SUPREME COURT OF PENNSYLVANIA

Nos. 4 WM 2022, 11 MM 2022, 14 MM 2022, 7 WM 2022,
16 MM 2022, 11 WM 2022, 17 MM 2022,
18 MM 2022, 12 WM 2022
(consolidated for briefing purposes)

In Re: 2021 LEGISLATIVE REAPPORTIONMENT COMMISSION

Brief of Respondent
2021 Legislative Reapportionment Commission

Appeal from the Final Plan of the 2021 Legislative Reapportionment Commission, adopted February 4, 2022

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INTRODUCTION

The 2021 Legislative Reapportionment Commission's Final Plan is the product of a historic effort by the Commission's members, their staffs, and, most importantly, the public. The Commission held an unprecedented 7 public hearings and 16 public meetings, in which the Commission heard from 36 invited witnesses and additional 145 citizen-witnesses. The Commission received and reviewed to over 6,000 comments—both positive and negative—about its process and proposed maps. And, when the Commission's work was finished, the Chair of the Commission issued a thorough, detailed report explaining the priorities of the Commission and the rationale for its various determinations.

The work of the Commission has been praised both for conducting a process that was so respectful of the public and—importantly for this Court's purpose—for creating a plan that so clearly placed public interest above partisan interest. Those expressions of praise came from many sources, including leaders of good-governance groups having a deep commitment to fair reapportionment processes and from leaders from within minority communities that have long felt disadvantaged in the electoral process. Consider just the following statements that are representative of many others.

Representative Donna Bullock, the Chair of the Legislative Black Caucus, sent a letter to the Commission that said, "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."

In a published op-ed, 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."

In another op-ed, Carol Kuniholm, the Founder and Chair of Fair Districts, PA, a citizen-led coalition working to stop gerrymandering, described the Commission's final plan in the 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."

The Commission coupled its open, transparent process with sophisticated technology and, for the first time, the Commission's own non-partisan redistricting consultant. The Commission produced a Final Plan that focused very deliberately on the

governing law, including the U.S. and Pennsylvania Constitutions, as well as applicable statutes.

Particularly when purely local disputes are put to the side, very few challengers to the plan have emerged. And for the reasons explored below, none of these challenges comes close to establishing that the Commission's Final Plan is contrary to law.

COUNTERSTATEMENT OF SCOPE AND STANDARD OF REVIEW

In appeals from the Legislative Reapportionment Commission's Final Plan, the Court's "scope of review is plenary, subject to the restriction that 'a successful challenge must encompass the Final Plan as a whole.'" *Holt v. 2011 Legislative Reapportionment Comm'n*, 67 A.3d 1211, 1216 (Pa. 2013) ("*Holt II*") (quoting *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 733 (Pa. 2012) ("*Holt I*")). The Court also "will not consider claims that were not raised before the LRC." *Id.*

The Court's "standard of review is defined by the Pennsylvania Constitution: the plan may be held unconstitutional only if the appellants establish that it is 'contrary to law.'" *Id.* (quoting Pa. Const. art. II, § 17(d)).

The Court considers legal challenges to the Final Plan *de novo*, and appellants bear the burden of showing that the Commission's Final Plan is contrary to law. *Id.*

COUNTERSTATEMENT OF THE QUESTION INVOLVED

Have the petitioners met their burden of showing that the Commission's Final Plan is contrary to law, where the Final Plan complies with all relevant state and federal laws and outperforms the previous plan approved by the Court on almost every metric?

SUMMARY OF ARGUMENT[1]

The Commission's Final Plan meets all state and federal requirements. It performs better on the traditional redistricting criteria on compactness and respecting the integrity of political subdivisions than the map previously blessed by this Court, and does so by allowing only slightly more leeway in achieving near population equality. It takes into account the Free and Equal Elections Clause, ensuring that no voter's voice is diluted because of where they live or their partisan affiliation. And the Plan creates appropriate opportunities for minority communities to elect

[1] The Commission has opted not to include a Counterstatement of the Case because of the unusual nature of appeals challenging the Commission's adoption of a final reapportionment plan. However, the Commission has attached the March 4, 2022 Report of Mark A. Nordenberg, Chair of the 2021 Legislative Redistricting Commission, Regarding the Commission's Final Plan, to the Brief. This Report contains thorough descriptions of the Commission's process, considerations, and results.

representatives of their choice, while still adhering to all traditional redistricting criteria.

None of the nine Petitions for Review demonstrates that the Commission's Final Plan is contrary to law.

The majority of the Petitions object to the House map, and all of the arguments advanced in those Petitions to the House map—that the Commission impermissibly considered partisanship, that the Commission's final House map is a partisan gerrymander favoring Democrats, that the Commission's final House map is a racial gerrymander, and that the Commission's final House map divides too many municipalities—are not supported by the law or by the record. Indeed, all of the claims of Majority Leader Benninghoff—the most strident opponent of the Commission's House map—were thoroughly debunked by expert after expert.

The Commission's Senate plan attracts considerably less criticism, and that criticism amounts to nothing more than a charge that it was possible to draw a better plan using a supercomputer. But this charge, while perhaps true on certain objective metrics, does nothing to show that the Commission's plan is contrary to law. Indeed, there are many plans that are compatible with the law, and as long as the Commission adopted one such plan, its plan will not be invalidated. The Commission adopted such a plan here. Indeed, like the House map, the Commission's Senate map compares favorably to

the current Senate map on almost every metric. Accordingly, the Commission's decision should be upheld.

ARGUMENT

I. The Commission's Final Plan Comports With All Pennsylvania and Federal Constitutional and Statutory Mandates.

The Commission's Final Plan adheres to all of the Pennsylvania and federal constitutional and statutory mandates that govern the legislative redistricting process. These mandates include Article II, § 16 of the Pennsylvania Constitution (the traditional redistricting criteria), Article I, § 5 of the Pennsylvania Constitution (the Free and Equal Elections Clause), Article I, § 29 of the Pennsylvania Constitution (the Racial and Ethnic Equality Clause), the 14th Amendment to the U.S. Constitution, and the Voting Rights Act, 52 U.S.C. § 10301, *et seq.*

The basis for the Commission's Final Plan, including specific decisions that were made and priorities of the Commission, are outlined in detail in Chair Nordenberg's Report, which is attached as Appendix A. Below is a brief summary of some of the details of the Commission's Final Plan and why it complies with all constitutional and statutory mandates.

A. Adherence to Traditional Redistricting Criteria in Article II, § 16.

The Commission's Final Plan for both the House and the Senate performs well on all the traditional redistricting criteria in Article II, § 16—compactness, contiguity, respecting the integrity of political subdivisions, and near equal population. Indeed, the Final Plan performs better on every metric, other than population equality, than the plan the Court approved in *Holt II*. Although this Court has recognized that comparing favorably to previously approved plans does not immunize a plan from attack, *see Holt II*, 67 A.3d at 1238, the magnitude of the improvement shows that the Commission's Final Plan is not contrary to law.

The Commission's Final Plan in no way approaches the situation in *Holt I*, where the Court invalidated the map because "the challengers' presentation 'overwhelmingly' show[ed] the existence of political subdivision splits that rather obviously were not made absolutely necessary by competing constitutional, demographic, and geographic factors, and indeed where it was 'inconceivable' that the number of subdivision splits was 'unavoidable.'" *Holt II*, 67 A.3d at 1240 (quoting *Holt I*, 38 A.3d at 756).

1. *Compactness*

The Commission's Final Plan is more compact than the *Holt II* plan. Under the Reock measure, where a higher score is better, the

Holt II plan scored 0.38 for the Senate map and 0.39 for the House map. (*See* Report 70-71.) Under the Commission's Final Plan, those scores have increased to 0.39 for the Senate map and 0.42 for the House map. (*Id.*)

The Polsby-Popper measure, in which a higher score is also better, yields the same result. The *Holt II* Senate map has a compactness score of 0.27 and the *Holt II* House map has a compactness score of 0.28. (*Id.*) In the Commission's Final Plan, those scores have increased to 0.33 and 0.35, respectively. (*Id.*)

No Petitioner has challenged the Commission's Final Plan for not being sufficiently compact.

2. *Contiguity*

Similarly, no Petitioner has argued that the Commission's Final Plan is contrary to law because of a lack of contiguity. The districts in the House and Senate Maps are all contiguous except for the rare circumstances where municipalities along the border of a district are discontiguous. The Court has allowed such instances of discontiguity in order to preserve municipal and county boundaries. *See Holt II*, 67 A.3d at 1242.

3. *As Nearly Equal in Population as Practicable*

The Commission's Senate map has a population deviation of 8.11%, which is only marginally higher than the 7.96% deviation in

the plan approved in *Holt II*. (Report 70.) The Commission's House map has a population deviation of 8.65%, which again is only slightly higher than the 7.87% population deviation in the plan approved in *Holt II*. (*Id.*)

Both of these population deviations are presumptively constitutional under the 14th Amendment to the U.S. Constitution. The U.S. Supreme Court has recognized that "some deviations from population equality may be necessary to permit the States to pursue other legitimate objectives such as 'maintain[ing] the integrity of various political subdivisions' and 'provid[ing] for compact districts of contiguous territory.'" *Brown v. Thomson*, 462 U.S. 835, 843 (1983) (quoting *Reynolds v. Sims*, 377 U.S. 533, 578 (1964) (alterations in original)).

"An unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement." *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973).

In recognition of these considerations, the U.S. Supreme Court has held that "minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment

so as to require justification by the State." *Id.* at 745. Instead, that Court has "established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations." *Brown*, 462 U.S. at 842.

