

IN THE SUPREME COURT OF PENNSYLVANIA

Carol Ann Carter, Monica Parrilla,	:	CASES CONSOLIDATED
Rebecca Poyourow, William Tung,	:	
Roseanne Milazzo, Burt Siegel,	:	
Susan Cassanelli, Lee Cassanelli,	:	
Lynn Wachman, Michael Guttman,	:	
Maya Fonkeu, Brady Hill, Mary Ellen	:	
Balchunis, Tom DeWall,	:	
Stephanie McNulty and Janet Temin,	:	
Petitioners	:	

v.	:	No. 7 MM 2022
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Leigh M. Chapman, in her official	:
capacity as the Acting Secretary of the	:
Commonwealth of Pennsylvania;	:
Jessica Mathis, in her official capacity	:
as Director for the Pennsylvania Bureau	:
of Election Services and Notaries,	:
Respondents	:

Philip T. Gressman, Ron Y. Donagi;	:
Kristopher R. Tapp; Pamela Gorkin;	:
David P. Marsh; James L. Rosenberger;	:
Amy Myers; Eugene Boman;	:
Gary Gordon; Liz McMahan;	:
Timothy G. Feeman; and Garth Isaak,	:
Petitioners	:

v.	:
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**EXCEPTIONS OF DRAW THE LINES PA AMICUS PARTICIPANTS
TO THE FEBRUARY 7, 2022 REPORT AND RECOMMENDATION**

AND NOW, this 14th day of February, 2022, pursuant to the Court's Order of February 2, 2022, Amicus Participants Adam Dusen, Sara Stroman, Mike Walsh, Myra Forrest, Athan Biss, Michael Skros, Susan Wood, Jean Handley, Daniel Mallinson, Jesse Stowell, Sandra Strauss, Rick Bryant, Jeffrey Cooper, Kyle Hynes, Priscilla McNulty and Joseph Amodei, each of whom is affiliated in some manner with the Draw the Lines PA project (the "DTL Amicus Participants"), take the following exceptions to the February 7, 2022 Report Containing Proposed Findings of Fact and Conclusions of Law Supporting Recommendation of Congressional Redistricting Plan and Proposed Revision to the 2022 Election Calendar/Schedule (the "Report"):

1. The DTL Amicus Participants take exception to the Report's inappropriate deference to the House Bill 2146 ("H.B. 2146") Plan proposed by the Republican Legislative Intervenors, a map that was vetoed by Governor Wolf in accordance with the Pennsylvania Constitution and has not been adopted into law. See Pa. Const. art. IV, § 15. According to the United States Supreme Court, a plan that has been vetoed is not entitled to deference or owed any more than "thoughtful consideration." *Sixty-Seventh Minnesota State Sen. v. Beens*, 406 U.S. 187, 197 (1972); see also *O'Sullivan v. Brier*, 540 F. Supp. 1200, 1202 (D. Kan. 1982) (citing *Beens*, 406 U.S. at 197, for the proposition that deference is not owed to "any plan

that has not survived the full legislative process to become law”). While the Report ostensibly “review[ed] [H.B. 2146] along with the other plans submitted to the Court to assess its compliance with the constitutional . . . [and] non-constitutional factors,” Report at 43, the Report improperly accorded deference to H.B. 2146 as “functionally tantamount to the *voice and will of the People*, . . . a device of monumental import [that] should be honored and respected by all means necessary, *id.* at 214 (emphasis added). In the same vein, the Report erroneously concluded that “the Court must find that the decisions and policy choices expressed by the legislative branch are presumptively reasonable and legitimate, absent a showing of an unconstitutional defect or deficiency.” *Id.* at 213. In contrast, the Report did not accord any deference to the plan proposed by Governor Wolf, who is himself a representative chosen by a majority of statewide electors (and not solely a particular subset of the state population). Thus, this Court should reject the Special Master’s Report as improperly deferential to H.B. 2146.

2. The DTL Amicus Participants take exception to the Report’s inappropriate focus on the treatment of one single municipality, the City of Pittsburgh, to the exclusion of consideration of other municipalities throughout the Commonwealth. In particular, the Report erroneously states that the Citizens’ Map proposed by the DTL Amicus Participants and various other maps proposed by other parties and Amicus Participants would split the City of Pittsburgh across

congressional districts for the first time “in the history of the Commonwealth.” *Id.* at 194. This is incorrect. To the contrary, Pittsburgh was regularly split among multiple Congressional districts until the 1980s redistricting cycle. *Id.* at 148; *see also* <https://www.redistricting.state.pa.us/> for redistricting summaries from 1943, 1951, 1962 and 1972, each including splits of Pittsburgh). There are several legitimate reasons why it would be appropriate to split the City of Pittsburgh among two Congressional districts, such as achieving compactness, which the Report acknowledges is better achieved with a split of Pittsburgh, Report at 155, and political competitiveness, *see infra* ¶ 3. While the Report generally references H.B. 2146’s jurisdictional splits, it provides no specific analysis of such splits, in contrast to extended discussion of the proposed split of Pittsburgh in several proposed maps. *See, e.g.*, Report at 144, 148–52. Of the four reasons cited in the Report for rejecting the Citizens’ Plan, three concerned the Plan’s proposed split of Pittsburgh. *Id.* at 201. Similarly, four of the five reasons cited in the Report for rejecting Governor Wolf’s proposed map, and three of the five reasons cited for rejecting Senate Democratic Caucus Plans 1 and 2, concerned the maps’ proposed split of Pittsburgh. *Id.* at 200–02. The Report’s inappropriate focus on the treatment of a single municipality, the City of Pittsburgh, to the exclusion of analysis of the treatment of other municipalities warrants its rejection by this Court.

