolution by Leader McClinton through a public 3-2 vote, with the majority consisting of the two Democratic leaders and me. Thus, the Commission resolved to count inmates in state correctional facilities, other than inmates serving life sentences without the

possibility of parole, as residents not of the municipality where they are incarcerated as of the decennial census day, but as residents of the communities where they lived prior to incarceration.

That resolution was subsequently altered—again through a 3-2 vote, this time with the majority consisting of the two Republican leaders and me—after Senator Kim Ward, the Senate Majority Leader, proposed an amendment. That amendment precluded prisoners with more than ten years left to serve on their sentences as of the decennial census day from being considered to be residents of their pre-incarceration community for redistricting purposes.

Each of the Commissioners presumably had his or her own reasons for voting for or against these resolutions. I publicly shared my own views prior to the Commission's first vote on the issue. Among other things, I said that, when a system holds and counts a person in one place but forces him or her to vote in another place, it creates issues of fundamental fairness for that person. (*See* Aug. 24, 2021 Tr. at 631.) When the numbers are large enough, those practices also implicate the principle of one-person-one-vote, creating issues of voter equality, from district to district. (*See id.*)

A similar view had been expressed by Professors Rory Kramer and Brianna Remster from Villanova University, who have studied this topic, with a particular

focus on Pennsylvania, and testified at a Commission hearing. This is a small part of what they said:

[P]rison gerrymandering distorts representation by strengthening the political voices of Pennsylvanians who live near a prison while simultaneously weakening the voices of residents who live near high crime areas. Counting incarcerated people where they are imprisoned affects the entire communities and towns from which large numbers of people are being incarcerated. And with patterns of residential segregation, prison gerrymandering does so in a racially unequal way.

(See Written Testimony Professors Kramer and Remster, at 3.)<sup>15</sup>

Though I found this line of reasoning to be persuasive, before I could support the proposal, I needed to know both that the data necessary to implement it would be available and that the Commission had the authority to direct that prisoner data be reallocated. My practical concern regarding data availability was heightened by the pressures tied to our constitutional deadlines, deadlines relating to the upcoming primary election schedule, and the already-dramatically delayed delivery of census data. However, after a number of interactions with the Department of Corrections, the Penn State Data Center confirmed that creating a population dataset incorporating Leader McClinton's resolution would only result in a comparatively short delay, and that proved to be the case.

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<sup>15</sup> Available at Tab 13d of the Commission's Certified Record.

As noted, I also was concerned with whether or not the Commission had the authority to adopt such a resolution, but I was persuaded by the recommendations and conclusions of Chief Counsel Byer. Most basically, the Commission simply was altering a longstanding practice of the Census Bureau, which the Bureau itself has acknowledged is not determinative for legislative redistricting.<sup>16</sup> In fact, the Bureau is now proactively helping states to make these data adjustments, if they wish to do so.<sup>17</sup>

It also was persuasive to me that there is not any statutory limitation on the Commission's action, nor could there be. Instead, the history of the Commission's creation and the removal of the General Assembly from the legislative reapportionment process reveals that, while its structure was intended to infuse the Commission with the special wisdom of legislative leaders by providing for their membership on the Commission, the Commission itself was created by the Constitution to be independent of the General Assembly.

In that regard, an initial cause for concern had been the fact that nine of the twelve other states that have adopted prisoner reallocation measures have done so

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<sup>16</sup> *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 895 (D. Md. 2011) (three-judge district court) (“According to the Census Bureau, prisoners are counted where they are incarcerated for pragmatic and administrative reasons, not legal ones.”).

<sup>17</sup> Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525, 5528 (Feb. 8, 2018).

through legislation. However, research revealed that in each of those nine states the legislature either had retained complete control or some significant level of control over the legislative reapportionment process. Far closer to our situation are three states—California, Colorado and Montana—that have created independent commissions. In California, the legislature recognizes that it lacks power over the redistricting commission, and therefore only “request[ed]” that the commission reallocate prisoners. Cal. Elec. Code § 21003. In Colorado, the Supreme Court has indicated that the legislature has no authority to control the decision of whether to reallocate Census data, a decision that rests with the Commission.<sup>18</sup> *In re Interrogatories on Senate Bill 21-247 Submitted by Colorado General Assembly*, 488 P.3d 1008, 1020 (Colo. 2021). More recently, the Montana Redistricting and Apportionment Commission has taken steps to reallocate prisoners and has done so without any legislative direction. *See* Nov. 9, 2021 Commission Minutes.<sup>19</sup>

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<sup>18</sup> Colorado has two separate commissions—one for congressional redistricting and one for legislative redistricting. The commission in charge of legislative redistricting chose to reallocate prisoners. This is in contrast to the commission in charge of congressional redistricting, which ultimately decided not to reallocate prisoners when drawing the new congressional districts. *See* “Redistricting commissions diverge on prison gerrymandering, and the 3rd Congressional Redistrict revisited,” Colorado Sun (Aug. 16, 2021), available at <https://coloradosun.com/2021/08/16/redistricting-newsletter-2021-second-edition/>.

<sup>19</sup> Available at <https://leg.mt.gov/content/Districting/2020/Meetings/November-9-2021/DAC-minutes-Nov-9-2021.pdf>. As the examples from California, Colorado, and Montana show, the statement in the Benninghoff Petition that “[n]o state has



I further agreed that reallocating prisoners would be consistent with the Commonwealth’s policy as it relates to inmates and voting. In particular, § 1302 of the Voter Registration Act 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 to the penal institution, or, if there was no registration prior to confinement, the individual shall be deemed to reside at the last known address prior to confinement.” 25 Pa.C.S. § 1302(a)(3). That language can be viewed as a strong and longstanding expression of legislative policy, and it would be consistent with that policy to count prisoners for redistricting purposes in the same place they could vote, if able.

I also considered the impact of the opinion in *League of Women Voters*. That opinion did not directly address the question of prisoner reallocation, but there are some passages and overarching principles that seem relevant. In particular, the Court explained that “[t]he broad text of the first clause of [Article I, Section 5 of the Pennsylvania Constitution] mandates clearly and unambiguously, and in the broadest possible terms, that *all* elections conducted in this Commonwealth must

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established a policy regarding prisoner reallocation for reapportionment purposes absent legislation” (see Benninghoff Petition at ¶ 62), is simply not accurate.

be ‘free and equal.’” *League of Women Voters*, 178 A.3d at 804 (emphasis in original). The Court further explained that its analysis of the Free and Equal Elections Clause “leads [the Court] to conclude the Clause should be given its broadest interpretation, one which governs all aspects of the electoral process, and which provides the people of this Commonwealth an equally effective power to select the representatives of his or her choice, and bars the dilution of the people’s power to do so.” *Id.* at 814.

These statements by the Supreme Court mirror the statements made by Jerry Powell, a delegate at Pennsylvania’s Constitutional Convention in 1968, during the debates that ultimately resulted in the creation of the Commission. He stated, “[a] plan which places a number of citizens in a legislative district in which they can have virtually no hope of affecting the outcome of an election or the official conduct of the elected legislators can as effectively disenfranchise those people as a population imbalance.” 1 Daily Journals of the Pennsylvania Constitutional Convention of 1967-1968, at 532 (1968). Counting prisoners in one place for redistricting purposes, yet requiring them to vote in a different place, is a type of disenfranchisement and unfairness that should be avoided. And looking at the impacts more broadly, it distorts the reapportionment process by giving certain classes of voters—here, voters living in districts with state correctional institutions—more voting power than voters who reside in districts that do not

include such institutions. For these reasons, I voted in favor of Leader McClinton's resolution.