Although this Court has never adopted the 10% presumption, Pennsylvania jurisprudence tends to align with federal equal population principles. In *Holt I*, the Court held that Article II, § 16 "does not require that the overriding objective of reapportionment is equality of population." 38 A.3d at 759. Instead, the nearly equal population requirement must be balanced with other redistricting mandates, including the compactness, contiguity, and minimization of political subdivision splits requirements in Article II, § 16. *Id.* Neither the U.S. Constitution nor the Pennsylvania Constitution "require[s] that reapportionment plans pursue the narrowest possible deviation, at the expense of other, legitimate state objectives." *Id.* at 760.

The language of Article II, § 16 makes clear that populations of the districts must be as nearly equal "as practicable." Pa. Const. art. II, § 16. This "'practicable' modifier in the 'as nearly equal in population as practicable' language necessarily leaves room for the operation of the other constitutional commands." *Holt I*, 38 A.3d at 757. Further, the Commission has discretion to determine what population deviation is most practicable. *Holt II*, 67 A.3d at 1239.

The Commission's Final Plan often chose to sacrifice achieving more equal population equality in the name of other constitutional mandates, including keeping counties and municipalities intact. (Report 51.) As this Court noted in *Holt II*, increasing the population deviation creates "more breathing space" for other constitutional considerations, including protecting the integrity of political subdivisions. 67 A.3d at 1238.

The Commission exercised its discretion to determine that population deviations in the 8%-9% range struck the appropriate balance of creating districts that are as nearly equal as possible and that also respect political subdivision boundaries, are compact, are contiguous.[2] In fact, as discussed below, the Commission's Final Plan outperforms every previous redistricting plan on county and municipal splits. The Commission's Final Plan achieves this goal while also ensuring that no district in either the Senate or the House map deviates more than 4.40% from the ideal district population. (C.R.[3] Tab 42a.)

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[2] Specific challenges to the population deviations in the Commission's Final Plan are discussed below.

[3] C.R. stands for the Commission's Certified Record.

4. *Integrity of Political Subdivisions*

The Commission's Final Plan is a marked improvement over the plan approved in *Holt II*. The Commission's Senate map splits two fewer counties into six fewer county pieces. (Report 70.) While the Commission's Senate map splits two more municipalities, it creates one fewer municipality piece than the *Holt II* map. (*Id.*) Further, the Commission's Senate map splits two fewer wards than the *Holt II* map. (*Compare Holt II*, 67 A.3d at 1240, with C.R. Tab 42c. PDF page 6748.)

Senate Plan Comparisons

	Current Senate Plan	**2022 Senate Plan**
Counties Split	25	23
Number of County Splits	53	47
Municipalities Split	2	4
Number of Municipal Splits	11	10
Wards Split	10	8

Some of these splits are absolutely necessary based purely on population. Fourteen counties—Allegheny, Berks, Bucks, Chester, Dauphin, Delaware, Lancaster, Lehigh, Luzerne, Montgomery, Northampton, Philadelphia, Westmoreland, York—have populations larger than an ideal Senate district and, accordingly, must be split. *See* Penn State Data Center, County and Municipal Population Change

Table.[4] In addition, the population of Erie County is almost 5% above the ideal population for a Senate district. Similarly, two cities—Philadelphia and Pittsburgh—must be split in the Senate map because their populations exceed the size of an ideal Senate district. *Id.*

Allowing for these absolutely necessary splits, the Commission's plan only splits nine additional counties and two additional municipalities. Compared to the 67 counties and 2,560 municipalities in the Commonwealth, the number of county and municipal splits in the Commission's Senate map is "remarkably small." *Holt II*, 67 A.3d at 1240 ("We agree with the LRC that the number of splits, over and above those numbers which would be inevitable even in the absence of other constitutional factors, is remarkably small.").

The Commission's House map even more dramatically outperforms the *Holt II* House map. The Commission's House map splits five fewer counties into thirty-five fewer parts. (Report 71.) The Commission's map also splits twenty-three fewer municipalities into thirty-two fewer parts. (*Id.*) Finally, the Commission's House map

[4] Available at https://pasdc.hbg.psu.edu/Portals/48/Features/CountyAndMunicipalPopulationChange_2010to2020.xlsx?ver=2021-08-24-080135-920

splits sixteen fewer wards. (*Compare Holt II*, 67 A.3d at 1240, with C.R. Tab 43e, PDF page 6808.)

House Plan Comparisons

	Current House Plan	2022 House Plan
Counties Split	50	45
Number of County Splits	221	186
Municipalities Split	77	54
Number of Municipal Splits	124	92
Wards Split	103	87

Like with the Senate map, the House map splits an extremely small number of counties and municipalities, after discounting those counties and municipalities that must be split purely to achieve nearly equal population. Of Pennsylvania's sixty-seven counties, thirty-seven—over half—must be split purely based on population. *See* Penn State Data Center, County and Municipal Population Change Table. The Commission's House map splits only an additional eight counties.

The Commonwealth also has seven municipalities that must be split in any plan for the House—Philadelphia, Pittsburgh, Allentown, Reading, Erie (the city), Upper Darby Township, and Scranton. *Id.* The Commission's Final Plan splits an additional forty-seven municipalities. (Report 71.) Considering that the Commonwealth has

2,560 municipalities, the Commission's House map only divides 1.8% of the municipalities that otherwise would not be split.

B. The Commission's Final Plan works to reduce partisan bias, in compliance with the Free and Equal Elections Clause.

The Commission's Final Plan also complies with the Free and Equal Elections Clause. Pa. Const. art. I, § 5. This clause forbids "diluting the potency of an individual's ability to select the [representative] of his or her choice."[5] *League of Women Voters v. Commonwealth*, 178 A.3d 737, 816 (Pa. 2018). 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

[5] *League of Women Voters* involved a challenge to the Commonwealth's congressional districts, but the Free and Equal Elections Clause applies with equal force to the Commonwealth's legislative districts.

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.

This Court recently made clear that "consideration of partisan fairness, when selecting a plan among several that meet the traditional core criteria, is *necessary* to ensure that a [redistricting] plan is reflective of and responsive to the partisan differences of the Commonwealth's voters." *Carter v. Chapman*, __ A.3d __, No. 7 MM 2022, slip op. at 18 (Pa. Mar. 9, 2022) (emphasis added).

Partisan fairness considerations are not subordinate to the traditional redistricting criteria in Article II, § 16. Indeed, "[w]hile the core criteria protect against the creation of obviously gerrymandered districts, such as those present in the 2011 Plan [for congressional districts], they do not necessarily prevent all forms of vote dilution." *Id.* at 23. In other words, the traditional redistricting criteria are necessary, but not necessarily sufficient, to protect against partisan gerrymandering and unfair vote dilution based on party affiliation.

This emphasis on partisan fairness is confirmed by the structure of the Free and Equal Elections Clause within the Constitution. This provision is in Article I, the "Commonwealth's Declaration of Rights, which spells out the social contract between the government and the people and which is of such 'general, great and essential' quality as to be ensconced as 'inviolate.'" *League of Women Voters*, 178 A.3d at 803 (quoting Pa. Const. art I, Preamble & § 25). The government has no power to infringe on the voters' rights to free and equal elections and the voters' related ability to translate votes into representation.

The Commission's Final Plan works to correct the partisan bias in the plans currently in place and moves toward a better balance between the urban and rural parts of the state and the political affiliation of the voters of the Commonwealth—all while having greater respect for political subdivision integrity and compactness. The Commission considered issues like the maps' "responsiveness to voters," evaluated "whether a party with a majority of votes is likely to win a majority of seats," and considered whether a map is "likely to produce 'anti-majoritarian' results, without focus[ing] on exact proportionality of representation." *Carter*, slip op. at 36-37. (*See* Report at 52-55.)

While recognizing that no plan is perfect, the Commission pursued these goals in a good faith attempt to balance the competing

requirements of the Free and Equal Elections Clause and the traditional redistricting criteria in Article II, § 16, as well as the realities of a Commission that, as it is currently structured, is "inherently political." *Holt II*, 67 A.3d at 1234.

The Commission's Final Plan complies with the Free and Equal Elections Clause because "neither party's voters are diluted and neither party's voters have more voice over political outcomes in Pennsylvania." (Supplemental Warshaw Report, at 16, attached as Exhibit 2 to the Commission's Answer.) The House map has a partisan bias score of 2.3%, as measured by PlanScore. (Report 69-70.) This is a marked decrease from PlanScore's 4.5% partisan bias score for the current map. (*Id.*) The Commission's Senate map also reduces the partisan bias score by a full percent—from 4.1% in the current map to 3.1% in the Commission's Senate map. (*Id.*)

The scores from PlanScore confirm the analysis of almost every expert retained in this case—including Leader Benninghoff's own expert, Dr. Barber (Bennighoff Br., App'x A, 055a-61a)—that the Commission's Final Plan is slightly biased in favor of Republicans, but to a lesser degree than previous maps. Particularly in the context of the House map, Dr. Christopher Warshaw and Dr. Jonathan Rodden both conclude that, not only is the House map *not* a partisan gerrymander in favor of Democrats, but also that the map will likely slightly favor Republicans. (*See* Commission Ans., Exhibit 2

(Supplemental Warshaw Report), at 4; Commission Ans. Exhibit 4 (Rodden Report), at 5-7.) Nevertheless, the map comes closer to democratic ideals, such as responsiveness and majoritarianism, than the maps currently in effect. (Supplemental Warshaw Report at 16-17.)

C. The Commission's Final Plan provides opportunities for minorities to influence elections consistent with Article I, § 29 and federal Equal Protection Clause.

The Commission's Final Plan also makes important strides toward providing opportunities for minority communities to elect candidates of their choice or influence elections. In making those strides, the Commission's Final Plan works to fulfill the promise of the Racial and Ethnic Equality Clause: ensuring that "[e]quality 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. By creating these opportunities when able, the Commission's Final Plan works to provide minority voters with equal opportunities to translate votes into representation.