3. The DTL Amicus Participants take exception to the Report's recommendation that the Citizens' Map should not be adopted. *Id.* at 201. The Citizens' Map is superior to the other maps submitted to the Commonwealth Court in terms of the constitutional factors of "compactness, contiguity, minimization of the division of political subdivisions, and maintenance of population equality" recognized by this Court. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 816–17 (Pa. 2018). As noted in the Report, the Citizens' Map scores at or near the top of several compactness metrics, *see* Report at 141, tbl. 1 (depicting the high scores of the Citizens' Map—referred to therein as the "CitizensPlan"—in the Polsby-Popper, Reock and Pop-Polygon metrics), and, according to Governor Wolf's expert, Dr. Moon Duchin, ranks approximately third among all plans in terms of overall compactness, *id.* at 147. Although omitted from the Report's comparison, the Citizens' Map ties with the Senate Democratic Caucus 2 Plan for the least total number of jurisdictional divisions of any map submitted to the Court (46). *See id.* at 147. Finally, all districts in the Citizens' Map are composed of either 764,864 or 764,865 people—a deviation of one person, which the Report noted is "as nearly equal in population as practicable." *Id.* at 137. The Citizens' Map is compliant with the Voting Rights Act and, as Dr. Duchin noted, "[is] far superior at leveling the partisan playing field," particularly in comparison to H.B. 2146, which "consistently convert[s] close elections to heavy Republican representational advantages." *Id.* at

82 (internal citation omitted). The Citizens' Map, the final product of five public mapping competitions, was created with unprecedented public engagement and input and reflects the values that over 7,200 Pennsylvanians, representing 40 of Pennsylvania's 67 counties, have declared as important to them. For these reasons, the Court should reject the Report's recommendation that the Citizens' Map should not be adopted as the plan of the Commonwealth.

4. The DTL Amicus Participants take exception to each and every subsidiary question within the issues identified in these Exceptions.

Dated: February 14, 2022

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

By: /s/ John P. Lavelle, Jr.

John P. Lavelle, Jr. (Pa. ID No. 54279)

1701 Market Street

Philadelphia, PA 19103-2921

+1.215.963.4824

john.lavelle@morganlewis.com

*Counsel for the DTL Amicus
Participants*

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No. 7 MM 2022

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: **BRIEF OF DRAW THE LINES PA**

: **AMICUS PARTICIPANTS IN**

: **SUPPORT OF THEIR**

: **EXCEPTIONS TO THE**

: **FEBRUARY 7, 2022 REPORT AND**

: **RECOMMENDATION**

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: John P. Lavelle, Jr. (Pa. ID No. 54279)

: MORGAN, LEWIS & BOCKIUS LLP

: 1701 Market Street

: Philadelphia, PA 19103-2921

: +1.215.963.4824

: john.lavelle@morganlewis.com

:

:

: *Counsel for the DTL Amicus*

: *Participants*

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITES	iii
STATEMENT OF INTEREST OF DRAW THE LINES AMICUS CURIAE PARTICIPANTS	v
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. THE PLAN PROPOSED IN HOUSE BILL 2146 IS ENTITLED TO NO DEFERENCE	2
A. The Report Failed to Follow the Applicable Legal Precedent.....	3
B. The Report Erred in According Deference to the Plan Proposed In H.B 2146	4
II. THE REPORT INAPPROPRIATELY GAVE SPLITTING THE CITY OF PITTSBURGH NEAR-DISPOSITIVE WEIGHT, AND IGNORED OVERALL PERFORMANCE ON MINIMIZING SPLITS OF POLITICAL SUBDIVISIONS.....	7
A. The DTL Amicus Participants Were Not Required to Prove the “Necessity” of Splitting the City of Pittsburgh Specifically.....	8
B. The Special Master’s Report Inappropriately Overweighted Secondary Factors in Concluding that Splitting Pittsburgh Into Two Congressional Districts was a Dispositive Issue	10
1. The Citizens’ Map Does Not Propose to Impermissibly Create Proportional Political Representation by Splitting Pittsburgh	10
2. Splitting Pittsburgh Among Two Congressional Districts Aligns with Historical Pennsylvania Redistricting Maps.....	12
3. The Special Master’s Unsupported Conclusion that Pittsburgh is a “Community of Interest” Cannot Be the Basis for Rejecting the Citizens’ Map	13
III. THE CITIZENS’ MAP IS SUPERIOR TO THE OTHER MAPS SUBMITTED	16
A. Neutral Constitutional Criteria Favor the Citizens’ Map.....	16
B. Partisan Fairness Also Favor the Citizens’ Map.....	18

TABLE OF CONTENTS
(continued)

