

IN THE SUPREME COURT OF PENNSYLVANIA

CAROL ANN CARTER; MONICA
PARRILLA; REBECCA
POYOUROWN; WILLIAM TUNG;
ROSEANNE MILAZZO; BURT
SIEGEL; SUSAN CASSANELLI;
LEE CASSANELLI; LYNN
WACHMAN; MICHAEL
GUTTMAN; MAYA FONKEU;
BRADY HILL; MARY ELLEN
BALCHUNIS; TOM DEWALL;
STEPHANIE MCNULTY; and JANET
TEMIN,

Petitioners,

v.

No. 7 MM 2022

LEIGH M. CHAPMAN, in
her official capacity as the Acting
Secretary of the Commonwealth of
Pennsylvania; JESSICA MATHIS, in
her official capacity 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 MCMAHON,
TIMOTHY G. FEEMAN; and GARTH
ISAAK,

Petitioners,

v.

LEIGH M. CHAPMAN, in
her official capacity as the Acting
Secretary of the Commonwealth of
Pennsylvania; JESSICA MATHIS, in
her official capacity as Director for the
Pennsylvania Bureau of Election
Services and Notaries,

Respondents.

**BRIEF OF INTERVENOR, REPRESENTATIVE JOANNA E.
McCLINTON, LEADER OF THE DEMOCRATIC CAUCUS OF THE
PENNSYLVANIA HOUSE OF REPRESENTATIVES IN SUPPORT OF
HER EXCEPTIONS TO THE FEBRUARY 7, 2022 REPORT OF THE
SPECIAL MASTER**

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I. INTRODUCTION

Pursuant to this Court's February 2, 2022 *per curiam* Order, Intervenor, Representative Joanna E. McClinton, Leader of the Democratic Caucus of the Pennsylvania House of Representatives ("House Democratic Caucus Intervenor" or "Representative McClinton"), hereby files this Brief on 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 of the Commonwealth Court of Pennsylvania ("Report and Recommendation" or "R&R"), "firmly" recommending that this Court:

adopt and implement HB 2146 as a matter of state constitutional law as it meets all of the traditional criteria of the Free and Equal Elections Clause, and does so in respects even noted by the Governor's expert, as well as the other considerations noted by the courts, it compares favorably to all of the other maps submitted herein, including the 2018 redistricting map, it was drawn by a non-partisan good government citizen, subjected to the scrutiny of the people and duly amended, it creates a Democratic leaning map which underscores its partisan fairness and, otherwise, is a reflection of the "policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature."

Id. at 216 ¶97 (all emphasis in original) (citations omitted). Additionally, the House Democratic Intervenor takes exception to the "Revised 2022 Primary Election Calendar Recommendations" submitted by the Commonwealth Court as set forth on pages 221-22 of the R&R. Significantly, unlike the Report and Recommendation of then President

Judge Craig in *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992), the Commonwealth Court herein refused to credit any concerns regarding the potential that its proposed schedule might lead to disparate primary election days for the congressional primary election and any other primary elections currently scheduled for the 2022 General Primary Election. Evidence of this disregard is plain on the face of the R&R herein as the proposed revised General Primary Election Schedule provides that the first day to circulate/file nomination petitions is March 1, 2022. *Id.* at 221.

With regard to the upcoming primary election, the House Democratic Caucus maintains that the primary election should proceed as scheduled on May 17, 2022. Notwithstanding the diverse proceedings pending or shortly to be presented to this Court, there is sufficient time to complete all necessary pre-election requirements on a reasonably compressed schedule in advance of May 17. The House Democratic Caucus urges the Court to establish a unitary, compressed election schedule for all election contests that allows for completion of the state legislative reapportionment process mandated by Article 2, Section 17 of the Pennsylvania Constitution,¹ as well as formulation of a final congressional redistricting plan. Importantly, the Pennsylvania Constitution specifically requires that, once appeals from the state reapportionment plan are decided, the new state reapportionment map “shall be used thereafter in

¹ By order dated February 11, 2022, in *David v. Chapman*, 8 MM 2022, which involved a request to enjoin the election calendar for state legislative offices, this Court entered an Order denying Respondents’ Emergency Application for Extraordinary Relief as moot given the *per curiam* Order entered in this action.

elections to the General Assembly.” Pa. Const. art. 2, § 17(e) (“When the Supreme Court has finally decided an appeal or when the last day for filing an appeal has passed with no appeal taken, the reapportionment plan shall have the force of law and the districts therein provided shall be used thereafter in elections in the General Assembly until the next reapportionment”) (emphasis added). Accordingly, to ensure compliance with Article 1, Section 5 and Article 2, Section 17 of the Pennsylvania Constitution and to fulfill the guarantee of equal representation in the Fourteenth Amendment to the U.S. Constitution, adjustments to the election schedule as a result of this proceeding should allow for final decision in this action and full consideration and decision of any appeals from the state legislative reapportionment plan. The House Democratic Caucus defers to the Department of State for particular refinements of the election schedule that satisfy the competing constitutional demands.

II. STATEMENT OF THE CASE

In the interest of brevity and as this Court is already familiar with the facts of this matter together with its procedural background and the current procedural posture of the case following its January 10, 2022 and February 2, 2022, Orders as described above, House Democratic Caucus Intervenor, will not repeat same here.

III. SUMMARY OF BASIC POSITION OF HOUSE DEMOCRATIC CAUCUS INTERVENOR

The basic position of the House Democratic Caucus Intervenor remains as it did in its opening brief, trial brief, post-trial submission/brief filed in the Commonwealth

Court together with its Answer to the Petition for Extraordinary Relief filed by the *Carter* Petitioners²: first and foremost, preserve the rights of all citizens in the Commonwealth to participate in “free and equal” elections and that all elections in the Commonwealth be free and equal. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018) (“LWV”). Second, that this Court rule definitively that by virtue of it being imbued with the supreme judicial power in this Commonwealth that this Court and this Court alone, and not any inferior court has the sole power to adjudicate the constitutionality of any proposed congressional redistricting map whether that map has been previously adopted, or where the legislature and the Governor fail to agree on a proposed redistricting map. Finally, that this Court select its proposed map, not because of any purported statistical superiority, but because it appropriately ensures that no voter in the Commonwealth of Pennsylvania will be disenfranchised nor have its vote diluted.