According to Dave's Redistricting App, the Commission's Final Plan for the House includes twenty-five districts where the voting age population of minority communities comprises over 50% of the

overall voting age population. *See* Dave's Redistricting App, House.[6] In addition, the Commission's House map includes nineteen districts where minority populations are not the majority, but are sizeable enough in number to influence the election. *Id.* Of these forty-four districts, at least seven do not include incumbents, further enhancing the opportunities of minority communities to elect representatives of their choice, in furtherance of the policy goals behind the Racial and Ethnic Equality Clause and the Voting Rights Act.

In the Senate map, the Plan includes five districts where minority voting age population exceeds 50%, and another five districts where minority communities comprise a substantial proportion of the population. *See* Dave's Redistricting App, Senate.[7] At least one of these ten districts also does not have an incumbent, which further increases the opportunity for minority communities to elect candidates of their choice.

The Commission exercised its discretion to determine that including both opportunity districts and influence districts would best serve the mandates of the Racial and Ethnic Equality Clause, the

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[6] https://davesredistricting.org/maps#stats::12a18072-adf1-48ac-a9d1-12280567b824

[7] https://davesredistricting.org/maps#stats::317011f0-6bcd-4df6-a1ee-435a92640426

Fourteenth Amendment, and the Voting Rights Act. The Commission's decision is consistent with federal precedent, which does not "entrench majority-minority districts by statutory demand." *Bartlett v. Strickland*, 556 U.S. 1, 23-24 (2009) (plurality op.). The U.S. Supreme Court has recognized that "[s]tates that wish to draw crossover districts are free to do so." *Id.* at 24. In drawing these districts for the express purpose of complying with the Racial and Ethnic Equality Clause and to give minority voters equal opportunities to influence elections, the Commission has in no way engaged in pernicious "packing" and "cracking" to *dilute* minority opportunities.

The Commission's Final Plan was able to include these districts while still adhering to the traditional redistricting criteria of Article II, § 16 and the Free and Equal Elections Clause. More importantly, as Chair Nordenberg made clear in his statements at the Commission's hearings and in his Report, creating a target number of minority opportunity or influence districts was not the goal of the Commission. Instead, the starting point for all redistricting decisions were the traditional redistricting factors in Article II, § 16. (Report 44-46, 60-61.)

II. Responses to Specific Arguments by Petitioners

Nine different Petitions for Review were filed challenging the Commission's Final Plan. The task for the Court is to determine

whether any of the Petitions meets its burden of showing that the Commission's plan is contrary to law. *Holt II*, 67 A.3d at 1216. This task is notably different from the task faced by the Court in selecting a congressional map where, because of deadlock between the General Assembly and the Governor, this Court was forced to decide which of the submitted maps "best balances the requisite criteria and considerations." *See Carter*, slip op. at 4-5.

None of the nine Petitions meets this burden. At best, the Petitions argue that the Commission could have drawn a map that balanced the constitutional mandates differently and, according to the Petitioners, would result in a better map. But the Commission's Final Plan is not contrary to law simply because someone can arguably draw a map that performs better on some or even all constitutional metrics. *See Holt II*, 67 A.3d at 1240 ("By necessity, a reapportionment plan is not required to solve every possible problem or objection in order to pass constitutional muster.").

A. Five of the Petitions for Review raise only localized challenges, which necessarily fail to challenge the Final Plan as a whole.

As a preliminary matter, five of the nine Petitions for Review raise only localized disputes about the Commission's Final Plan and fail to challenge the maps as a whole. This Court has repeatedly made clear that it will not consider challenges that only raise such

localized disputes. *See Holt II*, 67 A.3d at 1216 (noting that "a successful challenge must encompass the Final Plan as a whole"); *Holt I*, 38 A.3d at 733 (same); *Albert v. 2001 Legislative Reapportionment Comm'n*, 790 A.3d 989, 995 (Pa. 2002) (same).

Despite this caution, the Petitions for Review in *Boscola* (14 MM 2022), *Koger* (7 WM 2022), and *Kress* (12 WM 2022) expressly only challenge districts in one part of the Commonwealth. The *Koger* Petition for Review only challenges the decision not to pair the Borough of Wilkinsburg with parts of the City of Pittsburgh.[8] (*See* Koger Supp. Br. 7-8.) The *Kress* Petition for Review raises the same challenge to the district in which Wilkinsburg Borough is located and also challenges the number of splits in Pittsburgh.[9] (*See* Kress Pet. 8-17.) Neither of these Petitions challenges any areas outside Allegheny County.

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[8] The *Koger* Petition can also be dismissed because the Petitioner in that case failed to raise his challenge in proceedings before the Commission, despite the alleged flaws about which he now complains being in both the Commission's Preliminary and Final Plans. *See Holt II*, 67 A.3d at 1216 (noting that the Court "will not consider claims that were not raised before the LRC"). Despite these fatal flaws, the Commission has nevertheless answered Mr. Koger's factual charges. As the Commission's answer demonstrates, Mr. Koger's claims have no merit. (*See* Commission Ans. ¶¶ 21-25.)[9] No brief was filed in support of the *Kress* Petition for Review.

[9] No brief was filed in support of the *Kress* Petition for Review.

The *Boscola* Petition for Review only takes issue with the Senate districts in the Lehigh Valley, even while acknowledging the Court's "reluctance to entertain local challenges." (Boscola Br. 8.) In particular, Senator Boscola only challenges the decision to move the 14th Senate District to the Lehigh Valley and the resulting divisions of the City of Allentown and South Whitehall Township. (*See* Boscola Br. 8-11.)

The *Covert* and *Hutz* Petitions for Review suffer from similar infirmities. While purporting to challenge the Final Plan as a whole, the Petitions and supporting briefs only mount specific arguments to the divisions in Butler County. (*See* Covert Br. 105-110; Hutz Br. 105-110.) These petitioners present no arguments about the plan as a whole, except to the extent they incorporate arguments of other petitioners by reference.[10] (Covert Br. 111; Hutz Br. 111.)

[10] The Covert and Hutz Petitioners nevertheless ask this Court to order the Commission to pay their legal fees because the Commission allegedly engaged in vexatious and bad faith conduct. (Covert Br. 110-11, Hutz. Br. 110-11.) This request should be dismissed out of hand, because the Petitioners assert no meritorious claims and cite to no legal authority that would allow for deviations from the American Rule, under which every party is generally responsible for their own counsel fees. Finally, although the Covert and Hutz Petitioners' claims are legally insufficient, the Commission nevertheless responds to some of their factual allegations. (*See* Commission Ans. ¶¶ 26-29.)

Because these five Petitions fail to argue that the Commission's Final Plan, as a whole, is contrary to law, the Court should deny the Petitions.

B. The House map is not contrary to law.

Three of the four remaining petitions focus primarily on arguing that the House map is contrary to law. None of the attacks has any merit.

1. *The House map is not a partisan gerrymander in violation of the Free and Equal Elections Clause.*

The *Benninghoff* and *Roe* Petitions for Review both argue that the Commission's Final Plan for the House is a partisan gerrymander (Benninghoff Br. 34-62, Roe Br. 11-20, 35), and the *Benninghoff*, *Roe*, and *Ingram* Petitions assert that the Commission was either not allowed to consider partisan bias at all (Roe Br. 31-34, Ingram Br. 3-5), or was not allowed to overcome any supposedly "natural" partisan bias that is supposedly present in Pennsylvania's geography (Benninghoff Br. 54-60). These arguments are wrong as a matter of fact and law.

a. Reducing partisan bias is a legitimate consideration for redistricting.

Contrary to the arguments made in the *Roe* and *Ingram* Petitions for Review, the Commission is allowed to consider questions of partisan bias and fairness when adopting a redistricting

plan for the Commonwealth. This Court's opinion in *Carter* recently made clear that partisan fairness has an important role. *Carter*, slip op. at 39 ("Our task is to discern which plan, in our view best abides by the traditional core criteria with attention paid to the subordinate historical considerations and awareness of partisan fairness.").

Consideration of partisan fairness is more than merely permissible. This Court held that "consideration of partisan fairness, when selecting a plan among several that meet the traditional core criteria is *necessary* to ensure that a [redistricting] plan is reflective of and responsive to the partisan preferences of the Commonwealth's voters." *Id.* at 18 (emphasis added). In fact, partisan fairness is seemingly one of the three main factors that must be balanced when crafting a redistricting plan, along with the traditional redistricting factors in Article II, § 16 and compliance with the Voting Rights Act. *Id.* at 22-23.

In elevating partisan fairness to the same level as the traditional redistricting criteria and federal law, this Court made clear that redistricting authorities like the Commission have an independent obligation to ensure that any plan "avoids vote dilution based on political affiliation." *Id.* at 23. It is not enough simply to rely on the traditional redistricting criteria and then assume that the traditional criteria will create a plan without any partisan bias. *Id.*; *see also League of Women Voters*, 178 A.3d at 817 (recognizing that "advances in map

drawing technology and analytical software can potentially allow mapmakers, in the future, to engineer [redistricting] maps, which, although minimally comporting with these neutral 'floor' criteria, nevertheless operate to unfairly dilute the power of a particular group's vote").

Accordingly, Leader Benninghoff's argument that the Free and Equal Elections Clause forbids any attempts to compensate for the alleged "tilt" in Pennsylvania's political geography falls flat.[11] (Benninghoff Br. 54-60.) The *Carter* opinion makes clear that the Commission was permitted to ask questions like whether the party that wins the most votes also wins the most seats, whether the map is responsive to voter preferences, and whether the map produces "anti-majoritarian" results. (Report 52-55.) Indeed, this Court looked at the same considerations when selecting the Carter map. *Carter*, slip op. at 36-37. The Commission's consideration of partisan bias is, in fact, constitutional under the Free and Equal Elections Clause and not contrary to law.