Page

IV. CONCLUSION.....23

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TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Arizona State Legis. v. Arizona Indep. Redistricting Comm’n</i> , 576 U.S. 787 (2015).....	4
<i>Hartung v. Bradbury</i> , 33 P.3d 972 (Or. 2001)	3
<i>Holt v. 2011 Legislative Reapportionment Comm’n</i> , 67 A. 3d 1211 (Pa. 2013).....	11, 14
<i>Johnson v. Wisconsin Elections Comm’n</i> , 967 N.W.2d 469 (Wis. 2021).....	3
<i>League of Women Voters v. Commonwealth</i> , 178 A.3d 737 (Pa. 2018).....	<i>passim</i>
<i>O’Sullivan v. Brier</i> , 540 F. Supp. 1200 (D. Kan. 1982).....	3
<i>Perry v. Perez</i> , 132 S. Ct. 934 (2012).....	3
<i>Sixty-Seventh Minnesota State Sen. v. Beens</i> , 406 U.S. 187 (1972).....	3
<i>Smiley v. Holm</i> , 285 U.S. 355 (1932).....	4
<i>Upham v. Seamon</i> , 456 U.S. 37 (1982).....	3
<i>Vieth v. Jubelirer</i> , 541 U.S. 267 (2004).....	12
<i>Wilson v. Eu</i> , 823 P.2d 545 (Cal. 1992).....	3

TABLE OF AUTHORITIES
(CONTINUED)

Page(s)

OTHER AUTHORITIES

House Bill 2146	<i>passim</i>
Mich. Const. art. IV, § 6(13)(c)	14
Pa. Const. art. I, § 5	16
Pa. Const. art. II, § 16	8
Pa. Const. art. IV, § 15	6

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Statement of Interest of Draw the Lines Amicus Curiae Participants

The Draw the Lines (“DTL”) Amicus Participants are members of Draw the Lines PA, a civic engagement project founded in 2016 and developed and hosted by the Committee of Seventy, Pennsylvania’s oldest and largest 501(c)3 nonpartisan good government organization. Draw the Lines PA is a nonpartisan education and engagement initiative that has attempted to demonstrate that ordinary Pennsylvanians, when given the same digital tools and data used in the political redistricting process, can, through a fair and transparent process, produce voting districts that are objectively better by standard mapping metrics.

Draw the Lines PA created the Citizens’ Map with the input of more than 7,200 Pennsylvania citizens. To do so, Draw the Lines PA hosted competitions open to anyone in Pennsylvania and compiled more than 1,500 maps drawn by individuals and teams throughout the state to create the Citizens’ Map.

The DTL Amicus Participants have a direct interest in the outcome of this case, as they have submitted the Citizen’s Map to the Court and believe it to be the best plan the Court will consider. The Citizen’s Map has not only scored at or near the top in every metric compared to the other maps submitted, but also best reflects the priorities of everyday Pennsylvania citizens.

SUMMARY OF ARGUMENT

Amicus Participants Adam Dusen, Sara Stroman, Mike Walsh, Myra Forrest, Athan Biss, Michael Skros, Susan Wood, Jean Handley, Daniel Mallinson, Jesse Stowell, Sandra Strauss, Rick Bryant, Jeffrey Cooper, Kyle Hynes, Priscilla McNulty and Joseph Amodei, each of whom is affiliated in some manner with the Draw the Lines PA project (the “DTL Amicus Participants”), respectfully submit this brief pursuant to the Court’s Order of February 2, 2022 in support of their three exceptions to the Special Master’s February 7, 2022 Report Containing Proposed Findings of Fact and Conclusions of Law Supporting Recommendation of Congressional Redistricting Plan and Proposed Revision to the 2022 Election Calendar/Schedule (the “Report”). First, the Report erroneously accorded deference to the plan proposed in House Bill 2146 (“H.B. 2146”). Second, the Report inappropriately made splitting the City of Pittsburgh disqualifying and failed to conduct the proper constitutional analysis, which would have demonstrated that the Citizens’ Map proposed by the DTL Amicus Participants (also referred to as the “Draw the Lines’ Plan”) was the most successful plan in minimizing splits of political subdivisions. Third, the Report failed to recognize that in consideration of all of the constitutional factors of compactness, contiguity, minimization of the division of political subdivisions and maintenance of population equality, the Citizens’ Map is superior to the other maps submitted.

ARGUMENT

I. **The Plan Proposed In House Bill 2146 is Entitled to No Deference.**

The Special Master erroneously afforded the plan proposed in H.B. 2146, a bill that was vetoed by the Governor and never signed into law, special and deferential treatment to which it was not entitled. There is no precedent that suggests partisan proposals are somehow more authoritative than congressional redistricting plans that have been thoroughly and thoughtfully authored with comment and participation from non-partisan groups and individual citizens. The Report acknowledges extensive precedent recognizing that redistricting maps that were merely proposed by a branch of government but not adopted into law are owed no deference. Report at 42. However, the Report nevertheless accords substantial deference to the plan proposed in H.B. 2146 as purportedly “functionally tantamount to the voice and will of the People”, and in doing so disregards Supreme Court precedent on point, and the weight of authority to the contrary. In deciding that the plan proposed in H.B. 2146 was entitled to deference, the Special Master circumvented, and failed to conduct, the proper constitutional analysis of determining which map is the best proposal for Pennsylvania voters. If that had been done, the Citizens’ Map would have been selected, for the reasons discussed, *infra*.

A. The Report Failed to Follow the Applicable Legal Precedent.

First, in concluding that the plan proposed by the Republican Legislative Intervenor -- H.B. 2146 -- was entitled to deference the Report ignored extensive relevant precedent. According to the United States Supreme Court, a plan that has been vetoed is not owed any more than “thoughtful consideration[.]” *Sixty-Seventh Minnesota State Sen. v. Beens*, 406 U.S. 187, 197 (1972); see also *O’Sullivan v. Brier*, 540 F. Supp. 1200, 1202 (D. Kan. 1982) (citing *Beens*, 406 U.S. at 197, for the proposition that deference is not owed to “any plan that has not survived the full legislative process to become law.”); *Johnson v. Wisconsin Elections Comm’n*, 967 N.W.2d 469, 490 n.8 (Wis. 2021); *Hartung v. Bradbury*, 33 P.3d 972, 979 (Or. 2001) (rejecting the argument that deference is owed to the Legislative Assembly’s plan of reapportionment vetoed by the Governor); *Wilson v. Eu*, 823 P.2d 545, 576 (Cal. 1992) (rejecting argument that “special deference be given to the various plans passed by the Legislature but vetoed by the Governor.”).