IV. JURISDICTION

As discussed in great length in Intervenor McClinton’s trial brief and Answer to the Carter Petitioners’ Application for Extraordinary Relief, Intervenor McClinton position regarding jurisdiction is that only this Court through both its Extraordinary Jurisdiction (42 Pa. C. S. § 726) and King’s Bench powers (Pa. Const. art. V. § 2; 42 Pa.

² All of those briefs and pleadings are incorporated herein by reference as fully as though herein set forth at length.

C.S. §502) can declare an in-force congressional map to be violative of Pennsylvania's Constitution *see LWV*, or craft remedy after declaring an in-force map unconstitutional or where, as here, the legislature and the Governor are unable or unwilling to agree on a redistricting plan. *See Carter v. Chapman*, No. 7 MM 2022, 2022 Pa. LEXIS 102, *8 (Pa. Feb. 2, 2022) (Dougherty, J., concurring). *Accord LWV, Mellon*.

As stated above, in *Mellon*, the last time this Court was faced with the issue of congressional redistricting, it exercised extraordinary jurisdiction to take plenary jurisdiction over the matter and thereafter appointed the President Judge of Commonwealth Court to function as a master in developing the factual record and to thereafter issue a report and recommendation. In both *LWV* and *Mellon* (relating to congressional redistricting plans), the Supreme Court fashioned the remedy while at the same time deputizing the Commonwealth Court to conduct “all necessary and appropriate discovery, pre-trial and trial proceedings so as to create an evidentiary record on which Petitioners’ claims may be decided.” *LWV* at 766-67. *See also Mellon*, at 206 (designating “President Judge David W. Craig of the Commonwealth Court as Master to conduct hearings and report to us not later than February 26, 1992.”). Regardless of the designation bestowed by this Court upon the Commonwealth Court, in both instances, the Commonwealth Court’s final determination was transmitted to this not as a “final order and judgment” of that Court, to the contrary, on both occasions the Commonwealth Court transmitted findings of fact, conclusions of law and recommendations as to the remedy. *See LWV* at 838 n.1 (referring to the

Commonwealth Court’s “December 29, 2017 Recommended Findings of Fact and Conclusions of Law”); and *Mellow*, at 206 (referring to Commonwealth Court President Judge Craig’s submission of “Findings, Recommended Decision and Form Order,’ along with a proposed election schedule revision”).

This is a “remedies case,” in that all parties and the Commonwealth Court agree that the currently in-force congressional district map has 18 congressional districts and as a result of the 2020 decennial census the Commonwealth has only been apportioned 17 representatives to the United States House of Representatives, thus the currently in-force map adopted by this Court in 2018 is now obsolete.³ Given that this Court must now fashion a remedy in the form of a newly redistricted congressional map of the Commonwealth, there can be no doubt that this Court and only this Court has the jurisdiction, judicial authority and power to grant such relief.

It cannot be gainsaid that the Commonwealth Court is a court of limited jurisdiction. That Court’s jurisdiction is circumscribed by statute (42 Pa. C.S. §§ 761 –

³ Throughout the R&R the Commonwealth Court refers to the currently in-force map adopted by this Court in 2018 as being “malapportioned.” *See, e.g.*, R&R at 4. Notwithstanding the census results, such is not the case. “Malapportioned” as defined by the Oxford English Dictionary means: “Of a legislative or electoral body: badly or inequitably apportioned; structured or constituted in such a way as to deprive sectors of the population of fair representation.” *See* “malapportioned, adj.” OED Online, Oxford University Press (Dec. 2021 Ed.) available online at www.oed.com/view/Entry/243991 (last accessed Feb. 14, 2022). The 2018 map is not “malapportioned,” in the sense that it was structured in such a way as to deprive sectors of the population fair representation. To the contrary, at the time it was adopted, it was properly proportioned, however, the population changed, resulting in Pennsylvania losing a representative in Congress. Thus, while the 2018 map may be unconstitutionally obsolete due to the 2020 census results, there is no evidence on this record that the 2018 map was “malapportioned” as that term is defined. *Id.*

764). Relevant to this matter, the Commonwealth Court's jurisdiction can only be predicated upon 42 Pa. C.S. § 761(a)(1), as the Commonwealth Court has original (but not exclusive) subject matter jurisdiction over all civil actions and proceedings against the Commonwealth government, including any officer thereof, acting in their official capacity. *Id.*⁴ Furthermore, 42 Pa. C.S. § 562 specifically cabins the Commonwealth Court's powers by limiting those powers to issuing:

every lawful writ and process necessary or suitable for the exercise of its jurisdiction and for the enforcement of any order which it may make, including such writs and process to or to be served or enforced by system and related personnel as the courts of common pleas are authorized by law or usage to issue. The court shall also have all powers of a court of record possessed by the courts of common pleas and all powers necessary or appropriate in aid of its appellate jurisdiction which are agreeable to the usages and principles of law.

Id. Simply put the Commonwealth Court's power is limited to performing all necessary acts and the issuance of all process necessary in order to exercise its jurisdiction as an appellate court or as a court of original jurisdiction, like that of a court of common pleas within one of Pennsylvania's 60 judicial districts. *Id.*

By contrast, this Court, the Supreme Court of Pennsylvania, possesses original, appellate, extraordinary, special, and plenary jurisdiction over all matters within Pennsylvania's Unified Judicial System. *See* Pa. Const. art. V, §§ 1, 2, 10. *See also* 42 Pa.

⁴ While 42 Pa. C.S. § 764 delegates to the Commonwealth Court exclusive original jurisdiction over certain contests related to nominations and elections pursuant to the Pennsylvania Election Code, this matter does not involve any contested election or nomination for any office in particular over which the Commonwealth Court has original exclusive jurisdiction.