[11] As discussed below, Leader Benninghoff's argument is incorrect for a number of other reasons, not the least of which is his assumption that Pennsylvania's "natural political geography' means that Republicans must necessarily win more seats than Democrats in the House.

b. The Commission's House map is not an extreme partisan outlier.

Leader Benninghoff also argues that the Commission's House map is an extreme partisan outlier because it does not create the same partisan results as a map that supposedly respects Pennsylvania's political geography. (Benninghoff Br. 47-54.) In Leader Benninghoff's view, Republicans are entitled to more seats in the General Assembly because their voters are more efficiently spread throughout the Commonwealth, while Democrats are naturally entitled to fewer seats in the General Assembly because their voters have inefficiently packed themselves in cities.

This Court already rejected this argument in *Carter*. The Court credited the testimony of Dr. Rodden that "it is not the case that the human geography in Pennsylvania somehow requires that we draw unfair districts." *Carter*, slip op. at 18 (quotation omitted). Instead, the Commission is permitted to select a map that is responsive to voter preferences and that seeks to avoid anti-majoritarian outcomes, as long as the map also complies with the "floor" criteria of Article II, § 16. *Id.* at 37.

Further, the argument runs afoul of *League of Women Voters*, which recognized that voters' ability to influence elections should not depend on where they live or with whom they associate. *League of Women Voters*, 178 A.3d at 808-09. Indeed, the prior version of the

Free and Equal Elections Clause was 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." *Id.* at 809 (emphasis added) (quotation omitted). The voters in the Commonwealth's early history were primarily concerned with preventing "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." *Id.* at 808.

Rather than arguing that a voter's vote should not be diluted based on where the voter lives, Leader Benninghoff instead argues that voters who vote for Democratic candidates should have *less* of a say in the makeup of the General Assembly because those voters have chosen to pack themselves in cities. Such location-based vote dilution is anathema to the Free and Equal Elections Clause, which was enacted to do away with such geographically based vote dilution. *Id.* at 808-09.

Leader Benninghoff's argument is further undermined for two critical reasons.

First, Leader Benninghoff's argument starts from the mistaken premise that a fair plan is a plan that adheres to the median partisan balance created by thousands of simulations. However, simulations are not traditionally used to create norms for redistricting. Political

scientists and redistricting experts stress important caveats "about how and how not to use these ensembles." Amariah Becker, et al., *Computational Redistricting and the Voting Rights Act*, 20 Election L.J. 407, 412 (2021). First, ensembles are used for "[c]omparison, not selection." *Id.* Moreover, ensembles reveal only the normal range of maps, not the ideal map. "While talking about normal ranges and outliers, [political scientists] should avoid the temptation to valorize the top of the bell curve (or its center of mass, or any other value) as an ideal." *Id.*

As Dr. Rodden confirms in his expert report, which is attached as Exhibit 4 to the Commission's Answer, Dr. Barber is using a very different definition of "bias" and "fairness" from the academic literature on redistricting. (Rodden Report 2.) Indeed, Dr. Barber's interpretation of a "fair" map being the modal partisan outcome of a large ensemble of simulations does not appear *anywhere* in the academic literature. (*Id.*) Dr. Barber has invented an entirely new definition of fair that undermines fundamental democratic principles, such as a redistricting map should be responsive to voter preferences and should reflect the general principle that the party that wins the most votes should also win the most seats. (*Id.*)

Dr. Rodden is not alone in his criticism of Dr. Barber and his ensemble-based assumptions. When evaluating the simulation ensembles, renowned experts in the field recognize that it is also

critical to "look at the directionality of deviation from ensemble expectation." Report of Bernard Grofman, *NCLCV v. Hall*, 21 CVS 15426 (N.C. Dist. Ct.), at 7.[12] As explained by Dr. Grofman:

> If a map has lower (absolute) values on metrics such as partisan bias than most of the maps in the ensemble, *ceteris paribus*, that is something to be desired, not condemned, even if the map is outside the 95% confidence range of the ensemble. It is only when the map has higher values of metrics that show vote dilution than most of the maps in the ensemble that we see evidence of partisan gerrymandering that might rise to the level of unconstitutionality.

Id. at 7-8.

The argument in the *Benninghoff* Petition flips this analysis on its head—claiming that the Commission was required to pick the "normal," biased plan and that anything outside the range of "normal" is an extreme partisan gerrymander[13]—even if it performs

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[12] Available at https://www.nccourts.gov/locations/wake-county/cases-of-public-interest (in file 22-02-23 Order on Remedial Plans (Special Masters Materials), Expert Reports Folder)

[13] Leader Benninghoff's invocation of the term "gerrymander" is also incorrect as a matter of law. Under this Court's precedent, a partisan gerrymandering claim requires: "(1) intentional discrimination against an identifiable political group; (2) an actual discriminating effect on that group; and (3) a history of disproportionate results appearing in conjunction with strong indicia of lack of political

well on all the traditional redistricting metrics *and* results in a more balanced map by all the scientific partisan fairness metrics typically employed by political scientists and redistricting experts. Leader Benninghoff finds no support for such a position in *League of Women Voters*, *Carter*, or the scientific literature.

Second, Leader Benninghoff's position is flawed for an additional, more fundamental reason: Dr. Barber's assumption—that maps based only on neutral redistricting criteria create outsized Republican majorities—is simply incorrect.

Dr. Barber arrives at his conclusion by using flawed methodology. Because both Leader Benninghoff and Dr. Barber present themselves as champions of neutral districting criteria and Dr. Barber premises his entire argument on his simulations, it is telling that *none* of Dr. Barber's ensembles manages to perform as well as the Commission's House map, *even on the traditional redistricting criteria*. As the chart from Dr. Barber's updated report shows, his simulations split between 61 and 105 municipalities (with

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power and denial of fair representation." *Albert*, 790 A.2d 998 n.10 (cleaned up). No scenario exists in which Leader Benninghoff could establish the second and third elements, because the House map continues to favor Republicans and because Republicans have outsized political power in the General Assembly.

a median split of 82 municipalities), whereas the Commission's Final House map splits only 56 municipalities.

Table 1: Commission Proposal and 50,000 Simulations: Population, Splits, and Compactness

	Commission Final Proposal	Simulations Median	Simulations Range
Population Deviation			
Smallest District:	-4.24%	-4.22%	[-4.25., -3.91]
Largest District:	4.40%	4.23%	[3.93, 4.25]
Boundary Splits			
Counties Split:	45	46	[42, 52]
Total County Splits:	186	195	[184, 208]
Municipalities Split:	56	82	[61, 105]
Total Municipal Splits:	92	119	[98, 140]
Compactness			
Median Polsby-Popper:	0.35	0.32	[0.29, 0.34]

(Benninghoff Pet., App'x A, at 0008a.) Similarly, the most compact simulation in Dr. Barber's ensemble has a Polsby-Popper score of 0.34, where the Commission's House map has higher, and therefore better, score of 0.35. Therefore, even taking partisanship out of the equation, the Commission's House map would not be in Dr. Barber's ensemble because it performs *better* than any of Dr. Barber's simulations.

The importance of looking at Dr. Barber's compliance with the traditional redistricting criteria cannot be minimized. The "inputs"—*i.e.*, the parameters for creating his ensemble—necessarily affect the output—*i.e.*, the ensemble itself. Dr. Kosuke Imai—the House Democrats' expert on redistricting ensembles, who created the algorithm used by Dr. Barber and who was also Dr. Barber's

graduate-school advisor—recognized this fact and improved his algorithm when analyzing the Commission's Final House map (as compared to his analysis of the Preliminary House map).[14] (Updated Imai Report at 4, attached as Exhibit 1 to Commission's Answer.)

Dr. Imai concluded that, when the algorithm instructed the ensemble program to create simulations with fewer municipal splits—so that the simulations more accurately reflect the language in Article II, § 16 that municipalities should not be divided unless "absolutely necessary"—he determined that the Commission's plan was not an outlier *by any measure*. (*Id.* at 8-9.) Indeed, the Commission's House map is in the center of the distribution in Dr. Imai's race-blind simulation:

[14] In his assessment of Dr. Barber's earlier report, Dr. Imai reported that he could not replicate Dr. Barber's results. That also was true with Dr. Barber's more recent report. As Dr. Imai explained, "Unfortunately, Professor Barber's latest report suffers from the same problem . . . . Professor Barber does not provide sufficiently detailed information about his algorithmic choices . . . ." (Updated Imai Report 7.)

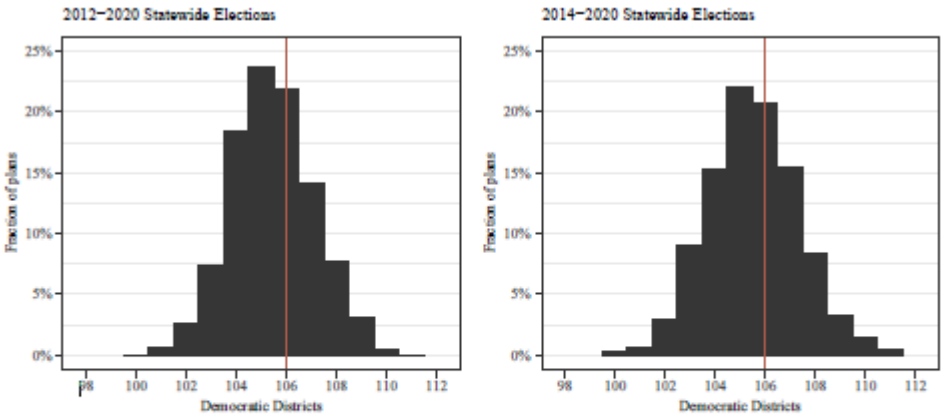

Figure 1: The likely number of Democratic districts across 5,000 *race-blind* simulated plans. Democratic districts are tallied based on an average of statewide elections for the 2012–2020 cycles (left) and the 2014–2020 cycles (right). The red vertical lines represent the results under the final House plan, which fall well within the simulation ranges.