The Report’s efforts to avoid this substantial authority are unavailing and should be rejected. The Report erroneously cited *Upham v. Seamon*, 456 U.S. 37 (1982) and *Perry v. Perez*, 132 S. Ct. 934, 941 (2012) for the propositions that district courts are not free to disregard the political program of state legislatures when fashioning reapportionment plans and legislative backed plans deserve deference. Report at 43. But *Upham* and *Perry* did not involve partisan

redistricting bills that had been vetoed by the Governor, and in fact, involved a very different process whereby under Texas law the district court had to pre-clear the legislature's plan. Furthermore, the U.S. Supreme Court has recognized that, under the Elections Clause, "legislative action in districting the state for congressional elections shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power." See *Smiley v. Holm*, 285 U.S. 355, 372-73 (1932); see also *Arizona State Legis. v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 806 (2015) (reaffirming *Smiley*). In this Commonwealth, the Governor has the authority under the Commonwealth's constitution to veto election-related legislation. The Governor exercised that authority to veto H.B. 2146. Thus, the Report erred in ignoring the Supreme Court's guidance in *Beems* that vetoed reapportionment plans are entitled to no more than "thoughtful consideration."

B. The Report Erred in According Deference to the Plan Proposed In H.B. 2146.

The Report is deferential to the plan proposed in H.B. 2146 not because it is a superior plan but simply because it was proposed by the General Assembly – or, more specifically, by the Republican Legislative Intervenors whose caucus currently controls the General Assembly. The Report declared that it would analyze H.B. 2146 in the same manner as the other plans submitted. Report at 208, para. 61. However, the Report failed to follow its own proclamation and relied on

logical fallacy in its decision to treat H.B. 2146 more favorably than any other proposed redistricting plan.

First, the Report erroneously asserts that the legislative branch is entitled to greater deference than the executive branch and “the decisions and policy choices expressed by the legislative branch are presumptively reasonable and legitimate, absent a showing of an unconstitutional defect or deficiency.” Report at 213, ¶ 90. There is no legal authority cited by the Report for the breathtaking and fallacious conclusion that “policy choices” incorporated in a bill passed by the General Assembly that is vetoed and not adopted into law “are presumptively reasonable and legitimate[.]” *Id.* The Report also states that “HB 2146 represents ‘[t]he policies and preference of the state,’ ... and constitutes a profound depiction of what the voters in the Commonwealth of Pennsylvania desire, through the representative model of our republic and democratic form of government, when compared to the Governor or any other of the parties or their *amici*.” Report at 214, ¶ 93. The Report concludes that “the interests of the Commonwealth ... would best be served by factoring in and considering that *HB 2146 is functionally tantamount to the voice and will of the People* ... and should be honored and respected by all means necessary.” Report at 214, ¶ 94 (emphasis added).

There is no basis, however, to assume that the policy choices of the legislative branch in drawing a redistricting plan are presumptively reasonable and

legitimate, while assuming the choice of the duly elected governor to reject the redistricting plan is not. Additionally, the Report offers no explanation why the plan proposed by Governor Wolf, who is himself a representative chosen by a majority of statewide electors (and not solely a particular subset of the state population), was not entitled to similar weight. Notably, Pennsylvania's Constitution provides a path for the General Assembly to override a Governor's veto and enact a vetoed plan into law—a path the Republican Legislative Intervenor has not attempted to take with respect to H.B. 2146. *See* Pa. Const. art. IV, § 15; *see also* Am. Post-Hearing Submission of Intervenor-Resp. Gov. Tom Wolf at 46 (explaining that, based upon the initial votes on H.B. 2146, the legislature would not be able to obtain the requisite supermajority required to override the Governor's veto). H.B. 2146, a bill that “never obtained the official status of a duly enacted statute” (Report at 213, ¶ 91), should be afforded no deference in judicial review and should stand on the same footing as the other plans submitted. Thus, this Court should reject the Report's recommendation that this Court adopt and implement HB-2146 because it was based on unwarranted deference.

II. **The Report Inappropriately Gave Splitting the City of Pittsburgh Near-Dispositive Weight, And Ignored Overall Performance on Minimizing Splits of Political Subdivisions.**

As discussed further below, the Citizens' Map was the best of all the maps on the constitutional criteria of minimizing the division of political subdivisions, with only 46 subdivisions. The Report, however, ignored this completely – not even mentioning this excellent performance in its summary. Report at 147 (FF39), 193 (¶ 23). Instead, the Report focused myopically on the City of Pittsburgh alone and, inexplicably, suggested that the parties had a burden (not found in the law) to prove why splitting the City of Pittsburgh was necessary. The Report then concluded that splitting the City of Pittsburgh was disqualifying and rendered the Citizens' Map less desirable than H.B. 2146 or other maps that kept together the City of Pittsburgh but split many more jurisdictions. Report at 201 (citing splitting the City of Pittsburgh as three of the four reasons for rejecting the Citizens' Plan); *see also* Report at 200-02 (citing splitting the City of Pittsburgh as three of the four reasons for rejecting the Governor's Plan and three of the five reasons for rejecting the Senate Democratic Caucus Plans 1 and 2). Nowhere does the Report offer an explanation as to why the City of Pittsburgh should be treated differently than other political subdivisions. Moreover, in connection with this improper focus on the City of Pittsburgh, the Report misstates the history of congressional redistricting.