I also considered it to be a prudent policy decision to vote in favor of Leader Ward's resolution in recognition of the fact that prisoners with more than ten years left on their sentences of incarceration would not be returning to their home communities during the period for which the Commission's maps would be in effect. Thus, voting in favor of these two resolutions struck the appropriate balance in adhering to the spirit of the Free and Equal Elections Clause.

Thanks to extraordinary efforts of the LDPC and the Penn State Data Center, the Commission's decision to adopt resolutions providing for the reallocation of certain prisoners, as noted above, did not delay the work of the Commission in any meaningful sense. Both the LDPC and the Penn State Data Center were able to outperform their projections and deliver a revised dataset within nine days of the original, non-reallocated dataset being made available. (*See* Oct. 25, 2021 Tr. at 843.) Indeed, as Mr. McClintock and I both confirmed at the hearing in which the Commission certified the data, the non-reallocated dataset was completed and made available to the Commission on October 5, 2021, and the dataset that was

adjusted to account for the prisoner reallocation resolutions was made available on October 14, 2021.<sup>20</sup> (*Id.*)

#### **IV. The Commission's Process**

##### **A. The Commission's Commitment to Public Engagement**

From the outset of the Commission's work, both good-governance groups and many members of the public stressed the importance of public engagement in the redistricting process. The Commission was urged to both be as open and transparent as possible and to take public input and feedback into account when drawing and approving the plans for the House and Senate districts.

The Commission worked to be as responsive to these recommendations as possible, within the constraints of the process and timeline outlined in Article II, § 16, as well as the pressures of the upcoming primary elections. In particular, from the time when the full Commission first met on May 26, 2021, the Commission conducted seven public meetings and hosted sixteen public hearings. At those hearings, the Commission heard from 36 invited witnesses, typically experts, and from 145 citizen-witnesses, who offered both perspectives on the

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<sup>20</sup> In the end, while it may be said that the Commission's reallocation of prisoner data was important, it did not have a significant effect on the Plan as a whole. To measure the impact of data reallocation, we examined the Final Plan using unadjusted 2020 census data. Not surprisingly, the population deviations increased—in the Senate plan to 8.5% and in the House plan to 9.88%—but remained under the presumptive 10% maximum.

Commission's process and information about their home communities. The Commission also created a website to receive citizen comments, which attracted 5,856 submissions. The Commission also received 155 submissions through mail or email, for a grand total of more than 6,000 submissions.

All of these comments and submissions were read by at least two members of the Commission team, and the submissions were organized into a usable tool to consider and, where appropriate and feasible, to implement public feedback into the Final Plan. The Commission also was attentive to the testimony that was solicited by the House Republican Caucus in meetings that it independently held in McCandless and Mechanicsburg regarding the Preliminary Plan.

The Commission's Final Plan incorporates many suggestions and comments that came from citizens, as well as comments and suggestions made by members of the General Assembly. Members from both groups often are more aware of local communities of interest or specific community needs than members of the Commission staff or the caucus teams could possibly be.

Perhaps the most visible example of such responsiveness resulted from testimony at one of our public hearings offered by a bipartisan group of four House members from the Greater Pittsburgh region. They made a persuasive, professional presentation about the need for drawing districts that cross the border between Allegheny and Washington Counties, as well as making other adjustments to the

proposed districts in that region. These Representatives focused on distinctive regional needs, such as coordinated responses to flooding, key economic development initiatives that cross county lines, and the needs of the Greater Pittsburgh International Airport, and supported their positions with letters from local officials and constituents.

The Commission also received numerous citizen submissions regarding Horsham Township in Montgomery County and benefited from both public testimony and private conversations with the Republican House member whose district includes that Township. Here, too, the presentations and submissions were persuasive because they focused on the distinctive needs of the Horsham Township community. More specifically, the Commission learned about the challenges Horsham is facing because of the need to remediate the environmental hazards on the site of what had been the Willow Grove Naval Air Station. As a result, we kept Horsham whole in our Final Plan, rather than dividing the Township as had been done in our Preliminary Plan.<sup>21</sup>

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<sup>21</sup> There are less visible instances of Commission responsiveness as well. For example, the Commission was directly contacted by the Republican House member representing the 84th District, which had received so much attention because of its unusual shape. With his help, we were able to create a better plan for the people and communities of Union, Lycoming, and Sullivan Counties. Unfortunately, we also feel quite certain that there were other good ideas held by members of the General Assembly that, for whatever reason, were not brought to

Other examples of the Commission's responsiveness to public comment can be found throughout both maps. For example, the Commission's Final Plan no longer divides Aspinwall, McCandless, Mechanicsburg, or Murrysville. The Final Plan also no longer divides the City of Scranton into four different districts, as had been done in the Preliminary Plan. The Commission's Final Plan further reflects testimony about communities of interest, such as reasons for putting East Caln Township in the same district as Downingtown, keeping Abbottstown with other communities with which it shares municipal services, and respecting the Wissahickon Gorge as a relevant dividing line for certain Philadelphia neighborhoods.

Similar changes were made to the Senate map between release of the Preliminary Plan and approval of the Final Plan. For example, responding to suggestions made by numerous citizens and good-governance groups, the Commission created more compact districts in Philadelphia and, in the process, created a Latino-influence district in the Senate map. The Commission also responded to testimony that West Bethlehem, though it is in a different county, should not be in a different Senate district from the rest of the City of Bethlehem.

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the Commission, either by the affected members or by Caucus Leadership, in time for us to assess and act upon them, if they got to us at all.

Of course, not all comments and public feedback could be implemented. Changes to one area of the map often create ripple effects throughout the map. *See Holt I*, 38 A.3d at 762-63 (Eakin, J., concurring and dissenting). Requests not to split one municipality almost always require splits to be made in other municipalities.<sup>22</sup>

Perhaps not surprisingly, some public comments were directly at odds with other public comments. For example, the Commission received both comments supporting the decision to divide the City of Lancaster and to combine it with areas of Manheim Township and East Petersburg Borough and comments opposing that decision. Throughout the process, though, the Commission tried to be as receptive and attentive to public feedback as possible.

#### B. A Consensus Map and a Composite Map

In addition to public meetings and hearings and opportunities for public comment, the Commission staff and I had frequent meetings with members of the caucus teams. I also had frequent meetings with individual caucus leaders. Of course, it was not possible for me to have any private meetings with two caucus

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<sup>22</sup> For example, when we decided to follow the recommendation made at the House Republican Caucus's McCandless hearing to keep McCandless whole, the result was a cut to Hampton Township, a neighboring municipality in the suburban North Hills of Pittsburgh, which displeased some of the residents and leaders of that community.



leaders at the same time, because the three of us would represent a quorum of the Commission, triggering the requirement that it be a public meeting.

Members of the caucus teams were encouraged to discuss challenges, opportunities, and priorities and to share and discuss proposed maps. Each caucus had the same ability to be involved in the development of maps as every other caucus. When I took the initiative to schedule meetings with the Commissioners and their teams, I did so in a uniform, even-handed way. Each Commissioner and caucus also was equally free to request meetings with the Commission team or me and to submit materials in whatever form they believed would advance their case. Almost from the beginning, however, the caucus teams took vastly different approaches to working with each other, and that necessarily impacted the process.