(*Id.*) In other words, the Commission's House map creates the *expected* number of Democratic-leaning and Republican-leaning districts when municipality splits are kept to a minimum. By Dr. Barber's logic, then, the Commission's plan is not a gerrymander at all.

Dr. Imai's supplemental report confirms that, even if Leader Benninghoff were right that the Commission were required to draw a map that falls in the center of a race-blind ensemble's distribution (a dubious proposition at best, given both the lack of academic acceptance of ensembles as being the appropriate measure for a "fair" redistricting plan, *and* the requirement in the Voting Rights Act that redistricting plans do not dilute minority opportunity), the Commission's Final House map meets this requirement.

Leader Benninghoff cannot show that the Commission's House map is a partisan gerrymander.

c. The Commission's House map does not split cities impermissibly for partisan reasons.

Another critique lobbed at the Commission's House map in the Final Plan is that it impermissibly splits cities for partisan reasons. (Benninghoff Br. 42-47, Roe Br. 20-28.)

Article II, § 16 recognizes that cities and other municipalities should not be split unless "absolutely necessary." However, the Constitution does not answer the question: absolutely necessary for what purpose? This Court has recognized that population equality is one permissible reason for splitting a county or municipality. *See Carter*, slip op. at 32. Other federal and state mandates may also require political subdivision splits. *See Holt II*, 67 A.3d at 1240 ("Moreover, respecting the point that it may be possible to produce maps with fewer subdivision splits, that circumstance alone proves little, since respect for the integrity of political subdivisions is but one of the multiple state constitutional and federal commands that must be accommodated").

Here, the Commission's primary reason for splitting large municipalities, such as cities, had to do with population equality. When a split became necessary to create nearly equal populations, the Commission chose to split the larger municipalities rather than

smaller ones in order not to dilute the opportunities for these smaller communities to elect representatives and influence policy. (Report 47-50.)

Leader Benninghoff and other Petitioners argue that, in actuality, the Commission split cities to create partisan fairness. As a factual matter, this argument makes no sense. While Leader Benninghoff accuses the Commission of following Dr. Rodden's "roadmap to gerrymandering" by dividing Democratic-leaning cities like pizza slices, in order to combine them with Republican-leading suburbs (Benninghoff Br. 42),[15] Leader Benninghoff fails to point to a single district that comes close to resembling this vivid imagery. Indeed, Dr. Rodden cannot discern any district in Dr. Barber's report that exhibits this pattern. (Rodden Report 9.)

Dr. Rodden then meticulously rebuts Dr. Barber's unfounded assumptions that certain municipalities were divided and then combined with suburbs to create Democratic-leaning seats. For example, Dr. Rodden notes that Dr. Barber takes issue with how the districts around Scranton and Wilkes-Barre are divided. (*Id.* at 10-12.)

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[15] Dr. Rodden also explains in exhaustive detail how Dr. Barber misinterprets and misuses Dr. Rodden's work and takes Dr. Rodden's quotes out of context. Indeed, Dr. Rodden expressly states: "In making these claims, Dr. Barber draws heavily on my work, *often in a misleading way*." (Rodden Report 7 (emphasis added).)

However, Dr. Barber never once tries to explain *why* the way the region was divided was objectionable. Dr. Barber cannot rely on his familiar trope that the split of Scranton was unnecessary, because Scranton was split only once—a split that was absolutely necessary because the city's population exceeds the population of an ideal House district.

It is also far from clear that the splits in Leader Benninghoff's Amendment, which Dr. Barber endorses, are preferable to those in the Commission's Final Plan. Leader Benninghoff divides Scranton four times, even after harshly criticizing the Commission's Preliminary Plan for doing the same thing (and which has since been remedied). (Benninghoff Br., App'x B at 0132a.) Further, Leader Benninghoff splits communities like the Borough of Moosic in Lackawanna County, which has a population under 6,000, and West Pittston Borough in Luzerne County, which has a population under 5,000. (*Id.* 0132a-0133a.) By contrast, the *only* municipality that the Commission's House map splits in these two counties is Scranton. (*See* C.R. Tab 42e, PDF page 6809.)

Leader Benninghoff also takes issue with the Commission's plan because it divides the City of Lancaster. (Benninghoff Br. 17-18, 44.) But, as Dr. Rodden notes, Dr. Barber's report, on which Leader Benninghoff relies, "includes maps of districts that do not raise any red flags regarding traditional redistricting principles upon initial

visual inspection." (Rodden Report 13.) Dr. Barber's "only claim appears to be that since the city of Lancaster has a population just below the ideal population size of a Pennsylvania House district, it should be included in a single district." (*Id.*) However, Dr. Barber does not discuss the tradeoffs of putting Lancaster in only one district. For example, Lancaster is discontiguous, meaning any district that prioritizes keeping Lancaster whole will likely be discontiguous. (*Id.*) Indeed, the Benninghoff Amendment suffers from this exact problem, while also suffering from a lack of compactness because of the city's bizarre boundaries. (*Id.*) Overall, "it is very difficult to see how the Lancaster area in the Final House Plan can be understood to be violative of traditional redistricting principles for partisan gain." (*Id.*)

Dr. Rodden explains that the same holes in Dr. Barber's logic are present in his criticisms of the Allentown and Bethlehem area. (*Id.* at 18.) "Since the population of Allentown is very slightly less than twice the target population for a district, [Dr. Barber] concludes that it must be divided into two districts." (*Id.*) However, like in Lancaster, this decision comes with tradeoffs. Keeping Allentown in only two districts creates extremely non-compact districts, like those in the Benninghoff Amendment. (*Id.*)

Harrisburg exhibits a similar pattern. While Harrisburg's population is small enough to fit in one district, its "narrow, non-

compact arrangement . . . along the banks of the Susquehanna River," combined with the shape of Dauphin County, means that keeping it whole "has knock-on effects when one is also trying to minimize county splits and avoid splitting other communities." (*Id.*)

Dr. Rodden thoroughly debunks Leader Benninghoff's claims about Reading as well. Dr. Rodden notes that "it is not clear why Dr. Barber considers the Final House Plan to have a pinwheel shape," especially where the "Commission's approach to Berks County led to a more compact arrangement to the Southwest," and required fewer splits of the Berks County boundary than the Benninghoff Amendment. (*Id.* at 15.)

Although not discussed by Dr. Rodden, Leader Benninghoff also takes issue with the split of State College. However, as Chair Nordenberg explained in his Report, the borough was split because it is the most populous municipality in the region and, when some municipality needed to be split to create nearly equal populations, the Commission exercised its considerable discretion to divide State College. (Report 49.) This decision was met with approval by many of the borough's citizens and local officials. (*Id.*) And contrary to Leader Benninghoff's representations, *most* of the "complaints" about the split of State College in the House map came from residents of Snyder, Union, and Lycoming Counties, who were unhappy with how the supposed ripple effect from the State College split affected

their House districts. (*See, e.g.*, C.R. 39, PDF pages 335, 488, 559, 571, 576, 581, 598, 616, 645.)

As Dr. Rodden demonstrates, each of the supposedly unnecessary city splits can be explained by traditional redistricting criteria and, more importantly, are *not* paradigms of the kinds of pizza slices and wheel-spokes that supposedly indicate partisan gerrymandering. Yet again, Leader Benninghoff's attack of the Commission's Final House map falls flat.

d. There is no evidence that the population deviations in the House plan systematically discriminate against Republicans.

Leader Benninghoff and other Petitioners similarly argue that the population deviations in the House map are excessive and are particularly problematic because they systematically disadvantage Republicans.[16] (Benninghoff Br. 38-41, Roe Br. 14-17, Ingram Br. 18.) These Petitioners make this statement, however, without expert analysis and without even discussing the election metrics that they

[16] The Ingram Petitioners argue that the population deviations are too high, without necessarily ascribing a partisan motivation behind the deviations. (Ingram Br. 12-18.) However, the Ingram Petitioners appear to base their argument on federal standards for *congressional* districts, where the U.S. Supreme Court has made clear that the districts must come close to population deviations of zero. (*Id.* at 15 (complaining about a district that is 0.15%, or 97 people, below the ideal population for a House district).)

chose to use, how close any elections were, or any other defining characteristics that inform Petitioners' conclusions. The failure to offer "any concrete or objective data," and instead relying on "conclusory allegations" is precisely the kind of argument that this Court has routinely refused to credit. *See Holt I*, 38 A.3d at 753 (discussing why challenges to previous redistricting plans had failed). The Court should treat this claim the same way.

Leader Benninghoff's analogy to *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (three-judge district court), is also unavailing. In that case, the Georgia house plan had a total population deviation range of 9.98% and an average deviation of 3.47%. *Id.* at 1326. In *Larios*, the court found notable that "ninety of the 180 House seats (50.00%) are in districts with population deviations greater than ± 4%. Sixty seats (33.33%) are in districts with deviations greater than ± 4.5%, and twenty seats (11.11%) are in districts with deviations greater than ± 4.9%." *Id.* Further, "most of the districts with negative deviations of 4% or greater are located either in south Georgia or within inner-city Atlanta," which were the two areas that had lost the most population over the previous decade. *Id.* at 1325-26.