C.S. §§ 721 – 727. No statute nor the Pennsylvania Constitution limits the judicial power of this Court within the Commonwealth of Pennsylvania. To the contrary, “The Supreme Court (a) shall be the highest court of the Commonwealth and in this court shall be reposed the supreme judicial power of the Commonwealth;” Pa. Const. Art. V, § 2(a). *See also* 42 Pa. C.S. § 501 (“The [Supreme] court shall be the highest court of this Commonwealth and in it shall be reposed the supreme judicial power of the Commonwealth.”). Finally, the “general powers” of our Supreme Court are statutorily set forth as follows:

The Supreme Court shall have and exercise the powers vested in it by the Constitution of Pennsylvania, including the power generally to minister justice to all persons and to exercise the powers of the court, as fully and amply, to all intents and purposes, as the justices of the Court of King’s Bench, Common Pleas and Exchequer, at Westminster, or any of them, could or might do on May 22, 1722.

The Supreme Court shall also have and exercise the following powers:

- (1) All powers necessary or appropriate in aid of its original and appellate jurisdiction which are agreeable to the usages and principles of law.
- (2) The powers vested in it by statute, including the provisions of this title.

42 Pa. C. S. § 502. Accordingly, our Constitution and judiciary code make plain that, unlike every other court in this Commonwealth, this Court has all the necessary powers in aid of its original and appellate jurisdiction, and also all “powers vested in it by the Constitution of Pennsylvania, including the power generally to minister justice to all

persons **and to exercise the powers of the court, as fully and amply, to all intents and purposes, as the justices of the Court of King’s Bench, Common Pleas and Exchequer, at Westminster, or any of them, could or might do on May 22, 1722.”**

Id. (Emphasis added). As such, this Court, by definition has the power, authority, and jurisdiction to fashion any judicial remedy: legal, equitable, criminal, or otherwise. As is self-evident, this Court is the only court within this Commonwealth to be so invested. *Id.*

With regard to the sole issue before the Commonwealth Court in this proceeding, selecting which of more than a dozen of proposed congressional redistricting plans should be adopted by the Commonwealth following the constitutionally required census, as noted above, this Court has been called upon previously to fashion such a remedy *i.e.*, select between competing redistricting plans or simply fashioning one itself that meets both the federally mandated requirements and those of the Free and Equal Elections Clause of the Pennsylvania Constitution. Pa. Const. Art. I, § 5. *See LWV and Mellow*. *See also Butcher v. Bloom*, 203 A.2d 556, 559 (Pa. 1964) (relating to “Pennsylvania Reapportionment Acts and the election of state senators and representatives thereunder.”). The *LWV* Court in summarizing those prior decisions stated:

Thus, it is beyond peradventure that it is the legislature, in the first instance, that is primarily charged with the task of reapportionment. However, the Pennsylvania Constitution, statutory law, our Court’s decisions, federal precedent, and case law from our sister states, all serve as a bedrock foundation on which stands the authority of the

state judiciary to formulate a valid redistricting plan when necessary. Our prior Order, and this Opinion, are entirely consistent with such authority.¹¹

Id. at 824. Furthermore, the *LWV* Court held:

When, however, the legislature is unable or chooses not to act, it becomes the judiciary's role to determine the appropriate redistricting plan. Specifically, while statutes are cloaked with the presumption of constitutionality, **it is the duty of this Court**, as a co-equal branch of government, to declare, when appropriate, certain acts unconstitutional. **Indeed, matters concerning the proper interpretation and application of our Commonwealth's organic charter are at the end of the day for this Court — and only this Court.**

Id. at 822 (emphasis added). Specifically with regard to the crafting of a remedy, the *LWV* Court found:

Further, our Court possesses broad authority to craft meaningful remedies when required. Pa. Const. art. V, §§ 1, 2, 10; 42 Pa.C.S. § 726 (granting power to “enter a final order or otherwise cause right and justice to be done”).

Id. (emphasis added).

Accordingly, what any fair reading of *LWV*, *Mellow*, and *Butcher* bring into sharp focus is that it is this Court that uniquely possess both the jurisdiction **and power** to “craft” the necessary remedy in this case. The Commonwealth Court simply does not have jurisdiction to craft a constitutional remedy in the form of either creating or selecting a redistricting plan.

As discussed above, the fact that the Commonwealth Court lacks the jurisdiction, power, and authority to implement one constitutionally satisfactory plan over another

is further buttressed by *LWV*, *Mellow*, and *Butcher*. In each of those cases, once the legislature and governor failed to enact reapportionment or redistricting plans it was the Supreme Court that fashioned the remedy. *LWV* at 766-67. *See also Mellow* at 206 (designating “President Judge David W. Craig of the Commonwealth Court as Master to conduct hearings and report to us not later than February 26, 1992.”).

Unlike the present case, in *LWV*, the issue was whether the then existing and enacted “Pennsylvania Congressional Redistricting Act of 2011” violated our Commonwealth’s Constitution. *Id.* at 741. Here, there is currently no redistricting plan in place. Accordingly, no decision need be rendered on the constitutionality of any existing redistricting map. Furthermore, the parties stipulated that based upon the United States 2020 Census results, Pennsylvania shall be apportioned 17 seats in the United States House of Representatives as opposed to the 18 seats apportioned by to the Commonwealth as a result of the 2010 United States Census. As a result, the current Pennsylvania congressional map enacted by the Pennsylvania Supreme Court in 2018 as a result of the *LWV* decision, is by definition unconstitutionally obsolete as it contains one more district than the Commonwealth has been apportioned. *See* USCS Const. Art. I, § 2, Cl 3.

Because Pennsylvania’s current congressional district map provides for 18 congressional districts rather than 17 it cannot legally be used for the upcoming election.

As a result, the Commonwealth Court need not pass judgment upon the constitutionality of that map and, given the Governor's veto of House Bill 2146 on January 26 2022, there is no currently enacted redistricting plan for the Commonwealth Court to evaluate as to constitutionality. Rather, the Commonwealth Court was being asked to fashion a remedy in the absence of a legislatively passed and approved redistricting plan. As discussed above, the jurisdiction, power, and authority to issue such a remedy is outside the statutorily prescribed jurisdiction and power of the Commonwealth Court and instead resides solely with the Supreme Court of Pennsylvania.