Senate Leaders Ward and Costa, as well as their respective teams, regularly discussed reapportionment issues and negotiated between themselves. They wanted the first opportunity to come to agreement on as many essential features of the Senate map as they could—clearly hoping to develop a consensus map, if that was possible. Though we maintained regular contact throughout the process, I was most heavily engaged in helping to resolve issues on which they could not agree. To some considerable extent, I functioned as a mediator, but I also worked to effectively discharge an independent responsibility to ensure that any agreements reached were consistent with governing law and advanced the interests of the

citizenry. Particularly over the course of a few days leading up to the adoption of the Preliminary plan and a longer period leading up to the adoption of the Final Plan, such involvements on the Senate side were frequent and intense.

Caucus interactions with respect to the House map took a very different form, with far less interaction between the caucus leaders and their teams. That more distanced approach principally reflected significantly different perceptions about the process and what should be accomplished through it. Democratic Leader McClinton believed that population shifts, as well as partisan flaws in the existing map, meant that substantial change was required, while Majority Leader Benninghoff and his team, from the outset, were very resistant to change. This stark difference seemed to fuel a judgment by Democratic Leader McClinton that direct negotiations would not be productive.

Still, I tried to encourage interaction and brought the two caucus teams together with the understanding that we would begin by focusing on two specific regions—Southwestern Pennsylvania and Bucks County in the Southeast. The discussions seemed productive, and we left our meeting with an understanding that the Bucks County map drawn by the Democrats and the Southwestern Pennsylvania map drawn by the Republicans would provide the foundation for future discussions. However, shortly after that meeting, the Democrats asserted that the Republican team had breached a confidentiality agreement by providing a

proposal submitted by the Democratic Leader to a member of the Republican caucus who had, in turn, shared it with members of the Democratic caucus who had not yet been briefed by the Democratic Leader.<sup>23</sup> That seemed to bring an end to any efforts to work together.

As a result, the Commission team was tasked with dealing with the two House caucuses separately, having tried, without success, to bridge the gap between them. The House map, then, is more of a composite map than a consensus map, with the Commission team taking the best features of maps offered by each of the House caucuses and attempting to knit them together.

### C. The Use of Expert Witnesses

As has already been noted, the Commission received thirty-six presentations from expert witnesses. The great majority of those presentations came relatively early in the process, when the Commission was moving through what might have

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<sup>23</sup> At a very early point in the process, and in response to a question posed by caucus counsel, Chief Counsel for the Commission indicated that documents exchanged in discussions seeking agreement on maps should be treated as confidential, much as communications made in pursuit of settlement in litigation would be. That approach was agreed to by caucus counsel. I have no first-hand knowledge of what happened in this earlier incident. However, the understanding described also calls into question the propriety of counsel's inclusion as Appendix I to Leader Benninghoff's Petition for Review a document that is described as follows: "[D]uring one meeting on November 16, 2021, a member of Leader McClinton's staff circulated a sheet analyzing certain proposed districts in or about Bucks County . . . ." (See Appendix I to Benninghoff Petition for Review.) It is interesting that Bucks County was the subject of both disclosures.

been viewed as its “educational phase.” However, at a public hearing on January 14, 2022, after the Preliminary Plan had been filed, the Commission also provided each caucus with an opportunity to present expert testimony either for or against the Plan. That naturally was a more adversarial process.

On December 23, 2021, Chief Counsel Byer wrote to counsel for all four caucuses, setting the parameters for what was intended to be a fair and orderly process. More specifically, he directed that caucus counsel identify each expert they intended to call by December 30, 2021 and provide a written statement from each such witness by January 7, 2021. He further advised that experts called by opponents of the Plan would testify first and that experts called by proponents of the Plan would testify after them at the January 14, 2022 hearing.

Only two caucuses, the House Republicans and the House Democrats provided notice that they intended to present testimony from expert witnesses. The House Republicans advised that they intended to call two experts, Associate Professor Michael Barber from Brigham Young University and Professor Jonathan Katz from the California Institute of Technology. The House Democrats identified three expert witnesses who they intended to call, Professor Matt Barreto from UCLA, Professor Kosuke Imai from Harvard, and Associate Professor Christopher Warshaw from George Washington University.

As time passed, the House Republicans indicated, without further explanation, that they were unable to produce a report from Professor Katz and that he would not be testifying at the upcoming expert-witness hearing. However, on the day of that hearing, without prior notice or explanation, they did present a report from Professor Katz, which I accepted for the record, over the objection of Leader McClinton, in the spirit of openness. However, because the untimely submission of this report was a surprise, because Professor Katz never was made available for questioning by members of the Commission, and because Professor Barreto's rebuttal was so persuasive, I gave less weight to his report, and I am sure that was the case for other Commission members as well.<sup>24</sup>

The testimony and reports offered by Professor Barber provide the essential foundation for most of the arguments advanced in Leader Benninghoff's Petition for Review. Professor Barber's work is mentioned in no fewer than eighteen paragraphs of that Petition and is offered in support of its major themes – that the

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<sup>24</sup> In his rebuttal report, Professor Barreto dealt directly and substantively with the critiques advanced by Professor Katz against his report, ultimately dismissing them as "baseless." (Barreto Rebuttal Report at 2, available at Tab 34g of the Commission's Certified Record.) He also questioned the breaches of process in the presentation of the Katz report to the Commission: "Given that a federal judge so soundly dismissed Dr. Katz's theory concerning homogenous precincts, the Commission should question why such a debunked theory was offered at the very last moment. The late submission suggests that proponents of Dr. Katz's report held it until the 11th hour to shield both Dr. Katz and his report from fair examination and scrutiny." (*Id.* at 3.)

Final Plan is “an extreme partisan gerrymander,” that the plan cuts mid-sized cities for “partisan political gain,” and that the plan dilutes the votes of minority groups. Each of those assertions is being addressed separately in this report, but given the indispensable nature of the support provided by Professor Barber for Leader Benninghoff’s Petition, it also seemed important to separately look at his credentials as an expert and compare them to the credentials possessed by the competing experts called by the House Democratic Caucus.

As I stated at the Commission’s meeting of February 4, 2022, when the Final Plan was approved, at an earlier point in my career, I taught courses in civil procedure, advanced civil procedure, evidence and trial advocacy and had a strong grounding in the law governing the qualifications and testimony of courtroom experts, but that knowledge now is quite dated. However, over the course of a more recent twenty-year period of my career, assessing the academic records of faculty members from wide-ranging disciplines in a major research university was one of my central responsibilities. In this case, though Professor Barber’s record is commendable in other ways, it surprised me that, even though this academic was being presented as an expert, he had not written a single academic paper that was directly relevant to the areas in which his testimony was being offered.

This stands in sharp contrast to the expert witnesses called by the House Democratic caucus. Professors Barreto, Imai, and Warshaw are very well

published in the areas about which they offered testimony, and they each also are distinctively well-credentialed in other ways.

Professor Barreto is one of the country's leading scholars of Latino politics and the Voting Rights Act. He has faculty appointments at UCLA in both Political Science and Chicana/o Studies and also serves as Faculty Director of the UCLA Voting Rights Project. In addition, he is the president and founder of BSP Research, a leading Latino polling and data analytics company, and founder of the Latino Policy and Politics Initiative at UCLA.

Professor Imai is regarded by many to be the world's leading quantitative social scientist. He is the first person ever to hold appointments in both the Department of Government and the Department of Statistics at Harvard. He served on the Princeton faculty for fifteen years and was the founder of its Program in Statistics and Machine Learning. He also developed the algorithm that was used by Professor Barber and was Professor Barber's graduate-school advisor.

Professor Warshaw, who now is at George Washington University, earlier held a faculty appointment at MIT. He is a Pennsylvania native whose expert testimony was cited by the Pennsylvania Supreme Court in the *League of Women*

*Voters* case. He not only has published academic papers directly relevant to his testimony but also is a member of the Advisory Board of PlanScore.<sup>25</sup>

There is, in sum, a stark difference in credentials.