A. The DTL Amicus Participants Were Not Required to Prove the “Necessity” of Splitting the City of Pittsburgh Specifically.

The Report reasoned that neither the DTL Amicus Participants nor any other party proposing a Pittsburgh split had produced “any credible evidence as to why it was ‘necessary’ to split [Pittsburgh][.]” Report at 194, ¶ 27. This requirement is not found anywhere in the law. Instead, it appears the Special Master arrived at this evidentiary requirement based on an erroneous reading of both the Pennsylvania Constitution and this Court’s opinion in *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (“*LWV II*”). First, the Report cited to the Pennsylvania Constitution Article II, Section 16, which states that: “[u]nless absolutely necessary *no county, city, incorporated town, borough, township or ward shall be divided...*” Report at 148 (CL1) (emphasis added). However, the Pennsylvania Constitution creates no special burden to prove the necessity of splitting the City of Pittsburgh in particular, just as it would create no special burden for splitting any other specific individual municipality. Rather, as indicated by this Court in *League of Women Voters II*, any proposed redistricting plan must endeavor to minimize jurisdictional splits overall, which the Citizens’ Map has done. *See LWV II*, 178 A.3d at 814-15.

Second, the Report concluded that splitting Pittsburgh was disqualifying because it was not necessary to “ensure equality of population.” Report at 148

(CL1), citing *LWV II*, 178 A.3d at 816-717 (congressional districts shall not “divide any county, city, incorporated town, borough, township, or ward, *except where necessary to ensure equality of population*”) (emphasis added). While it is true that some maps achieved population equality without splitting Pittsburgh, they did so by splitting more total political subdivisions. For example, the H.B. 2146 plan and the Gressman Plan both create 49 total splits, the Reschenthaler Plans 1 and 2 split 54 and 53 respectively, and the Carter Plan creates 57 total splits. Report at 143-146 (FF7-34); 157 (FF15). This Court’s *League of Women Voters II* decision did not require that a proposed redistricting plan afford any special deference to the City of Pittsburgh in balancing the neutral criteria of achieving population equality while minimizing jurisdictional divisions. Further, nowhere does the Report address why the Republican Legislative Intervenors were not required to justify the necessity of splitting any of the 16 municipalities the H.B. 2146 plan would split. Here, it is undisputed that the Citizens’ Map achieves the highest level of population equality (with a population deviation of only 1 person), and the lowest number of jurisdictional splits (46) of all plans proposed. *See infra* at p.19. In contrast, the H.B. 2146 plan would leave the City of Pittsburgh intact but create 49 total splits. The Report’s focus on the City of Pittsburgh to the exclusion of consideration of other jurisdictional splits was inappropriate and should be rejected.

B. The Special Master’s Report Inappropriately Overweighted Secondary Factors in Concluding that Splitting Pittsburgh Into Two Congressional Districts was a Dispositive Issue

The Citizens’ Map was superior to H.B. 2146 and other maps which propose to keep Pittsburgh in a single Congressional district because, *inter alia*, it had substantially fewer splits of political subdivisions – a key constitutional neutral criteria. Despite this, the Report concluded that three other secondary factors weighed against plans that proposed splitting Pittsburgh: eschewing proportionality, preserving historical practice, and preserving Pittsburgh as a “community of interest[.]” Report at 201. Though the Report recognized that these factors should be viewed as secondary to the constitutional neutral criteria, it not only afforded these issues substantial weight, but also relied on erroneous conclusions of law, incorrect factual statements, and uncredible expert opinion to justify rejecting any plan that proposed to split Pittsburgh into two Congressional districts.

1. *The Citizens’ Map Does Not Propose to Impermissibly Create Proportional Political Representation by Splitting Pittsburgh.*

The Pennsylvania Citizens’ Map is the result of 7,200 Pennsylvanians sharing their opinions and priorities about the best way to create new congressional districts in their state. In addition to optimizing for constitutionally required criteria, the Citizens’ Map’s creators identified increasing political competitiveness within a congressional district as one of Pennsylvanians’ top priorities. Report at

201 (citing Villere Report at 4). Splitting the City of Pittsburgh not only achieves lower jurisdictional splits and increased overall compactness without sacrificing population equality, it also increases political competitiveness by creating two competitive districts where one non-competitive Democratic district had existed. *Id.* To the extent increasing political competitiveness (and therefore *decreasing* the likelihood that one part or another has a guaranteed advantage) is a “political factor,” this Court has explicitly stated that these “political factors can operate at will” so long as they do not contravene constitutional requirements. *Holt v. 2011 Legis. Reapportionment Comm’n*, 67 A. 3d 1211, 1235-36 (Pa. 2013). However, in an effort to frame splitting Pittsburgh as an impermissibly political recommendation, the Report mischaracterizes both Pennsylvania and federal law to reach the conclusion that increasing political competitiveness constitutes an unlawful “balancing the representation of the political parties[.]” Report at 176.