Simply stated, the Commonwealth Court lacks jurisdiction to issue a final judgment and order declaring which congressional redistricting plans should be utilized in the upcoming 2022 congressional election cycle. The House Democratic Caucus Intervenor sets forth this detailed jurisdictional argument herein in hopes that consistent with *Mellow* and *LWV* this Court will issue an opinion herein which finally adopts a rule consistent with the historically understood procedure that regardless of whether a case of this nature is originated in this Court or the Commonwealth Court, that the Commonwealth Court be appointed to head evidence, conduct pre-trial and trial proceedings, submit findings of fact and conclusions of law and then issue its overall conclusions not as an order and final judgment, but instead as here as a Report and Recommendation. *See Mellow* at 206, 224; *LWV* at 838, n.36 (referring to this Court's December 29, 2017, decision as "Recommended Findings of Fact and

Conclusions of Law”). Such a ruling will take the “guesswork” out of this procedure, should the Court be called upon to grant such remedy in the future.

V. ARGUMENT

A. The Commonwealth Court’s “Noise” and “Confirmation Bias”

The House Democratic Caucus respectfully takes exception with the R&R to the as it appears that wherever and whenever the Commonwealth Court was required to select between a Republican aligned map or suggestion, or between the credibility of experts, the Commonwealth Court almost always selected the Republican choice. This includes recommending that this Court adopt HB2146, despite it being vetoed by the Governor of the Commonwealth and his veto not being overridden by a two-thirds vote of each house of the General Assembly, accepting as credible the testimony Dr. Naughton, while not crediting or only crediting in part the testimony of other experts, despite the fact that the record in this case hardly reveals that it was a “battle of the experts.” Yet despite all cross examination, agreement of experts on most issues (with only slight deviations), the Commonwealth Court when presented with a binary choice between Republican and Democrat, always chose the Republican point of view.

“Confirmation Bias” and “Noise” in system judgements have been the subject of much scholarly work over the last decade or more. *See, e.g.,* Daniel Kahneman, Olivier Sibony, & Cass R. Sunstein, *Noise: A Flaw in Human Judgment* (2021); Daniel Kahneman, *et al.*, *Noise: How to Overcome the High, Hidden Cost of Inconsistent Decision Making*, Harvard Bus. Rev., Oct. 2016, at 2; Daniel Kahneman, *Thinking, Fast and Slow*,

(2011). Confirmation Bias is defined by the Oxford English Dictionary as “the tendency to seek or favour new information which supports one’s existing theories or beliefs, while avoiding or rejecting that which disrupts them.” *See* “confirmation bias, n” OED Online, Oxford University Press (Jun. 2019 Draft Addition) available online at www.oed.com/view/Entry/38852 (last accessed Feb. 14, 2022). Unlike “confirmation bias,” “noise” in judgment is described as the variability of judgments by different people or experts, who are given the same data to analyze. *See* Kahneman, *et al.*, at 4 (“The unavoidable conclusion is that professionals often make decisions that deviate significantly from those of their peers, from their own prior decisions, and from rules that they themselves claim to follow.”). As Kahneman, *et al.*, explained in their 2016 article, a “noisy judgment” can be thought of as an arrow that misses the bullseye, but does not always hit the target in the same place, they are widely scattered. A “biased” decision also does not hit the bullseye, but all of the shots are clustered in the same location. Finally, a “noisy and biased” decision is one where all the arrows miss the bullseye, and although they appear widely scattered, they are all still clustered in the same general area of the target. *Id.* at 5. Put in a legal context by Kahneman and Sunstein, while studying criminal sentencing found variability between judges in the severity of their sentencing for equivalent crimes. *See* Noise and the Flaws in Human Judgement – A Conversation with Daniel Kahneman & Cass R Sunstein, available on the internet at <https://thoughtconomics.com/noise/> (last accessed Feb. 14, 2020). Significantly, they found that: “Judges may issue the right sentence by the agreed upon

guidelines, but the increased severity or leniency created variability that adds up.” *Id.*

The difference between bias and noise in decision making was explained by Prof.

Sunstein as follows:

In many domains, there are biases. Over the last 30 years, bias has received a great deal of attention. They may be cognitive biases such as unrealistic optimism, or biases like discrimination on the basis of gender or skin colour. Then there’s noise, unwanted variability. You could have a firm where half the time people discriminate against women, and half the time people discriminate against men. On average you may get the right distribution, but you get a lot of mistakes and unfairness on both sides – that’s noise.

Id.

In this case, without differentiating between any potential “confirmation bias” or “noise” exhibited by the Commonwealth Court in the R&R a pattern of favoring Republican leaning parties’ facts and expert testimony, as well as only partially crediting or not crediting at all the facts and expert testimony presented by other parties, culminating in the R&R’s selection of the now vetoed HB2146 as the “winning map,” reveals either that such a selection was the result of a subconscious confirmation bias or a decision variability (noise) which steered the Commonwealth Court’s R&R away from “neutral criteria” to the subordination of that criteria to elevate subjective criteria above that of the neutral criteria that this Court set forth in *LWV*. Purely by way of example, and not intended as a full and complete list, the Commonwealth Court R&R:

- At first stated that it would review HB2146 along with all of the other proposed redistricting criteria without giving it any special deference due solely to the fact that it had been passed by the legislature. R&R at 42-42. Subsequently however, the

Commonwealth Court went on to do just that, stating: “Therefore, with all things being relatively equal with regard to the maps that the Court has not previously discounted or recommended not be adopted, **the Court respectfully recommends that our highest and most honorable institution in the judicial branch of government, our Supreme Court, recognize and revere the expressed will of the People, and the ‘policies and preferences of our State,’ ... as previously stated, and adopt HB 2146 to represent the boundary lines for the Commonwealth of Pennsylvania in its creation of geographically-unique congressional districts so that the citizens of our great Commonwealth are ensured fair and equal representation in the United States House of Representatives.** *Id.*, at 214-15. (emphasis added; citations omitted). Accordingly, after initially stating that it would not accord the now vetoed plan embodied in HB2146 any special deference, the Court then did just that and found that all other things being equal, in its judgment HB2146 should be selected because it represents the “will of the people,” despite this Court and the Supreme Court of the United States previously holding that redistricting legislation that fails the legislative process in whole or in part (including being vetoed by the executive branch) is entitled to absolutely zero deference in a judicial proceeding. *See LWW* at 742; *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 862 (2015).