## **V. The Commission’s Priorities, Values, and Challenges**

In drafting the Preliminary and Final Reapportionment Plans for the House and Senate, the Commission’s predominant purpose always was to create districts that comply in all respects with the requirements of the Pennsylvania Constitution—most notably, Article II, § 16 (which sets forth requirements for legislative districts); Article I, § 5 (also known as the “Free and Equal Elections” clause); and Article I, § 29 (the Racial and Ethnic Equality clause). Of course, the Commission was also attentive to the requirements of the 14th Amendment to the United States Constitution and to the federal Voting Rights Act. In fact, the Commission heard from a sizeable number of Voting Rights Act experts, both before and after the Commission approved its Preliminary Plan.

When circumstances permitted the Commission to do so, and after ensuring compliance with all aspects of state and federal law, the Commission fashioned

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<sup>25</sup> PlanScore is a project of Campaign Legal Center, a nonpartisan organization working to advance democracy through law. The PlanScore website (<https://planscore.campaignlegal.org/>) allows policymakers, advocates, and the public to evaluate district plans according to peer-reviewed measures of partisan fairness.



districts to create additional opportunities beyond the minimum requirements of the Voting Rights Act, positioning voters in racial and language minority groups to influence the election of candidates of their choice. Going beyond these minimum requirements not only is consistent with the Voting Rights Act, but also is consistent with, and possibly required by, both the Free and Equal Elections Clause and the Racial and Ethnic Equality Clause of the Pennsylvania Constitution.

When able to do so, the Commission team sought to create minority opportunity and influence districts without an incumbent, so as to provide the greatest potential for racial and language minority voters to influence the election of candidates of their choice.<sup>26</sup> Again, the Commission did so while being mindful of and adhering to the traditional redistricting criteria of Article II, § 16 and other constitutional mandates.

A. Prioritization of Article II, § 16 Criteria

The Commission's starting point for all of its work was the language of Article II, § 16 of the Pennsylvania Constitution, which provides:

The Commonwealth shall be divided into fifty senatorial and two hundred three representative districts, which shall be composed of compact and contiguous territory as nearly equal in population as practicable. Each senatorial

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<sup>26</sup> The importance of drawing districts without an incumbent was underscored by the testimony that a Latina candidate in an Allentown district had lost a primary election contest waged against an incumbent by only 55 votes, suggesting that, absent her opponent's incumbency advantage, she would have won.

district shall elect one Senator, and each representative district one Representative. Unless absolutely necessary no county, city, incorporated town, borough, township or ward shall be divided in forming either a senatorial or representative district.

Pa. Const. art. II, § 16. This section can best be summarized as having four requirements: nearly equal population, compactness, contiguity, and minimization of county and political subdivision splits. However, not all of these four criteria is given equal weight. The Constitution makes clear that population equality does not need to be exact, but instead only needs to be as nearly equal “as practicable.” Further, the Constitution provides that counties and designated political subdivisions should only be split if “absolutely necessary”—language that does not appear in connection with the other three criteria.

However, even within the sentence stating that counties and political subdivisions should not be split, the Constitution is silent as to which of these recognized entities should be prioritized when making the difficult choices surrounding redistricting. For example, the Commonwealth has municipalities that cross county lines, yet the Constitution does not specify whether the Commission should prioritize keeping the county whole (which necessarily results in a divided municipality) or whether the Commission should prioritize keeping the municipality whole (which necessarily results in a divided county).

To address these issues in a consistent way, the Commission staff and I attempted to establish a hierarchy for protected political subdivisions for when to divide protected areas, when such splits became necessary. The Commission team first decided to prioritize county lines over municipalities. Counties are often the most recognizable and influential form of local government in the Commonwealth and generally are also reflective of larger communities of interest. Counties also play important roles in administering elections and in allocating emergency funding and other important resources.

This prioritization was not a hard-and-fast rule however. Some counties must be divided based purely on their large populations. And in some situations drawing districts that cross county lines may be *more* representative of the communities of interest and the needs of the citizens. Such was the case with the areas described in the bipartisan presentation by the Representatives from the Allegheny County and Washington County area. When compelling cases were made for why counties should be divided, the Commission attempted to accommodate those requests, as long as the map as a whole continued to comply with the requirements of Article II, § 16.

When faced with situations in which some municipalities must be divided, the Commission team generally chose to divide the more populous municipalities, rather than the less populous municipalities. When areas with greater population

are divided, their communities still represent sizeable constituencies that can garner attention from their elected officials. Further, these communities still have significant voting share and can therefore continue to influence the election for their representatives. The same often is not true for less populous communities. Even when whole, these communities may struggle to attract the attention of elected officials or to influence elections—especially when the smaller communities are grouped with much larger communities. When these less populous communities are divided, their chances for influence are further diminished.

Residents of less populous municipalities also tend to identify more closely with their municipalities. By contrast, residents of large municipalities often define their communities more in terms of neighborhoods. Therefore, residents of larger municipalities tend to accept being divided into multiple legislative districts more willingly than residents of smaller municipalities.

These sentiments were often expressed by citizens living in these smaller communities, who were concerned that their voices would not be heard if their communities were divided among legislative districts. For example, the Commission received almost 90 submissions objecting to the division of Aspinwall in the Preliminary Plan—a remarkable number considering Aspinwall has a population of less than 3,000 people.

This policy judgment also is reflected in the Commission’s decision to divide some of Pennsylvania’s mid-sized cities, as opposed to smaller communities, when a split municipality was necessary. For example, when it was apparent that a municipality in the Centre County region needed to be divided in order to equalize population, the Commission chose to divide State College Borough, the most populous municipality in the region. Though Leader Benninghoff’s Petition for Review criticizes the Commission for ignoring “important feedback” on this issue, the Commission’s decision was met with widespread support from local officials in the State College region, including the Mayor of State College Borough, numerous current and former members of the State College Borough Council, members of the State College Area School District board, and a member of the Centre County Board of Commissioners, as well as other citizens.<sup>27</sup>

The Commission team made similar choices when dividing mid-size cities like Reading, Lancaster, Harrisburg, and Allentown. Divisions in Reading and

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<sup>27</sup> The Benninghoff Petition also fails to acknowledge that if State College had been kept whole, it most logically might have been included in the District represented by Leader Benninghoff himself, since he is the closest to it, as was true in the People’s Map released by Fair Districts PA. Presumably, he would not have welcomed that infusion of Democratic-leaning voters, and the Commission staff and I had made the early decision not to be disruptive of the districts represented by the caucus leaders unless that became absolutely necessary.

Allentown were already absolutely necessary based on population alone. However, it was also clear that a municipality in each of the four cities' general regions needed to be split in order to achieve population equality. The Commission exercised its discretion to place those splits in areas that would be more acceptable to the residents of those communities and that would ensure that municipalities of all sizes would have effective representation. *See Holt I*, 38 A.3d at 735 n.22 (recognizing that the Commission has “considerable discretion” in deciding how to redistrict the Commonwealth); *see also id.* at 763 (Eakin, J., concurring and dissenting) (noting that “[i]t is never ‘absolutely necessary’ to draw a line in any spot” because “it could always go elsewhere”).