The testimony in *Larios* included express admissions that the people in charge of redistricting Georgia had two objectives: protect the citizens in rural Georgia and inner-city Atlanta, despite a relative decline in population compared to the rest of the state, and protect

democratic incumbents. *Id.* at 1325. Indeed, it was clear that the people in charge of redistricting prioritized these two factors above even the traditional redistricting criteria. *Id.* at 1332-33. The combination of all these facts—the admissions of priorities, the admissions that traditional redistricting factors were not considered, and the sheer number of over- and under-populated districts—convinced the court that Georgia's districts were malapportioned. *Id.* at 1327.

Here, the Petitioners have none of these facts. The Commission's House plan is significantly lower in terms of absolute population deviation (8.65%) and average population deviation (2.1%). (Report 71.) *No* district, let alone a third of the districts (like in the Georgia plan), has a population deviation greater than ±4.5%. (C.R. 42a.) And the Petitioners point to *no* admissions that the Commission purposefully overpopulated Republican districts, purposefully underpopulated Democratic districts, or ignored traditional redistricting criteria. *Larios* is simply inapposite.

e. The Commission did not target Republican incumbents.

In a last-ditch attempt to argue that the Commission's Final House map is biased against Republicans, the *Benninghoff* and *Roe* Petitions argue that the Commission's plan is a partisan gerrymander because it targets Republican incumbents and places them in the

same district or places Republican and Democratic incumbents together in districts that Republicans are guaranteed to lose. (Benninghoff Br. 61-62, Roe Br. 17-18.)

First, Leader Benninghoff overstates the supposed problem. Although Leader Benninghoff provides a list of incumbents who are "double-bunked," he does not account for the announced retirements of some of these incumbents. Among others, the following paired incumbents have announced that they would not seek reelection: Rep. Mark Longietti, Rep. Lori Mizgorski, Rep. Carrie DelRosso, Rep. Pam Snyder, and Rep. Curt Sonney. *See* "The Capital-Star's 2022 Pa. incumbent retirement and primary tracker"[17]; "State Rep. Carrie DelRosso announces run for lieutenant governor."[18] Therefore, his list on Appendix H does not reflect the true state of incumbent pairings, and, in fact, it does not appear that a single Democrat-Republican "double-bunking" is now present in the House plan.

Second, Leader Benninghoff's arguments were persuasively rebutted by Chair Nordenberg at the first hearing after release of the Preliminary Plan. Chair Nordenberg noted that the Commission's

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[17] https://www.penncapital-star.com/government-politics/the-capital-stars-2022-pennsylvania-incumbent-retirement-and-primary-tracker/

[18] https://triblive.com/local/valley-news-dispatch/state-rep-carrie-delrosso-announces-run-for-lieutenant-governor/

incumbent pairings were relatively small compared to the number of pairings in plans proposed by Fair Districts PA and by Amanda Holt—both of whom paired thirty-six Republican incumbents and twenty-four Democratic incumbents. (C.R. 29b, 807-08.) The pairings were also quite small compared to pairings in other states like Virginia, where nearly half of the incumbents in the House of Delegates would be forced to run against each other. (*Id.* at 805-06.)

Third, the location of incumbents' residences often made it hard to avoid pairings, especially when many live near each other in areas that experienced declining population. Moreover, after the 2020 election, Republicans held 113 seats. The four districts in which Republican incumbents are double-bunked represent only 3.5% of all Republican-held seats, and just 2.0% of all House seats.

However, there were many opportunities for the Commission to pair Republican incumbents, if that had been the Commission's true goal. (*See* C.R. 29b at 804-05.) That the Commission chose *not* to make those pairings undercuts Leader Benninghoff's argument.

Like each of Leader Benninghoff's prior arguments, this argument, too fails.

2. *Race did not predominate in creating the House map and, as a result, the House map is not a racial gerrymander.*

The Benninghoff and Roe Petitions also accuse the Commission's House map as being a racial gerrymander. (Benninghoff Br. 62-79, Roe Br. 28-21.)

A racial gerrymandering claim is a species of a 14th Amendment, Equal Protection violation claim. "As interpreted by the [U.S.] Supreme Court, the Equal Protection Clause prohibits states from using race *as the sole or predominant factor* in constructing district lines, unless doing so satisfies strict scrutiny." *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 901 (D. Md. 2011) (three-judge district court) (emphasis in original) (citing *Easley v. Cromartie*, 532 U.S. 234, 241 (2001), and *Bush v. Vera*, 517 U.S. 952, 958-59 (1996) (plurality op. of O'Connor, J.).

The Equal Protection Clause, however, "does not preclude *any* consideration of race in the redistricting process." *Id.* (emphasis in original). The U.S. Supreme Court has expressly acknowledged that redistricting authorities will "almost always be aware of racial demographics." *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

A violation of the Equal Protection Clause only occurs when race is the *sole* or *predominant* factor, such that the state "has subordinated traditional, legitimate redistricting principles to racial considerations." *Id.* (citing *Vera*, 517 U.S. at 959). In other words, the

predominance of racial considerations is unconstitutional where "[r]ace was the criterion that, in the State's view, could not be compromised," and where traditional redistricting factors were considered "only after the race-based decision had been made." *Shaw v. Hunt*, 517 U.S. 899, 907 (1996). This is a "demanding" burden for plaintiffs to meet, *Easley*, 532 U.S. at 241, and requires a showing of discriminatory motive, *Fletcher*, 831 F. Supp. 2d at 902.

Petitioners come nowhere close to meeting that demanding standard. Most fundamentally, Leader Benninghoff's own expert—who Leader Benninghoff attempts to cite in support of his racial gerrymandering claim (Benninghoff Br. 67-68)—expressly concludes that "the decision to divide particular cities in the Commission's proposal *is not driven by minority representation*, but instead by partisan considerations." (Benninghoff Br., App'x B, at 0064a.)

Petitioners are trying to have it both ways—they argue *both* that the Commission's House map is a partisan gerrymander *and* a racial gerrymander. But to succeed on a racial gerrymandering claim, a plaintiff must show that the Commission's *sole* or *predominant* purpose was to make decisions based on race, such that traditional redistricting criteria were subordinated. *Fletcher*, 831 F. Supp. 2d at 901. Even Leader Benninghoff's expert concludes that partisan considerations, and *not* racial considerations, are responsible for any supposed departure from traditional redistricting standards. (*See*

(Benninghoff Br., App'x B, at 0064a (expounding that "the decision to divide particular cities in the Commission's proposal *is not driven by minority representation*, but instead by partisan considerations.").)

Petitioners' other evidence fares no better. Petitioners cite to passages from Chair Nordenberg's statements explaining the features of the Preliminary Plan for the House. (*See, e.g.*, Benninghoff Br. 67.) But these statements acknowledge nothing more than that the Commission was "aware of racial demographics," which is to be expected. *Miller*, 515 U.S. at 916. Similarly, the testimony from Dr. Imai, about how ensembles that take into account race demonstrate that the House map is not a partisan gerrymander, also does nothing more than reveal that the Commission was aware of racial demographics when analyzing the House map. (Benninghoff Br. at 69.) Moreover, these statements and analyses were made after the Preliminary House map was already drawn. By definition, then, these pieces of "evidence" do nothing to show *how* race factored into the Commission's decisions, let alone that discriminatory racial intent predominated.

The declarations from members of Leader Benninghoff's team also cannot form the basis of a racial gerrymandering claim. (Benninghoff Br. 68.) These stray instances of discussions about the racial makeup of different districts do not suggest that race was the one factor—to the exclusion of all others—that the Commission was

using to draw districts. And even if the evidence is probative of the Commission's intent, the declarations suggest that the Commission was trying to *promote* opportunities for minority communities, not to discriminate against them.

Leader Benninghoff's allegations of racial gerrymandering are incredible for other reasons, too. To credit Leader Benninghoff's allegations, the Court would have to believe that Leader McClinton—the first person of color to sit on the Commission in its fifty-year history—voted for and championed a map that discriminates against minorities. *See Fletcher*, 831 F. Supp. 2d at 902 (requiring evidence that "African-Americans are especially disadvantaged by the State Plan"). Similarly, the Court would have to believe that the House Legislative Black Caucus and the three Latino members of the House, all of whom have expressed support for the Commission's plan, also agree with a plan that intentionally discriminates against minorities. (Report 64-65.) The Court would have to believe that the same is true for the numerous good governance groups and individuals advocating for the rights of people of color, which have also supported the Commission's work. (*Id.* at 66-68.) The court in *Fletcher* refused to reach such a conclusion—that "the entire African-American leadership in the State of Maryland was hoodwinked"—on

a less than overwhelming record.[19] *Fletcher*, 831 F. Supp. 2d at 902. This Court should exercise the same caution here.

The case cited by Leader Benninghoff shows just how much evidence is needed to establish racial predominance in redistricting and, relatedly, just how short Leader Benninghoff's evidence falls. In *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016) (three-judge district court), the court found "overwhelming and consistent evidence" that race was the predominant factor in drawing districts. *Id.* at 130. Indeed, all the individuals involved in the redistricting process repeatedly stated, and then confirmed under oath, that they drew districts with three instructions in mind: (1) draw so-called "VRA districts" with at least 50%-plus-one Black voting age population; (2) "draw these districts first, before drawing the lines of other districts"; and (3) "draw these district everywhere there was a minority population large enough to do so and, if possible, in rough proportion to their population in the state." *Id.* In other words, the architects of the North Carolina maps used immovable racial

[19] Of course, that is not to say that every person of color supports the plan, or that there are no legitimate criticisms of the House map. However, disagreement among minority communities does not demonstrate that "discriminatory motivations predominated in the redistricting process." *Fletcher*, 831 F. Supp. 2d at 902.

thresholds, drew minority districts first, and attempted to maximize minority districts.