The Report confuses the Citizens’ Plan’s goal of creating more competition within a single congressional district with an effort to advantage the Democratic Party state-wide. This is incorrect. Some level of partisan consideration is permissible in redistricting. *See Holt*, 67 A.3d at 1235-36. Notably, the H.B. 2146 plan is far *more* partisan than the Citizens’ Map: H.B. 2146 advantages Republicans by 6.3% according to Dr. DeFord (Report at 173) while the Citizens’ Map advantages Republicans by only 3.5% as discussed *infra*). The Special Master

nevertheless concludes with no evidence that the Citizens' Map's motivations for splitting Pittsburgh are impermissibly partisan. Report at 178. The Report also cites *Vieth v. Jubelirer* for the principle that "the Constitution guarantees no right to proportional representation." 541 U.S. 267, 352 fn7 (2004) (citations omitted). However, the Report neglects to explain that in this decision the Supreme Court defines "proportional representation" as "a set of procedural mechanisms used to guarantee, with more or less precision, that a political party's *seats in the legislature* will be proportionate to its share of the vote." *Id.* (emphasis added). Plainly, this definition does not encompass increasing political competitiveness within a single congressional district. In fact, increasing competitiveness actually *decreases* the likelihood of proportional representation by decreasing the number of congressional seats guaranteed to be won by one party or another.

2. *Splitting Pittsburgh Among Two Congressional Districts Aligns with Historical Pennsylvania Redistricting Maps.*

The Report also erroneously stated that the Citizens' Map proposed by the DTL Amicus Participants and four other maps proposed by other parties and Amicus Participants would split the City of Pittsburgh across congressional districts "apparently for the first time in the history of the Commonwealth." Report at 194, 201. While it is true that "preservation of prior district lines" is a legitimate "subordinate" factor (Report at 161), the notion that Pittsburgh has "remained within a single congressional district in all previous districting plans" is

factually incorrect. To the contrary, the City of Pittsburgh was routinely split into multiple congressional districts up until the 1980s. Report at 148; *see also* <https://www.redistricting.state.pa.us/maps/> (redistricting summaries from 1943, 1951, 1962 and 1972, each including splits of Pittsburgh). Thus, to the extent historical practice be given any consideration, in recent history the City of Pittsburgh has been split into multiple Congressional districts at least as often as not. The Report's reliance on the erroneous conclusion that splitting Pittsburgh is a "novel proposition" should be given no weight in this Court's decision.

3. *The Special Master's Unsupported Conclusion that Pittsburgh is a "Community of Interest" Cannot Be the Basis for Rejecting the Citizens' Map.*

Finally, as further justification that Pittsburgh should not be split, the Report wrongfully elevated the goal of preserving communities of interest above constitutional criteria. To do this, the Report concluded without citation to any precedent that "although compactness, contiguity, and respect for municipal boundaries are undoubtedly the primary tool for evaluating the constitutionality of a redistricting plan, we understand these principles serve to advance the Free and Equal Elections Clause's overarching goal of protecting the interest of communities." Report at 153. Even if the preservation of communities of interest generally were a dispositive factor in evaluating redistrict plans, it is anything but clear that the City of Pittsburgh constitutes one singular community of interest.

The Special Master relies on the testimony of Dr. Keith Naughton, who gave analysis on how the different maps under considerations addressed communities of interest. Dr. Naughton “has ‘no particular experience in redistricting,’ and has never served as an expert in redistricting litigation before.” Report at 93 (FF215). Further, “Dr. Naughton explained that ‘much of [his] professional career has been dedicated to helping Republican candidates in Pennsylvania win their seats.’” *Id.* at 94 (FF218). Given this lack of expertise and potential for partisan bias, the Court should accord Dr. Naughton’s opinion that the City of Pittsburgh constitutes a community of interest the same weight as the lay opinion of any other Pennsylvanian.

There is not a uniform legal definition in this Commonwealth of a “community of interest.” The Report recognizes that the term encompasses “school districts, religious communities, ethnic communities, geographic communities which share a common bond due to locations of rivers, mountains and highways[.]” Report at 153, quoting *Holt*, 38 A.3d at 746. Michigan’s Constitution provides an alternate definition, stating that “communities of interest may include, but shall not be limited to populations that share cultural or historical characteristics or economic interests.” Mich. Const. art. IV, § 6(13)(c). Both definitions leave room for interpretation of what groups or neighborhoods have shared interests.

One person may feel strongly that Pittsburgh's municipal boundaries are sacrosanct and must be held together in a single Congressional District. But another person may believe that as soon as you cross the Monongahela River and go through the Fort Pitt Tunnel, you may technically still be in Pittsburgh but you have entered an entirely new community, with different needs and a different culture.

Ultimately, Draw the Lines leaned on the weight of its mappers, particularly those from Allegheny County, that were drawing their own districts. From the 1,500 maps submitted to the Draw the Lines competition, a plurality of them used the three rivers confluence as a natural dividing line around Pittsburgh. Thus, what makes the Citizens' Map so strong is that it was developed using input from 7,200 Pennsylvanians, each of whose opinions are just as credible as Dr. Naughton's on something as basic as Pennsylvania culture and what their neighborhood should be like.

In the end, the Report's conclusion that it was impermissible to split the City of Pittsburgh into two Congressional Districts arose from numerous legal and factual errors. Here, the Citizens' Plan split less political subdivisions than any other plan, and under the neutral constitutional criteria, that is much more important than whether any one jurisdiction was split.