The Commission's plan was met with approval by legislators representing districts in these cities and by elected officials holding municipal offices in them. Among those expressing support for the Commission's plan were Representative Manuel Guzman, Jr., who represents House District 127, comprised of Reading and other areas of Berks County (*see* Letter to Commission from Rep. Guzman, Rep. Angel Cruz, and Rep. Danillo Burgos (January 14, 2022)),<sup>28</sup> and Mayor Danene Sorace, the mayor of Lancaster (*see* “We're Pa. small city mayors, fair

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<sup>28</sup> Available in Tab 40 of the Commission's Certified Record.

legislative maps will aid our recovery,” Pennsylvania Capital Star (January 19, 2022).<sup>29</sup>

The Commission team, of necessity, also attempted to balance the requirement of avoiding county and municipal splits when possible with the requirement of nearly equal population. In many cases, keeping counties and municipalities whole required greater tolerance for population deviations. In some cases, the Commission chose to draw districts that divided county or municipal lines in pursuit of more equal population, especially where the affected communities explained that crossing county or municipal lines would be beneficial from the standpoint of effective representation.

#### B. Fairly Reflecting Population Shifts

The primary purpose of decennial redistricting is to develop legislative maps that fairly reflect population changes as revealed by the federal census. As already has been noted, significant population shifts did occur in Pennsylvania during the last decade. In fact, with the population of Southeastern Pennsylvania growing by more than 340,000 people, and with the population having declined in all of the rest of the state taken together, it was apparent that some districts would need to be moved to accommodate these population shifts.

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<sup>29</sup> Available at <https://www.penncapital-star.com/commentary/were-pa-small-city-mayors-fair-legislative-maps-will-aid-our-recovery-opinion/>

The Commission determined that it would be appropriate to move House districts into Lancaster, Montgomery, and Philadelphia Counties—all areas that experienced significant population growth. Implementing that decision, though, proved to be more challenging. Perhaps because the population losses over the past decade had most affected House districts represented by Republicans, the House Republican team clearly would have preferred to minimize the extent of change by maintaining the core of the map from the previous decade. Moving past that position was a struggle.

Then, even after the team came to accept that some seats held by their caucus members would need to be moved from areas of declining population, they maintained that they had the right to pick the location to which “their” seat would be moved and to draw the new district. In other words, they viewed the seat as belonging to them. However, legislative districts do not belong to either politicians or their parties but, instead, belong to the people, and the Final Plan for the House reflects the population trends of the past decade and recognizes that “Legislators represent people, not trees or acres.” *Reynolds v. Sims*, 377 U.S. 533, 562 (1964)

### C. Respecting Democratic Ideals

The Commission staff and Chair also were attentive to the Free and Equal Elections Clause in Article I, § 5 of the Pennsylvania Constitution and the interpretation given to that Clause by the Supreme Court in *League of Women*



*Voters*. Notably, that case was decided several years after the last round of state legislative redistricting, meaning the maps now in place were not drawn with its lessons in mind.

The *League of Women Voters* decision recognized that there is a constitutional dimension to avoiding partisan bias and held that partisan gerrymandering violates the Free and Equal Elections Clause. The Commission heard from multiple experts, good-governance groups, and interested citizens about what it means to avoid partisan bias. Needless to say, the opinions of these experts, organizations, and citizens were not always aligned. Still, there seem to be some fundamental principles about which there should be basic agreement.

Most basically, a fair map should be responsive to voters' preferences. Otherwise, why would people vote? So when voter preferences change dramatically, so too should the composition of the General Assembly. To put it in simple terms, when there is a blue-wave election, the makeup of the General Assembly should reflect that blue wave, and when there is a red-wave election, the makeup of the General Assembly should reflect that red wave.

Put another way, one party should not have entrenched political power that is so strong as to not reflect the actual votes of the citizens of Pennsylvania. Professor Warshaw discussed this type of responsiveness in his report and

explained that it is one of the basic benchmarks of the fairness of a redistricting plan. (*See* Warshaw Report at 20-21.)<sup>30</sup>

It also is reasonable to expect that the party that wins the most votes generally also should win the most seats. Similarly, when the two parties each receive 50% of the votes, they should each receive about 50% of the seats. Both of these expectations are consistent with basic fairness and democratic principles, according to Professor Warshaw. (*See id.* at 6, 17-18.) In fact, in response to a question about that precise issue, Professor Warshaw stated that “among scholars of political representation and democracy writ large,” it is “a consensus view that the party that wins a majority of the votes should win enough seats to control the legislature.” (*See* Jan. 14, 2022 PM Tr. at 1572.) Professor Warshaw further explained that, if the party that wins the most votes does not win the most seats in the legislature, that “calls into question the democratic bona fides of any government.” (*Id.*)

Leader Benninghoff’s Petition seems to claim that the Commission is seeking to impose proportional representation. However, as Professor Warshaw explained, proportional representation is not the same thing as the majoritarian principle that the party that wins the most votes generally should win the most

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<sup>30</sup> Available at Tab 34d of the Commission’s Certified Record.

seats. Proportional representation “is the idea that if we were electing perhaps 100 representatives statewide, . . . the party that wins 53 percent of the vote should get exactly 53 percent of those 100 seats.” (*Id.* at 1571.) However, this Commission neither argued for nor made any attempt to achieve a direct correlation between vote share and seat share.

In fact, the map that the Commission adopted for the House as part of the Final Plan still leans in favor of Republicans. As Professor Warshaw explained, Republicans may not need a majority of the statewide vote share to win a majority of the seats. (*Id.* at 1569.) However, compared to the current maps, the Republican Party as a whole would need to come closer to that 50% threshold to keep control of the General Assembly. In other words, the Commission’s Final Plan is still biased in favor of Republicans, just not to the same extent as previous maps.

#### D. Simulating an Extreme Partisan Gerrymander

Another criticism of the Final Plan is that, instead of minimizing partisan bias, the Final Plan is an “extreme partisan gerrymander.” This attack features prominently in the Petition for Review filed by Leader Benninghoff, for which the Petition relies exclusively on the testimony of Professor Barber.

Professor Barber argues that any “fair” redistricting plan must respect Pennsylvania’s natural political geography, where Democratic voters have “packed” themselves inefficiently in the cities, and where Republican voters are

more efficiently spread throughout the Commonwealth.<sup>31</sup> Professor Barber attempts to show that the Preliminary Plan and the Final Plan are partisan gerrymanders by looking at large numbers of simulations of possible redistricting plans based only on the quantifiable criteria in Article II, § 16—which, he says, are necessarily unbiased.<sup>32</sup>

Professor Barber explains his approach in the following way:

If the Commission’s map produces a similar outcome as the alternative set of maps [*i.e.*, the simulations], we may reasonably conclude that the Commission’s plan also is unbiased. Alternatively, if the Commission’s proposed plan significantly diverges from the set of simulated maps, it may be that the proposed plan is biased in favor of one party.

(Supplemental Barber Report, Appendix A to Benninghoff Petition, at 4.) Because the Commission’s plan did diverge significantly from his set of simulated maps, both Professor Barber and the Benninghoff Petition labeled it “an extreme partisan outlier.”

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<sup>31</sup> Both Professor Barber and the Benninghoff Petition are fond of reciting that, because of Pennsylvania’s political geography, Democrats can only compete under a redistricting plan that “carve[s] up large cities like pizza slices or spokes of a wheel.” (*See, e.g.*, Benninghoff Petition at ¶ 37.) However, there is nothing in the Commission’s maps consistent with those attention-grabbing images.

<sup>32</sup> In his assessment of the Commission’s Preliminary Plan, the number of simulations was 50,000. In his assessment of the Commission’s Final Plan, the number of simulations was 17,537.