Further, the North Carolina plan made no attempt to comply with traditional redistricting criteria. The plan split over 100 more municipalities than the benchmark plan, leaving the court with the impression that "little to no attention was paid to political subdivisions, communities of interest, or precinct boundaries." *Id.* at 137-38. Nor was much attention paid to compactness, as the plan performed worse than the benchmark plan on almost every compactness measure. *Id.* at 138.

Here, the overwhelming and consistent evidence is that the Commission first focused on the traditional redistricting factors of Article II, § 16 and the Free and Equal Elections Clause, and then, when consistent with those general principles, looked to ensure that minority communities would have opportunities to elect or influence the election of candidates of choice. (Report 44-46, 60-61.) Indeed, unlike the plan in *Covington*, the Commission's plan performs well under all the traditional redistricting measures, in many cases performing better than the simulations produced by Leader Benninghoff's expert. Leader Benninghoff's proffered evidence does nothing to undercut this evidence or demonstrate that race was the sole or predominant factor in how the Commission drew districts. As

a result, Leader Benninghoff never gets past the first hurdle for establishing a racial gerrymandering claim.[20]

3. *The House map does not unnecessarily split municipalities.*

The Ingram Petitioners argue that the Commission's House map divides too many municipalities, without ascribing partisan motivations to the Commission. (Ingram Br. 7-11.)

The Commission's House map has significantly fewer municipal splits than the map approved by this Court in *Holt II*, as the chart below shows:

[20] Leader Benninghoff spends much space in his brief arguing that the Commission cannot satisfy strict scrutiny because the Commission has insufficient evidence of racially polarized voting. Because Leader Benninghoff fails to make the threshold showing that race was the prominent factor in the Commission's drawing of districts, the Court does not need to reach this issue. However, to the extent Leader Benninghoff criticizes Dr. Barreto's analysis on the Voting Rights Act, Dr. Barreto has again refuted these claims in a supplemental expert report, which is attached to the Commission's answer as Exhibit 3. In particular, Dr. Barreto explains in detail how Leader Benninghoff is misinterpreting the *Gingles* factors under the Voting Rights Act, and how Dr. Barreto did, in fact, establish patterns of racially polarized voting and bloc voting patterns by White majorities that prevent minority communities from electing candidates of choice. (*See* Barreto Supplemental Report at 3-6.)

House Plan Comparisons

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

Moreover, the Ingram Petitioners identify only one municipality split—the split of Middletown Township in Delaware County—that they contend is unnecessary.[21] However, this split was absolutely necessary for population equality. Middletown Township has a population of over 16,000 people. *See* Penn State Data Center, County and Municipal Population Change Table. About 10,500 people in Middletown Township are in House District 161, and the

[21] For this reason, the Ingram Petition could also be dismissed for raising only localized disputes. Indeed, the Ingram Petitioners' arguments focus only on districts in Delaware and Chester Counties. However, to aid the Court, the Commission has addressed the merits of the Ingram argument as well.

other 5,500 people are in House District 168. *See* Dave's Redistricting App, House.[22] Making Middletown Township whole in either of these two districts would push the populations of these districts well past the permissible deviations. If Middletown Township were whole in District 161, that district would have a population of over 69,000 people, or 8.2% above the ideal district population. If Middletown Township were whole in District 168, that district would have a population of around 73,500 people, or 14.7% above the ideal district population. Therefore, the split of Middletown Township was absolutely necessary.[23]

The Petitioners' other examples all involve divided "communities of interest" that do not receive any special constitutional protection. For example, the Ingram Petitioners criticize the House map for separating Chester City from Chester Township. (Ingram Br. 8.) Needless to say, these are two separate municipalities that are not constitutionally required to stay within the same district.

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[22] https://davesredistricting.org/maps#stats::12a18072-adf1-48ac-a9d1-12280567b824

[23] Indeed, even the Benninghoff Amendment divides Middletown Township. (Benninghoff Br., App'x B, at 0132a.)

The Ingram Petitioners also complain about the divisions of the Marple-Newtown School District, the Rose Tree Media School District, the Wallingford-Swarthmore School District, and the Unionville-Chadds Ford School District. (*Id.* at 10-11.) School districts are not mentioned in Article II, § 16 as a type of government unit that must be kept whole unless absolutely necessary. Accordingly, the Commission's failure to keep certain school districts within one House district cannot establish that the Commission's House map was contrary to law. *See Holt II*, 67 A.3d at 1233-34 (explaining that "a unified political subdivisions, such as a county seat, which *Holt I* spoke of, is a narrower concept than a 'community of interest'").

C. The Senate map is not contrary to law.

Unlike the House map, only one Petition for Review—that filed by the Math-Science Professors—specifically complains about the Senate map.[24] The thrust of their argument is that their experts

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[24] Leader Benninghoff also raises some challenges to the Commission's Senate map for, in his view, unnecessarily splitting certain municipalities and allowing too high population variances. To the extent his claims relate to the same partisanship theories as his claims to the House map, the challenges to the Senate map fail for the same reasons. Moreover, his complaints about the divisions in Allegheny County and the Lehigh Valley are nothing more than localized disputes, which this Court has repeatedly refused to consider. Finally, his complaint that the population deviations are too

produced an "optimal" Senate map by using supercomputers. (Math/Science Br. 12 (explaining that computational redistricting is superior because humans have trouble drawing "optimal" districts).) By using these techniques, the Math-Science Professors proved that it is possible to draw a Senate map that performs better on the traditional redistricting criteria and is more fair, as measured by partisan fairness metrics.

The Math-Science Professors start from the mistaken premise that the Commission's Senate map must minimize every traditional redistricting criteria and partisan bias in order for the Commission's plan to be constitutional. However, as this Court reiterated in *Holt II*, "the question is not whether there exists an alternative redistricting map which is claimed to be 'preferable' or 'better' than the LRC's map, but rather whether the LRC's proffered plan, which must balance multiple considerations, fails to meet core and enumerated constitutional requirements." *Holt II*, 67 A.3d at 1240 (citing *Albert*, 790 A.2d at 995, and *In re 1981 Plan*, 442 A.2d 661, 665 (Pa. 1981)).

Indeed, if the four caucus leaders were taken out of the equation and whatever redistricting authority put in the Commission's place was instructed to use advanced technology, it is

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high is conclusory and unsupported by the concrete evidence required to challenge a map under *Holt I*.

surely possible to create a map that is near perfection in an objective sense. But, as tempting as it might be to take politicians out of the equation, the Pennsylvania Constitution, in Article II, § 17, requires that politicians be part of the process. Necessarily, *some* level of partisan compromise must be acceptable, so long as the map as a whole does not do violence to the traditional redistricting criteria of Article II, § 16.

The Commission's comes nowhere close to doing such violence. Compared to the plan this Court approved in *Holt*, the Commission's Senate map performs almost equally or better than the plan currently in effect on all the traditional redistricting criteria of Article II, § 16 and partisan bias metrics.

Senate Plan Comparisons

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

Indeed, despite arguing that their supercomputers can do better, the Math/Science Professors offer no persuasive explanation why the Commission's Senate map, while perhaps not quite as high-performing, is contrary to law.

Any number of maps may be constitutional and not contrary to law. The Commission selected one that performs admirably and that, importantly, received approval from four of the five members of the Commission. Although the Court has made clear that the Commission's map gets no special deference and that the Commission's structure, as outlined in Article II, § 17, does not excuse a map that would otherwise be contrary to law, the Court has, at the same time, recognized that the Commission has a great deal of discretion in drawing and selecting a map. *Holt II*, 67 A.3d at 1238-39. The Court has allowed flexibility precisely because the Commission's process necessarily requires some level of compromise, and that compromise might mean that the objectively "best" map is not the one preferred by a majority of the Commissioners.

The Commission's Senate map, and the Math-Science Professors' challenge to the map, simply reinforces why this practical approach to judicial review of the Commission's plan is necessary. Otherwise, the process of trying to draw better and better maps will never end. As long as the Commission's map is not contrary to law, it should be affirmed. Such is the case here.

D. The Commission had the authority to reallocate certain prisoners.

The *Benninghoff*, *Roe*, and *Ingram* Petitions for Review also fault the Commission for choosing to count certain prisoners as members of their home communities, instead of as members of the community where they are incarcerated.

The Commission made the policy choice to follow the lead of many jurisdictions around the country in reallocating prisoners and, like those jurisdictions, was 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. This decision was resoundingly supported by citizens and good-governance groups, among others. (Report 22-23.)

Counting prisoners as residents of their home communities also recognizes that, when a system holds and counts a person in one place but forces them to vote in another place, it creates issues of fundamental fairness for that person. 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.

This view was supported 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* C.R. Tab 13d at 3.)[25]

Indeed, in some counties, the prison population is substantial enough to impact equal protection principles. For example, Forest County has about 2,650 prisoners incarcerated at SCI Forest, which amounts to 38% of the county's total population (C.R. Tab 15e, at 405.)

Rather than disputing the Commission's rationale for deciding to reallocate certain prisoners, Petitioners argue that the Commission lacked the authority to decide to reallocate certain prisoners, in the absence of legislation from the General Assembly directing the Commission to make such adjustments. (Benninghoff Br. 79-85, Roe Br. 18-20, Ingram Br. 5-7.)

[25] Available at Tab 13d of the Commission's Certified Record.

Contrary to these arguments, the Commission did not need legislation in order to make the policy decision to reallocate certain prisoners. A brief history of the creation of the Commission demonstrates why.