III. The Citizens' Map is Superior to the Other Maps Submitted.

The Report erroneously failed to give sufficient weight to the constitutional neutral factors that this Court has explained govern congressional redistricting. Instead, it focused on partisan fairness, but turned this analysis on its head to require that Republican majorities be preserved. When the correct constitutional analysis is applied, it is clear that the Citizens' Map proposed by the DTL Amicus Participants is superior to the other maps submitted. In addition to excelling in all the constitutional criteria, the Citizens' Map was created with unprecedented public engagement and input and reflects the values that over 7,200 Pennsylvanians, representing 40 of Pennsylvania's 67 counties, have declared as important to them.

A. Neutral Constitutional Criteria Favor the Citizens' Map.

In *League of Women Voters II*, this Court laid out the congressional redistricting standards that are necessary to comply with the Free and Equal Elections Clause in the Pennsylvania Constitution, Article I, Section 5. Specifically, this Court explained that the key factors were “the neutral criteria of compactness, contiguity, minimization of the division of political subdivisions, and maintenance of population equality among congressional districts.” *LWV II*, 178 A.3d at 817. The evidence demonstrates that the Citizens' Map for congressional

redistricting is far superior to the H.B. 2146 Plan that the Report recommended when evaluated under these criteria.

Dr. Moon Duchin, an expert retained by Governor Wolf, is a Professor of Mathematics and a Senior Fellow at Tufts University who has published numerous scholarly works on redistricting. Report at 74-75 (FF112-13). Dr. Duchin also runs an interdisciplinary research lab focused on geometric and computational and analytical aspects of redistricting. Report at 75 (FF114). Dr. Duchin placed the Draw the Lines Plan in the top tier (Tier One) on neutral criteria (along with Governor's Plan, Voters of the Commonwealth and Reschenthaler I). Report at 79-80 (F138) (recognizing it as meeting "a high excellence standard for traditional criteria"). H.B. 2146, in contrast, was not in either Dr. Duchin's "high excellence standard" tier of plans or the lower "excellence standard" tier. *Id.* at 79-80 (FF138-39).

Looking at the neutral criteria one by one yields the same result. In each category, the Citizens' Map is either equal or superior to the H.B. 2146 plan. First, the Citizens' Map satisfied the contiguity requirement, as did the other proposed maps. Report at 137 (CL1-3). Second, as to population equality, Citizens' Map met the standard that districts be created "as nearly equal in population as practicable," with a deviation of only 1 person, consistent with most other plans, and better than the Carter Plan and House Democratic Plan. Report at 138 (CL1-

2). However, with respect to the other two neutral factors, the Citizens' Map is clearly superior. As to compactness, the Citizens' Map scores at or near the top of several compactness metrics (Polsby-Popper, Reock, Pop-Polygon metrics) and is superior to HB-2146 in four out of five of these metrics. Report at 141(FF4 tbl 1). According to Dr. Duchin, the Citizens' Map ranks approximately third or fourth among all maps submitted in terms of overall compactness, while the H.B. 2146 plan was not ranked as highly. Report at 147 (FF1-3). And as to minimization of the division of political subdivisions, the Citizens' Map was at the top -- tied with the Senate Democratic Caucus 2 Map for the least total number of jurisdictional divisions of any map submitted to the Court. Report at 145 (FF23-24) (concluding that the Citizens' Map had 46 subdivisions); Report at 144 (FF19) (Senate Democratic Caucus 2 Map had 46 subdivisions); Report at 147 (FF39) and 193 (¶ 23) (stating that the plan which divided the fewest political subdivisions was the Senate Democratic Caucus 2 with 46 subdivisions, but failing to mention the Citizens' Map). Thus, under the constitutional factors the Citizens' Map should be adopted as the plan of the Commonwealth.

B. Partisan Fairness Also Favor the Citizens' Map.

In addition to the neutral factors, "partisan gerrymandering" is impermissible under the Pennsylvania Constitution because it "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[.]” *LWV II*, 178 A.3d at 813-14, 817 (where the neutral criteria are subordinated to “gerrymandering for unfair partisan political advantage” the congressional districting plan violates the Pennsylvania Constitution). When examining the Citizens’ Map properly under the lens of partisan fairness, it is superior to H.B. 2146 and the other alternate plans.

As Dr. Duchin explained, the Governor’s Plan and the Draw the Lines’ Plan “are far superior at leveling the partisan playing field,” whereas H.B. 2146 “consistently convert[ed] close elections to heavy Republican representational advantages.” Report at 82 (FF151). The Report erred in discounting this testimony and instead reasoning that due to the geographic clustering of Democrats in Pennsylvania, it is a *fait accompli* that any map that attempts to minimize the inherent advantage awarded to the Republican Party is a partisan gerrymander. *Id.* at 197, ¶ 40 (concluding it was partisan gerrymandering when the lines drawn “negate a natural and undisputed Republican tilt that results from the objective, traditional, and historical practice whereby Democratic voters are clustered in dense and urban areas”). Yet, there is no law that says a political party is guaranteed a certain share of representation based simply on such geographic distribution. Rather, maps must minimize partisan bias for either party to the greatest extent possible under Pennsylvania’s Free and Equal Elections Clause, consistent with the other Constitutional criteria. *See LWV II*, 178 A.3d at 817.

That is what the Citizens' Map accomplishes. In selecting the H.B. 2146 map, the Report improperly concluded that a map giving "heavy Republican representational advantages" was permissible, but a map that was superior in all constitutional criteria was not because it attempted to neutralize that advantage.