It is important to remember that in his assessment of the Preliminary Plan, Professor Barber’s simulations were limited to the quantifiable criteria found in Article II, § 16 of the Pennsylvania Constitution and ignored all racial considerations. That is a puzzling choice because, under certain circumstances, the Commission is *required* to take account of racial considerations and, in a broader set of circumstances, the Commission is permitted to do so.<sup>33</sup>

When Professor Imai, who developed the algorithm that Professor Barber reported he had used, analyzed Professor Barber’s report, he reached three conclusions. First, he could not replicate Professor Barber’s results, which raises serious questions about Professor Barber’s methodology and data. Second, when Professor Imai used the algorithm that he had developed to assess the Commission’s Preliminary Plan himself, he found the plan to be less of a statistical outlier than Professor Barber had claimed. And third, when Professor Imai factored in racial data to ensure that all the ensembles produced would comply with the Voting Rights Act, he concluded that, when “majority-minority districts are

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<sup>33</sup> In his more recently updated report, Professor Barber does include some racial considerations in his simulations, but they are not as expansive as the considerations that framed the mapping choices made by the Commission. Interestingly, in his updated report, *not one* of his 17,537 simulations has as few split municipalities as the Commission’s Final Plan, so that the Commission’s plan is an outlier in that (presumably good) sense, too. This also raises questions about his methodology.

considered, the [P]reliminary [P]lan is not a partisan gerrymander in terms of the likely number of Democratic districts.” (See Imai Presentation, “Summary of findings,” at 12.)<sup>34</sup>

Even more recently, a similar issue was raised with respect to a report offered by Professor Barber in a reapportionment case in another state. Dr. Moon Duchin, a Professor of Mathematics at Tufts University and a highly regarded expert in this field, filed an affidavit in which she said the following:

I have made a very serious attempt at replication in the very limited time available and have not been able to figure out how Dr. Barber arrives at his numbers, exactly. My conclusion is one of two things: either the discrepancy owes to the problematic way he blends elections together, which I will describe below, or he is actually using a different method from the one he describes in his report.

Second Affidavit of Dr. Moon Duchin on Remedies, submitted in *North Carolina League of Conservation Voters v. Hall*, Nos. 21 CVS 015426, 21 CVS 500085 (N.C. Super.), at 13.

John Nagle, a professor emeritus from Carnegie Mellon University, had appeared as a citizen-witness at one of our earlier hearings and returned in that role in January. Professor Nagle was a professor of physics and the biological sciences at Carnegie Mellon and had used statistical simulations extensively in his work.

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<sup>34</sup> Available at Tab 37c of the Commission’s Certified Record.

Interestingly, though this was not his original field, unlike Professor Barber, a political scientist, Professor Nagle now has published four directly relevant papers in *Election Law*, a top-ranked, peer-reviewed political science journal. He also invented two of the partisan bias metrics used by Dave’s Redistricting App.<sup>35</sup> In addition to his more scientific observations, Professor Nagle offered a down-to-earth, but thought-provoking, perspective on the method employed by the House Republican’s expert witness.

The fallacy of averaging the ensemble of simulations can be revealed by analogy. A professional basketball coach could consider 1,000 people who know how to play the game and then randomly choose an average one to play center. That is like choosing a plan from many simulated plans in the middle of an ensemble of simulated plans. Or the coach could hire Lebron James. That is like picking the LRC proposed plan.

(See Nagle Report at 6.)<sup>36</sup>

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<sup>35</sup> Dave’s Redistricting App (<https://davesredistricting.org>) is run by a team of volunteers whose mission is to empower civic organizations and citizen activists to advocate for fair congressional and legislative districts and increased transparency in the redistricting process. In addition to allowing the public to view and draw maps, the App also includes a rich set of analytics, including measures of proportionality, competitiveness, minority representation, compactness, splitting, and partisan bias.

<sup>36</sup> Available at Tab 38c of the Commission’s Certified Record

Professor Duchin recently made a similar point in the North Carolina case to which I just referred:

It is important to note that outlier status is a flag of intentionality, but not necessarily a smoking gun of wrongdoing. Being in a tail[] of a distribution that was created around certain design principles can often provide persuasive evidence that other principles or agendas were in play. For example, a map might be an outlier as the most compact, or the map that gives minority groups the greatest chance to elect their candidates of choice—these kinds of outlier status would not be marks of a bad plan.

Affidavit of Dr. Moon Duchin on Remedies, submitted in *North Carolina League of Conservation Voters v. Hall*, Nos. 21 CVS 015426, 21 CVS 500085 (N.C. Super.), at 4.

E. Creating Appropriate Opportunities for Minority Voters to Influence the Election of Candidates of Choice

After considering the traditional redistricting criteria of Article II, § 16 and the requirements of the Free and Equal Elections Clause, the Commission also sought to ensure that any final plan complied with the Voting Rights Act, which prohibits redistricting plans that dilute the opportunities of racial or language minority groups to elect representatives of their choice. The Commission received expert testimony on the Voting Rights Act from a number of witnesses throughout the process and, in the final stages of its work, relied, in particular, on the testimony and reports of Professor Matt Barreto.



U.S. Supreme Court authority gives significant latitude to states in how they effectuate the goals and requirements of the Voting Rights Act. *See Bartlett v. Strickland*, 556 U.S. 1, 23 (2009). The goal of the Voting Rights Act—prevention of minority vote dilution—is also important in the context of the Free and Equal Elections Clause and the Racial and Ethnic Equality Clause of Pennsylvania’s Constitution.

As was earlier noted, the Commission further recognized that incumbency is often a barrier that prevents minority voters from electing candidates of their choice. To counter that political reality, the Commission looked for opportunities where districts with sizeable minority communities could be drawn in ways that did not include an incumbent as a resident. To be clear, however, the Commission did so only when consistent with other traditional redistricting criteria and while also keeping in mind the requirements and prohibitions of the 14th Amendment to the U.S. Constitution.

One of the challenges leveled at the Final Plan by Leader Benninghoff’s Petition for Review is that the Plan dilutes minority votes, particularly by splitting cities like Reading and Allentown. Repeating a familiar pattern, for this claim, too, the Benninghoff Petition relies on Professor Barber’s analysis. As noted above, Professor Barber’s ensemble analysis did not include racial data. However, neither that fact nor the fact that this is another area in which he has no academic

publications to his credit, kept Professor Barber from basing much of his analysis on the sweeping theme that, if minority-group voters are spread across legislative districts, their influence is inevitably diluted.

Of course, the influence of a minority group can be diluted either by cracking or by packing. *See Voinovich v. Quilter*, 507 U.S. 146, 153 (1993). The law does not sanction a simplistic approach for determining whether a minority group's voting power is diluted. Knowing where the correct balance between packing and cracking can be struck requires an intensive local appraisal, which Professor Barber did not perform.

By contrast, Professor Barreto did perform such an analysis at both the statewide and local levels. In analyzing the redistricting plan currently in effect, Professor Barreto analyzed each of the factors set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986), for establishing a violation of the Voting Rights Act.

Professor Barreto first concluded that, in regions with sizeable populations of White and minority voters, those voters engage in a clear pattern of racially polarized voting. (*See Barreto, Voting Rights Act Compliance in Pennsylvania*, at 5.)<sup>37</sup> “Black, Latino and Asian American voters demonstrate unified and cohesive voting, siding for the same candidates with 75% to 90% support. In contrast, White

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<sup>37</sup> Available at Tab 34b of the Commission's Certified Record.

voters tend to block vote against minority candidates of choice.” (*Id.*) Professor Barreto noted that his findings are in line with basic exit poll reporting from recent elections, which tend to exhibit racially polarized voting. (*Id.*)

Professor Barreto expanded on his analysis by looking at voting patterns in different regions of the Commonwealth. He demonstrated that each region of the Commonwealth with significant minority populations exhibited racially polarized voting. (*Id.* at 6-8 (Southwest region), 9-11 (Lehigh Valley), 11-13 (Philadelphia region), 14-16 (Central Pennsylvania region), 17-19 (Allegheny County).)