In ratifying Article II, §§ 16 and 17 of the Pennsylvania Constitution in 1968, the voters removed the power of the General Assembly over legislative redistricting and placed that power exclusively in the independent Commission. Prior to the 1968 amendments, Article II, § 18 of the Pennsylvania Constitution (repealed by the 1968 Constitution) gave the General Assembly the power to reapportion itself. *See* Pa. Const. art. II, § 18 (1874). However, the General Assembly did not have a positive track record when it came to trying to reapportion itself. Therefore, when a constitutional convention was called in 1967, the issue of legislative reapportionment was raised and hotly debated.

Even though the Constitutional Convention decided to change who was responsible for reapportioning the General Assembly, there were several efforts by delegates to continue to allow the General Assembly to reapportion itself. Those amendments were soundly rejected. Indeed, during the second effort to adopt such an amendment to the proposal (the "Shoemaker Amendment"), Delegate Baldridge, a member of the Subcommittee on the Method of Apportionment that drafted the proposal to create this Commission,

stated directly that the "idea [of this proposal] was to take it away from" the General Assembly. *See* 1 Daily Journals of the Pennsylvania Constitutional Convention of 1967-1968, at 532 (1968).

Consistent with that approach, the Commission's constitutional structure takes the General Assembly out of legislative reapportionment. The Commission is not part of the General Assembly and is chaired by someone who is not a member of the General Assembly. The only role that the General Assembly has in the Commission is designating four of the five Commission members (by virtue of their leadership positions) and funding the Commission's work. *See* Pa. Const. art. II, § 17(b), (g). Because of this structure, the General Assembly itself might lack the power to do anything other than to request action by the Commission (similar to what has happened in other states with independent Commissions, like California[26] and Colorado[27]) or propose a Constitutional Amendment. And the Commission's approach is similar to that in

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[26] *See* Cal. Elec. Code § 21003.

[27] *See In re Interrogatories on Senate Bill 21-247 Submitted by Colorado General Assembly*, 488 P.3d 1008, 1020 (Colo. 2021), and "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/.

Montana, which also has a redistricting commission that is separate and distinct from the legislature, and that has decided, without legislative fiat, to reapportion certain prisoners.[28] The Commission therefore had the discretion to decide to change where a substantial number of prisoners are counted when redistricting the Commonwealth.

The Commission's decision to reallocate certain prisoners is also consistent with federal law. The U.S. Supreme Court's decision in *Evenwel v. Abbott*, 578 U.S. 54 (2016) recognizes that a state has discretion to depart from a strict census count so long as there is no invidious discrimination or violation of one-person-one-vote principle. *Id.* at 62. Similarly, fifty-five years ago, in *Burns v. Richardson*, 384 U.S. 73 (1966), the Supreme Court held that states could use an apportionment base that differed from the Census so long as it produced roughly the same distribution of legislators as would have been the case using the Census data. *Id.* at 91. And more recently, the three-judge district court in *Fletcher* rejected an argument that the Maryland statute requiring prisoner reallocation rendered the resulting maps unconstitutional. 831 F. Supp. 2d at 894-97.

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[28] *See* Nov. 9, 2021 Commission Minutes, available at https://leg.mt.gov/content/Districting/2020/Meetings/November-9-2021/DAC-minutes-Nov-9-2021.pdf.

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. *Fletcher*, 831 F. Supp. 2d at 895 ("According to the Census Bureau, prisoners are counted where they are incarcerated for pragmatic and administrative reasons, not legal ones."). In fact, the Bureau is now proactively helping states to make these data adjustments, if they wish to do so. Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525, 5528 (Feb. 8, 2018).

Petitioners' other complaints about the Commission's decision to reallocate certain prisoners are also unavailing. Petitioners' argue that, if the Commission wants to reallocate prisoner data, it should also reallocate the data of other individuals who live in group quarters, such as college students and those in nursing homes.

Notably, Leader Benninghoff makes this complaint, but he never asked the Commission to consider such a resolution—despite raising the question with the Commission's Chief Counsel. (Tr. 598-99.) The Commission's Chief Counsel informed Leader Benninghoff that a resolution reallocating college students and nursing home residents "would definitely be open for consideration by the Commission and is a valid consideration." (*Id.*) No resolution was ever proposed.

While reallocating nursing home residents and students may have been a valid policy choice, the Commission was under no obligation to make such adjustments. *See Fletcher*, 831 F. Supp. 3d at 896. A state's "failure to improve its redistricting data *even more*" by, for example, reallocating students as well, "has little bearing" on whether the Commission was permitted to make these kinds of adjustments in the first place. *Id.*

The Court in *Fletcher* also raised another flaw with this line of argument: it assumes that residents of group quarters, like college students, nursing home residents, and prisoners, "are all similarly situated groups." *Id.* "This assumption, however, is questionable at best." College students and nursing home residents "are eligible to vote" and have the "liberty to interact with members of the surrounding community and to engage fully in civic life." In this sense, college students and nursing home residents "have a much more substantial connection to, and effect on, the communities where they reside than do prisoners." *Id.*

The Court's opinion in *Fletcher* also rejected the argument that adjustments to prisoner data are improper because, according to Petitioners, most prisoners do not return to their last known addresses after release. However, studies show that "at least *some* prisoners will return to their old communities." *Id.* "Because some correction is better than no correction, the [Commonwealth's]

adjusted data will likewise be more accurate than the information contained in the initial census reports, which does not take prisoners' community ties into account at all." *Id.* at 897.

Finally, contrary to the arguments of Petitioners, it is irrelevant that the congressional redistricting plan selected by this Court does not use prisoner-reallocated data. Numerous states, including Connecticut, Colorado,Illinois, Michigan, New York, and Tennessee[29]—reallocate prisoner data for some redistricting exercises but not others.

CONCLUSION

None of the Petitions for Review establishes that the Commission's Final Plan is contrary to law. Accordingly, this Court should dismiss the Petitions for Review and uphold the Commission's Final Plan.

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[29] *See* National Conference of State Legislatures, "Reallocating Inmate Data for Redistricting," available at https://www.ncsl.org/research/redistricting/reallocating-incarcerated-persons-for-redistricting.aspx; "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/.

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CERTIFICATES OF COMPLIANCE

I certify that this brief contains 13,683 words, exclusive of the materials listed in Pa.R.A.P. 2135(b), and therefore complies with Pa.R.A.P. 2135.

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

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Appendix 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—contiguousness, 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.[1]

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

[1] 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.[2] 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.[3]

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[2] 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.

[3] 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.[4] 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.[5] Pittsburgh has a population of 302,971 people, which translates to a minimum of 5 House districts and 2 Senate districts.[6] Berks County has a population of 428,849 people, Lehigh County has a population of 374,557 people,

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[4] *See* https://data.census.gov/cedsci/all?q=pennsylvania

[5] *See* https://data.census.gov/cedsci/all?q=philadelphia

[6] *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.)[7] 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

[7] Available at 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, discontiguous. *Id.* The Supreme Court has generally found that the Commission's plan complies with the Constitution's contiguity requirement where the only discontiguous sections of the district are the result of keeping the discontiguous 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.[8] At a minimum, then, the

[8] *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 Dicennial [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.[9]

[9] 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.)[10]

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.)[11]

[10] Available at Tab 16 of the Commission's Certified Record.

[11] Available at 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.[12] (*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

[12] 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.)[13] 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.

[13] 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.[14])

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

[14] 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.)[15]

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.

[15] 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.[16] In fact, the Bureau is now proactively helping states to make these data adjustments, if they wish to do so.[17]

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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[16] *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.").

[17] 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.[18] *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.[19]

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[18] 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/.

[19] 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.[20] (*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

[20] 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.[21]

[21] 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.[22]

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

[22] 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.[23] 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

[23] 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 experts 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.[24]

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

[24] 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.[25]

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

[25] 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.[26] Again, the Commission did so while being mindful of and adhering to the traditional redistricting criterial 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

[26] 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.[27]

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

[27] 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)),[28] and Mayor Danene Sorace, the mayor of Lancaster (*see* "We're Pa. small city mayors, fair

[28] Available in Tab 40 of the Commission's Certified Record.

legislative maps will aid our recovery," Pennsylvania Capital Star (January 19, 2022).[29]

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.

[29] 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.)[30]

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

[30] 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.[31] 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.[32]

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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[31] 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.

[32] 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.[33]

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

[33] 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.)[34]

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.

[34] 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.[35] 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.)[36]

[35] 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.

[36] 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.)[37] "Black, Latino and Asian American voters demonstrate unified and cohesive voting, siding for the same candidates with 75% to 90% support. In contrast, White

[37] 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.)[38] 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

[38] 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)).[39] 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

[39] 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)).[40]

[40] 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."[41]

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."[42] 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

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

[42] 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."[43] 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

[43] 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.[44]

[44] 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."[45]

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.[46] 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.[47]

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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[45] "Partisan Bias," PlanScore, https://planscore.campaignlegal.org/metrics/partisanbias/

[46] https://planscore.campaignlegal.org/plan.html?20220204T133732.129648635Z

[47] 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.[48] 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.[49]

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

[48] https://planscore.campaignlegal.org/plan.html?20220126T152843.418880351Z

[49] https://planscore.campaignlegal.org/plan.html?20220207T162001.827086135Z

House Plan Comparisons

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

[50] "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.

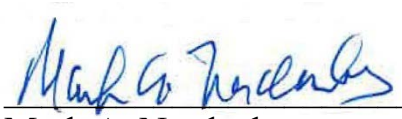
- The language of the Benninghoff Petition itself asserts that "[a] plaintiff alleging a racial gerrymandering claim need only show that race was the 'predominant factor motivating the legislature's decision.'" (Benninghoff Petition at ¶ 67 (quoting *Bethune Hill v. Va. State Board of Elections*, 137 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.[51] 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

[51] 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."[52] 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.



Mark A. Nordenberg
Chair
2021 Legislative Redistricting Commission

[52] "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