The Report also erred in concluding that "based on its credited efficiency gap score, [the Citizens' Map] provides a partisan advantage to the Democratic party in contravention to the natural state of political voting behavior and bias towards Republicans in Pennsylvania." Report at 201. In fact, the publicly available website PlanScore gives the Citizens' Map an efficiency gap of 3.5% in favor of Republicans when not factoring in the power of incumbency. *See* <https://planscore.campaignlegal.org/plan.html?20220112T114256.829958524Z>; *see also* Report at 113-14 (FF335) (explaining the 3.5% efficiency gap in favor of Republicans). This means Republicans would win an extra 3.5% of 17 seats, or an extra half-seat. *Id.* (FF335) When factoring incumbency, there is a 0.2% gap in favor of Republicans. Report at 114 (FF336). Moreover, when analyzing the Citizen Map's mean-median difference, Dr. DeFord concluded that it was 1.6% in favor of Republicans. Report at 170-71 (FF20).

To conclude that the Citizens' Map provides a partisan advantage to Democrats, the Report also relied heavily on an unreliable analysis from Dr. Michael Barber. Dr Barber agreed that his analysis did not consider a number of

variables, including the voting results of all recent statewide elections, Voting Rights Act requirements, equal population requirements (his simulations improperly allowed for a variance of 30), the splitting of wards, or communities of interest concerns. Report at 92-93 (FF212). Moreover, Dr. Barber does not have the proper credentials to serve as a reliable expert. As Legislative Reapportionment Commission Chairman Mark Nordenberg noted, Dr. Barber “has not published a single academic article in the areas for which his expert testimony was being presented.” See Meeting of the Pennsylvania Legislative Reapportionment Commission Approval of a Final Plan, at p. 18 (Feb. 4, 2022) (available at www.redistricting.state.pa.us/resources/Press/2022-02-04%20Chairmans%20Statement.pdf.) Chairman Nordenberg largely dismissed Dr. Barber’s analysis on the legislative maps because other academics could not accurately replicate his work. *Id.* The Court should do the same here.

Lastly, the Report erroneously concluded that Draw the Lines’ incumbent pairings showed greater partisan influence.¹ Specifically, the Report noted that since Pennsylvania lost one seat in the U.S. House of Representatives, one set of incumbents must be paired in a single district, and that how these incumbents are

¹ The Report acknowledged that protection of incumbents is not “a constitutionally required, or necessarily dispositive consideration,” and “wholly subordinate” to the constitutional criteria as stated in *LVW II*, 178 A.3d at 817, but still considered this factor. Report at 178 (CL1).

paired could be used to assess whether a proposed plan was partisan. Report at 178-79 (FF1-2). The Report concluded that it would be most non-partisan and desirable if the two Democratic incumbents who were not seeking re-election (Lamb and Doyle) were paired with each other or other Democratic incumbents. Report at 179 (FF4-5). Because Draw the Lines did not do so, but paired three Republican incumbents with one Democrat, the Report wrongly concluded that its map was more partisan. Report at 181 (FF24-25). In fact, six Republican-held districts require adding people to meet the new population target (764,865), while all but two Democratic-held districts will need to shed population to meet the target population.² This will require more Republican-held districts to expand geographically. Thus, it makes more sense to pair Republican incumbents together in light of the neutral constitutional criteria, as the Citizens' Map has done.

In conclusion, the Citizens' Map is superior to the H.B. 2146 Republican map selected by the Report both on the constitutional neutral criteria, and the additional metrics that are important to Pennsylvanians, like competitiveness, and limiting partisan bias (as discussed further below).³ Moreover, it was created with

² See <https://data.census.gov/cedsci/table?g=0400000US42%245000000&y=2020&d=DEC%20Redistricting%20Data%20%28PL%2094-171%29&tid=DECENNIALPL2020.P1> (2020 census data reflecting total population in each PA district).

³ In addition, the Report acknowledges that the Citizens' Map has the same number of majority-minority districts as H.B. 2146 (and most of the other maps) and that it

unprecedented public engagement and input. It is a composite map that incorporates what over 7,200 Pennsylvanians, representing 40 of Pennsylvania's 67 counties, collectively mapped through public Draw the Lines competitions over the last four years, and reflects the values that mappers declared as important to them. The Citizens' Map, in effect, represents the everyday Pennsylvania, and the Special Master erred in not recommending it.

IV. CONCLUSION

For the foregoing reasons, the Exceptions of the DTL Amicus Participants should be granted, and this Court should adopt the Citizens' Map as the final Congressional redistricting plan.

Dated: February 14, 2022

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

By: /s/ John P. Lavelle, Jr.
John P. Lavelle, Jr. (Pa. ID No. 54279)
1701 Market Street
Philadelphia, PA 19103-2921
+1.215.963.4824
john.lavelle@morganlewis.com

Counsel for the DTL Amicus Participants

was likely to be compliant with Section 2 of the Voting Rights Act. Report at 182-183.

CERTIFICATE OF COMPLIANCE

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

/s/ John P. Lavelle, Jr.

John P. Lavelle, Jr. (Pa. ID No. 5427)

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service by PACFile eService as follows:

All counsel of record

Dated: February 14, 2022

/s/ John P. Lavelle, Jr.
John P. Lavelle, Jr. (Pa. ID No. 54279)
1701 Market Street
Philadelphia, PA 19103-2921
+1.215.963.4824
john.lavelle@morganlewis.com

*Counsel for the DTL Amicus
Participants*

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