Professor Barreto also examined the current House map. He concluded that multiple Black-performing and Latino-performing districts are packed and exhibit wasted minority votes, which results in vote dilution. (*See* Barreto Presentation, “Summary of Voting Analysis” Slide.)<sup>38</sup> He also concluded that, given the growth of the minority population in certain regions of the Commonwealth, existing minority districts should be unpacked, and new minority-performing districts should be created in order to comply with the Voting Rights Act. (*Id.*) Finally, in analyzing the Commission’s Preliminary Plan, Professor Barreto concluded that the Commission’s Preliminary Plan created districts that comply with the Voting

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<sup>38</sup> Available at Tab 37d of the Commission’s Certified Record.

Rights Act and that will provide opportunities for minority voters to elect candidates of their choice.

The unsupported contention in the Benninghoff Petition that “the 2021 Final Plan’s splitting of various cities and urban areas in numerous House districts acts to ‘crack’ and dilute the minority communities,” (*see* Benninghoff Petition ¶ 81e), certainly has not been embraced by the individuals and organizations that have long been working to enhance the voting impact of minority groups in Pennsylvania. Instead, there have been strong expressions of support for the LRC’s plan. Consider these examples.

Representatives Manuel Guzman, Jr., Danillo Burgos, and Angel Cruz, the three Latino Representatives currently serving in the Pennsylvania House, applauded the work of the Commission in adopting a plan that they view as responsive to the growth of the Latino community. (*See* Letter to Commission from Rep. Guzman, Rep. Angel Cruz, and Rep. Danillo Burgos (January 14, 2022)).<sup>39</sup> For the districts in Reading, in particular, Representative Guzman agreed that the Commission’s Preliminary Plan “unpacks the Latino population in House Districts 126 and 127 and increases the Latino population in House District 129 to

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<sup>39</sup> Available in Tab 40 of the Commission’s Certified Record.

more than 35%. The effect of these changes is that the Latino community in Berks County will now have three opportunities to elect candidates of choice.” (*Id.*)

A similarly positive response also was offered by the Pennsylvania Legislative Black Caucus. Its Chair, Representative Donna Bullock, wrote a supportive letter that said, in part:

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

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

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

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

(*See* Letter to Commission from Rep. Bullock (January 18, 2022)).<sup>40</sup>

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<sup>40</sup> Available in Tab 40 of the Commission’s Certified Record.

In an op-ed entitled “Thirty Years of racial inequity vs. Pennsylvania’s only growing populations,” Salewa Ogunmefun, the Executive Director of PA Voice, wrote that “the LRC released a draft set of maps that demonstrated a commitment to ensuring that Pennsylvania’s rapidly-growing Black, Latinx, and Asian-American populations will have a greater opportunity to elect candidates that truly represent them over the course of the next ten years.”<sup>41</sup>

Ray Block, the Brown-McCourtney Career Development Professor and Associate Professor of Political Science and African American Studies at Penn State, testified as a Voting Rights Act expert at a Commission hearing and subsequently wrote an op-ed entitled “The proposed legislative redistricting map complies with the Voting Rights Act.”<sup>42</sup> This is part of what he said: “The preliminary map proposed by the Commission recognizes the growing minority populations and fulfills the objectives of the requirements of the VRA by creating more opportunities for racial and ethnic minorities to achieve meaningful representation . . . . The preliminary plan offered by the Commission takes us one

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<sup>41</sup> Available at <https://www.pennlive.com/opinion/2022/01/thirty-years-of-racial-inequity-vs-pennsylvanias-only-growing-populations-opinion.html>.

<sup>42</sup> Available at <https://www.pennlive.com/opinion/2022/02/the-proposed-legislative-redistricting-maps-complies-with-the-voting-rights-act-opinion.html>.

step towards correcting past wrongs through faithful adherence to the requirements in the state’s Constitution.”

Michael Jones-Correa, the President’s Distinguished Professor of Political Science and Director of the Center for the Study of Ethnicity, Race and Immigration at the University of Pennsylvania also testified before the Commission and wrote a separate op-ed entitled “Ensuring Pennsylvania’s Latino voters have a say.”<sup>43</sup> In it, he said: “The preliminary plan for House and Senate districts recognizes the significant growth in communities of color like Latinos across the Commonwealth [and] reverses decades of partisan gerrymandering that led to the dilution of the political power of Black, Latino and Asian Pennsylvanians by packing them into a small number of districts with incredibly high populations of people of color.”

It has been heartening to receive such expressions of support from leaders from within the minority communities that stand to benefit from the shape of the new maps. And it again should be underscored that the Commission was able to make these important, and obviously welcome, strides while focusing predominantly on the traditional redistricting criteria in Article II, § 16, while adhering to the 14th Amendment of the U.S. Constitution, and while respecting the

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<sup>43</sup> Available at <https://www.inquirer.com/opinion/commentary/pennsylvania-redistricting-latino-community-20220106.html>.

Constitutional requirements of the Free and Equal Elections Clause and the Racial and Ethnic Equality Clause of the Pennsylvania Constitution.

## **VI. The Legislative Reapportionment Commission's Final Plan**

The LRC's Final Plan, adopted by a 4 to 1 vote of the Commission, is the product of exhaustive efforts by the Commission members and their teams, unprecedented levels of contact with and feedback from the public, and a deep reservoir of invaluable expert advice. The LRC's Final Plan performs better on almost every metric than the plan currently in effect. Indeed, the Commission's maps for the House and Senate score better on county splits, municipal splits, and compactness than the maps currently in effect. The only metric for which the current maps outperform the Commission's Final Plan is population deviations. However, as explained above, the Commission chose to prioritize, consistent with governing legal precedent, the redistricting criteria set forth in Article II, § 16 of the Pennsylvania Constitution, while also abiding by other mandates of state and federal law, and it has long been recognized that performing better on some metrics often requires sacrificing performance on other metrics.<sup>44</sup>

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<sup>44</sup> Even maps that perform better on population deviations and municipal splits must sacrifice some other metric. For example, the Benninghoff Amendment, discussed in more detail below, is more biased in favor of Republicans than the Commission's Final Plan, according to PlanScore.