- In referring to the drafter of the plan which is embodied in HB2146, the Commonwealth Court repeatedly referred to it as being drafted by a “well-known nonpartisan citizen, Amanda Holt ...” (R&R at 42) and “being drawn by a non-partisan good government citizen, subjected to the scrutiny of the people...”. *Id.* at 216. Despite the effusive praise for the non-partisanship of the “citizen drafter” of this plan, Ms. Holt is neither non-partisan nor merely a “good government citizen.” To the contrary, Ms. Holt is a former Republican member of the Lehigh County Board of Commissioners, initially appointed in 2014 to fill a vacancy on that Board. *See* Randy Kraft, *Amanda Holt of Upper Macungie appointed Lehigh County commissioner*, available on the internet at https://www.wfmz.com/news/insideyourtown/amanda-holt-of-upper-macungie-appointed-lehigh-county-commissioner/article_c3b45438-9447-5022-9cf2-46b22cf85a31.html (last accessed on Feb. 14, 2022). On the

occasion of her appointment, while being interviewed by the press: “Holt later agreed that she is a conservative Republican.” Accordingly, Ms. Holt can hardly be considered a neutral, agenda-less good government citizen who is equally non-partisan.

The fact that Ms. Holt self-identifies as a conservative Republican in and of itself is of no moment to this Court’s analysis. It is the Commonwealth Court’s description of Ms. Holt as a “non-partisan good government citizen” and its attempt to thereafter pass off HB2146 as truly non-partisan map due to its initial authorship that reveals why this Court must look skeptically at the Commonwealth Court’s R&R.

- The Commonwealth Court accepted as credible the testimony of Dr. Naughton, a political scientist who testified in support of the Republican Congressional Intervenor. Specifically, the Commonwealth Court found credible Dr. Naughton’s testimony that Bucks County not be split into two separate congressional districts and further that Bucks County should add population to its district by drawing from Montgomery County as opposed to Philadelphia County, who’s surplus population he suggested be added to Delaware County. R&R at 210-11. Again citing Dr. Naughton, the Commonwealth Court further stated that Bucks County should not be split, because it has not been split since the 1860s. *Id.* at 195.

Under cross examination regarding whether the far northeast of Philadelphia County could be appropriately attached to any Bucks County congressional district, Dr. Naughton admitted “I’m not good on the city neighborhoods. I apologize.” (N.T., Jan. 28, 2022, at 845). Further, when pressed on that same issue, admitted that part of the city of Philadelphia could added to a Bucks County district depending on “how much of the northeast you attach to Bucks County.” *Id.* He later said: “I wouldn’t recommend attaching too much of the northeast to Bucks. I don’t think it would be in their best interests.” *Id.* at 846. Despite Dr. Naughton’s testimony, this Court can take judicial notice of the fact the far northeast of the City and County of Philadelphia is in that city’s 10th Councilmanic District and has been represented in that district by a Republican Council Member, Brian J. O’Neill, since his election to that office in 1979, some 42 years now. *See*

<https://phlcouncil.com/brianoneill/#:~:text=District%2010,term%20on%20Philadelphia%20City%20Council>. Additionally, most of that same neighborhood in the far northeast of Philadelphia is part of District 170 of the Pennsylvania State House of Representatives. Since 2015, that District has been represented by Representative Martina A. White, a Republican and House Majority Caucus Secretary. *See* https://www.legis.state.pa.us/cfdocs/legis/home/member_information/house_bio.cfm?id=1732. (Ms. White also serves as the current Chair of the Philadelphia Republican City Committee). From 2009 – 2015 the 170th district was represented by a Democrat, Brendan Boyle, prior Mr. Boyle representing that district for 6 years it was represented by a Republican member dating back some 41 years to the time the district was first created in 1968 and was first represented by Republican Tom Gola. *See* https://en.wikipedia.org/wiki/Tom_Gola⁵

Pennsylvania House District 18, which directly borders the 170th district, and is in Bucks County, is also a Republican, Kathleen C. Tomlinson, who has held that post since 2020. Prior to that the district was represented by Gene DiGirolamo, also a Republican, who held that seat for 25 years prior to Ms. Tomlinson. Accordingly, the representation of the far northeast of Philadelphia in the Pennsylvania state House of Representatives and Philadelphia City Council has been Republican, just as the representatives in the Pennsylvania state House of Representatives for the abutting Bucks County District has also been Republican. Despite this obvious similarity between the communities of the far northeast of Philadelphia and Lower Buck County, Dr. Naughton testified, and the Commonwealth Court found that “Philadelphia’s surplus population would best be combined with a district with maximum commonality;” R&R at 210. The Commonwealth Court found that the “most sensible” plan “would attach surplus Philadelphia residences to Delaware County; and, hence, Philadelphia County should extend into Delaware County to obtain additional population.” *Id.* at 210-11.

⁵ Tom Gola is widely considered one of the greatest NCAA basketball players of all-time, having played for Philadelphia’s LaSalle University Explorers and being inducted into Naismith Memorial Basketball Hall of Fame in 1976. *Id.*

Despite this long history of similar party representation in both areas, the two bordering congressional districts the (now) 2nd district (encompassing the far northeast of Philadelphia and part of Montgomery County) has been regularly represented by a Democrat and the (now) 1st district (encompassing Bucks County and a portion of Montgomery County) has been (with the exception of four years from 2007-2011 represented by a Republican. However, in 2018 Representative Fitzpatrick (a Republican) won the seat with a majority of just over 8,000 votes and in 2020 he was reelected with a 57,929 vote margin.⁶ Accordingly, by keeping northeast Philadelphia out of the Bucks County district, the Republicans stand a better chance of maintaining control over the 1st district seat, while also maintaining control over the two abutting state house districts – the 170th and the 18th.

The above examples are but a few of the examples of either the “confirmation bias” or “noise” found in the Commonwealth Court’s decision to recommend the HB2146 plan for approval. As stated from the outset, the Commonwealth Court’s R&R appears to either be biased (intentionally or not) towards the Republican party or is the product of the Commonwealth Court’s variability (“noise”) combined with its confirmation bias in favor of Republicans, either way, the choice is not the product of the dispassionate, non-partisan judicial review to which the citizens of the Commonwealth of Pennsylvania are entitled in order to preserve what this Court has repeatedly referred to as “...the overarching objective of this provision of our

⁶ See Pennsylvania Department of State website showing election results for 2018 congressional district elections at <https://www.electionreturns.pa.gov/General/OfficeResults?OfficeID=11&ElectionID=63&Electi onType=G&IsActive=0> and for the 2020 election at <https://www.electionreturns.pa.gov/General/OfficeResults?OfficeID=11&ElectionID=83&Electi onType=G&IsActive=0>. (Both last accessed Feb. 14, 2022).

constitution is to prevent dilution of an individual's vote by mandating that the power of his or her vote in the selection of representatives be equalized to the greatest degree possible with all other Pennsylvania citizens.” *LWV*, at 817.

B. Historical Perspective And The Fallacy Of “The Natural State of Political Voting” In The Commonwealth of Pennsylvania

1. The Cognitive Dissonance of the Commonwealth Court’s Recommendation

Part and parcel of the House Democratic Caucus Intervenor’s Exceptions to the R&R is the Commonwealth Court’s constant reference to the “natural state of political voting in Pennsylvania” and that Court’s conclusion that the “natural state of political voting” behavior in Pennsylvania is biased in favor of Republicans, and, thus, the Commonwealth Court with that same phrase eliminated all maps that were suggested by a Democratic elected official or had a democratic leaning advantage.⁷ Yet a closer review of the actual R&R language once again reveals the Commonwealth Court’s bias towards a Republican leaning map.

In dismissing Governor Wolf’s proposed plan, the R&R states:

5) based on its **credited efficiency gap score**, it provides a **partisan advantage to the Democratic party in contravention to the natural state of political voting behavior and bias towards Republicans in Pennsylvania.**

⁷ Bearing in mind that Pennsylvania will go from an even number of representatives in the United States House of Representatives (18) to an uneven number (17), it is beyond peradventure that one party must have one more seat than the other and that the result of any election conducted under any plan will result in, at a minimum, one additional seat for one party (*i.e.*, 9-8).

Id. at 201 (emphasis added). In eliminating the so-called “Draw the Lines Map” the Commonwealth Court found:

4) based on its **credited efficiency gap score**, it provides a **partisan advantage to the Democratic party in contravention to the natural state of political voting behavior and bias towards Republicans in Pennsylvania.**

Id. Similarly, in dismissing both of the Pennsylvania Senate Democratic Caucus maps, the R&R found:

5) based on its **credited efficiency gap score**, it provides a **partisan advantage to the Democratic party in contravention to the natural state of political voting behavior and bias towards Republicans in Pennsylvania.**

Id. at 202. When it dismissed Intervenor McClinton’s proposed plan, the R&R found:

4) based on **both its credited efficiency gap score and credited mean-median score**, it provides a **partisan advantage to the Democratic party in contravention to the natural state of political voting behavior and bias towards Republicans in Pennsylvania.**

Id. at 203. Neither the Carter Petitioners nor the Gressman Petitioners fared any better under the Commonwealth Court’s “natural state of political behavior and bias towards Republicans in Pennsylvania.” As to the Carter Petitioners’ plan, the Court stated:

4) based on its **credited efficiency gap score**, it provides a **partisan advantage to the Democratic party in contravention to the natural state of political voting behavior and bias towards Republicans in Pennsylvania.**

Id. at 205. The Gressman Petitioners got the same treatment from the Commonwealth Court as did the House Democratic Caucus Intervenor’s plan:

3) based on **both its credited efficiency gap score and credited mean-median score**, it provides a partisan advantage to the Democratic party in contravention to the natural state of political voting behavior and bias towards Republicans in Pennsylvania.

Id. Accordingly, every plan which the Commonwealth Court reviewed in detail with which it found either a credited efficiency gap score or credited mean-median score which provided a partisan advantage to the Democratic party, or both, the Commonwealth Court dismissed as in “contravention to the natural state of political voting behavior and bias towards Republicans in Pennsylvania.” *Id.* All, that is, except one, HB2146. According to the Commonwealth Court, HB2146 also violates the natural state of political voting behavior and bias towards Republicans in Pennsylvania, and, yet, not only did the Commonwealth Court not eliminate HB2146, but it also recommended it for adoption by this Court.

In reviewing HB2146, the Commonwealth Court made certain findings of fact regarding the testimony of Dr. Barber, the expert presented by Intervenors Benninghoff and the House and Senate Republican Caucuses, including the following:

FF211. **On cross-examination, Dr Barber conceded that every other plan except for the two Reschenthaler plans have mean-median scores closer to zero, meaning they are less biased than HB 2146.** (N.T. at 575-78.).

Id. at 92. What this concession means is that of the more than one dozen maps proposed, the third most biased map submitted. *Id.* And yet, given the statements about the other plans and their disqualification for being bias towards Democrats

(although all apparently less so than HB2146), the Commonwealth Court did not exclude HB2146 for that reason. To the contrary, in recommending HB2146, the Commonwealth Court found that:

79. Unlike other maps that leaned Democrat, here, it is the Republican majority in the General Assembly that developed and proposed a plan, HB 2146, that favors Democrats, which ultimately underscores the partisan fairness of the plan.

Id. at 211. Further, the Commonwealth Court found:

80. The Court finds, as a result of the credible experts' opinions, reports, and concessions made during cross-examinations, that HB 2146 falls well within the acceptable constitutional ranges and indicia used to measure partisan fairness, in the following particulars.

81. H.B. 2146, when analyzed with districts that have a Democratic vote share of .48 to .52, which is a common range for assessing competitive elections, creates 5 competitive seats, 4 of which lean Democratic, and, ultimately, has more competitive districts than any other plan.