The Commission’s Final Plan is also significantly less biased than the plan currently in effect, as measured by PlanScore, a tool accessible to the public and frequently used to measure bias. PlanScore defines partisan bias as “the difference between each party’s seat share and 50% in a hypothetical, perfectly tied election. For example, if a party would win 55% of a plan’s districts if it received 50% of the statewide vote, then the plan would have a bias of 5% in this party’s favor.”<sup>45</sup>

PlanScore gives the current Senate map a partisan bias score of 4.1% in favor of Republicans, which means that Republicans would be expected to win 4.1% extra seats (or 2 extra Senate seats) in a hypothetical, perfectly tied election.<sup>46</sup> The Commission’s proposed map reduces this bias to 3.1% in favor of Republicans, which means that the map still favors Republicans, who would be expected to win 3.1% extra seats (or 1.5 extra Senate seats) in a hypothetical, perfectly tied election.<sup>47</sup>

The reduction in partisan bias for the House map is even more marked, even though the Commission’s Final Plan continues to favor Republicans. According to PlanScore, the current House plan has a partisan bias score of 4.5%, meaning

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<sup>45</sup> “Partisan Bias,” PlanScore, <https://planscore.campaignlegal.org/metrics/partisanbias/>

<sup>46</sup> <https://planscore.campaignlegal.org/plan.html?20220204T133732.129648635Z>

<sup>47</sup> <https://planscore.campaignlegal.org/plan.html?20220207T161907.945950188Z>

Republicans would be expected to win 4.5% extra seats (or 9 extra House seats) in a hypothetical, perfectly tied election.<sup>48</sup> The Commission’s House map, by contrast, has a partisan bias score of only 2.3%, meaning it still favors Republicans who would be expected to win 2.3% extra seats (or 4.7 extra House seats) in a hypothetical, perfectly tied election.<sup>49</sup>

The tables below show that the Commission’s Final Plan does a markedly better job in adhering to the applicable redistricting criteria compared to the current plan. In reviewing the charts, it should be remembered that scoring higher on the Reock and Polsby-Popper tests is better:

### Senate Plan Comparisons

	Current Senate Plan	2022 Senate Plan
<b>Counties Split</b>	25	23
<b>Number of County Splits</b>	53	47
<b>Municipalities Split</b>	2	4
<b>Number of Municipality Splits</b>	11	10
<b>Reock</b>	0.38	0.39
<b>Polsby-Popper</b>	0.27	0.33
<b>Smallest District</b>	243,944	248,858
<b>Largest District</b>	264,160	269,942
<b>Overall Deviation</b>	7.96%	8.11%
<b>Average Deviation</b>	2.3%	2.1%
<b>Partisan Bias</b>	4.1%	3.1%

<sup>48</sup> <https://planscore.campaignlegal.org/plan.html?20220126T152843.418880351Z>

<sup>49</sup> <https://planscore.campaignlegal.org/plan.html?20220207T162001.827086135Z>

## House Plan Comparisons

	Current House Plan	2022 House Plan
<b>Counties Split</b>	50	45
<b>Number of County Splits</b>	221	186
<b>Municipalities Split</b>	77	54
<b>Number of Municipality Splits</b>	124	92
<b>Reock</b>	0.39	0.42
<b>Polsby-Popper</b>	0.28	0.35
<b>Smallest District</b>	60,111	61,334
<b>Largest District</b>	65,041	66,872
<b>Overall Deviation</b>	7.87%	8.65%
<b>Average Deviation</b>	2.0%	2.1%
<b>Partisan Bias</b>	4.5%	2.3%

It is important to underscore that the Commission’s Final Plan not only scores well on these metrics but also has succeeded in providing more opportunities for Pennsylvania’s growing minority communities to elect representatives of their choice, consistent with the Voting Rights Act, the Free and Equal Elections Clause, and the Racial and Ethnic Equality Clause.

Since the meeting at which the LRC adopted its Preliminary Plan, the work of the Commission has been attacked on a succession of specious grounds. Consider just the following.

- The most prominent visual image to emerge from that meeting was the juxtaposition of an irregularly drawn district with the salamander shape that has traditionally been associated with a gerrymander. This was cited as proof that the Commission’s plan was itself a political gerrymander.

However, the district in question was a Republican district, surrounded by other Republican Districts. Its configuration, then, did nothing to benefit any Democrat and, by definition, was not a gerrymander.

- It was contended that Dave’s Redistricting App [DRA] proved that the Commission’s preliminary House map had been “drawn to cement House Democrats in the legislative majority for the coming decade.”<sup>50</sup> More particular reference was made to a DRA projection that House Democrats would secure “a legislative majority of 106 seats, up from their current total of 90 seats.” This was true only when the app was calibrated for an election in which the Democrats won 5% more votes, in which case a 106 to 97 majority does not seem unreasonable. According to DRA, in a perfectly equal election, the Republicans would be projected to win 105 seats compared to the Democrat’s 98 seats, making it clear that the plan still favors the Republicans.
- It also was asserted that the preliminary map’s pairing of twelve Republican incumbents and only two Democratic incumbents was a clear

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<sup>50</sup> “Proposed state House map is a partisan gerrymander,” Centre Daily Times (Dec. 22, 2021), available at <https://www.centredaily.com/opinion/opn-columns-blogs/article256757467.html>.

sign of partisan bias. However, a party holding a substantial majority of seats and holding most of the seats in parts of the state that have lost population would naturally be the subject to more pairings, and preliminary maps submitted by two respected good-governance advocates each actually paired 36 Republican incumbents. It also should be noted that the number of Republican incumbents paired in the Final Plan has been reduced, and some of those pairings involve incumbents who plan to retire.

Many of the attacks made on the Final Plan have been addressed above. However, there are at least two additional points that should be made.

- The language of the Benninghoff Petition itself asserts that “[a] plaintiff alleging a racial gerrymandering claim need only show that race was the ‘predominant factor motivating the legislature’s decision.’” (Benninghoff Petition at ¶ 67 (quoting *Bethune Hill v. Va. State Board of Elections*, 137 S.Ct. 788, 792 (2017).) However, the fact that race is **a** factor, or even **an** important factor, does not make it **the** predominant factor, as the governing authority requires.
- The Benninghoff Petition also states that “[d]rawing lines to intentionally benefit one political party over another, whether to negate a natural disadvantage or not, is still a gerrymander and a violation of Article II,

Section 16 and the Free and Equal Elections Clause under Article I, Section 5 of the Pennsylvania Constitution.” (Benninghoff Petition at ¶ 49.) However, in its *League of Women Voters* opinion, the Pennsylvania Supreme Court defined what is a gerrymander in a far different way: “Specifically, partisan gerrymandering dilutes the votes of those who in prior elections voted for the party not in power to give the party in power a lasting electoral advantage.” 178 A.3d at 814. There has been no suggestion that anything of that nature has been involved in the Commission’s work.

It is often said that there is no such thing as a perfect plan, and the Supreme Court has never held the Commission to the standard of perfection or required that the Commission produce the best possible plan on all available metrics.<sup>51</sup> However, the Commission’s plan is a very good plan, one that was approved by a majority of the Commission that had worked diligently to create it and one that has received praise from many quarters. Earlier this week, for example, the Founder

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<sup>51</sup> The Benninghoff Petition contends that Majority Leader Benninghoff has produced a better plan. However, it was presented to the Commission in a fashion that precluded serious consideration, not having been shared with the Commission until the day of the meeting scheduled to approve the Final Plan, though from dates on the document, it appears to have been available several days earlier. More substantively, that map also would produce markedly higher levels of partisan bias, which a majority of the Commission has sought to avoid.

and Chair of Fair Districts PA, a non-partisan, citizen-led coalition working to stop gerrymandering, described the plan in following way: “The final maps show that it’s possible to balance concern for incumbents with traditional redistricting criteria, provide representation for minority communities and yield maps that limit partisan bias.”<sup>52</sup> I would only add more explicitly that these maps should serve the people of Pennsylvania and Pennsylvania democracy well for the next ten years, and also extend my thanks to all the many people who contributed to this effort.



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Mark A. Nordenberg  
Chair  
2021 Legislative Redistricting Commission

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<sup>52</sup> “The good and the bad of Pennsylvania redistricting,” Lancaster Online (Mar. 2, 2022), available at [https://lancasteronline.com/opinion/columnists/the-good-and-the-bad-of-pennsylvania-redistricting-column/article\\_f4852e2a-998c-11ec-b226-5741c8513951.html](https://lancasteronline.com/opinion/columnists/the-good-and-the-bad-of-pennsylvania-redistricting-column/article_f4852e2a-998c-11ec-b226-5741c8513951.html)