82. H.B. 2146 possesses a mean-median of -0.015, which is very close to zero and virtually unbiased, and demonstrates that HB 2146 is more favorable to Democrats than 85% of the simulation results.

83. H.B. 2146 has an efficiency gap of -0.02, which, again, is very close to zero and virtually unbiased, and, furthermore, demonstrates that Democratic votes are not much more likely than Republican votes to be "wasted" across districts.

Id. at 212-13. Accordingly, for the same reasons the Commonwealth Court eliminated other maps (they had a partisan advantage for Democrats), the Commonwealth Court recommended HB2146. The only basis for this dissonance is the Commonwealth

Court's deference to the plan, as it was passed in the General Assembly, although vetoed by the Governor, and that Court's belief in "the natural state of political voting behavior and bias towards Republicans in Pennsylvania." *Id.* As discussed above, the first reason, deference to the legislature is not a constitutional basis either under our Constitution nor the United States Constitution. *See LWV* at 742, *Ariz. State Legislature*, at 808.

As to the second reason given by the Commonwealth Court to support its selection of the now vetoed HB2146, the natural state of political voting behavior and bias towards Republicans in Pennsylvania, as this Court specifically detailed in *LWV*, there was never such a historic bias in favor of Republicans in the Congressional districting of Pennsylvania dating back to 1966.

2. Congressional Election in Pennsylvania from 1966 - 2010

In the years leading up to this Court's 2018 *LWV* decision, from 1966 – 2010, Pennsylvania's Congressional delegation ranged in amount between 19 – 27 members of congress being elected from Pennsylvania. *Id.* at 762-763 (Table 1). Accordingly, Pennsylvania's congressional delegation during that time averaged approximately 23 (22.65%) members. During that same time the number of Democrats elected to congress averaged 12.35 members per election cycle and the number of Republicans averaged 12.30 members per election cycle. Translated into percentages, what that means is that from 1966 – 2010 of the total 521 representatives elected to the United States House of Representatives from Pennsylvania, 54.5% were Democrats and

54.39% were Republicans. Simply put, given the varying number of representatives apportioned to the Commonwealth during that 44 year period, the election results were almost evenly split.⁸

In 2011, after the 2010 census, Pennsylvania's number of apportioned members to the House of Representatives was diminished by 1, from 19 to 18. As a result, the Pennsylvania General Assembly adopted Pennsylvania Congressional Redistricting Act of 2011, which was signed into law by then Governor Corbett. The result of that plan was that from its first use in the 2012 election through its last use in 2016, the 18 members of the United States Congress sent from Pennsylvania amounted 5 Democrats and 13 Republicans, in every one of those elections. Accordingly, during that four year period of time the average number of Democrats elected to the House of Representatives was diminished to 27.77% and the number of Republicans elected to the House of Representatives was increased to 72.23%. *Id.* at 765 (Table 2).⁹

Having lost only one seat due to the 2012 decennial census, the total average number of representatives for the first four years of the use of the 2011 plan resulted in a net loss of 26.73% of the seats historically (since 1966) won by Democrats and an increase of 17.84% of the seats historically (since 1966) won by Republicans. *Id.* Accordingly, in 2018, this Court implemented a remedial redistricting plan which

⁸ These percentages were calculated simply by averaging the numbers extant on table 1 in the *LWV* opinion.

⁹ These percentages were calculated simply by averaging the numbers extant on table 1 in the *LWV* opinion.

resulted in a 9-9 split of Pennsylvania's seats in the House of Representatives for that year and again in 2020. As a result, the 2018 remedial plan restored the previous 44 year balanced historical partisan distribution Pennsylvania's congressional districts. *Id.*

What these statistics (actual congressional election results) make clear is that there is no historical or "the natural state of political voting behavior and bias towards Republicans in Pennsylvania" relative to the election of representatives to Congress nor in drawing congressional districts in Pennsylvania. To the contrary, while there were years where one party or another enjoyed more seats than the other in the House of Representatives between 1966 – 2010, the plan itself was never solely responsible for the results of any particular election during that 44 year period. *Id.* at Table 1. It was only the 2011 plan that firmly established a lopsided Republican advantage in Pennsylvania's partisan distribution of members of the House of Representatives.

3. 2022 and Beyond

The two days of testimony in this matter focused on the technical details of redistricting and minute differences between the maps that have been submitted has been used to obscure the larger points at issue in this case. Fortunately, none of the proposed plans are as egregiously gerrymandered as the 2011 Plan. All of the parties' maps fall within an acceptable statistical range with regard to the neutral criteria set forth in *LWV*. Yet none of the maps (except that of the House Democratic Intervenor) considers the 44 year history of Pennsylvania's congressional delegation (from 1966 – 2010), as well as the 4 year history of that same delegation since 2018, nor do the other

plans consider the fact that between 2011 and the present registered Democratic voters outnumber Republicans by a range of 500,000 – 1,100,000 depending upon the year. Regardless of the amount of the Democratic voter registration advantage, there can be no doubt that such advantage has existed since at least 2011.

In *LWV*, this Court, did not suggest that the judicial process for determining what plan to implement was the one that came the closest to statistical perfection regarding the “neutral criteria.” To the contrary, in *LWV*, the Supreme Court recognized that:

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. By placing voters preferring one party’s candidates 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), the non-favored party's votes are diluted. It is axiomatic that a diluted vote is not an equal vote, as all voters do not have an equal opportunity to translate their votes into representation. This is the antithesis of a healthy representative democracy. Indeed, for our form of government to operate as intended, each and every Pennsylvania voter must have the same free and equal opportunity to select his or her representatives.

Id. at 814. Furthermore, *LWV* itself specifically predicted and provided for a situation, where, as here, a plan or plans, might statistically meet the “neutral criteria” but a future Court, might still find that even a statistically perfect plan does not comply with the Free and Equal Elections Clause of the Pennsylvania Constitution. Pa. Const. art. I, § 5. In clairvoyantly predicting the not too distant future from 2018, Justice Todd writing for this Court in *LWV* found:

However, this is not the exclusive means by which a violation of Article I, Section 5 may be established. As we have repeatedly emphasized throughout our discussion, the overarching objective of this provision of our constitution is to prevent dilution of an individual's vote by mandating that the power of his or her vote in the selection of representatives be equalized to the greatest degree possible with all other Pennsylvania citizens. We recognize, then, that there exists the possibility that advances in map drawing technology and analytical software can potentially allow mapmakers, in the future, to engineer congressional districting maps, which, although minimally comporting with these neutral “floor” criteria, nevertheless operate to unfairly dilute the power of a particular group’s vote for a congressional representative. *See* N.T. Trial, 12/13/17, at 839-42 (Dr. Warshaw discussing the concept of an efficiency gap based on the number of “wasted” votes for the minority political party under a particular redistricting plan).

Id. at 817. Unfortunately, the *LWV* Court was not required to consider the issue presented in this case because as that Court concluded: “However, as the case at bar may be resolved solely on the basis of consideration of the degree to which neutral criteria were subordinated to the pursuit of partisan political advantage, as discussed below, we need not address at this juncture the possibility of such future claims.^{ll}” *Id.* (Footnote omitted).

4. Analysis and Application to Current Proposed Plans

As a preliminary matter, the House Democratic Intervenor reasserts its objection to the claim of the Republican House and Senate Intervenor, and apparent finding of the Commonwealth Court, that the now vetoed plan found in HB2146 deserves any deference or special treatment from this Court because it represents the “will of the people of the Commonwealth of Pennsylvania.” As stated in the Trial Brief of the

House Democratic Intervenor filed in Commonwealth Court, at section III.B, which is incorporated by reference herein, as fully as though set forth herein at length.

By comparison to the present case, the *LWV* case was not nearly as challenging. Since the 2011 Plan was so obviously violative of the “neutral criteria” as to be unconstitutional under Pennsylvania’s Free and Equal Elections Clause, not to mention that in practice over three separate election cycles it produced such lopsided results compared to the 23 election cycles that preceded it, the task of declaring that plan unconstitutional and thereafter implementing a remedial plan which restored parity to the partisan distribution of members Pennsylvania’s Congressional delegation now seems relatively “easy.” By contrast, the present case does not require this Court to declare any currently in force plan unconstitutional, everyone agrees the 2018 remedial plan is now unconstitutionally obsolete by virtue of the 2020 census. The only issue then is which new plan to pick.

That task is not simple. As the experts all agreed in one way or another, each of these plans meet all of the neutral criteria within such a narrow band of deviation, they could all be deemed reasonable. So, the question still remains, what should be the tiebreaking factor.

The House Democratic Caucus Intervenor suggests that there is no one factor that can be used to “break the tie.” Instead, a plan which comports with the historical partisan distribution of members of Pennsylvania’s congressional delegation (excluding those years that the unconstitutional 2011 Plan was in place), together with some

consideration of the overall partisan identification of the voters in the Commonwealth, is the fairest way to “break” the tie between these otherwise equal maps. When the results from 1966-2010 are added in with the results from 2018-2021, the total number of representatives elected to congress from Pennsylvania amounts to 557. Expressed as a percentage of those elected, approximately 54% (54.21%) were Democrats and approximately 46% (45.78%) were Republicans. Accordingly, carrying that 48 year, 25 election cycle history forward and applying it to the current 17 seats apportioned to Pennsylvania for 2022 that would result in 9 (9.17) Democratic representatives and 8 (7.82) Republicans elected.

An analysis of the House Democratic Caucus Intervenor’s Plan by the “Dave’s Redistricting” Website, reveals that of the 17 congressional districts in the Plan, 8 would be safely or lean Democratic, 6 would be safely or lean Republican and the remaining 3 districts would result in competitive or otherwise unpredictable district outcomes as between the two parties. *See* <https://davesredistricting.org/maps#stats::95238e8e-6273-480a-bb5e-ee0dd7b122d5> (last visited Jan. 29, 2022). With 3 competitive or otherwise unpredictable districts, the outcomes could range anywhere from 11 Democratic seats to 6 Republican seats; to 9 Republican seats and 8 Democratic seats. Both of those outcomes are at the extreme of the results, but either one would comport with the results of the 25 previous election cycles (again excluding only those cycles where elections were held under the unconstitutional 2011 Plan).

Accordingly, having paid its “entry fee,”¹⁰ the House Democratic Caucus Intervenor respectfully suggests to this Court that it is its Plan which is the only plan that meets the “neutral criteria” and is respectful of the historical partisan distribution of congressional representatives dating back to 1966 as well as the only plan that respects and reflects the Democratic voter registration of between 500,000 – 1,100,000 Pennsylvanians registered to vote in this Commonwealth from 2011 to the present.

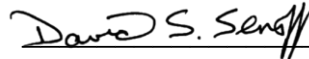
Thus, it is the House Democrat Caucus Intervenor’s Plan which best protects against vote dilution and voter disenfranchisement, while best protecting the right of all Pennsylvanians to participate in all elections in this Commonwealth which are both free and equal, as guaranteed by Article. I, § 5 of our constitution.

VI. CONCLUSION

For all the foregoing reasons, Intervenor Representative Joanna E. McClinton, Leader of the Democratic Caucus of the Pennsylvania House of Representatives, respectfully requests that this Court order that House Democratic Caucus Intervenor’s congressional redistricting plan be adopted by this Court and be implemented throughout the Commonwealth of Pennsylvania for the 2022 General Primary Election.

¹⁰ House Democratic Intervenor incorporates by reference herein its January 24, 2022, Brief in support of its Proposed Redistricting Plan, filed in the Commonwealth Court as fully as though herein set forth at length with regard to the data and support that its plan does, in fact, meet the *LWV* neutral criteria.

Respectfully submitted,



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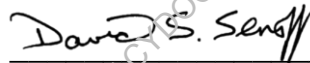
Dated: February 15, 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief contains 8,726 words. In making this certification, I have relied upon the word count function of the word-processing system used to prepare this Brief.

I further certify that this Brief 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 confidential information and documents differently than non-confidential information and documents.

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